UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

ORDER DENYING MOTION FOR INTERLOCUTORY APPEAL

On April 11, 2002, the ALJ issued an order denying Complainant's Motion for Accelerated Decision and Respondent's Motion for Partial Accelerated Decision as to Count I; Merging the Allegations of Count II with Count I; Granting Complainant's Motion for Accelerated Decision as to Liability for Count III; Granting Respondent's Motion for Accelerated Decision as to Counts IV and V and Dismissing these latter counts with prejudice (Order on Cross Motions for Accelerated Decision, April 11, 2002).Under date of April 29, 2002, Complainant served a Motion to Forward Order to Environmental Appeals Board for Review (Motion), requesting that the Order of April 11, 2002, be recommended for interlocutory appeal, under Section 22.29 of the Consolidated Rules of Practice, 40 C.F.R. Part 22, insofar as it merged Count II with Count I, denied Complainant's Motion for accelerated decision as to Counts I and II and dismissed with prejudice Counts IV and V. Respondent, Consumers Recycling, Inc., has not responded to the Motion.[1] For the reasons hereinafter appearing, the Motion will be denied.

The facts are fully set forth in the prior order and will be repeated here only insofar as necessary to understand rulings made. Respondent owns and operates a facility which receives scrap metal and household appliances for recycling. The Amended Complaint in this proceeding, dated March 30, 2001, charged Respondent in Counts I and II with violating Section 113(a)(3) of

[1] Although Rule 22.16(b) provides that a party who fails to respond to a motion within the designated period (15 days from service of the motion) waives any objection to the granting of the motion, an interlocutory appeal is not a motion to be granted without consideration of its merits.

the Clean Air Act (CAA), in Count III with violating Section 311(b) of the Clean Water Act (CWA), and in Counts IV and V with violating the Resource Conservation and Recovery Act, as amended (RCRA).

The Consolidated Rules of Practice provide at 40 C.F.R. § 22.29(b), with respect to appeals from interlocutory orders and rulings:

> The Presiding Officer may recommend any order or ruling for review by the Environmental Appeals Board when:
> (1) The order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion; and
> (2) Either an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or review after the final order is issued will be inadequate or ineffective.

Complainant contends that it has met all of the requirements of Section 22.29 for an interlocutory appeal to the EAB. Citing Chautauqua Hardware Corporation, EPCRA Appeal No.91-1,3 E.A.D.616 (CJO,1991), Complainant says that an interlocutory appeal is appropriate when the issue is fundamental and has not been addressed by the Agency's highest appellate body or when a legal precedent is set (Brief in Support of Motion (Brief) at 2).

In summary, Complainant says that there are two primary issues which have never been directly decided by the Environmental Appeals Board, i.e., 1) whether the Agency may use its discretion to seek separate penalties for separate violations of the chlorofluorocarbon (CFC)regulations (40 C.F.R.Part 82, Subpart F)and 2) the scope of the used oil processing regulations (40 C.F.R.Part 279). Complainant asserts that the rationale employed by the Order presents important legal/policy issues such as: 1) when does disposal occur under the CFC regulations; 2) the Respondent's burden of proof to withstand a motion for accelerated decision; 3) what constitutes a contract under the CFC regulations and 4) the proper scope of the words "on-site" and "free flowing" under the used oil regulations (Brief at 3).

DISCUSSION

I. Merging of Count II with Count I

The Amended Complaint alleges in Counts I and II that Respondent violated certain provisions of the CFC regulations promulgated under Subchapter VI of the Clean Air Act (CAA) to protect the stratospheric ozone. Specifically, Respondent was charged in Count I with disposing 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), which provides, in pertinent part:

> 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 [motor vehicle air conditioners] 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.

Count II of the Amended Complaint alleges that Respondent failed 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:

> (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.

The Order concluded that 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) for disposal of the same appliances, and therefore merged the allegations of Count II with those of Count I. This conclusion was based in part upon the fact that the recordkeeping requirements of Section 82.166(i) and (m) are completely dependent upon compliance with Section 82.156(f)(2). Order at 17. It is, of course, obvious that § 82.156(f) is written in the alternative, ¶ (f) providing that the person taking the final step in the disposal of small 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."

This language can only mean that as to the disposal of a single appliance a person could not be charged with a violation of ¶ (f)(1) and also of ¶ (f)(2)as to that appliance. By the same token, the assessment of a penalty for the violation of ¶ (f)(1) would preclude the assessment of a penalty for violation of ¶ (f)(2)for the disposal of that same appliance. In short, Complainant in drafting his complaint, or at the very latest in presenting his case, must choose whether to charge the alleged violator with a violation of § 82.156(f)(1) or of (f)(2) as he may not charge, or assess a penalty for, a violation of both sections for the disposal of the same appliance or appliances.

In this regard, Complainant takes issue with the observation in the Order at 20 that 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)(Brief at 12, note 5).Complainant says that the assumption behind this observation, i.e., that the person recovering refrigerant from appliances in accordance with § 82.156(f)(1) would not be required to maintain records, is erroneous, pointing to § 82.166(a), which requires that persons who sell or distribute any class I or class II substance *for use as a refrigerant* to retain invoices, indicating the name of the purchaser, the date of sale and the quantity of refrigerant purchased. It is clear that the record-keeping requirement of § 82.166(a)has no application unless the distribution or sale of the class I or class II substance is *for use as a refrigerant,* and refrigerant, recovered by a person or firm, such as Consumers, engaged in scrap metal recovery and recycling is unlikely to be usable as refrigerant unless it is reclaimed or as a minimum recycled, in which case the initial

sale or distribution would not be for use as a refrigerant. Be that as it may, definitions of reclaim and recycle are in § 82.152, and § 82.166 makes it clear that it was intended to place the burden of record-keeping on persons reclaiming refrigerant as such persons must maintain records of from whom they receive the material for reclamation and the quantities thereof (§ 82.166(g)and (h)).By contrast, the only records required to be maintained by the person disposing of small appliance are the signed statements required by § 82.156(f)(2). See § 82.166(i). It is therefore clear that if Respondent had intended to recover refrigerant from the appliances itself, but had failed to do so for some reason, only one violation could be charged as there would be no requirement that Respondent maintain or keep records.

In McLaughlin Gormley King Co., FIFRA Appeal Nos.95-2 through 95-7, 6 EAB 339 (EAB, 1996), the EAB held that the unit of violation for the purpose of determining the number of violations or counts that may result or be charged from any proscribed conduct is essentially a matter of statutory construction. Following that precedent, the Order herein discussed the statutory language of Sections 608(a)and (b) of the CAA, which authorizes EPA to promulgate regulations concerning the use and disposal of class I and class II substances during the use, repair or disposal of appliances, and which requires the regulations to include requirements that refrigerant "shall be removed from each such appliance..prior to the disposal of such items or their delivery for recycling,"(§ 608(b)(1)). The Order concluded that prima facie the appropriate unit of violation is an appliance. This conclusion requires rejection of Complainant's contention that the CAA authorizes separate penalties for violations of separate CFC rules, notwithstanding the requirement of one rule may be totally dependent upon another, as the person taking the final step in the disposal of a small appliance is required to maintain signed statements that an appliance has previously been evacuated of refrigerant only if he elects to comply with § 82.156(f)(2) and verify that the refrigerant has previously been removed.

Noting that the CAA Stationary Source Penalty Policy is silent on the issue of dependent requirements, the Order pointed out that several of EPA's other penalty policies, and a decision of the Environmental Appeals Board (EAB) in Lazarus, Inc., 7 E.A.D. 318, 382 (EAB, 1997)(penalty assessed for a single violation based on allegations of both failure to inspect and failure to maintain records of inspection), indicate that only one violation should be charged where one act of noncompliance is completely dependent on another act of noncompliance.

Complainant argues that there are substantial grounds for a

difference of opinion as to this issue. First, Complainant argues that the merger is "inconsistent with Lazarus,"that it "deprives the Respondent of notice of the nature of the violations and the proposed penalty," and deprives the Complainant "of its ability to plan for trial and seek the entire proposed penalty sought for both violations." Brief at 5. Complainant says that the Order "appears to intend to eliminate Count II and reduce the proposed penalty to only the amount proposed for Count I." Brief at 4. This assertion is accurate to the extent it alleges that the Order is intended to eliminate Count II, because that is the inevitable result of the conclusion that Complainant has improperly attempted to multiply the number of counts.[2] The Order, following the language of § 82.156(f) clearly holds that Complainant may not, with respect to the disposal of the same appliance or appliances, charge Respondent with a violation of (f)(1), failure to recover any remaining refrigerant and (f)(2), failure to verify that the refrigerant has previously been evacuated. As we have seen, it is only in respect to the requirement for verification that a person disposing of appliances is required to maintain records. It is true that the EAB in Lazarus upheld the assessment of penalties for failure to maintain records of inspection of PCB transformers under single counts alleging both failure to inspect and failure to maintain records of inspection, notwithstanding respondent's evidence that the transformers were inspected. This is not authority for the proposition that Complainant may pursue Count II, failure to maintain records required by §§ 82.166 (i) and (m), independently of the requirement for verification set forth in § 82.156(f)(2).

Next, Complainant argues that the Order has "effectively engrafted onto the CFC program a limitation which is not there and is contrary to the positions of Congress and the Agency for the CFC program." Brief at 6. According to Complainant, the language of Section 113(d)(1)(B) of the CAA, authorizing EPA to assess separate penalties per day of violation for "violating . . . a requirement or prohibition of any rule . . . .," makes clear that penalties may be assessed for each violation of a distinct requirement. This argument provides no assistance to Complainant here, because the requirement of § 82.166(i)to maintain signed statements is completely dependent on Respondent electing to verify in accordance with § 82.156(f)(2) that appliances received

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[2]. The Order appropriately could have merged Count I to the extent it alleged a violation of § 82.156.(f)(2), with Count II and then forced Complainant to elect whether it was pursuing Count I, failure to recover, or Count II, failure to verify, as it clearly could not pursue both counts as to the disposal of the same appliance or appliances.

had previously been evacuated of refrigerant. Although it is true that the CFC Penalty Policy does not expressly refer to "dependent violations",there is no support for Complainant's contention this silence means that it was determined that separate penalties for dependent violations were appropriate.

The CFC Penalty Policy expressly provides that some requirements -- which could be regarded as dependent violations -- are to be grouped together and one penalty assessed. For example, the Penalty Policy under "extent of deviation" states that where "most . . . of the requirements [of the regulation] are not met," such as the failure to submit an owner certification, in violation of the general requirement of 40 C.F.R. § 82.42(a)(1), there is one violation with a "major" extent of deviation. Where "some of the requirements are implemented," such as the failure to comply with some of the specific requirements for contents and timeliness of such certification, in violation of 40 C.F.R. § 82.42(a)(1)(iii), there is one violation with a "moderate" extent of deviation. Where most requirements are met, such as the failure to comply timely with one specific requirement for contents of certification, there is one violation with a "minor" extent of deviation. Additionally, the Policy's discussion of "potential for harm," listing separately the failure to follow required practices of Section 82.156 and the failure to properly follow recordkeeping requirements, contains no suggestion that combining a dependent recordkeeping violation with a violation of Section 82.156(f)(2), resulting in a single penalty, would be inconsistent with the Policy.

Complainant is correct to the extent it recognizes that Respondent has not been given notice of the [precise] nature of the violations and the proposed penalty (Brief at 4).This situation, however, is not related to the Order and resulting merger of Count II into Count I, but arises because Complainant has elected to combine in Count I a charge for failing to recover refrigerant from appliances in accordance with § 82.156(f)(1) with a charge for failing to verify that refrigerant has been been evacuated from the same appliances in accordance with § 82.156.(f)(2). As noted above, the regulation is written in the alternative, and does not permit charging a violation of § 82.156(f)(1) and of § 82.156(f)(2) as to the disposal of the same appliance or appliances. Rescission of the Order requiring the merger would not change that conclusion. In this regard, Complainant refers only to § 82.156(f)(2), failure to verify, in its prehearing exchange and appears to have abandoned any intention of proceeding under § 82.156(f)(1), failure to recover, as to the appliances referred to in the complaint (note 2 supra). Complainant may, of course, move to amend the complainant so as

to seek a larger penalty, if it considers it appropriate to do so.

In view of the foregoing, there is no reasonable basis for concluding that the Order merging Count II into Count I "involves an important question of law or policy concerning which there is substantial ground for difference of opinion."[3] Therefore, the second prong of 40 C.F.R. § 22.29(b) need not be reached as to this merger issue.

II. Denial of Accelerated Decision as to Count I

Complainant argues that the denial of accelerated decision as to Respondent's liability on Counts I and II "deviates from established precedent regarding accelerated decisions." Brief at 13. Complainant alleges that the Order relies on unsupported and unreasonable inferences and "ignores established facts." Id. Complainant also argues that the Order establishes precedent as to when disposal occurs and what constitutes a contract under CFC regulations.

Specifically, Complainant asserts first that the Order unreasonably inferred that Respondent could have verified recovery of refrigerant from appliances in compliance with 40

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[3]According to Complainant, an interlocutory appeal is appropriate when an issue is fundamental and hasn't been squarely addressed by the Agency's highest appellate body (Brief at 2). The issue here is not fundamental, because there is no requirement for the person disposing of small appliances to keep records of any kind unless that person intends to verify that the refrigerant has previously been evacuated from the appliance or appliances in accordance with § 82.156(f)(2). See, e.g., Lake County, Montana, Docket No. CAA-8-99-11-2001, EPA ALJ LEXIS 132 (July 2001) (where County elected to evacuate refrigerant from appliances received for disposal at its landfill with its own equipment and made no attempt to verify that refrigerant had previously been recovered from the appliances, there was no allegation or contention that County had any obligation to maintain records relating to disposal of recovered refrigerant , or indeed, records of any kind). The lack of EAB or other precedent on this issue is then readily explainable, the Agency has not previously taken the position advocated by Complainant here.

C.F.R. § 82.156(f)(2), based on the Respondent's statements that it inspected appliances received from Refrigeration Services, Inc., ("RSI") for tags, and on the copy of a blank tag. The blank tag, presented as an exhibit by Complainant, is entitled "Certification," and includes blank spaces marked "freon recovered," the date, and "technician," and include RSI's address and license number. (Complainant's Motion for Accelerated Decision, Exhibit 16) Complainant points out that the tag "does not state on it that the refrigerant has been evacuated in compliance with 40 C.F.R. § 82.156(g) or (h) as required by 40 C.F.R. § 82.156(f)(2)." Brief at 15. Complainant construes Section 82.156(f)(2) to require exactly that language, and asserts that the RSI tags were facially deficient without it. The conclusion in the Order that more evidence is required before any determination can be made as to the sufficiency of the tags is based on an unsupported inference which was not even presented by the Respondent, Complainant argues, and in effect re-writes the CFC regulations as not requiring the certification statement.

The question is whether to recommend for interlocutory review a denial of Complainant's Motion for Accelerated Decision as to Count I. Accelerated decision is essentially the same as summary judgment, and summary judgment law under Federal Rule of Procedure 56 is applicable to accelerated decision. Puerto Rico Aqueduct and Sewer Authority v. EPA, 35 F.3d 600 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995). As noted by the Fifth Circuit Court of Appeals, the trial court "generally has the right to decline to summarily resolve a case before it . . ." Harvey Construction Co. v. Robertson Ceco Corp., 10 F.3d 300, n. 12 (5th Cir. 1994). *See,* Roberts v. Browning, 610 F.2d 528, 536 (8th Cir. 1979)(court may, in accordance with "sound judicial policy and the proper exercise of judicial discretion," deny summary judgment and allow a case to be fully developed at trial); In re Franklin National Bank Securities Litigation, 478 F. Supp. 210, 223 (E.D. NY 1979)("[s]atisfying the basic requirements of the rule for summary judgment does not guarantee that the motion will be granted"). Similarly, the rule for accelerated decision allows such discretion, providing that the ALJ "may . . . render an accelerated decision." 40 C.F.R. § 22.20(a). (emphasis supplied). Consequently, Complainant's argument that the ALJ's refusal " to grant summary judgment," has "deviated from the established standards for accelerated decision," and "presented a significant legal issue upon which there is substantial disagreement with established case administration principles" (Brief at 14) is rejected.

The applicable standard for interlocutory appeal under 40 C.F.R. § 22.29 is that the order "involves an important question

of law or policy concerning which there are substantial grounds for difference of opinion" (emphasis added) and that an "immediate appeal will materially advance the ultimate termination of the proceeding . . . ." It appears to be based upon a Federal standard for interlocutory decisions at 28 U.S.C. § 1292(b), which provides,

> When a district judge . . . shall be of the opinion that [an] order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. (emphasis added)

Denials of summary judgment on the basis that genuine issues of material fact exist are not subject to interlocutory review. Johnson v. Jones, 515 U.S. 304, 307 (1995)(district court's determination that the evidence in the pretrial record was sufficient to raise a genuine issue of fact for trial was not appealable). As the Supreme Court has stated, "denial of a motion for a summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim . . . [but] decides only one thing – that the case should go to trial" and therefore is not subject to interlocutory review under 28 U.S.C. § 1292. Switzerland Cheese Ass'n v. E. Horne's Market, Inc., 385 U.S. 23 (1966).

Accordingly, to the extent that Complainant challenges the existence of genuine issues of material fact, interlocutory review is denied.

To the extent that Complainant asserts that any facts to be proven are immaterial, and that the blank tag itself establishes as a matter of law that Respondent violated 40 C.F.R. § 82.156(f)(2), Complainant's assertion fails. That provision requires "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." 40 C.F.R. § 82.156(f)(2). Paragraphs (g) and (h) of Section 82.156 set forth standards for the amount of refrigerant that must be recovered: within four inches of mercury vacuum, or 90% of the refrigerant must be recovered if the compressor is operating, or 80% if it is not operating. While the blank tag presented by Complainant does not expressly state "that all refrigerant . . . has been recovered . . . in accordance with paragraph (g) or (h)," Complainant has not established as a matter of undisputed

fact that the blank tag presented is identical to any tags that were affixed to the appliances at issue, or that any such tags could not have indicated that all refrigerant had been recovered.

Indeed, Respondent claims 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," and that these appliances were "tagged by the supplier indicating that all refrigerants had been removed in accordance with §82.156"(Respondent's Motion at 5). In support, an affidavit of Respondent's president, Norbert Wierszewski, states that "[t]he retail appliance store [from which Respondent receives appliances] will drain the refrigerant from the appliance and place a tag on the appliance which indicates the refrigerant has been drained from the appliance." Complainant's Motion, Exhibit 4, ¶ 5. RSI's Response to EPA's Request for Information, dated March 28, 2001, states that it verified recovery of refrigerant from each appliance, and "would place a recovery certification tag identifying the amount of refrigerant recovered . . . ." Complainant's Motion, Exhibit 2. Complainant has presented evidence that the average working refrigerator contains between eight and twelve ounces of refrigerant, and the average working air conditioner contains between two to three pounds of refrigerant. Complainant's Motion for Accelerated Decision, Exhibit 18, ¶ 19. According to its Prehearing Exchange, Respondent intends to present testimony of Mr. Wierszewski and Respondent's Principal Scale Operator, as to inspecting appliances to ensure they were properly tagged.

From the evidence, a reasonable inference could be drawn that the tags on appliances received by Respondent from RSI were marked with the amount of Freon removed. A comparison of this amount with the evidence of the amount of refrigerant generally contained in the particular type of appliance may allow verification of whether the amount of the refrigerant removed was in compliance with 40 C.F.R. § 82.156(h).[4] The regulation, Section 82.156(f)(2), does not mandate that the signed statement include any particular language or conform to any particular format. Indeed, a certification on each appliance with a handwritten statement of the actual amount of refrigerant removed

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[4]The fact that Respondent did not specifically present this reasoning in its motion does not bar the undersigned from considering it. An administrative law judge "may . . . raise issues *sua sponte* upon essential matters not covered adequately by the parties." Manual for Administrative Law Judges, Administrative Conference of the United States, at 5 (3rd Ed. 1993).

may be more reliable an indication of compliance with Section 82.156(h) than a statement parroting the regulatory language that "all refrigerant that has not leaked previously has been recovered . . . in accordance with paragraph (g) or (h) . . . ." *See,* Shuffle Master, Inc. v. Progressive Games, Inc., 170 F.R.D. 166, 171 (D. Nev. 1996)(certification under Fed. R. Civ. Proc. 37(a)(2)(B), requiring declaration that movant in good faith conferred or attempted to confer with opposing party to obtain the requested information, "must include more than a cursory recitation that counsel have been 'unable to resolve the matter,'" or a "perfunctory parroting of statutory language on the certificate," but must adequately set forth essential facts); Burditt v. U.S. Dep't of Health and Human Services, 934 F.2d 1362 (5th Cir. 1991)(physician's signed certification under 42 U.S.C. § 1395dd(c)(1)(A)(ii) for patient transfer is insufficient if merely a formality -- a signed paper stating the determination under the statutory requirement was made). Therefore, genuine issues of material fact exist as to whether the certification tags met the requirements of 40 C.F.R. § 82.156(f)(2), and therefore interlocutory review of this issue is not appropriate.

With regard to appliances Respondent received from Environmental Specialty Services (ESS), the Order concluded that a letter dated November 17, 2000, signed by Consumers and ESS, appears to be consistent with the option in Section 82.156(f)(2) of "a contract that refrigerant will be removed prior to delivery." Complainant denies that the letter is a contract. The Order noted that an inference could be drawn that the letter, dated November 17, 2000, applies to the one occasion on which ESS claims to have sold scrap to Respondent. Complainant argues that this inference "ignores critical factual information" (Brief at 15).

In its Motion for Accelerated Decision (at 15), Complainant asserted that Respondent did not have a refrigerant recovery contract with any of its suppliers prior to delivery at Respondent's facility, and that the letter, dated November 17, 2000, was not a contract. Complainant's Statement of Undisputed Material Facts (¶¶ 49 and 50) points out that service tickets, documents of reclamation, and invoices from ESS' contractor, Bumler Heating & Specialties, Inc. (Bumler), indicate that Bumler recovered refrigerant from ESS' appliances from August through November 14, 2000. Complainant's Statement of Material Facts (¶ 53) states "ESS sent scrap to Consumers on one occasion," citing ESS' response to EPA's Request for Information, dated March 12, 2001 (Complainant's Motion for Accelerated Decision, Exhibit 3, Response No. 5). It is reasonable to infer that the one occasion occurred after Bumler serviced the last of ESS' appliances at the

end of November, 2000. Thus, as stated in the Order (at 12), an inference could be drawn that the November 17, 2000, letter applies to the one occasion ESS claims to have sold scrap to Consumers.

Yet now Complainant asserts (Brief at 15-16) that "[t]he shipments at issue from ESS all arrived at Respondent prior to November 1, 2000." In support of that assertion, Complainant cites not only its Statement of Material Facts ¶¶ 49 and 50, but also to an additional document, dated February 6, 2002, submitted with its current Motion, which appears to be an ESS' response to another EPA Information Request (Brief, Attachment 1). This document indicates that appliances serviced by Bumler were sent in sixteen shipments to Respondent from August 17, 2000 to September 13, 2000. Thus, Complainant's own documents indicate that a genuine issue of fact exists, on the question of whether the November 17, 2000, letter applied to the shipments at issue from ESS to Respondent. Moreover, Complainant's attempt to provide additional factual information submitted after its Motion for Accelerated Decision was denied suggests the necessity of an evidentiary hearing to elicit all the facts prior to an appealable decision.

Complainant urges that an inference be drawn in its favor that the letter dated November 17, 2000 is not a contract, despite a reference therein to a "certification by contract" and to "this contract of sale," because ESS denied that it had a written contract with Consumers (Complainant's Motion for Accelerated Decision, Exhibit 3, Response No. 14), and therefore there was no "meeting of the minds" as required for a contract. Motion at 16. In essence, Complainant urges that ESS' denial must be accepted. Moreover, Complainant insists that there was no mutuality of obligations, and denies that there was any implied promise on the part of Consumers to purchase the appliances from ESS.

Complainant's insistence on its interpretation of the language in the letter, on the credibility of ESS' denial, and on inferences being drawn in its favor, fails to establish the absence of genuine issues of material fact. On a motion for summary judgment, the court must review the record "taken as a whole." Matsushita Elec, Industrial Co. v. Senioth Radio Corp., 475 U.S. 574, 587 (1986). The court must draw all reasonable inferences in favor of the nonmoving party, may not make credibility determinations or weigh the evidence, and must disregard all evidence favorable to the moving party that the jury is not required to believe. Reeves v. Sanderson, 530 U.S. 133, 150-151 (2000). "In a summary judgment motion involving the

construction of contractual language, the parties' 'intent is all [and] the language used must be examined first to see of it is ambiguous'" and the "court may grant the motion 'only where the language and the inferences to be drawn therefrom are unambiguous,'" and thus "a motion for summary judgment must be denied if the intent of the contracting parties is subject to more than one reasonable interpretation." Union Switch & Signal, Inc. v. The Metropolitan Transportation Authority, Civ. No. 4335, 1993 U.S. Dist, LEXIS 4992 * 12-13(S.D. NY 1993)(quoting Cable Science Corp. v. Rochdale Village, Inc., 920 F.2d 147, 151 (2nd Cir. 1990).

Complainant insists that a long term relationship between the parties is a prerequisite for a valid contract under Section 82.156(f)(2), on the basis of Complainant's interpretation of a statement in the preamble to the rule, that "[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). The Order concluded that the preamble does not set forth a prerequisite of a long-standing relationship. The statement that the agency believes that an option is appropriate for certain situations does not prohibit use of the option in other situations. This conclusion is supported by the fact that a preamble is merely the agency's interpretation of what is stated in the rule; the preamble cannot set forth binding requirements or conditions which are not in the rule. As stated by the EAB, "it is not enough that the interpretation of the regulation be reasonable, the regulation itself must provide the regulated community with adequate notice of conduct required by the agency . . . [t]o satisfy due process, the notice of the required conduct must come from the language of the regulation itself . . . ." CWM Chemical Services, Inc., 6 E.A.D. 1, 16-17, 18 (EAB 1995)(no fair warning of EPA's interpretation as to the method of measurement of PCB concentration where the regulation was completely silent as to the intended method); Albermarle v. Herman, 221 F.3d 782, 786 (5th Cir. 2000)(Secretary of Labor's reliance on regulation's preamble, which referred to written safety practice, did not support a condition that safe work practices be written, where the regulatory text did not state that condition; court noted that "the preamble need be consulted . . . only when . . . the regulation's plain language is ambiguous."). *See also,* National Wildlife Federation v. Marsh, 721 F.2d 767, 773 (11th Cir. 1983), *reh'g denied,* 747 F.2d 616 (preambles to statutes do not impose substantive rights, duties or obligations).

As to the appliances observed by Mr. Cardile during his inspection on July 15, 1999, the Amended Complaint (at ¶¶ 34, 67) alleges that there were six appliances or parts thereof in piles of mixed scrap, that Respondent was not sorting through these piles prior to compressing or baling them, and that Respondent disposed of appliances without verifying that refrigerant had been removed previously. Respondent did not admit these allegations in its Answer. Respondent asserted that appliances without tags were "pulled from the scrap pile and placed in service." Complainant's Motion for Accelerated Decision, Exhibit 1, Response No. 29. Respondent asserted further that it did not dispose of any appliance that did not clearly exhibit a sticker or tag confirming that all refrigerants had been previously removed. Respondent's Motion at 5. Issues of credibility are not to be determined on motions for summary judgment. Abraham v. Raso, 183 F.3d 279, 287 (3rd Cir. 1999). Because of the conflicting inferences that could be drawn from the evidence, including the possibility that Respondent had not yet verified refrigerant recovery from the appliances and had not yet decided to dispose of or recycle the appliances at the time Mr. Cardile observed them, and because the evidence was not fully developed, the Order denied accelerated decision.

Complainant alleges that the Order thereby establishes precedent for when a "disposal" occurs under the CFC regulations, and therefore raises significant legal or policy issues appropriate for interlocutory appeal. Brief at 13. As pointed out in the Order, the regulation, 40 C.F.R. § 82.156(f)(2) does not set forth a time period within which the verification must occur. Complainant's Motion for Accelerated Decision (at 13-14) focused on the fact that the appliances were scattered in piles prior to being processed into scrap, and that as a scrap processor, Consumers took the final step in the disposal of the appliances. The evidence, however, did not establish that Respondent, at the time of the inspection, disposed of the appliances observed by Mr. Cardile by crushing and baling them for recycling, nor did the evidence establish that Respondent "was not sorting through these three piles prior to compressing or baling them," as alleged in the Amended Complaint.

Now in its Motion, Complainant emphasizes what was asserted merely in a footnote in its Motion for Accelerated Decision (n. 4), that the placement of appliances "in scrap piles on the land" qualifies as disposal. Complainant states that Mr. Cardile saw the appliances "in piles that were on the land." Brief at 17. Complainant insists that the appliances were without certification tags, were not serviceable and were thus disposed of at the point Mr. Cardile saw them, maintaining that the facts

meet the definition of "disposal" set forth in 40 C.F.R. § 82.152:

> the process leading to and including:
> (1) The discharge, deposit, dumping or placing of any discarded appliance into or on any land or water;
> (2) The disassembly of any appliance for discharge, deposit, dumping or placing of its discarded component parts into or an any land or water; or
> (3) The disassembly of any appliance for reuse of its component parts.

The information thus far in the record is undeveloped to the facts surrounding the placement of appliances in scrap piles. For example, Complainant has not pointed to any evidence of the surface – such as soil or a cement floor -- upon which the scrap was placed in piles, and therefore has not established that the appliances were placed "on land." An examination of the record reveals a vague statement by EPA's Clean Water Act inspector, Ross Powers, that Respondent's facility "is located on land" and vague mention of "the ground," without any reference to the location of the scrap piles. Complainant's Motion for Accelerated Decision, Exhibit 19, ¶¶ 2, 13, 15. It is inappropriate to recommend for interlocutory review an argument based on such an undeveloped factual record.

Finally, Complainant argues that Respondent's liability "could not be clearer" for the allegations of Count II, that Respondent did not maintain or retain records of its disposal or verification statements for the appliances. Motion at 18. Respondent does not dispute the fact that it did not maintain copies of signed statements obtained pursuant to Section 82.156(f)(2), and has not pointed to any evidence to the contrary. Technically it may be found that Respondent has violated 40 C.F.R. § 82.166(i) and (m). However, these allegations are merged with Count I, and genuine issues of material fact remain as to the remaining allegations of Count I and as to the number of violations for Count I. Therefore, interlocutory review of the issue of Respondent's liability for Count I is not recommended.

In sum, Complainant has not established any issue of law or policy appropriate for interlocutory review, because genuine issues of material fact exist as to Respondent's liability for Count I.

III. Dismissal of Counts IV and V

A. Complainant's Arguments

Complainant requests interlocutory review of the dismissal of Counts IV and V on the basis that the rationale behind the dismissal sets new precedent which is "contrary to established court precedent and the Agency's clear and long-held interpretation of its hazardous waste and used oil management regulations." Brief at 19. Second, Complainant asserts that the distinction in the Order between used oil generators and used oil processors creates an exclusionary interpretation of the rules, whereby a generator cannot be a processor, which is contrary to long-standing precedent and the clear language of the regulations. Brief at 22. Third, Complainant asserts that there was no evidence to support critical facts found in the Order and that reasonable inferences indicate that judgment as a matter of law should have been made in Complainant's favor.

Complainant argues that the plain language of the regulatory definition of "used oil processing" and legislative intent justify the classification of Respondent as a used oil processor. The term "used oil processing" is defined in the applicable state regulations as

> [c]hemical 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 . . .[which] includes, but is not limited to: blending used oil with virgin petroleum products, blending used oils to meet the fuel specification, filtration, . . . chemical or physical separation and re-refining.

Michigan Administrative Code (MAC) § 299.9019(t); *see also,* 40 C.F.R. § 279.1.[5] Complainant maintains that the totality of Respondent's actions -- receiving drums of used oil from generators, placing the drums on the drum catch basin, punching holes in the drums, removing used oil from the drums by gravity, and collecting the used oil in the drum catch basin along with the used oil from various generators – constitutes "used oil processing." Complainant adds that this process made the used oil more amenable for the production of used-oil derived

[5] EPA authorized the State of Michigan to administer and enforce its hazardous waste program, and authorized its used oil management rules. Because Michigan's hazardous waste and used oil rules are based upon and, for purposes of this proceeding, essentially the same as the Federal regulations, the latter are referenced and discussed herein and in the Order.

products, consistent with the definition of "used oil processing."

The Order stated that the regulatory definition of "processing," and in particular the listed example of "physical separation" could encompass the act of draining oil from other materials. Order at 28. Complainant asserts that this statement should have ended the inquiry, and resolved judgment as a matter of law in its favor. Complainant believes that the regulatory definition is clear, and under the principles of statutory construction set forth in Chevron USA, Inc. v. NRDC, 467 U.S. 837 (1984), no further analysis should have been undertaken. According to Complainant, the fact that further examination was undertaken of the meaning of "used oil processing," is an important legal or policy departure that justifies review by the EAB.

Complainant disputes not only the fact that further analysis was undertaken in the Order, but also the analysis itself, which quoted EPA's discussion of the term "used oil processor" in the preamble to the amendments to the used oil regulations, 40 C.F.R. Part 279. 59 Fed. Reg. 10550, 10555-1057 (March 4, 1994). In the preamble, EPA distinguished used oil processors from used oil generators on the basis of the primary purpose of their activities. Complainant asserts that the Order articulates a new standard, a "primary purpose" standard, that is not contained in the language of the regulations. Brief at 22. As to the finding in the Order that Respondent removed used oil from the metal chips for the primary purpose of cleaning the metal prior to recycling it, Complainant claims that the record does not support such a finding. Complainant states that scrap metal is not typically and does not have to be cleaned prior to crushing and baling. Brief at 24.

Complainant points out that the exemption from the processor standard for generators who drain used oil, at 40 C.F.R. § 279.20(b)(2), includes the condition that the used oil be generated "on-site." Complainant states that the Order "fails to recognize that this exemption is limited to on-site generation where EPA has defined on-site narrowly." Brief at 25-26. In support, Complainant quotes from EPA's discussion of the term "on-site" in the preamble to the RCRA hazardous waste generator standards, at 45 Fed. Reg. 12722, 12723 (Feb. 28, 1980), in support of its argument that the critical determination "is whether the used oil is transported along public highways and the ownership of the property at the point of generation." Brief at 26. Complainant claims that the used oil at issue was not generated on-site at Respondent's facility, but was generated as

a result of Respondent's suppliers' manufacturing activities and transported to Respondent's facility. The scrap metal in the drums constituted "used oil" at the time Respondent received the drums from its supplier. Complainant points out that materials contaminated with used oil are exempt from the definition of used oil if there is "no visible signs of free-flowing oil remain in or on the material." 40 C.F.R. § 279.10(c)(1). Complainant asserts, "from the facts of this case it is obvious that the residual oil in the drums was free-flowing" at the time the drums were received at Respondent's facility, because the oil flowed from the drums into the catch basin. Brief at 28; *see* Complainant's Motion for Accelerated Decision, Exhibit 20 ¶ 4.D (Declaration of RCRA Regional Used Oil Expert). Complainant disagrees with the conclusion in the Order that both the supplier and Respondent generated used oil from the scrap metal, and maintains that a generator is a manufacturer who produces that hazardous waste or used oil. Thus, Complainant asserts, by concluding that Respondent was not a used oil processor, but only a used oil generator, the Order has rewritten the used oil management regulations and established new policy.

B. Discussion

As spoken by the Supreme Court, the analysis of whether a statutory provision applies to a particular factual situation begins with a determination of whether Congress has directly spoken to the precise question at issue, by "look[ing] to the particular statutory language at issue, as well as the language and design of the statute as a whole." K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988). "[T]he meaning – or ambiguity – of certain words or phrases may only become evident when placed in context," so a statute must be interpreted "as a symmetrical and coherent regulatory scheme . . . fit[ting] if possible all parts into a harmonious whole." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-133 (2000). These principles may be applied similarly to the construction of regulations, and thus to the analysis of whether, as alleged in the Amended Complaint at ¶¶ 99 and 100, Respondent engaged in "processing" of used oil and is therefore a "used oil processor," under the definitions in MAC §§ 299.9101-9109, and of whether Respondent violated MAC § 299.9813(3) and (7) and the Federal provisions incorporated by reference therein (40 C.F.R. §§ 279.51(a) and 279.55), as alleged in the Amended Complaint at ¶¶ 101 and 104.

Applying these principles, the meaning of "used oil processor," and "processing," and the determination of Respondent's liability, must be analyzed by looking not only to

the particular definitions of those terms (in the State regulations at MAC §§ 299.9106(t) and 299.9109(z)), but also to the rules concerning the applicability of used oil regulation at MAC § 299.9809 and to the rule allegedly violated, at MAC § 299.9813. This analysis of the plain language of the State regulations, and of the analogous Federal regulations, was conducted and discussed in the Order at 27-30, consistent with principles of statutory construction set forth in Chevron USA, Inc. v. NRDC, 467 U.S. 837 (1984), and in K Mart and Brown & Williamson Tobacco Corp., *supra*.

This analysis included a distinction, based upon the express language of the regulations, between used oil processors and generators. It also included a quotation from EPA's preamble to the March 4, 1994 amendments to the used oil regulations, explaining the distinction. In the preamble, EPA stated that "a number of very basic on-site generator activities . . . were not intended to be covered under the used oil processor standards . . . because used oil processing is not their primary purpose . . . . the primary purpose of these activities [identified in 40 C.F.R. § 279.20(b)(2)(ii)] 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 . . . . [i]nstead . . the act of . . . draining . . . 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." 59 Fed. Reg. 10550, 10555, 10556 (March 4, 1994)(emphasis added). Complainant's contention that the Order's focus on the distinction between generators and processors created an exclusionary interpretation, such that a used oil generator cannot also be a processor of used oil, is no more valid that a contention that the preamble's focus on the distinction creates an exclusionary interpretation.

It is ironic that Complainant denies EPA's own inter-pretation of its regulations, by asserting that the preamble's reference to the "primary purpose" is not contained in the language of the regulations. It is even more ironic that Complainant would request review of any reliance by the ALJ on EPA's own interpretation. In any event, the preamble excerpt quoted in the Order did not set forth any conduct, or condition thereof, which the Agency prohibits or requires, and which is unstated in the language of the regulation. Indeed, the "primary purpose" discussion merely clarifies the express language [generators who are not processors] of 40 C.F.R. § 279.20 (b)(ii)(D) , "[d]raining or otherwise removing used oil from materials . . . in order to remove excessive oil . . . " and the definition of "processing" at 40 C.F.R. § 279.1, "operations designed to produce from used oil . . . ."

As noted in the Order, it is undisputed that another company, Safety-Kleen, removed the oil from the drum catch basin and re-refined it. Complainant's Statement of Undisputed Facts ¶¶ 84, 109, 111, 115; Complaint and Answer, ¶¶ 50, 53. Safety-Kleen was a "used oil processor," as its activities were "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." MAC § 299.9106(t); 40 C.F.R. § 279.1. On the other hand Respondent's activities were for the purpose of recycling scrap metal. EPA indicates in the preamble that a scrap metal recycler removes excess oil primarily to clean scrap metal prior to recycling. Specifically, the preamble states, "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) . . . 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 . . .." 59 Fed. Reg. at 10557. Complainant's inconsistent and unsupported assertion that Respondent did not need to clean the metal before crushing and baling it for recycling does not suggest any infirmity in the conclusions stated in the Order.

As pointed out in the Order (at 30), a condition to the exemption from the processor standard for generators is that used oil was "generated on-site." MAC § 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 . . . ."); 40 C.F.R. § 279.20(b)(2)(ii)(". . . provided that the used oil is generated on-site . . . ."). Respondent's draining activities are not inconsistent with Complainant's "narrow" distinction of the term as "the ownership of the property at the point of generation." Brief at 26. It is undisputed that the removal of excess oil occurred on Respondent's property. The essential argument is whether used oil was "generated" on Respondent's property. Complainant believes that the drums of scrap metal contained free flowing oil at the time Respondent received them, and the exemption from "used oil" includes the condition that the materials contaminated with used oil have no "visible signs of free-flowing oil" (MAC § 299.9809(2)(c)), so at that point the scrap metal was within the definition of "used oil." Complainant reasons further that Respondent cannot generate more used oil from the same "used oil" materials, because a "used oil generator" is "any person, by site, whose act or process produces used oil or whose act <u>first causes</u> the used oil to become subject to regulation." MAC § 299.9109(x)(emphasis added).

Complainant depends on a myopic reading of the exclusion

from “used oil” at 40 C.F.R. § 27910(c)(1) and MAC § 299.9809(2) rather than on a logical and harmonious reading of the regulatory provisions concerning materials contaminated with used oil at § 279.10(c)(1),(2) and (3) and MAC § 299.9809(1) and (2), and of the exemption from regulation as a processor, at MAC § 299.9813(2)(c) and 40 C.F.R. § 279.20(b)(2)(ii). In pertinent part, the regulation, at MAC § 299.9809(1)(b) (40 C.F.R. § 279.10(c)(2), includes as regulated “used oil” materials that are both contaminated with used oil and are burned for energy recovery. The regulation also includes as regulated “used oil” the used oil which has been drained or removed from the other materials (MAC § 299.9809(1)(c); 40 C.F.R. § 279.10(c)(3)).

Logically, two categories of materials remain as not regulated as “used oil”: a material which is contaminated with used oil and is not burned for energy recovery, and the material which is left after used oil has been drained from the material. Otherwise, the words “and is burned for energy recovery” would be superfluous, and any material, including any operating machine, vehicle or other object which contains some used oil, would be regulated as used oil -- an absurd interpretation.

There is no dispute that the scrap metal was not to be burned for energy recovery. Therefore, the scrap metal as received by Respondent fits at least the first if not both of those two categories of exclusion.

The second category is described by § 299.9809(c)(2): a material contaminated with used oil is not subject to regulation as used oil “if the used oil has been properly drained or removed . . . so that visible signs of free-flowing oil do not remain in or on the material . . . .” *See also*, 40 C.F.R. § 279.10(c)(1). This category is also described by MAC § 299.9813(2)(c), exempting generators from regulation as a processor if they drain or remove used oil from other materials to the extent provided in § 299.9809(c)(2); *see also*, 40 C.F.R. § 279.20(b)(2)(ii)(D). If such draining did not remove the oil to the extent that no visible signs of free-flowing oil remained, then the remaining material could be burned for energy recovery – which would bring them within the first category. Complainant’s insistence that the scrap metal received by Respondent was “used oil” based on an inference that free-flowing oil existed on the scrap metal, ignores the plain language of § 299.9809(1)(b), 40 C.F.R. § 279.10(c)(2)) and the fact that the scrap metal would not be burned. It also ignores EPA’s purposes in promulgating the amendments distinguishing generators from processors in 40 C.F.R. Section 279.20(c)(2)(ii), as stated in the preamble:

> The Agency is concerned that in situations where used oil is being filtered, separated or otherwise reconditioned and then sent to off-site burners, the purpose of the activity may be difficult to discern and that consequently, § 279.20(b)(2)(ii) provisions may be used as a means to avoid compliance with the used oil processor standards (i.e.., by persons . . . whose primary purpose is to make the used oil more suitable for burning). Therefore, EPA believes it is necessary to adopt an objective measure of the purpose of the activity. The Agency believes that a prohibition against sending used oil generated from specified on-site activities to off-site burners provides the most practical and effective way to ensure that activities undertaken only to make used oil more amenable for burning are subject to the used oil processor standards.

59 Fed. Reg. at 10556. Respondent generated on its property used oil from scrap metal, and the used oil was sent to a processor, Safety-Kleen, not to a burner. The scrap metal was baled for recycling. The Order's conclusion that Respondent was an on-site "generator" of used oil and not a processor of used oil is consistent with the plain meaning as well as the Agency's stated purposes of the regulations. Therefore, the Order does not involve any question of law or policy concerning which there is substantial grounds for difference of opinion. The second criterion for recommending interlocutory review, at 40 C.F.R. § 22.29(b)(2) need not be reached.

IV. Conclusion and Order

Complainant has not met the criteria of 40 C.F.R. § 22.29(b) with respect to the denial of its Motion for Accelerated Decision as to Count I, with respect to the ruling which merged Count II with Count I, or with respect to the dismissal of Counts IV and V.

For the reasons stated above, Complainant's Motion to Forward the Order of April 11, 2002, to the Environmental Appeals Board for Interlocutory Appeal is **DENIED.**[6]

[6]It is understood that Consumers is in bankruptcy and Complainant is directed, or before September 6, 2002, to file a statement of how it intends to proceed in this matter.

Dated this 22nd day of August, 2002.

_____

Spencer T. Nissen
Administrative Law Judge

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 Denying Motion for Interlocutory Appeal**, dated August 22, 2002, was sent this day in the following manner to the addresses listed below:

Original + 1 by Pouch Mail to:

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Dated: August 22, 2002