UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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| **In the Matter of:** | ) | |
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| | ) | **Docket No. RCRA-III-264** |
| **BIL-DRY CORPORATION** | ) | |
| | ) | |
| **Respondent** | ) | |

ORDER DENYING MOTION FOR ACCELERATED DECISION ON LIABILITY

On July 1, 1997, the United States Environmental Protection Agency (EPA/Complainant), moved for an order granting partial accelerated decision as to the issue of liability of the Bil-Dry Corporation in the above stated proceedings. Complainant's Motion, filed pursuant to 40 C.F.R. §22.20 of the Consolidated Rules of Practice (Rules), asserts that no genuine issue of material fact exists and complainant is entitled to judgment as a matter of law.

Respondent Bil-Dry Corporation filed its Brief In Opposition to Complainant's Motion on July 24, 1997,[(1)] wherein Bil-Dry denies that EPA is entitled to an accelerated decision based on the facts set forth in its legal memorandum.[(2)] Specifically, Bil-Dry avers that EPA test samples taken at its facility were in fact, neither "hazardous" nor "waste" as defined by applicable Pennsylvania law.[(3)]

Rather, respondent asserts that the materials in question were "raw materials" used infrequently at its facility and were, under Pennsylvania law, not hazardous wastes as they were not "discarded materials resulting from...operations."(Resp. Br. at 5). In addition, respondent argues that it is not the "owner" of the underground storage tanks (USTs) at the facility for purposes of the controlling Pennsylvania statute.

On July 31, 1997, complainant sought leave to file a Motion to Reply to Respondent's Brief in Opposition, requesting an opportunity to clarify the issues and arguments raised by respondent in its brief. Pursuant to Section 22.16 of the Rules the Motion to Reply is granted.

In its Reply, EPA sets forth several relative points which further reflect on the factual and legal issues in the matter at bar. In particular, EPA addresses the legal issue of the correct utilization of the terms "solid waste" and "hazardous waste," as defined by the Pennsylvania Hazardous Waste Management Regulations (HWMR); and challenges respondent's newly disclosed evidence which seeks to refute EPA's analysis of drum No. 2. Furthermore, EPA argues that respondent's admissions confirm that the content of drums 3 and 4 were "waste"; that drum 5 contained "hazardous waste" irrespective of respondent's intention to use it at some undetermined time in the future; that respondent's current disclosures of information contradict its previous statements that it could not identify the drums sampled by EPA; and that respondent is the owner and/or operator, and thus, is liable for the USTs at it's facility.

Before addressing the merits of Complainant's Motion for Accelerated Decision, a brief background discussion, utilizing the prevailing standard of review is useful.

## Background

A complaint was initiated by EPA on September 30, 1996, pursuant to Section 3008(a)(1) of the Solid Waste Disposal Act, referred to and amended by the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C.A. §6928(a)(1). The Complaint alleges that respondent had violated numerous provisions of the authorized Hazardous Waste Management Regulations of the Commonwealth of Pennsylvania, 25 Pa. Code Sec's. 75.259 et seq., and the Federal Hazardous Waste Management Regulations, 40 C.F.R. Parts 260-271.[(4)]

Complainant asserts inter alia, that respondent is liable for the unpermitted and improper management, storage and disposal of "hazardous wastes" in four (4) fifty-five gallon "drum" containers and three (3) storage "tanks" at its facility, located at 5525 Grays Avenue, Philadelphia, Pennsylvania (facility). The Complaint further charges respondent with failure to comply with the administrative and financial assurance obligations imposed upon an owner and/or operator of a Hazardous Waste Management facility (HWM facility). The

Complaint, in its entirety, asserts nine counts of alleged violations and proposes a total civil penalty of $231,800.

Subsequent to issuance of the Complaint, respondent, on October 30, 1996, filed its Answer, Request For Settlement Conference and Request For Hearing (CX-2). Although respondent generally denied the averments in the Complaint, it asserted, inter alia, the following specific points: 1) that although it operates its business on the premises, it does not consider its activities either owning or operating a hazardous treatment, storage or disposal facility; 2) that although there were 4 USTs on the premises, it denies that these were ever used or operated by Bil-Dry; 3) that the USTs at the site were sealed and locked prior to Bil-Dry's occupancy of the premises and that Bil-Dry has no knowledge as to how long any material was in the USTs; 4) that it denies accumulating the materials in issue; 5) that the material in the drums was paint, paint precursors and similar materials which are useful and which were intended for Bil-Dry's operations; 6) that it denies that the materials in issue are hazardous waste; 7) that although some of the drums were rusted and that the exterior appearance was poor, the drums were adequate containment for the materials stored therein; 8) that Bil-Dry's actions were not a violation of RCRA or any other law; and 9) that Bil-Dry is a small company with little money and the proposed penalty assessed by EPA jeopardizes the company's existence.

Subsequent to the issuance of the Order Setting Prehearing Procedures, complainant, on March 3, 1997, filed its Prehearing Exchange. On April 7, 1997, respondent filed its Prehearing Exchange and on April 24, 1997, complainant filed its Rebuttal Prehearing Exchange. By order dated May 28, 1997, the undersigned

Administrative Law Judge (ALJ), scheduled a hearing in this proceeding for September 23, 1997 in Philadelphia, Pennsylvania.

## Standard For Accelerated Decision

Section 22.20(a) of the EPA Consolidated Rules of Practice,

40 C.F.R. §22.20(a), authorizes the ALJ to "render an accelerated decision in favor of the complainant or respondent as to all or any part 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 as to all or

any part of the proceeding". In addition, the ALJ, upon motion of the respondent may dismiss an action on the basis of "failure to establish a prima facie case or other grounds which show no right to relief".

A long line of decisions by the EPA Office of Administrative Law Judges and the Environmental Appeals Board (EAB), has established that this procedure is analogous to the motion for summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure. See, e.g., In the Matter of CWM Chemical Serv., Docket No. TSCA-PCB-91-0213, 1995 TSCA LEXIS 13, TSCA Appeal 93-1 (EAB, Order on Interlocutory Appeal, May 15, 1995). See, also Harmon Electronics, Inc., RCRA No. VII-91-H-0037, 1993 RCRA LEXIS 247,(Order, August 17, 1993).

The burden of showing the absence of genuine issues of material fact rests on the party moving for summary judgment. Adickes v. Kress, 398 U.S. 144, 157 (1970). In considering such a motion, the tribunal must construe the factual record and reasonable inferences therefrom in the light most favorable to the non-moving party. Cone v. Longmont United Hospital Assoc., 14 F.3d 526, 528 (10th Cir. 1994). The mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). Similarly, a simple denial of liability is inadequate to demonstrate that an issue of fact does indeed exist in a matter. 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. In the Matter of Bickford, Inc., TSCA No. V-C-052-92, 1994 TSCA LEXIS 90, (Partial Accelerated Decision and Order on the issue of Liability, November 28, 1994).

"Bare assertions, conclusory allegations or suspicions" are insufficient to raise a genuine issue of material fact precluding summary judgment. Jones v. Chieffo, 833 F.Supp 498, 503 (E.D. Pa. 1993). The decision on a motion for summary judgment or accelerated decision must be based on the pleadings, affidavits and other evidentiary materials submitted in support or opposition to the motion. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); 40 C.F.R. §22.20(a); F.R.C.P. Section 56(c).

## Discussion

The focus of this action concerns the substances contained in four drums and three tanks which were sampled by EPA at Bil-Dry's facility in April of 1996. Respondent's defense to

liability addresses the applicability of the Pennsylvania and federal hazardous waste management regulations to the matter at bar. More specifically, respondent in effect does not deny that it did not comply with these regulations, but rather alleges that it was not required to comply because the substances in the drums and tanks were neither "waste" nor "hazardous waste". Therefore, the principle matter to be resolved by the Administrative Law Judge is whether the evidence of record, without more, is sufficient to demonstrate that the contents of respondent's drums and storage tanks were "hazardous waste"[(5)], thereby entitling complainant to prevail on its Motion as a matter of law.

In order to address this issue, the undersigned will consider, separately, the factual evidence pertaining to the drums and storage tanks, which are the subjects of the Complaint.

Drums

In June 1996, Toxicity Characteristic Leaching Procedure ("TCLP") analyses performed by EPA as described at 40 C.F.R. §261.24(a), indicated that the contents of four of respondent's drums were "hazardous waste": the contents of one drum exhibited the characteristic of corrosivity (D002); the contents of one drum exhibited the characteristic of corrosivity (D002) and the characteristic of toxicity for chromium (D007); the contents of one drum exhibited the characteristic of ignitability (D001) and toxicity for 2-Butanone (also known as Methyl Ethyl Ketone ("MEK") (D035)); and the contents of one drum exhibited the characteristic of ignitability (D001)). (CX-5 at A1-A2).

During their April 9th and 10th inspection, EPA inspectors also noted that the seven drums were "in very poor condition with rusted out tops" and lacking any "markings or labels" to identify the chemical composition, quantity or accumulation commencement date of their contents (CX-3 and attached photos 14-25; CX-4 at 2-3 and attached photos 1-29; A at ¶¶9 and 21; and B at ¶6). EPA portrays photographs taken by its inspectors as confirming the "degraded condition of the drums and the lack of labeling" (Comp. Motion at 24).

As of the filing of EPA's Motion, it asserted that respondent "has failed to present any evidence to challenge or rebut the above findings." As a result, it argued that a trier of fact could only conclude that the contents of the four drums in question were "hazardous wastes" (Comp. Motion at 29).

As indicated in EPA's Motion and attached legal memorandum, a material must register a pH of less than or equal to 2 (acidic), or greater than or equal to 12.5 (caustic) in order to be "hazardous" for the characteristic of corrosivity. If a material does not register in those ranges, it is not hazardous and cannot be considered "hazardous waste."

In its Brief in Opposition, Bil-Dry asserts, apparently for the first time, that shortly after EPA's inspection, it took a separate sample of the material contained in one of the drums sampled by EPA which indicated that it was in fact, not "hazardous waste."

According to statements contained in the Affidavit of George E. Sode, a chemical engineer for respondent, it is averred that the material in respondent's drums was "raw material" waiting for use in the production of paints and other products; that samples tested by EPA were not the by-product of any process or operations at the facility; and that Bil-Dry took its own samples of drums 1-7 with a properly calibrated pH meter.

Mr. Sode avers that Bil-Dry's test result indicated a pH reading for drum No. 2 of 12.17 which is less than the "hazardous" threshold. (Resp. Br., ex.2 ¶¶ 5-7). Bil-Dry has retained the sample and will seek to perform the identical test at the evidentiary hearing to prove that EPA's analysis was incorrect. It does not however, append the test results to its Brief in Opposition.

In its Reply, EPA charges respondent with attempting to manufacture a genuine issue of material fact through the Sode Affidavit. As such, EPA suggests that pursuant to 40 C.F.R. §22.22(a), the Administrative Law Judge should preclude the introduction of such "unreliable" information into the evidentiary record of this case.

Complainant further asserts that Bil-Dry should be precluded from introducing such evidence as it failed previously to disclose this information through its pre-hearing exchange.

In June 1996, as part of an EPA Request for Information, EPA asked Bil-Dry to provide "all information pertaining to the hazardous waste determination for the material inside the drums...accumulated in the rear of [its] Facility." (CX-10 at 3, ¶16). In response, Bil-Dry never mentioned the tests performed by Mr. Sode, and stated definitively that samples were drawn from the drums, "but not for analytical purposes." (CX-11 at 2,

¶16). Furthermore, as part of an August 29, 1996 RCRA Section 3007(a) Request for Information, EPA asked respondent to provide any and all information. Bil-Dry again failed to disclose Mr. Sode's test results or provide documentation thereof (CX-13).

As such, EPA asserts that to introduce Mr. Sode's unverifiable and unreliable testimony via affidavit would unduly reward respondent for failing to disclose such information and severely prejudice the complainant. In effect, EPA argues, it would be tantamount to permitting Bil-Dry "to introduce a surprise witness at trial" (Comp. Reply at 6).

Complainant's position is without merit. Although Section 22.19 of the Rules provides that documents that have not been exchanged shall not be introduced into evidence, nothing therein would prohibit respondent from moving for permission to amend or supplement its prehearing exchange to include such evidence, provided EPA be allowed a reasonable opportunity to review such new evidence to avoid being prejudiced.[(6)]

Whether EPA's test/analysis of the sample from drum No. 2 was properly performed, or whether respondent's test of the same material indicated a nonhazardous material, clearly present genuine issues of material fact. Both parties' tests raise questions of testing methods, chain of custody, etc., and requires further testimony of witnesses who obtained and tested the questioned samples.

Similarly, whether the material in drums 3,4, and 5 fall under the "beneficial use/recycle" exemption of RCRA, as alleged by respondent, is an issue of both fact and law.

First, as a factual issue, the source of the material must be determined, how often it is used, or re-used, and to what extent it could be considered "discarded" and therefore, possibly hazardous waste. Second, as a legal matter, 40 C.F.R. Part 260, Appendix I, Figure 3 of the regulations indicates that a hazardous waste, which is or is intended to be legitimately and beneficially used, re-used, recycled or reclaimed and which is not a sludge, a waste listed in Subpart D, or a mixture containing a waste listed in Subpart D, is not subject to regulations under Subtitle C of RCRA.[(7)]

Respondent indicates that the material in these drums is a solvent dispersion agent containing resin used to make paint. Respondent lists and provides photographs of cans of paint and the walls painted with the cans of paint made from the material

in these drums. Complainant asserts that the material in these drums is "discarded material and therefore 'solid waste'" and that respondent has not satisfied its burden of proving that the material in the drums falls within the "beneficial use" exemption. See, In the Matter of Humko, An Operation of Kraft, Inc., Docket No. V-W-84-R-014, 1985 RCRA LEXIS 46 (Initial Decision, March 7, 1985); 40 C.F.R. §261(a).

As to the drums at issue, complainant thus fails to meet its burden of showing that there exists no genuine issue of material fact and that it is entitled to judgement as a matter of law. See, Adickes v. Kress, supra at 157. Respondent has brought to the undersigned's attention some affirmative indication that its version of the facts is not mere speculation and that the evidence presents a sufficient disagreement to require submission to the trier of fact. See, Connecticut Fund for the Environment v. Job Plating Company Inc., 623 F.Supp. 207, 218, n.12 (D.Conn. 1985), cited In the Matter of U.S. Coast Guard, Kodiak, Alaska, RCRA Docket No. 1094-07-05-3008(a)(Order Denying Motion for Partial Accelerated Decision and Granting Motions for Official Notice, November 21, 1995); Anderson v. Liberty Lobby, 477 U.S. 242, 251-252 (1986).

Storage Tanks

In that complainant asserts that the contents of the three storage tanks in issue contained "hazardous" or "solid wastes", in violation of the Pennsylvania HWM program, its Motion is denied. There exist the same or similar factual disputes and legal issues discussed above which preclude judgment in complainant's favor.

Respondent's sole defense concerning the three storage tanks however, is that it does not consider itself to be the "owner and/or operator" of the tanks. In support of its assertion, respondent cites the definition of an "owner" as provided by 42 U.S.C.A. §6991(3), a provision of the Federal Underground Storage Tank Program (RCRA Subchapter IX).

Section 6991, however, states that the definitions provided in that section apply only "[f]or the purposes of this subchapter"; in other words, those definitions would appear to apply only to the Federal UST regulatory program and actions filed thereunder. The Complaint filed by EPA in the action at bar, however, does not seem to allege violations of either the federal UST program, or the Pennsylvania authorized UST regulatory program. As a result, the definition of "owner" as provided in 42 U.S.C.A.

§6991(3) and the opinion of G.J. Leasing Co. v. Union Electric Co.,825 F.Supp. 1363 (S.D. Ill. 1993), vac'd on other grounds, 839 F.Supp. 21 (S.D. Ill. 1993), which are cited and relied upon by respondent appear neither wholly applicable, nor necessarily controlling of the matter at bar.

In its Answer, respondent admitted that it "owns and operates" a facility located at 5525 Grays Avenue, Philadelphia, Pennsylvania, but "does not consider its activities either owning or operating a hazardous waste treatment or disposal facility" (Resp. Answer at 1).

The term "owner" is defined by the Pennsylvania Code as "the person or municipality who is the owner of record of a facility, or part of a facility", while the term "operator" is defined as "the person responsible for the overall operation of a facility". 25 Pa.Code §75.260(a).

Relying on the Affidavit of Joon S. Moon, which has been deemed inadmissible, Bil-Dry further claims that it was "unaware" of the existence of the USTs on its property and did not utilize the tanks during its ownership and operation thereof. The Environmental Appeals Board however, In the Matter Rybond, Inc., Docket No. RCRA--III-247, 1996 RCRA LEXIS 6, Appeal 95-3(Final Order, November 8, 1996), affirmed that RCRA is a remedial strict liability statute which is construed liberally, citing U.S. v. Production Plated Plastics, Inc., 742 F.Supp. 956, 960 (W.D. Mich. 1990), aff'd., 955 F.2d 45 (6th Cir. 1992); In the Matter of Arrcom, Inc., Drexler Enterprises, Inc. et al., Docket Nos. X83-04-01-3008 and X83-04-02-3008, 1986 RCRA LEXIS 49, Appeal No. 86-6, 2 E.A.D. 203, 207 (Final Order May 19, 1986) "RCRA does not link the duty to obtain a RCRA permit to the extent of the owner's knowledge or control of the facility."

Thus, to the extent that Bil-Dry allegedly failed to comply with the requirements applicable to an owner/operator of an HWM facility, and the management, storage and disposal of "hazardous waste", its defense seems especially perilous, i.e., resting wholly on the applicability issue of 42 U.S.C.A. §6991(3)(A) and (B), and the possible factual issue of when its USTs were deemed no longer "in use". This is a narrow ground which just escapes a partial finding favorable to the complainant on its Motion for Accelerated Decision.

Even were the undersigned to believe that summary judgement on this issue would be technically proper, sound judicial policy and the exercise of judicial discretion permit a denial of such

motion in order for the case to be developed fully at trial. Roberts v. Browning, 610 F.2d 528, 536 (8th Cir. 1979). Given the complexity of the above issues, the undersigned feels that such development is, in fact, necessary.

## Summary

It is the undersigned's conclusion that granting Complainant's Motion is not warranted in this instance because of the existence of genuine issues of material fact. Despite the merits of Complainant's Motion, the Administrative Law Judge can elect to hear the evidence as this case requires in an evidentiary hearing where, at minimum, evidence relating to the matters at issue may be fully presented.

Moreover, the issues of whether respondent is liable for a penalty and what the appropriate penalty should be are so interrelated as to preclude independent adjudication of either. Consequently, the undersigned finds that no useful purpose would be served in limiting the hearing to penalty issues as complainant seeks to do.

**ORDERED:** Complainant's Motion for Partial Accelerated Decision as to the liability of the respondent is **DENIED.**

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Stephen J. McGuire

Administrative Law Judge

Dated:

Washington D.C.

1. Attached to Bil-Dry's Brief in Opposition to Complainant's Motion are affidavits of William M. Rodgers, president of Bil-Dry; George E. Sode, a chemical engineer for respondent, and Joon S. Moon, Bil-Dry's majority shareholder. It is noted however, that Moon's affidavit is neither signed, nor notarized and as such is inadmissible pursuant to 40 C.F.R. §22.22(a) of the Consolidated Rules of Practice.

2. For purposes of this Order, Complainant's Motion for Partial Accelerated Decision will be referred as "Comp. Motion"; Respondent's Brief in Opposition will be referred to as "Resp. Br."; and Complainant's Reply Brief will be referred to as

"Comp. Reply". Each will be followed by a page number. Exhibits will be referenced as "CX-1", "CX-2", etc. for complainant's exhibits; and "RX-1", "RX-2" for respondent's exhibits.

3. Before a material can be designated and regulated as a "hazardous waste", it must first be determined to be a "solid waste." See 42 U.S.C.A. §6903(5). Solid Waste includes any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operation...42 U.S.C.A. §6903(27).

4. Pennsylvania's hazardous waste management program was formally recognized by EPA on January 30, 1986. See, 51 Fed.Reg. 1791 (January 16, 1986). Pennsylvania's authorized regulations therefore are enforceable pursuant to Section 3008(a) of RCRA

(42 U.S.C.A. §6928(a), and are cited by complainant as authority for its Motion.

5. The substances in the tanks and drums at issue were removed from the facility by respondent shortly after the EPA inspections in April of 1996. (CX-13 at 4 ¶12)("Bil-Dry has had all material removed from the [tanks] and disposed....Approximately 150 drums have been disposed and approximately 110 remain pending analysis for disposal.").

6. Similarly, EPA cannot assert that Mr. Sode's appearance at hearing constitutes a "surprise" witness. Bil-Dry's April 3, 1997 prehearing exchange specifically listed Mr. Sode as a witness it intended to call at hearing (Resp. prehearing exchange at 1).

7. 40 C.F.R. §261.6(a)(2) provides that a hazardous waste which ..."is being accumulated, stored or physically, chemically or biologically treated prior to beneficial use or re-use, or legitimate recycling or reclamation" is not subject to regulations under Parts 262 through 265, or Parts 270, 271, or 124...".