UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	**)**	
	)	
Chemtron Corporation	**)**	**Docket No. RCRA-05-2001-0017**
	)	
	)	
Respondent	**)**	

ORDER GRANTING IN PART, AND DENYING IN PART, COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY

ORDER DENYING RESPONDENT'S MOTION FOR ACCELERATED DECISION ON COMPLAINANT'S SECOND COUNT

Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984.

This proceeding involves Cross-Motions for Accelerated Decision. Complainant filed a Motion for Accelerated Decision on Liability pursuant to Section 22.20(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), 40 C.F.R. §§ 22.1-22.32 (2001). The Complaint alleges three violations of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 ("RCRA"), as amended by the Hazardous and Solid Waste Amendments of 1984, commonly referred to as RCRA, and the federal regulations implementing Section 3004(n) of RCRA, 42 U.S.C. § 6924(n), codified at 40 C.F.R. Parts 264 and 265 Subparts AA-CC. For these alleged RCRA violations, Complainant seeks $161,705 in civil penalties and a Compliance Order pursuant to § 3008(a) of RCRA, 42 U.S.C. § 6928(a), and Section 22.37(b) of the Rules of Practice, 40 C.F.R. § 22.37(b). Respondent filed a Motion for Accelerated Decision on Complainant's Second Count and opposed Complainant's Motion for Accelerated Decision as to Count 1.

Respondent does not oppose Complainants Motion for Accelerated Decision on Liability as to Count 3. **Held**: Based upon the conclusion that no genuine issue of material fact exists, and that Complainant is entitled to judgment as a matter of law, its Motion for Accelerated Decision on Liability is **GRANTED** for Counts 1 and 3. Based upon the conclusion that genuine issues of material fact exist, Complainant's Motion for Accelerated Decision on Count 2 is **DENIED**. Based upon the conclusion that either genuine issues of material fact exist, or that Respondent is not entitled to judgment as a matter of law, Respondent's Motion for Accelerated Decision on Complainant's Count 2 is **DENIED**.

Before:

Stephen J. McGuire Date: December 2, 2002
Administrative Law Judge

Appearances:

For Complainant:

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For Respondent:

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I. Introduction

This administrative enforcement proceeding arises under the authority of Sections 3006(g) and 3008(a) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 ("RCRA"), as amended by the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. §§ 6926(g), 6928(a). Complainant, the Environmental Protection Agency ("EPA"), instituted this proceeding by filing an Administrative Complaint and Compliance Order ("Complaint") against Respondent, Chemtron Corporation on September 28, 2001. The Complaint alleges three violations of RCRA and its implementing regulations codified at

40 C.F.R. Part 265 Subparts BB and CC. For these three alleged violations Complainant seeks a civil penalty in the amount of $161,705.[1] Respondent filed an Answer to the Complaint on November 7, 2001, and requested a hearing in this matter.

The Court issued a Prehearing Order on April 9, 2001, establishing the prehearing exchange schedule. Pursuant to this Order, Complainant was directed to file its initial prehearing exchange on June 10, 2002, and if necessary, to file a rebuttal prehearing exchange on July 31, 2002. Respondent was directed to file its prehearing exchange on July 10, 2002. On May 9, 2002, Complainant filed a Motion for Extension of Time to File Prehearing Exchange. The Court granted Complainant's Motion, extending Complainant's prehearing exchange filing deadline to June 21, 2002, and accordingly adjusting Respondent's filing deadline.[2] Complainant filed a rebuttal prehearing exchange on August 9, 2002. On September 6, 2002, Complainant filed the pending Motion for Accelerated Decision on Liability. With permission from the Court, Respondent filed its Opposition to Complainant's Motion for Accelerated Decision on September 27, 2002. Additionally, Respondent served upon the Court and Complainant a Motion for Accelerated Decision on Complainant's Second Count.[3] Complainant filed with the Regional Hearing Clerk an Opposition to Respondent's Motion for Accelerated Decision on Count 2 on September 17, 2002. Both parties have filed reply briefs in support of their respective Motions.

Pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926, the Administrator of the Environmental Protection Agency ("Administrator") may authorize a state to administer a state hazardous waste program in lieu of the federal RCRA program when the Administrator deems the state program is equivalent to, consistent with, and no less stringent than the federal hazardous

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[1] The Complaint seeks a proposed penalty in the amount of $178,783. However, Complainant indicates in its Penalty Narrative, see Complainant's Ex. 25 at US433, that there was an error in computing the penalty for Count 1 which reduces the penalty to $161,705.

[2] Although the Court has received Respondent's proposed prehearing exchange, the Court observes that Respondent has not filed it with the Regional Hearing Clerk as required by the Rules of Practice. See 40 C.F.R. § 22.5(a).

[3] The Court received this Motion via facsimile on September 9, 2002.

waste program. See RCRA § 3006(b). The Administrator granted the State of Ohio final authorization, effective June 30, 1989, to administer a state hazardous waste program in lieu of the federal RCRA hazardous waste program. See 54 Fed. Reg. 27170 (June 28, 1989). However, the State of Ohio has not received final authorization from the EPA to implement state regulations governing the monitoring and control of organic air emissions as required by Section 3004(n) of RCRA, 42 U.S.C. § 6924(n). See Complaint ¶ 8. Pursuant to Section 3006(g) of RCRA, 42 U.S.C. § 6926(g), the EPA must implement these regulations until Ohio is granted final authorization. As such, the applicable EPA regulations governing the monitoring and control of organic air emissions are the controlling regulations in this proceeding.

II. Factual Background

Respondent is the owner and operator of a facility in Avon, Ohio. See Answer ¶ 13; 40 C.F.R. § 260.10. Respondent admits that it is a "person" as that term is defined by RCRA. See Answer § 14; RCRA § 1004(15). Pursuant to Section 3005 of RCRA, 42 U.S.C. 6925, Respondent obtained a permit for the treatment, storage, or disposal of hazardous waste at its facility. See Answer ¶¶ 15-20. Specifically, "Respondent receives hazardous waste from a variety of sources and operates several processes to reclaim chemicals from the wastes." See Complainant's Motion for Accelerated Decision at 1 (citing Complainant's Prehearing Exchange Exhibit ("Complainant's Ex.") 14 at US131). Respondent has a permit to store hazardous waste in tanks. See Answer ¶ 46. Respondent stores a hazardous waste, having the waste code F002, in Tank 6, a 5,250 gallon tank with a design capacity of less than 75 cubic meters. See Answer ¶ 53; Complainant's Ex. 19 at US264; Complainant's Ex. 35 at US489. F002 is a listed hazardous waste and has a toxic waste hazard code. See 40 C.F.R. § 261.31(a).

On March 4-5, 1999, EPA conducted an inspection of Respondent's facility for compliance with "the applicable requirements of RCRA and the facility's Hazardous Waste Installation and Operation Permit." See Answer ¶ 21. This inspection serves as the basis for the alleged RCRA violations in the administrative enforcement proceeding at bar.

III. Legal Standard

Section 22.20(a) of the Rules of Practice, 40 C.F.R. § 22.20(a), authorizes the Administrative Law Judge ("ALJ") 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). A long line of decisions by the Office of Administrative Law Judges ("OALJ") and the Environmental Appeals Board ("EAB"), has established that this procedure is analogous to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. See e.g., In re CWM Chem. Servs., Inc., 6 E.A.D. 1 (EAB May 15, 1995). As recently articulated by the D.C. Circuit Court of Appeals, "the movant is entitled to an accelerated decision only if it presents 'evidence so strong and persuasive that no reasonable [fact finder] is free to disregard it.'" Rogers Corp. v. EPA., 275 F.3d 1096, 1103 (D.C. Cir. 2002) (quoting BWX Technologies, Inc., RCRA Appeal No. 97-5 (EAB, Apr. 5, 2000).

The burden of showing there exists no genuine issue of material fact is on the party moving for summary judgment. See Adickes v. S.H. Kress & Co., 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. See Cone v. Longmont United Hospital Ass'n, 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. See 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. See In re Bickford, Inc., Docket No. TSCA-V-C-052-92, 1994 TSCA LEXIS 90 (EPA ALJ, Nov. 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), aff'd, 22 F.3d 301 (3rd Cir. 1994) (mem.). 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. See Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); 40 C.F.R. § 22.20(a) (2000); FED. R. CIV. PRO. 56(c).

In the case at bar, the parties have filed cross-motions for accelerated decision as to Count 2. Thus, for this count, both parties assert that there is no genuine issue of material fact. Yet, that does not mean that accelerated decision must be granted in favor of one of the parties on this count. Rather, the

undersigned "must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." Taft Broadcasting Co. v. United States, 929 F. 2d 240, 248 (6th Cir. 1991). "A fact-finder may be entitled, on cross motions for accelerated decision, to decide among reasonable inferences where the evidence is fully developed." Rogers, supra, at 1105-06.

With regard to Respondent's burden for its Motion for Accelerated Decision, Respondent must aver "an absence of evidence to support the nonmoving party's case," thereby shifting the burden of production to Complainant. See In re Peter C. Varrasso, 37 F. 3d 760, n.1 (citing Celotex, supra, at 325). "To avoid accelerated decision in Respondent's favor, Complainant must come forth with evidence that would be sufficient, if all reasonable inferences were drawn in its favor, to find for Complainant on that issue at trial. See In re Consumers Recycling, Inc., Docket Nos. CAA-5-2001-002, CWA-5-2001-006, RCRA-5-2001-008, MM-5-2001-001 (ALJ, Apr. 12, 2002) (citing Azrielli v. Cohen Law Offices, 21 F. 3d 512, (2nd Cir. 1994).

Upon review of the evidence in a case, even if a judge believes that summary judgment is technically proper, 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).

IV. Discussion

A. Count 1

Count 1 of the Complaint alleges violations of 40 C.F.R. Part 265 Subpart BB which governs air emission standards for equipment leaks. The Subpart BB regulations generally apply to owners and operators of facilities that treat, store, or dispose of hazardous waste. See 40 C.F.R. § 265.1050(a). Within this universe, the subpart applies to equipment at such facilities which "contains or contacts hazardous wastes with organic concentrations of at least 10 percent by weight that are managed in . . . a unit that is subject to the permitting requirements of 40 C.F.R. Part 270." 40 C.F.R. § 265.1050(b)(1).

The regulations at issue in Count 1 govern the air emission standards for pumps and valves "in light liquid service." See 40 C.F.R. §§ 265.1052(a)(1), 265.1057(a). The term "in light liquid service" means that "the piece of equipment contains or contacts a waste stream where the vapor pressure of one or more of the

organic components in the stream is greater than 0.3 kilopascals (kPa) at 20 ◦C, the total concentration of the pure organic components having a vapor pressure greater than 0.3 kilopascals (kPa) at 20 ◦C is equal to or greater than 20 percent by weight, and the fluid is a liquid at operating conditions." 40 C.F.R. §§ 265.1051, 264.1031. Count 1 alleges that Respondent violated 40 C.F.R. §§ 265.1052(a)(1) and 265.1057(a), for failing to conduct monthly monitoring of pumps and valves in light liquid service pursuant to 40 C.F.R. § 265.1063(b), and in particular, Reference Method 21, between December 1996 and March 1999. See Complaint ¶¶ 36-37, 40-43.

In its Motion for Accelerated Decision, Complainant contends that, as to Count 1, it has established that there is no genuine issue of material fact and that Complainant is entitled to judgment as a matter of law. See Complainant's Motion for Accelerated Decision at 24-27; 40 C.F.R. § 22.20(a). In order for Complainant to meet its burden it must establish that Respondent is an owner or operator of a facility that treats, stores, or disposes of hazardous waste, and that at Respondent's facility Respondent manages hazardous waste, with the requisite organic concentration of 10 percent by weight, in a unit subject to the permitting requirements of 40 C.F.R. Part 270, and that the pumps and valves at issue in Count 1 were in light liquid service.

Complainant's Motion for Accelerated Decision, in conjunction with Complainant's Response to Order Requesting Further Briefing, does establish that there are no genuine issues of material fact with regard to Count 1 and that Complainant is entitled to judgment as a matter of law. Respondent has admitted it is an owner or operator of a facility that treats, stores, or disposes of hazardous waste, and that at Respondent's facility Respondent manages hazardous waste, with the requisite organic concentration of 10 percent by weight, in a unit subject to the permitting requirements of 40 C.F.R. Part 270. See Answer ¶¶ 13, 15-20, 23; Complainant's Ex. 4 at US18-19; Complainant's Ex. 14 at US139-142; 40 C.F.R. § 265.1050(a)-(b). Moreover, Complainant has established that there is no genuine issue that the pumps and valves were "in light liquid service" as that term is defined in 40 C.F.R. § 264.1031.

Respondent, in its Answer to the Complaint, averred that it had no knowledge of the factual allegations that the pumps and valves at issue in Count 1 were in light liquid service. See Respondent's Answer ¶¶ 36-37. On November 1, 2002, the Court issued an Order Requesting Further Briefing on the issue of whether the pumps and valves alleged in Count 1 were in light

liquid service. Each party filed a Memorandum in response to the Court's Order. Respondent, however, in its Memorandum, maintains that it is Complainant's burden to establish that the pumps and valves are in light liquid service. Respondent is correct that EPA "has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint." 40 C.F.R. § 22.24. Yet, as the owner and operator of a hazardous waste facility, it is Respondent's obligation to both determine and document whether, and to what extent, the Subpart BB regulations apply.

Determination of the applicability of the leak detection monitoring requirements to a particular hazardous waste and the equipment handling such waste is a multi-step process that is performed and recorded by the facility owner or operator. See 40 C.F.R. §§ 265.1050-265.1064. The first step is to determine whether equipment at the facility contains or contacts hazardous wastes with organic concentrations of at least 10 percent by weight. See 40 C.F.R. § 265.1050(b). The second step is to determine in what type of service the equipment is used, i,e., gas/vapor, light liquid, or heavy liquid. If the waste stream is a liquid at operating conditions, then the owner or operator must determine if it is a light liquid or a heavy liquid using the criteria specified in 40 C.F.R. § 264.1031. By virtue of the recordkeeping requirements, an owner or operator will be able to demonstrate compliance with the Subpart BB regulations. See 40 C.F.R. § 265.1064.

Complainant presents the Court with persuasive arguments and evidence that the pumps and valves at issue in Count 1 were in light liquid service. The Court is mindful that it is Respondent's regulatory obligation to determine whether its pumps and valves are in light liquid or heavy liquid service and then to implement the appropriate monitoring protocol. In ascertaining whether Respondent is fulfilling its regulatory obligations, Complainant must rely upon the records Respondent maintains pursuant to 40 C.F.R. § 265.1064, in order to demonstrate its compliance with the Subpart BB regulations. Respondent's SOP and Revised SOP implement a method of compliance consistent with the Subpart BB monitoring requirements for pumps and valves in light liquid service. See Complainant's Ex. 14 at US137-146. Because Respondent's SOP and Revised SOP document Respondent's "method of compliance" with the Subpart BB regulations, see 40 C.F.R. § 265.1064(b), the Court will place considerable weight on these documents and draw the reasonable inference that the pumps and valves at issue in Count 1 of the Complaint were in light liquid service.

The Court also recognizes that, pursuant to the Subpart BB regulations, pumps and valves in heavy liquid service are exempt from the routine leak detection monitoring requirements. See 40 C.F.R. § 265.1058. See also 55 Fed. Reg. 25454, 25465 (June 21, 1990)("The provisions exempt pumps and valves processing relatively low vapor pressure substances (heavy liquids) from the routine instrument monitoring requirements of the standards. These provisions are included to avoid requiring unnecessary controls on equipment that poses little emission problem even when leaking."); 55 Fed. Reg. at 25464 ("By their nature, heavy liquids exhibit much lower volatilities than do light liquids, and because equipment leak rates and emissions have been shown to vary with stream volatility, emissions from heavy liquids are less than those for lighter, more volatile streams.") Because pumps and valves in heavy liquid service are exempt from the routine light liquid monitoring requirements, Respondent had a regulatory obligation to "record in a log [] kept in the facility operating record . . . a statement listing the hazardous waste influent to and effluent from each hazardous waste management unit subject to the requirements in §§ 265.1052 through 265.1060 and an analysis determining whether these hazardous wastes are heavy liquids." 40 C.F.R. § 265.1064(k)(2). Yet, Respondent neither provided Complainant nor the Court with this requisite analysis.

Complainant further substantiates its allegation that the pumps and valves were in light liquid service with analysis of the light liquid criteria with regard to 111-trichloroethane, trichloroethylene, perchloroethylene, and methylene chloride. See Complainant's Response to Order Requesting Further Briefing at 15-22 (¶¶ 1-38), 38-39. Such analysis is also presented in the second affidavit of Michael R. Cunningham, an EPA employee with a background in organic and inorganic chemistry. See Second Cunningham Aff. ¶ 2. Mr. Cunningham avers that "as part of [his] employment responsibilities, [he] sometimes [is] required to determine whether a liquid waste containing 10 percent or greater by weight of organic compounds is a 'light liquid' or 'heavy liquid', pursuant to the definitions in 40 C.F.R. § 264.1031." Id. at ¶ 6. Mr. Cunningham averred that after ascertaining the vapor pressures of 111-trichloroethane, trichloroethylene, perchloroethylene, and methylene chloride at 20 ◦C, and then using Respondent's waste recovery records in conjunction with Respondent's Air Monitoring Document, he was able to conclude that the pumps and valves at issue in Count 1 were in light liquid service during the period alleged in Count 1 of the Complaint. See id. at ¶¶ 7-46.

Based upon the foregoing evidence, Complainant has

established that there is no genuine issue of material fact thereby shifting the burden to Respondent, the non-moving party, to produce some evidence that would place Complainant's evidence in question and raise a question of fact for an adjudicatory hearing. See In re Bickford, Inc., supra. Respondent has failed to meet this burden of production. Respondent argues that Complainant's Motion must fail because Respondent managed various chemicals in its fuel blending operation. See Respondent's Brief on the Issue of Whether the Pumps and Valves at Issue in Count 1 Were in Light Liquid Service at 6. Yet, such an argument does not persuade the Court that, in light of its RSOP, waste recovery records, and Air Monitoring documents, that the total concentration of pure components with vapor pressure greater than 0.3 Kpa at 20 ◦C was less than or equal to 20%. As such, the Court concludes that Complainant established that there is no genuine issue of material fact that the pumps and valves at issue in Count 1, during the time period in question, were in light liquid service.

In Respondent's Memorandum of Law in Opposition to Complainant's Motion for Accelerated Decision on Liability ("Respondent's Opposition"), Respondent argues that although it did not perform the exact monitoring required by 40 C.F.R. §§ 265.1052(a)(1) and 265.1057(a), it performed fundamentally the same monitoring on a daily basis as part of the visual inspection required by its Ohio State Permit. See Respondent's Opposition at 1. According to Respondent, this daily visual inspection will ascertain whether there is a "presence of wet spots around tanks, piping is tight and secured, and valves are leak free." Id. Respondent submits that due to the particular "waste product" at its facility, "it is probable that if Respondent's tanks were to leak, that leak would be visible." Respondent's Opposition at 3.

Respondent's daily visual inspections do not satisfy the requirements of 40 C.F.R. §§ 265.1052(a)(1), 265.1057(a), and 265.1063(b). Sections 265.1052(a)(1) and 265.1057(a) expressly state that all pumps and valves in light liquid service "shall be monitored monthly to detect leaks by the methods specified in § 265.1063(b)." The leak detection monitoring required by § 265.1063(b) necessitates compliance with "Reference Method 21" which is codified at 40 C.F.R. Part 60, Appendix A. Reference Method 21, entitled "Determination of Volatile Organic Compounds Leaks," requires the use of a portable instrument. Although the regulation does not specify the type of leak detector instrument, Reference Method 21 does provide "specifications and performance criteria" for the leak detector instrument. See 40 C.F.R. § 60, App. A, Meth. 21 at 1.2. Respondent has not proffered evidence that it used an instrument to detect leaks while performing its

visual inspection.

Respondent has failed to raise an issue of material fact regarding its liability for Count 1. The Court concludes that Respondent's daily visual inspections do not satisfy the requirements of 40 C.F.R. § 265.1063(b), and in particular Reference Method 21, which required the use of a portable instrument to detect leaks. As such, Complainant is entitled to judgement as a matter of law and accordingly, Complainant's Motion for Accelerated Decision on Count 1 is **GRANTED**. Although Respondent's argument that it employs alternative monitoring does not defeat its liability for Count 1, it may however, help to mitigate Respondent's penalty for Count 1.

Additionally, the undersigned observes that Respondent admitted most but not all of the factual allegations in the Complaint regarding pumps and valves identified in its Revised Standard Operating Procedure for Compliance with 40 C.F.R. Part 264 BB - Air Emissions Standards For Equipment Leaks ("SOP"). See Answer ¶¶ 28-29, 31, 40-41. But see Answer ¶¶ 30, 32, 36-37. Although the Court has concluded that Respondent did not comply with 40 C.F.R. § 265.1063(b) with regard to the pumps and valves subject to such monitoring, the Court has not concluded, as a matter of law, which pumps and valves are subject to the Leak Detection and Repair Program ("LDAR Program"). Based upon Complainant's penalty calculation narrative, see Complainant's Ex. 25, the number of pumps and valves which are subject to 40 C.F.R. § 265.1063(b) will no doubt influence the appropriate penalty amount. Complainant's narrative indicates that a total of 6 pumps and 73 valves are subject to the LDAR Program. See Complainant's Ex. 25 at US430. At the penalty hearing, Respondent is not foreclosed from presenting evidence regarding this aspect of Count 1.

B. Count 2

Procedural Arguments

The parties have submitted Cross-Motions for Accelerated Decision on Count 2. Before turning to the substantive arguments regarding this Count, it is first important to address Complainant's procedural objection to Respondent's Motion for Accelerated Decision on Complainant's Second Count ("Respondent's Motion for Accelerated Decision"). Complainant contends that Respondent's Motion is procedurally defective and thus should be denied on this basis. Complainant identifies two procedural deficiencies; first, Complainant argues that Respondent has failed to properly file its Motion with the Regional Hearing

Clerk, and second, Complainant argues that because Respondent's Motion has not been filed with the Regional Hearing Clerk, its Motion is violative of the Prehearing Order, which established a filing deadline for all substantive motions.

As previously indicated, the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), 40 C.F.R. §§ 22.1-22.32 (2001), are the controlling procedural regulations in this matter. Section 22.5(a) of the Rules of Practice, 40 C.F.R. § 22.5(a), articulates the procedure for "filing" documents in EPA's administrative enforcement proceedings. Section 22.5(a) provides, in pertinent part, that "the original and one copy of each document intended to be part of the record shall be filed with the Regional Hearing Clerk when the proceeding is before the Presiding Officer . . ." 40 C.F.R. § 22.5(a)(1). The Section further states that the ALJ may "authorize facsimile or electronic filing, subject to appropriate conditions and limitations." Id.

Respondent was given permission to "send" its Motion for Accelerated Decision via facsimile. See Respondent's Motion for Accelerated Decision at 1. The Court received a copy of Respondent's Motion on September 9, 2002. Although the Court is uncertain as to when Complainant received its copy of Respondent's Motion for Accelerated Decision, the Court can state with reasonable certainty that Complainant did receive a copy of the Motion. The Court observes, however, that an original and one copy of Respondent's Motion for Accelerated Decision has not been filed with the Regional Hearing Clerk. But, due to the *de minimis* nature of Respondent's procedural error and because Complainant has suffered no real prejudice as a result, the Court will not deny Respondent's Motion based on this procedural defect.

Complainant also contends that since the undersigned's Prehearing Order directed the parties to file all substantive motions "NO LATER THAN THIRTY (30) DAYS AFTER THE PREHEARING EXCHANGE HAS BEEN COMPLETED," and because Respondent's Motion has not been "filed", Respondent's motion should thus be denied as procedurally violative of the Prehearing Order. Complainant indicates that "any motion for accelerated decision 'regarding liability' was required to be filed by September 9, 2002." See Complainant's Opposition to Respondent's Motion for Accelerated Decision at 3. To the extent that the Court has already concluded that Complainant was not prejudiced by Respondent's procedural error, and because the undersigned received Respondent's Motion on September 9, 2002, the Court will not deny

Respondent's Motion based on this ground.

Substantive Arguments

Count 2 of the Complaint alleges that on March 4, 1999, Respondent violated 40 C.F.R. Part 265 Subpart CC, and in particular, 40 C.F.R. § 265.1085(c)(3), for its failure to maintain on Tank 6 a fixed roof with each closure device secured in the closed position. The Subpart CC standards generally apply to the management of hazardous waste in tanks, surface impoundments, and containers. See 40 C.F.R. § 265.1083(a). Specifically, the standards require "the owner or operator [to] control air pollutant emissions from each hazardous waste management unit in accordance with standards specified in §§ 265.1085 through 265.1088 . . . as applicable to the hazardous waste management unit . . ." 40 C.F.R. § 265.1083(b). Subpart CC also provides for exemptions from the air emission control standards. These exemptions are codified at 40 C.F.R. § 265.1083(c)(1)-(5).

The applicable Subpart CC regulation for the control of air pollutant emissions from tanks is codified at 40 C.F.R. § 265.1085. Respondent has not averred that Tank 6 is exempt from the Subpart CC regulations by virtue of the exemptions codified at 40 C.F.R. § 265.1083(c)(1)-(5).[4] See Answer ¶¶ 47-52.[5]

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[4] Regulatory exemptions are generally pled as affirmative defenses. See In re Standard Scrap Metal Co., 3 E.A.D. 267, 272-73, n.9 (CJO 1990) (holding that regulatory exemption for historic spills of PCBs must be raised by the respondent as an affirmative defense, with the burden of persuasion and the initial burden of production on the respondent). See also In re Rybond Inc., 6 E.A.D. 614, 637 (EAB 1996)(EAB concluded that it was Respondent's burden to demonstrate that it was exempt from a regulatory requirement). Additionally, Section 22.24(a) of the Rules of Practice, 40 C.F.R. § 22.24(a), places the burdens of presentation and persuasion for any affirmative defenses on Respondent.

[5] Respondent admitted that the exemptions codified in 40 C.F.R. § 265.1083(c)(2),(3), and (5) did not apply and averred that it had no knowledge of whether the exemptions codified in 40 C.F.R. § 265.1083(c)(1) and (4) applied. Because Respondent has the burden of raising and proving an exemption, see supra n.4, and because Respondent has not pled these exemptions as affirmative defenses, Respondent's answers in ¶¶ 47, 50, and 51, will be treated as admissions that the exemptions do not apply

Moreover, Respondent has admitted that Tank 6 satisfies the conditions articulated in 40 C.F.R. § 265.1085(b)(1)(i)-(iii), see Answer ¶¶ 53-56, and as such, Respondent is required to "control air pollutant emissions from [Tank 6] in accordance with the Tank Level 1 controls specified in [§ 265.1085(c)] or the Tank Level 2 controls specified in [§ 265.1085(d)]. See 40 C.F.R. § 265.1085(b)(1). Consequently, "whenever a hazardous waste is in [Tank 6], the fixed roof shall be installed with each closure device secured in the closed position." 40 C.F.R. § 265.1085(c)(3).

In addition to the exemptions codified at 40 C.F.R. § 265.1083(c), 40 C.F.R. § 265.1085 enunciates two instances in which hazardous waste may be in a tank while the fixed roof is removed and the closure devices are not secured in the closed position. First, "opening of closure devices or removal of the fixed roof is allowed . . . [t]o provide access to the tank for performing routine inspection, maintenance, or other activities needed for normal operations." 40 C.F.R. § 265.1085(c)(3)(i)(A). Once the necessary work is completed, "the owner or operator shall promptly secure the closure device in the closed position." Id. The regulation also permits an owner or operator to open the closure devices or remove a fixed roof "to remove accumulated sludge or other residues from the bottom of the tank." 40 C.F.R. § 265.1085(c)(3)(i)(B). Respondent has neither averred that on March 4, 1999, it was performing routine inspection, maintenance, or other activities needed for normal operations, nor removing accumulated sludge or other residues. See Answer ¶ 58.

Complainant alleges that during the walk-through inspection of Respondent's facility, conducted on March 4, 1999, one of the EPA inspectors, Mr. Bardo, observed an open manhole lid on top of Tank 6. See Bardo Aff. ¶ 10. While looking through the open manhole lid, the inspector "discovered that Tank 6 contained a low level of liquids as evidenced by a reflective sheen . . . [but was] nearly empty." Bardo Aff. ¶ 11. Complainant maintains that because Respondent was neither performing routine inspection or maintenance, nor removing accumulated sludge or residue, that Respondent violated 40 C.F.R. § 265.1085(c)(3) on March 4, 1999, for failing to keep the closure devices secured in the closed position when hazardous waste was present in the tank. See 40 C.F.R. § 265.1085(c)(3).

Respondent's principal opposition regarding Count 2 is that

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until and unless such time as Respondent seeks to amend its Answer to the Complaint.

there is "no credible evidence that hazardous waste was present in Tank 6 on March 4, 1999." See Answer ¶ 81; Respondent's Motion for Accelerated Decision at 1. Respondent relies on the following in support of this proposition: first, that EPA Inspector Bardo observed that Tank 6 was nearly empty; second, the Waste Code Summary which Respondent provided to Complainant on March 4 or 5, 1999, indicated that there was no liquid, sludge, or solids in Tank 6; and third, Complainant "did not ascertain the exact amount of liquid present by any sampling techniques or any photographic techniques." See Respondent's Motion for Accelerated Decision at 4. Respondent then asserts that although there may have been minimal amounts of hazardous waste in Tank 6, that the Court should find Tank 6 was "legally empty" and thus not subject to 40 C.F.R. § 265.1085(c)(3). See id. at 4-5.

It appears that Respondent is raising two distinct arguments with regard to Count 2. On the one hand, Respondent contends that EPA has failed to meet its prima facie case because Complainant failed to demonstrate that a hazardous waste was in Tank 6 on March 4, 1999. However, Respondent also maintains that despite any minimal amount of hazardous waste in Tank 6, the Tank should be treated as "legally empty" and as such, not subject to regulation under Subpart CC because it was no longer "managing" hazardous waste. Read together, Respondent argues that Complainant has failed to prove that there was hazardous waste in Tank 6 while concomitantly admitting that there was, in fact, minimal amounts of hazardous waste present in Tank 6. To obviate this perceived conflict, the Court will address Respondent's arguments as alternative pleadings, mutually exclusive of each other.

Complainant's Burden Regarding Hazardous Waste in Tank 6.

The primary evidence Complainant relies upon in support of its allegation in Count 2 of the Complaint is the affidavit of EPA Inspector Bardo. See Complainant's Motion for Accelerated Decision on Liability Att. A. In this affidavit, Inspector Bardo avers that on March 4, 1999, he "climbed to and walked along the top of Tanks 6, 7, and 8 in Area 1 of the Facility, and discovered that the manhole lid on top of Tank 6 was open." Bardo Aff. ¶ 10. While looking through the open manhole lid at the top of Tank 6, Inspector Bardo observed "the contents of th[e] tank, and discovered that Tank 6 contained a low level of liquids as evidenced by a reflective sheen." Id. at ¶ 11. Inspector Bardo made these observations unaccompanied by employees of Respondent. Inspector Bardo's observations regarding Tank 6 are the basis for the alleged violation in Count

2.

In order for Complainant to sustain its burden for accelerated decision it must establish by a preponderance of the evidence that there are no genuine issues of material fact that Respondent is the owner or operator of a hazardous waste management unit (Tank 6), that Tank 6 was used for the management of hazardous waste, that Tank 6 contained hazardous waste on March 4, 1999, and that the Tank 6 closure devices were not secured in the closed position. See 40 C.F.R. § 22.20(a); 40 C.F.R. §§ 265.1083; 265.1085.

In its Motion for Accelerated Decision on Liability, Complainant argues that there is no genuine issue as to the existence of hazardous waste in Tank 6 on March 4, 1999. According to Complainant, "Respondent admits that on March 4, 1999, Tank 6 contained hazardous waste." Complainant's Motion for Accelerated Decision at 14. Complainant specifically relies upon paragraphs 48 and 55-56 of Respondent's Answer in support of its position. The factual allegation in paragraph 48 of the Complaint states that "[o]n March 4, 1999, Tank 6 at the Facility contained hazardous waste whose organic content had not been reduced by an organic destruction, removal, or degradation process." Complaint ¶ 48. In its Answer, Respondent "admit[ted] the particular factual allegations in paragraph 48 of the Complaint." Answer ¶ 48. Paragraphs 55-56 allege that "the hazardous waste in Tank 6 at the Facility" was neither heated nor treated. Complaint ¶¶ 55-56. Similarly, Respondent admitted these factual allegations. See Answer ¶ 55-56. These specific answers notwithstanding, in Respondent's Answer, identified as ¶ 81, Respondent stated that "there is no credible evidence that hazardous waste was present in Tank 6 on March 4, 1999." Answer ¶ 81.

Complainant also alleges that evidence, beyond both Respondent's Answer and Inspector Bardo's Affidavit, supports its contention that there is no genuine issue as to the existence of hazardous waste in Tank 6 on March 4, 1999. Complainant cites to a Notice of Violation Response Letter in which Respondent states that "at the time of the inspection" Tank 6 "probably contained RCRA waste." See Complainant's Motion for Accelerated Decision on Liability at 28 (citing Complainant's Ex. 19 at US264). Complainant contends that because its burden of proof is judged by a preponderance of the evidence standard, this statement made by Respondent is sufficient to sustain Complainant's burden that there was hazardous waste in Tank 6 on March 4, 1999. See Complainant's Motion for Accelerated Decision at 28.

According to Respondent, there is no information in the record of this proceeding which demonstrates that there was hazardous waste in Tank 6 on March 4, 1999.[6] As such, Respondent moved for an Accelerated Decision in its favor on Count 2. In support of its proposition, Respondent calls the Court's attention to Complainant's Ex. 35 which contains several documents entitled Waste Code Summary. The Waste Code Summary for Tank 6, which Respondent provided to Complainant on March 4 or 5, 1999, indicates that there was no liquid, sludge, or solid waste in Tank 6.

Complainant challenges Respondent's reliance on Complainant's Ex. 35 as proof that there was no hazardous waste in Tank 6 on March 4, 1999. See Complainant's Motion for Accelerated Decision at 30-31. Complainant argues that the Waste Code Summary was generated on March 5, 1999, and thus is not dispositive regarding the contents of Tank 6 on March 4, 1999 due to the "continuous nature" of Respondent's computer tracking system. See Complainant's Ex. 19 at US264 and 265 (Letter from Drozdowski, Chemtron to Cunningham, EPA of 9/24/01). Additionally, according to Complainant, even if the Waste Code Summary had been generated on March 4, 1999, Respondent's computer tracking system is flawed and is not a reliable source to confirm the existence of waste in Tank 6 on March 4, 1999. See Complainant's Ex. 13 at US122-23 (Letter from Drozdowski, Chemtron to Hamper, EPA of 7/14/99) (stating that as a matter of Chemtron operating policy, Chemtron does not rely on any one measurement system, and thus performs periodic visual inspections to confirm the amount of waste in its tank systems). At the time of the inspection, Inspector Bardo was the only person to visually inspect the interior of Tank 6.

Drawing all reasonable inferences in favor of Complainant, the non-moving party for Respondent's Motion, the Court could find that there was F002 waste in Tank 6 on March 4, 1999 because Tank 6 was designated by Respondent to store F002, see Complainant's Ex. 35 at US489, Tank 6 has a roof over its manhole, see Bardo Aff. ¶ 11, and Mr. Bardo averred that he

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[6] Respondent also argues that Complainant failed to establish that Tank 6 held organic wastes with volatile organic ("VO") concentrations of greater than or equal to 500 ppm. See Respondent's Opposition at 12. This argument is not dispositive. It is Respondent's burden to prove that a particular unit is exempt from Subpart CC because the VO concentration is less than 500 ppm. See 40 C.F.R. § 265.1083(c)(1); 56 Fed. Reg. 33490, 33493 (July 22, 1991); supra n.4.

observed liquid in Tank 6 on March 4, 1999, see Bardo Aff. ¶¶ 10-11. However, drawing all reasonable inferences in favor of Respondent, the non-moving party for Complainant's Motion, the Court could find that Complainant failed to meet its burden of demonstrating that there was F002 waste in Tank 6 on March 4, 1999, because the Waste Code Summary indicates that there was no waste in Tank 6. Thus, neither party has presented sufficient evidence for this Court to conclude that there is no genuine issue of material fact.

Respondent has always maintained, since it answered the Complaint, that there is no credible evidence that hazardous waste was present in Tank 6 on March 4, 1999. See Answer ¶ 81. Respondent does admit that Tank 6 is designated to store a particular hazardous waste, e.g., "waste oils containing chlorinated solvents." See Complainant's Ex. 19 at US264; Complainant's Ex. 8 at US110; Complainant's Ex. 35 at US489. However, Complainant has no physical, independent evidence that there was any hazardous waste in Tank 6 other than Inspector Bardo's observations of "a low level of liquids as evidenced by a reflective sheen." Bardo Aff. ¶ 11. The Waste Code Summary for Tank 6 indicates that there was no liquid, sludge, or solid waste in the tank. See Complainant's Ex. 35 at US489. Yet, as discussed above, Complainant has challenged the reliability of this Waste Code Summary. As it appears that neither party can produce uncontroverted evidence regarding the existence or nonexistence of hazardous waste in Tank 6 on March 4, 1999, resolution of this Count in a Motion for Accelerated Decision is inappropriate. Thus, both parties' Motions for Accelerated Decision as to this Count are **DENIED**.

Respondent's argument that Tank 6 was legally "empty".

Respondent contends that even if there was hazardous waste in Tank 6 on March 4, 1999, it was a minimal amount. Consequently, Respondent argues, Tank 6 was "legally empty" and therefore, not subject to 40 C.F.R. § 265.1085(c)(3). Respondent acknowledges that the EPA has not promulgated a regulation defining an "empty tank" but urges this court to apply a concept that the EPA articulated as guidance in the generator, 90-day accumulation context. See 47 Fed. Reg. 1248, 1250 (Jan. 11, 1982). In order to adequately address Respondent's legal argument it is first important to discuss two distinct RCRA regulations; the regulatory exemption for hazardous waste residue in "empty containers", and the 90-day accumulation of hazardous waste for large quantity generators.

Regulatory Exemption for Hazardous Waste Residue in Empty

Containers

Pursuant to EPA definition, a "container" is any portable device in which a material is stored, transported, treated, disposed of, or otherwise handled." See 40 C.F.R. § 260.10. In November 1980, the EPA promulgated regulations addressing the regulatory status of hazardous waste residues in containers. See 45 Fed. Reg. 78524 (Nov. 25, 1980). The EPA recognized that hazardous wastes are often stored and transported in containers. See id. However, when these containers are emptied, the hazardous waste in the container generally leaves a residue because "the typical emptying of a container by pouring, pumping, aspirating, or other common emptying methods is not capable of removing all residues.[7] See id. at 78525. The Agency determined that "except where the hazardous waste is an acutely hazardous material [], the small amount of hazardous waste residue that remains in individual empty, unrinsed containers does not pose a substantial hazard to human health or the environment." Id.

Due to confusion by the regulated community as to the regulatory status of the residue, the EPA amended the regulations to clarify when hazardous waste remaining in an "empty" container is no longer subject to regulation as hazardous waste. Id. The EPA codified a definition for the term "empty container" in 40 C.F.R. § 261.7(b).[8] The EPA stated that "[w]hat should be clear

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[7] When containers are cleaned the rinsate byproduct may contain hazardous waste. See 45 Fed. Reg. at 78525.

[8]

> A container or an inner liner removed from a container that has held any hazardous waste, except a waste that is a compressed gas or that is identified in [40 C.F.R.] §§ 261.31, 261.32, or 261.33(e) is empty if: all wastes have been removed that can be removed using the practices commonly employed to remove materials from that type of container, e.g., pouring, pumping, and aspirating, and no more than 2.5 centimeters (one inch) of residue remain on the bottom of the container or inner liner, or no more than 3 percent by weight of the total capacity of the container remains in the container or inner liner if the container is less than or equal to 110 gallons in size, or no more than 0.3 percent by weight of the total capacity of the container remains in the container or inner liner if the container is greater than 110 gallons in size.

from § 261.7, however, is that no 'empty' containers are subject to regulatory control because no 'empty' containers hold residues that are considered hazardous wastes for regulatory purposes." Id. Thus, if a container satisfies the regulatory definition of "empty" in 40 C.F.R. § 261.7(b), the remaining hazardous waste in the container is no longer subject to regulation under Parts 261-265, 268, 270, or 124. See 40 C.F.R. § 261.7(a)(1).

90-Day Accumulation of Hazardous Waste

Generators of hazardous waste are allowed to accumulate waste on-site without either obtaining a RCRA permit as a storage facility subject to 40 C.F.R. Part 264 or qualifying for interim status as a storage facility subject to 40 C.F.R. Part 265. However, 40 C.F.R. § 262.34 places specific conditions on generators who accumulate waste on-site because "holding hazardous waste for a period of 90 days may pose some of the same risks to human health and the environment as long-term storage." 47 Fed. Reg. 1248, 1248 (Jan. 11, 1982). Thus, pursuant to 40 C.F.R. Part 262, the generator must comply, depending upon the type of unit holding the waste, with applicable provisions of Part 265.

Large quantity generators may accumulate hazardous waste on-site for 90 days or less in containers, tanks, or on drip pads. See 40 C.F.R. § 262.34(a)(1)(i)-(iii). However, "[a] generator who accumulates hazardous waste for more than 90 days is an operator of a storage facility and is subject to the requirements of 40 C.F.R. Parts 264 and 265 and the permit requirements of 40 C.F.R. Part 270 . . ." 40 C.F.R. § 262.34(b). In response to "questions raised concerning the applicability of the 90-day accumulation provision to accumulation in tanks" the EPA stated that "as with accumulation in containers, the 90-day period begins the moment the generator first places hazardous wastes in an 'empty' tank," id. at 1250, and ends once the generator has removed all wastes from the tank.

For purposes of the 90-day accumulation period, the EPA stated that "[a] tank will be considered 'empty' when its contents have been drained to the fullest extent possible." Id. In this context, the EPA recognized that depending upon the particular tank design, there may not be a "complete drainage" of the hazardous waste. Id. But, as guidance to generators that accumulate hazardous waste in tanks, the EPA stated that "a tank should be considered empty when the generator has left the tank's

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40 C.F.R. § 261.7(b)(1)(i)-(iii).

drainage system open until a steady, continuous flow has ceased." Id.

It was incumbent upon the Agency to indicate when the 90-day clock for tanks accumulating hazardous waste starts and stops so that generators could avoid the harsh sanction of becoming storage facilities subject to Parts 264, 265, and 270. See 40 C.F.R. § 262.34(b). Although the tank may not be "completely empty" the Agency's guidance to generators that the tank is "empty" when the generator has left the tank's drainage system open until a steady, continuous flow has ceased was necessary to facilitate the accumulation of hazardous waste in tanks. See OSWER Directive 9453.1982(01), 90-Day Accumulation of Hazardous Waste in Tanks, 1982 WL 195035 (Aug. 31, 1982).

Discussion

The Court rejects Respondent's contention that Tank 6 was not subject to regulation under 40 C.F.R. § 265.1085(c)(3). Neither the regulations regarding "empty containers" nor EPA guidance regarding the 90-day accumulation of hazardous waste in tanks can absolve Respondent of its alleged liability for Count 2. Respondent may be correct in stating that an empty tank is no longer "managing" hazardous waste and thus, not subject to regulation.[9] See 40 C.F.R. § 265.1083(a) ("This section applies to the *management* of hazardous waste in tanks, surface impoundments, and containers subject to this subpart.") (emphasis added). However, the Court will not use EPA guidance regarding 90-day accumulation as a definition for an "empty" tank to consequently remove Respondent's Tank 6 from the regulatory purview of Part 265 Subpart CC.

Respondent asks the Court to accept its legal position that a tank need not be completely empty in order for it to be "legally empty" because EPA guidance recognizes that "since many tank designs do not allow for complete drainage due to flanges, screens, or syphons, it is not expected that 100% of the wastes will always be removed." See 47 Fed. Reg. at 1250. However, as discussed above, it was necessary for the EPA to apply this concept in the generator 90-day accumulation context, otherwise it would be difficult for generators to accumulate hazardous

[9] The management of hazardous waste is defined broadly to mean "the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous waste." 40 C.F.R. § 260.10.

waste in tanks without becoming hazardous waste storage facilities, by operation of 40 C.F.R. § 262.34(b).

Additionally, Respondent argues that as part of Complainant's prima facie case for a violation of 40 C.F.R. § 265.1085(c)(3), Complainant must prove that Tank 6 "held more than the amount required by its own definition of 'empty'." See Respondent's Opposition at 12. However, there is no regulatory definition of an "empty" tank. Rather, the definition of the term "empty" that Respondent relies upon in support of its argument is only applicable to "residues of hazardous waste in empty containers," otherwise referred to as the Empty Container Rule. See 40 C.F.R. § 261.7.

Respondent is correct to note that Subparts AA-CC do not apply to "empty containers". See Respondent's Opposition at 8. In fact, the Subpart CC regulations expressly recognize that "an empty container as defined in 40 C.F.R. § 261.7(b) may be open to the atmosphere at any time (i.e., covers and closure devices are not required to be secured in the closed position on an empty container)." 40 C.F.R. § 265.1087(c)(3)(ii)(A). The Subpart CC regulations are inapplicable to "empty containers" because, by virtue of EPA regulation, the hazardous waste remaining in an empty container as defined by 40 C.F.R. § 261.7(b), is no longer managed as a hazardous waste and therefore not subject to regulation under 40 C.F.R. Parts 261-265, 268, 270, and 124. See 45 Fed. Reg. at 78524-25; 40 C.F.R. § 261.7(a)(1). However, Tank 6, a 5,250 gallon tank, see Complainant's Ex. 19 at US264, is not a portable device, see Complainant's Ex. 14 at US214, and therefore, is not a container.[10] Respondent even recognizes that there is not a similar regulatory definition for an empty tank. See Respondent's Motion for Accelerated Decision at 4. Thus, 40 C.F.R. § 261.7, the regulatory definition for "empty containers", is inapposite. As such, the Court rejects this legal argument proffered by Respondent.

C. Count 3

Count 3 of the Complaint alleges that Respondent violated 40 C.F.R. § 265.1050(c), for failing to mark each piece of equipment

[10] The Ninth Circuit authored an unpublished opinion in which it affirmed a district court's determination that even though a 25,000 gallon tank had, in fact, been moved, it was not a "portable device" as contemplated by 40 C.F.R. § 260.10, and thus not a container. See United States v. Elias, 2001 WL 1297705 (9th Cir. 2001).

subject to 40 C.F.R. Part 265 Subpart BB in a manner that would readily distinguish such equipment from other pieces of equipment at the facility. See 40 C.F.R. § 265.1050(c). With regard to this Count, Respondent has admitted all material factual allegations in the Complaint and does not oppose Complainant's Motion for Accelerated Decision. See Answer ¶¶ 65-70; Respondent's Opposition at 12-13. However, Respondent "submits that failure to label valves is simply an element of the failure to monitor," Id. at 13, which is the alleged violation in Count 1. In support of this proposition, Respondent references the applicable EPA Penalty Policy which states that "there are instances where a company's failure to satisfy one statutory or regulatory requirement either necessarily or generally leads to the violation of numerous other independent regulatory requirements." Id. (quoting RCRA Penalty Policy at 21). Respondent maintains that this is one such occasion where "multiple violations result from a single initial transgression" and as such, assessment of a separate penalty for Respondent's violation of 40 C.F.R. §§ 265.1052(a)(1) and 265.1057(a), the regulatory provisions at issue in Count 1, and for its violation of 40 C.F.R. § 265.1050(c), the regulatory provision at issue in Count 3, is inappropriate under the RCRA Penalty Policy.

Although Complainant offered the Court no legal analysis in opposition to Respondent's merger argument, the Court is unpersuaded by Respondent's contention that Counts 1 and 3 should be merged for penalty calculation purposes. In the case at bar, the violations alleged in Counts 1 and 3 are wholly independent and substantially distinguishable violations requiring different elements of proof. For instance, in Count 1, Complainant must prove that Respondent failed to perform the requisite Reference Method 21 monitoring of the pumps and valves in light liquid service. However, in Count 3, Complainant must prove that Respondent failed to mark each piece of equipment at its facility that is subject to Subpart BB. The fact that these two violations arise from the same regulatory section, namely 40 C.F.R. Part 265 Subpart BB, is not dispositive. Accordingly, Respondent's request to merge Counts 1 and 3 for penalty purposes is **DENIED**. Moreover, Complainant's Motion for Accelerated Decision on this Count is **GRANTED**.

An appropriate civil penalty will therefore be assessed for the violations found in Counts 1 and 3 of the Complaint. Such penalty will be determined by the evidence received at the hearing that will be scheduled in this matter. That hearing will also adjudicate Count 2 to which EPA has not been awarded accelerated decision. The parties are reminded that EPA bears the burden of proof as to both the civil penalty and liability issues. See 40 C.F.R. § 22.24.

ORDER

Pursuant to Section 22.20 of the Rules of Practice: Complainant's Motion for Accelerated Decision on Counts 1 and 3 is **GRANTED**; and, Complainant's and Respondent's Cross Motions for Accelerated Decision on Count 2 are **DENIED**.

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Stephen J. McGuire
Administrative Law Judge

Dated: December 2, 2002
Washington, DC