UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
N. KRAMER & COMPANY,	)	**Docket No. RCRA-5-2000-014**
	)	
Respondent	)	

ORDER DENYING CROSS MOTIONS FOR ACCELERATED DECISION AND MOTION FOR ORAL ARGUMENT

I. Procedural Background

This proceeding was initiated by a Complaint filed on September 29, 2000, by the Chief of the Enforcement and Compliance Assurance Branch, Waste, Pesticides and Toxics Division, of the United States Environmental Protection Agency, Region 5 (Complainant), against Respondent, H. Kramer & Company, located at 1315-1359 West 21st Street, Chicago, Illinois (the Facility). Respondent operates a brass and bronze smelting operation in which scrap metal is melted in furnaces which are lined with refractory brick. The Complaint alleges that there is refractory brick residue present at the Facility, that this residue is not reintroduced into Respondent's smelting process for metal recovery, and that this residue is a "hazardous waste." The Complaint alleges that Respondent violated Section 3005 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6925, and 35 Illinois Administrative Code (I.A.C.) §703.111 (40 C.F.R. § 270.1) by disposal of hazardous waste without a permit and without having been granted interim status. Complainant proposed a Compliance Order and a civil penalty of $100,320 for the alleged violation.

Respondent filed an Answer to the Complaint, denying the alleged violation, requesting a hearing, and setting forth seven Affirmative Defenses.

On January 11, 2001, Respondent filed a Motion for Accelerated Decision with a supporting Memorandum of Law, requesting dismissal of the Complaint on grounds that there is no genuine issue of material fact that Respondent places the refractory brick residue into its kilns to recover the metal on the brick, and that Respondent therefore did not dispose of hazardous waste. On January 25, 2001, Complainant filed a Response to Respondent's Motion for Accelerated Decision and Cross Motion for Accelerated Decision, accompanied by a Memorandum of Law in Support and a Statement of Material Facts. Thereafter, the parties filed prehearing exchange documents. Both parties also filed replies in support of their motions.

II. Respondent's Request for Oral Argument

By Motion dated March 21, 2001, Respondent requests oral argument on its Motion for Accelerated Decision. Respondent asserts that "all of the evidence" submitted in this proceeding shows that there has not been any disposal of hazardous waste without a permit. Respondent urges that "oral arguments can clarify this fact to the extent confusion has been caused by the voluminous pleadings submitted." Complainant opposes the request for oral argument, on grounds that the cross motions for accelerated decision have been fully and adequately briefed.

The Consolidated Rules of Practice, 40 C.F.R. part 22, provide that the presiding judge "may permit oral argument on motions in its discretion." 40 C.F.R. § 22.16(d). Oral argument is particularly suitable for complex issues of law. However, oral argument as to whether any genuine issues of material fact exist, or as to issues involving contested facts, is not of any significant assistance in resolving motions for accelerated decision. Although both parties have requested accelerated decision, the issues presented by their cross motions involve material facts which are contested, as discussed below. Consequently, oral argument on the parties' cross motions for accelerated decision is not warranted.

III. Respondent's Motion for Leave to File Sur-Reply

Along with its request for oral argument, Respondent filed a Motion for Leave to File Sur-Reply to Complainant's Rebuttal Prehearing Exchange, along with a Sur-Reply. Respondent asserts therein that the Rebuttal Prehearing Exchange raises new matters unrelated to the Prehearing Exchange, and which address the parties' cross motions for accelerated decision.

In its Rebuttal Prehearing Exchange, filed on March 14, 2001,Complainant requests the Court to deem virtually all of the allegations of the Complaint as admitted by Respondent, on various grounds, despite the fact that Respondent denied them in its Answer. In the Sur-Reply, Respondent objects to Complainant's requests for the allegations to be "deemed admitted," and argues that Complainant has not met its burden of proof, as Complainant cannot prove that the brick residue is "solid waste" and thus a "hazardous waste."

Complainant filed a Response to the Motion for Leave to File Sur-Reply on March 23, 2001, requesting that the latter Motion be denied, and setting forth arguments in support of its Rebuttal Prehearing Exchange and Cross Motion for Accelerated Decision. Complainant does not state any grounds for denying permission to file the Sur-Reply.

The Rebuttal Prehearing Exchange, the Sur-Reply, and Complainant's Response to the Motion for Leave to File Sur-Reply all set forth arguments relevant to the parties' cross motions for accelerated decision. To the extent that they include such arguments, they are deemed to constitute additional replies to those motions. In the interest of providing the parties with ample opportunity to present their arguments on the cross motions for accelerated decision, and in the absence of any argument for rejecting the Sur-Reply from the record, the Motion for Leave to

File Sur-Reply is granted.

IV. Regulatory and Factual Background

The Administrator of the United States Environmental Protection Agency (EPA) granted the State of Illinois final authorization, pursuant to Section 3006(b)of RCRA, to administer a State hazardous waste program in lieu of the Federal RCRA base program, effective January 31, 1986 (51 Fed. Reg. 3778 (January 31, 1986)), and to administer additional RCRA requirements and certain requirements of the Hazardous and Solid Waste Amendments of 1984 thereafter. The EPA-approved Illinois hazardous waste regulations are codified at 35 I.A.C. part 702 *et seq*. The Federal regulations provide that certain provisions of the Illinois Administrative Code, 35 I.A.C. part 702 *et seq.,* "are incorporated by reference . . . as part of the hazardous waste management program under Subtitle C of RCRA. 40 C.F.R. § 272.701(a)(1). The Federal regulations authorizing the State of Illinois to administer its program provide that, although the State of Illinois has primary responsibility for enforcing its program, "EPA retains the authority to exercise its enforcement authorities under Sections 3007, 3008, 3013 and 7003 of RCRA." 40 C.F.R. § 272.700(c). Section 3008(a)(2) of RCRA provides that, in the case of a violation of any requirement of Subtitle C of RCRA where the violation occurs in a State with an EPA-approved hazardous waste program, EPA "shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section."

Section 3005(a) of RCRA requires EPA to "promulgate regulations requiring each person owning or operating an existing facility . . . for the treatment, storage or disposal of hazardous waste . . . to have a permit issued pursuant to this section," and provides that after such regulations take effect, "the treatment, storage, or disposal of any such hazardous waste .. . is prohibited except in accordance with such a permit." Because the Illinois hazardous waste management program operates in lieu of the Federal program, the hazardous waste regulations promulgated by the State of Illinois are applicable here.

The Illinois hazardous waste regulations provide as follows:

> (a) No person shall conduct any hazardous waste storage, hazardous waste treatment, or hazardous waste disposal operation:
>
> (1) Without a RCRA permit for the HWM (hazardous waste management) facility * * * *
>
> (b) Owners and operators of HWM units shall have permits during the active life (including the closure period) of the unit. * * * *

35 I.A.C. § 703.121.

The Illinois regulations define "disposal" as "the discharge, deposit, injection, dumping, spilling, leaking, or placing any 'hazardous waste' into or on any land or water so that such hazardous waste or any constituent of the waste may enter the environment or be emitted into the

air or discharged into any waters, including groundwater." 35 I.A.C. §702.110. The term "hazardous waste" is defined as a "solid waste" which is not excluded and is either listed in 35 I.A.C. Subpart D, or exhibits any of the characteristics identified in 35 I.A.C. Subpart C, such as toxicity. 35 I.A.C. § 721.103. A solid waste exhibits the characteristic of toxicity if, pursuant to the Toxicity Characteristic Leaching Procedure, the extract from the waste exceeds a threshold concentration of a listed contaminant. 35 I.A.C. § 721.124. The threshold concentration for lead is 5.0 milligrams per liter (mg/l). *Id.*

A "solid waste" is defined as "any discarded material," which includes any material that is "abandoned." 35 I.A.C. § 721.102(a). The regulations provide further:

> (b) Materials are solid wastes if they are abandoned by being:
> (1) Disposed of; or
> (2) Burned or incinerated; or
> (3) Accumulated, stored or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned or incinerated.

35 I.A.C. § 721.102.

Respondent manufactures brass and bronze ingots at its Facility by melting scrap metal in kilns which are lined with refractory brick. Respondent periodically removes and replaces the refractory brick liner. Respondent stores the refractory brick before it is crushed by an on-site crushing machine, and then the crushed brick is stored again before it is reheated in the kilns in order to recover the metal that adhered to the brick while it was lining the kiln. Respondent's Motion for Accelerated Decision and Memorandum in Support (Motion) at 1-3; Complainant's Statement of Material Facts at 3.

On August 12, 1999, EPA conducted an inspection of Respondent's Facility. The inspector, Patrick Kuefler, observed refractory brick stored in piles on a concrete pad. On November 18, 1999, Mr. Kuefler conducted a sampling inspection at the Facility. He observed that the brick had been moved from the piles into roll-off boxes on the concrete pad. Mr. Kuefler collected samples of crushed brick material from roll-off boxes and from three locations on the concrete pad. The samples collected from the concrete pad were analyzed by the Toxic Characteristic Leaching Procedure (TCLP), and found to contain lead at levels above 5.0 mg/l, the regulatory threshold for lead toxicity.

Subsequently, on September 29, 2000, the Complaint was filed, alleging that "[a]ny spent refractory brick residue that is present at the facility and not ultimately reintroduced into the Respondent's smelting process for metal recovery, is a 'solid waste' . . . which has been 'discarded' . . . " and "abandoned," that such "solid waste" was present at Respondent's Facility, and due to its toxicity was "hazardous waste," as those terms are defined in the Illinois Administrative Code. Complaint ¶¶ 25, 26, 27, 29. The Complaint alleges further that Respondent is a "generator" of hazardous waste, who engaged in "disposal" of hazardous waste without a permit or having been granted interim status. Complaint ¶¶ 30-32. Based on those

facts, the Complaint alleges that "Respondent has violated Section 3005 of RCRA, 42 U.S.C. § 6925, and 35 I.A.C. § 703.111 [40 C.F.R. § 270.1]."[1] Complaint ¶ 33.

V. Parties' Arguments in Support of Accelerated Decision

In its Motion, Respondent argues that Complainant's allegation of the brick residue being a solid waste "relies entirely on the unsupported assumption that the crushed brick 'residue' was not returned to the rotary kilns" for recovery of metal. Respondent asserts that all of its crushed brick material was returned to its kilns. Motion at 7-8. Citing to *Association of Battery Recyclers, Inc. v. EPA,* 208 F.3d 1047 (D.C. Cir. 2000), Respondent asserts that as a matter of law, brick residue that is reintroduced into the smelting process for metal recovery is not a solid waste.

In support, Respondent presents a document entitled "Crushed Brick Recovery and Recycling Report," dated January 2001, prepared by Conestoga-Rovers & Associates (CRA). Motion Exhibit E. CRA's Report states that "[i]t has been the Company's practice to reintroduce the crushed brick back into the rotary kilns . . . in order to recover the molten metal . . . ." *Id.* p. 1. The Report states further that to assist Respondent in the implementation of that policy, CRA directed residual crushed brick recovery work which was performed by H. Kramer personnel periodically from October 11, 2000 to November 17, 2000. *Id.* at 3. Specifically, CRA's Report states that personnel used coarse-bristled brooms and broad-bladed shovels to recover the residual crushed brick present on the concrete pad, swept the pad, shoveled the crushed brick sweepings into heavy-duty 1000-pound capacity cardboard boxes, and placed the boxes of sweepings into the kilns. *Id.* at 3-4.

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[1] A review of the Illinois Administrative Code on LEXIS and WESTLAW shows that 35 I.A.C. § 703.111 does not exist. It appears that Complainant intended to cite to 35 I.A.C. § 703.121, which is analogous to 40 C.F.R. § 270.1 (". . . treatment, storage or disposal of hazardous waste by any person who has not applied for or received a RCRA permit is prohibited . . . owners and operators of hazardous waste management units must have permits during the active life . . . of the unit."). It is assumed that the citation to 35 I.A.C. § 703.111 in the Complaint is a typographical error, which should read 35 I.A.C. § 703.121. Because Complainant has correctly cited to the analogous Federal regulation, Section 270.1, the Complaint is not deficient for failure to put Respondent on notice of the charges against it. *See, Wego Chemical & Mineral Corp.,* 4 E.A.D. 513, 523-25 (EAB 1993)(where respondent was on notice of relevant facts for two years and no prejudice was shown, it was proper to grant EPA's request to amend typographical error in citation to the regulations in the complaint); *Walters v. President & Fellows of Harvard College,* 616 F.Supp. 471, 473-74 (D. Mass. 1985)(complaint's citation to wrong sections of statute, where sufficient notice of factual basis of claim was stated, does not support motion to dismiss). However, Complainant is hereby advised to file a motion to correct any errors in its citation to the Illinois Administrative Code.

Also in support, Respondent presents the Affidavit of Randall Weil, Executive Vice President of Respondent, stating that "[a]s a result of the brick crushing operation, small pieces of crushed brick settle on the surface of the concrete pad," but that "[i]t has been H. Kramer's practice to pick-up, store and then reintroduce the crushed brick back into the rotary kilns . . . in order to recover the molten metal . . . ." Motion, Exhibit C. In his Affidavit, Mr. Weil admits that "[i]n the past, it was H. Kramer's practice to temporarily store the brick in piles on the concrete staging pad," and that during the November 18, 1999 inspection, "there was crushed brick residue present on the concrete staging pad," but asserts that after that inspection, "H. Kramer employees collected all the crushed brick residue that was present on the concrete staging pad in cardboard boxes and subsequently returned the brick residue collected in the cardboard boxes to the rotary kilns for metal recovery." *Id.* Respondent also attaches to its Motion a document prepared by CRA, dated August 21, 2000, which is a review of the TechLaw Report, and which identifies "shortcomings" in EPA's sampling protocols, recorded information, and interpretation of analytical data, and concludes that EPA relied upon unusable data. Motion, Exhibit F.

In response to the Motion, Complainant asserts that, assuming that spent brick was swept off the pad and reintroduced into the kilns after the EPA inspections, Respondent nevertheless has illegally disposed of hazardous waste that "over the course of several years, came to be located in the cracks of Respondent's badly deteriorated concrete pad and, by extension, to the soils underlying and surrounding the deteriorated pad." Complainant's Response to Respondent's Motion for Accelerated Decision and Cross Motion for Accelerated Decision (Cross Motion) at 8. Complainant points out that the Complaint "is limited in scope to the hazardous material that evades Respondent's brooms and shovels." *Id.* at 5.

In support of its Cross Motion, Complainant presents an Affidavit of Patrick Kuefler, the EPA inspector. Mr. Kuefler states that for several years prior to his initial inspection of August 12, 1999, Respondent stored the brick on a "severely deteriorated concrete pad," and that laboratory analysis of samples of the material he collected from the cracks in the pad showed lead levels as high as 13 mg/l. Cross Motion, Exhibit 2, ¶¶ 8, 9, 10, 12. He states further that the "sweeping of the crushed brick present on the deteriorated concrete pad would not remediate lead-contaminated brick dust that had fallen or leached into or through cracks in the concrete pad and into the surrounding soil during the several years of storage of brick material on the deteriorated concrete pad." *Id.* ¶ 13. He asserts that the evidence of lead levels as high as 13 mg/l within the cracks of the pad suggests that unacceptably high lead levels exist in the soil surrounding the pad. *Id.* ¶ 14.

In further support of its Cross Motion, Complainant presents a "Revised Field Oversight and Split Sampling Report," prepared by TechLaw, Inc. (TechLaw Report), dated February 15, 2000, for EPA Region 5, documenting the sampling of material at Respondent's Facility on November 18, 1999, and the analysis of the samples. Cross Motion, Exhibit 3.

In its Reply, Respondent maintains that all of the crushed brick residue was recovered and reintroduced into the kilns, as the brick residue was swept from the cracks in the concrete

pad. Moreover, Respondent asserts that no residue has leached into the soil. In support, Respondent presents a CRA Soil Sampling Report, dated February 2001. Respondent's Reply, dated February 9, 2001, Exhibit A. The CRA Soil Sampling Report states that Respondent's efforts "did include sweeping brick residue from the cracks present in the concrete pad and placement of this material into the rotary kilns," and that "there were no cracks in the concrete pad wide enough to expose the underlying soil layer." Respondent's Reply, Exhibit A at 2, 6. In July of 2000, CRA collected two soil samples from beneath the pad, and analysis of the samples showed that there was no detected TCLP cadmium, TCLP chromium, or TCLP lead in either sample, and that the concentrations of total cadmium, total chromium and total lead were "below any applicable State of Illinois or EPA soil cleanup standard." Respondent's Reply, Exhibit A. pps. 5-6 and Appendix A pps. 5-6.

Complainant argues in reply that Respondent's evidence of analysis of the two soil samples does not raise a genuine issue of material fact. Complainant asserts that Respondent had declined to perform confirmation sampling in the area of the concrete pad and had rejected EPA's offer to perform such sampling, as stated in the Affidavit of Mr. Kuefler (Cross Motion, Exhibit 2 ¶ 15). Complainant asserts that it was not informed of Respondent's sampling event and not provided with an opportunity to split samples, despite EPA's meetings with Respondent in August 2000 and January 2001. Complainant asserts further that Respondent did not follow SW-846 Chapter 9 sampling protocols, and argues that Respondent's "clandestine sampling of two isolated points under the pad is in no way supportive of the proposition that contamination at and around the pad no longer exists." Complainant's Reply at 2.[2]

VI. Standards for Accelerated Decision

The Consolidated Rules of Practice provide, at 40 C.F.R. § 22.20(a), as follows:

> The Presiding Officer may at any time 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. The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

[2] Complainant also argues that data showing total concentrations of the metals analyzed were not included in the CRA Soil Sampling Report and that such data could show elevated levels of metals that pose a threat to human health and the environment. Respondent points out in a "Response to Correct EPA Misstatements of Fact," dated February 26, 2001, that such data was, in fact, included in the CRA Soil Sampling Report.

Summary judgment law under Federal Rule of Civil Procedure 56 is applicable to accelerated decision under the Consolidated Rules of Practice. *Puerto Rico Aqueduct and Sewer Authority v. EPA,* 35 F.3d 600 (1st Cir. 1994), *cert. denied,* 513 U.S. 1148 (1995); *CWM Chemical Services, Inc.,* 6 E.A.D. 1, 1995 TSCA LEXIS 10 (EAB 1995). The party moving for summary judgment has an initial burden to show the absence of any genuine issues of material fact, by "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986)(quoting Fed. R. Civ. Proc. 56(c)). The movant who carries the burden of persuasion at trial "must present evidence that is so strong and persuasive that no reasonable jury is free to disregard it." *BWX Technologies, Inc.,* RCRA (3008) Appeal No. 97-5, 2000 EPA App. LEXIS 9 (EAB, April 5, 2000), slip op. at 22. The movant who does not carry the burden of persuasion at trial has the burden of "showing" or "pointing out" to the tribunal that there is an absence of evidence to support an element essential to the nonmoving party's case. *Id.*; *Celotex,* 477 U.S. at 322-323. 325. Neither party can rely on "mere allegations, assertions, or conclusions of evidence." *BWX Technologies, Inc.,* slip op. at 22..

To defeat a defendant's motion for accelerated decision, mere speculation or a scintilla of evidence presented by plaintiff on a disputed factual issue is insufficient; substantial and probative evidence must be referenced in the record or produced. *Id.* at 23; *see, Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249-250, 252 (1986). In deciding whether a genuine issue of material fact exists, the judge "must consider whether the quantum and quality of evidence is such that a finder of fact could reasonably find for the party producing that evidence under the applicable standard of proof." *Mayaguez Regional Sewage Treatment Plant,* 4 E.A.D. 772, 781 (EAB 1993), *aff'd sub nom. Puerto Rico Aqueduct and Sewer Authority v. EPA*, 35 F.3d 600 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995). The applicable standard of proof is "preponderance of the evidence." 40 C.F.R. § 22.24. A factual issue is *material* where, under the governing law, it might affect the outcome of the proceeding, and is *genuine* if the evidence is such that a reasonable finder of fact could return a verdict in either party's favor. *Clarksburg Casket Co.,* EPCRA Appeal No. 98-8 (EAB July 16, 1999), slip op. at 9; *Anderson v. Liberty Lobby, Inc.,* 477 U.S. at 248. The record must be viewed in a light most favorable to the party opposing the motion, indulging all reasonable inferences in that party's favor. *Griggs-Ryan v. Smith,* 904 F.2d 112, 115 (1st Cir. 1990).

The fact that there are cross motions for summary judgment, or accelerated decision, "does not mean that the court must grant judgment as a matter of law for one side or the other; summary judgment in favor of either party is not proper if disputes remain as to material facts . . . [r]ather, the court 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).

VII. Discussion and Conclusions on Cross Motions for Accelerated Decision

A. Respondent's Motion for Accelerated Decision

Respondent's initial burden in its Motion for Accelerated Decision is to point out that there is an absence of evidence to support an element essential to Complainant's case. The essential elements of Complainant's claim under Section 3005(a) of RCRA and 35 I.A.C. § 703.121 [40 C.F.R. § 270.1] are that: (1) Respondent is a "person" (2) who engaged in the "disposal" (3) of "hazardous waste" (4) without a permit or interim status.[3] Element (4) is admitted by Respondent. Answer ¶ 32. As to Element (1), the definition of "person" in RCRA § 1004(15) and 35 I.A.C. § 702.110 includes a "corporation," and Respondent admits that it is a corporation. Respondent's Prehearing Exchange Statement p. 17; Answer ¶ 7.

Therefore, the questions presented by Respondent's Motion are whether Complainant has produced substantial and probative evidence that refractory brick residue on the concrete pad was "hazardous waste," and that Respondent engaged in the "disposal" of the refractory brick residue.

For a substance to be a "hazardous waste," it must meet the definition of a "solid waste" under the regulations, and must meet the toxicity threshold. 35 I.A.C. § 721.103. Complainant has presented evidence that samples of the refractory brick residue exceeded the toxicity threshold for lead. Cross Motion, Exhibit 3.

As to whether the refractory brick residue is a "solid waste" by being "abandoned," the term "abandoned" is defined in pertinent part as being "*disposed of*" or "[a]ccumulated, stored or treated (but not recycled) before or in lieu of being abandoned by being *disposed of* . . . ." 35 I.A.C. § 721.102(b) (emphasis added). The question of whether brick residue was "disposed of" being essentially the same as the question of whether there was a "disposal" of the brick residue, the questions merge. Respondent's Motion thus turns on whether Complainant has produced substantial and probative evidence that "disposal" of refractory brick residue occurred at Respondent's Facility, that is, a "discharge, deposit . . . dumping, spilling, leaking, or placing of any 'hazardous waste' into or on any land or water so that such hazardous waste or any constituent of the waste *may* enter the environment or be emitted into the air or discharged into any waters, including groundwater." 35 I.A.C. § 702.110 (emphasis added). As indicated by the word "may," a claim of disposal under this definition does not require proof that the waste or a constituent of the waste *in fact* entered the environment.

The submissions not only of Complainant, but also of Respondent, show that refractory brick residue was present in cracks on the concrete pad on November 18, 1999, even after

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[3] Alternatively, elements (2) and (3) could be stated in terms closer to the text of the Illinois Administrative Code, 35 I.A.C. § 703.121, as "conducted a hazardous waste disposal operation." However, the parties have not discussed any differences among the texts of RCRA § 3005(a), the state regulation, and 40 C.F.R. § 270.1, and the differences do not appear to be dispositive on the cross motions for accelerated decision.

Respondent had collected and removed the refractory brick from the concrete pad and placed it into the roll-off boxes. Cross Motion, Exhibit 2 (Affidavit of Patrick Kuefler) ¶ 12 and Exhibit 3 p. 2 ("Crushed brick sweepings remained in some irregular sections of the concrete"); Motion, Exhibit C (Affidavit of Randall Weil) ¶ 7; Respondent's Reply, Exhibit A p. 2. The Affidavit of Mr. Kuefler states that refractory brick was stored on the concrete pad for several years prior to that date. Cross Motion, Exhibit 2 ¶ 9. Viewing the parties' submissions in light most favorable to Complainant, a reasonable inference may be drawn that the brick residue in the cracks of the concrete pad was not reintroduced into Respondent's kilns for metal recovery. Such presence of the brick residue in the cracks of the concrete pad is substantial and probative evidence of the "discharge, deposit . . . dumping, spilling, leaking or placing" of brick residue.

The next question is whether the brick residue, or constituents thereof, "may enter the environment" -- the soil under or around the concrete pad. Complainant has produced evidence of the condition of the concrete pad, namely Mr. Kuefler's description of cracks in the "severely deteriorated concrete pad," and the photographs and descriptions of the pad in the TechLaw Report ("deteriorated concrete") and attached Field Notebook ("broken up cement"). Cross Motion, Exhibit 2 and Exhibit 3, Attachments B and C. This evidence of the condition of the concrete pad, coupled with the evidence that brick residue was present in cracks on the pad, is substantial and probative evidence that the brick residue or its constituents "may enter the environment."

Respondent's evidence -- including documentation of the sweeping and removal of brick residue from the concrete pad after the Complaint was filed (Motion, Exhibit E), the assertion that "there were no cracks in the concrete pad wide enough to expose the underlying soil layer," the analytical results of the two soil samples from under the pad (Respondent's Reply, Exhibit A at 2, 6 and Appendix A), and CRA's review of the Techlaw Report (Motion Exhibit F) – may indicate disputes of fact. That evidence does not, however, establish that Complainant has failed to produce sufficient evidence on an element of its claim.

Accordingly, Respondent's Motion for Accelerated Decision is denied.

B. Complainant's Cross Motion for Accelerated Decision

Complainant having adequately supported its Cross Motion with evidence on each element of its claim, the question is whether Respondent has produced sufficient evidence such that a finder of fact could reasonably find for Respondent under the preponderance of evidence standard.

The evidence Respondent produces in support of its argument that all of the brick residue was reintroduced into the kilns for metal recovery concerns the "residual crushed brick recovery" performed by Respondent, under the direction of CRA, on October 11 through November 17, 2000, after the Complaint was filed. Motion, Exhibit C ¶ 7, Exhibit E. Respondent does not point to specific facts showing that such actions were taken prior to the

Complaint. Respondent does produce statements that it "has been H. Kramer's practice to pick-up, store and then reintroduce the crushed brick back into the rotary kilns," and that its "policy [is] to reintroduce all brick into the rotary kilns." Motion, Exhibit C ¶ 6, Exhibit E p. 1. These statements do not specify that *all* of the brick *residue* was in fact recovered and reintroduced to the kilns, prior to the filing of the Complaint.

Respondent argues, however, that under *Association of Battery Recyclers v. EPA, supra*, material that is held until it is reintroduced into a manufacturing or industrial process is not a solid waste, regardless of how long the materials are stored. Respondent asserts that, "[a]s long as the material eventually makes its way back into production, it has not been discarded" and is thus not a solid waste. Respondent's Sur-Reply to Rebuttal Prehearing Exchange at 2-3.

Regardless of the extent to which Respondent recovered brick residue and reintroduced it into kilns for metal recovery, a remaining question is whether Respondent has produced sufficient evidence as to whether any brick residue on the concrete pad "may enter the environment." The CRA Soil Sampling Report, viewed in a light most favorable to Respondent, suggests that any brick residue on the concrete pad may not have been "discharge[d] . . . or plac[ed] into or on any land" such that the brick residue or constituents thereof "may enter the environment . . . ." Therefore, a genuine issue of material fact exists as to whether there was any "disposal" of hazardous waste.

Accordingly, Complainant's Cross Motion for Accelerated Decision is denied.

ORDER

1. Respondent's Motion for Leave to File Sur-Reply to EPA Rebuttal Prehearing Exchange is **GRANTED.** The Sur-Reply is accepted into the record.

2. Respondent's Request for Oral Argument is **DENIED.**

3. Respondent's Motion for Accelerated Decision is **DENIED.**

4. Complainant's Cross Motion for Accelerated Decision is **DENIED.**

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Susan L. Biro
Chief Administrative Law Judge

Dated: July 31, 2001
Washington, D.C.