UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	**Docket No.**
	)	
Summit, Inc.	)	**Proceeding to Assess a Civil**
Penalty6901 West Chicago Avenue	)	**Under Section 3008(a) of the**
Resource	)	
Gary, Indiana	)	**Conservation and Recovery Act,**
	)	**42 U.S.C. § 6928(a)**
U.S. EPA ID #: INX 000 028 902	)	
	)	**RCRA-05-2014-0006**
Respondent.	)	
	)	

MEMORANDUM OF LAW IN SUPPORT OF COMPLAINANT'S MOTION FOR ACCELERATED DECISION

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I. RELIEF REQUESTED.

Complainant seeks an accelerated decision as to liability for Counts 1-7 of the Complaint. Complainant's Motion is brought under 40 C.F.R. §22.20, which authorizes the Presiding Officer to render a decision as to all or any part of a proceeding "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law."

II. SUMMARY OF ARGUMENT

Complainant alleges violations of the hazardous waste and used oil management requirements based on its March 18, 2009,[1] inspection and subsequent investigation of the Summit, Inc. ("Summit" or "Respondent") facility located at 6901 Chicago, Avenue, Gary, Indiana ("site" or "facility"). Complainant's hazardous waste violations in Counts 1-4 are predicated on the results of its March 18, 2009, sampling which indicated that liquids in four

1 The Complaint contains factual allegations related to an April 2, 2008, EPA inspection and subsequent investigation. This motion for accelerated decision does not involve any facts related to that inspection n and is limited only to the March 18, 2009, inspection and subsequent investigation.

drums exceeded the hazardous waste toxicity characteristic concentration of 0.5 milligrams per liter (mg/l). Complainant's universal waste violations in Count 7 are predicated on its observations of Respondent's storage of used automotive batteries during the March 18, 2009, inspection and Respondent's failure to properly label and store these used automotive batteries ("universal waste") and its failure to provide employees with training. Complainant's used oil management violations in Counts 5 and 6 are predicated on Respondent's failure to label as "used oil" drums containing automotive liquids, including, but not limited to, engine and transmission oils, brake fluids and anti-freeze from its automotive crushing operations. Further, Respondent failed to clean-up releases of used oil that were observed throughout the site on March 18, 2009.

Complainant argues that there are no genuine issues of material fact because its March 18, 2009, sampling demonstrates that Respondent was storing both "used oil" and hazardous waste in four drums since the benzene concentrations exceeded the regulatory concentration of 0.5 mg/l. Further, the undisputed facts demonstrate that Respondent mixed the 4 drums of hazardous waste with 35 other drums of used oil and accumulated those wastes on-site. The mixture was a hazardous waste and was subsequently shipped off-site to Beaver Oil, Inc. ("Beaver") for reclamation. Complainant alleges and the Respondent does not submit any contrary evidence that Respondent did not adequately characterize the shipments to Beaver, did not have an EPA identification number, did not use a Uniform Hazardous Waste Manifest, did not have a hazardous waste storage permit, did not label the drums as "hazardous waste", did not have a contingency plan, did not conduct employee training and did not conduct weekly inspections. Consequently, there is no genuine issue of material fact that Respondent is liable

for the violations alleged in Counts 1-4.

Complainant asserts and Respondent has not submitted any contrary evidence that based on Complainant's observations and the declaration of its used oil expert, automotive liquids from the crushing operations were regulated "used oil," that on March 18, 2009, Respondents stored this used oil in containers without any labelling and at that time there were releases of used oil throughout the facility that were not subsequently promptly or appropriately cleaned-up and managed. Finally, Complainant asserts and Respondent has not submitted any contrary evidence that the storage of used automotive batteries without labeling and in a container without a permanent lid was in violation of the universal waste regulations. Therefore, there is no genuine issue of material fact that Respondent is liable for the violations in Counts 5-7.

III. JURISDICTION

The Complaint was issued pursuant to the authority in Section 3008(a) of the Solid Waste Disposal Act, as amended, also known as the Resource Conservation and Recovery Act, as amended (RCRA), 42 U.S.C. § 6928(a), and Sections 22.1(a)(4), 22.13 and 22.37 of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits" (Consolidated Rules), codified at 40 C.F.R. Part 22.

IV. STATUTORY AND REGULATORY BACKGROUND

A. RCRA STATUTORY BACKGROUND

Congress' overriding concern in adopting RCRA as amended by the Hazardous and Solid Waste Amendments of 1984 ("HSWA"), 42 U.S.C. § 6901, *et seq.*, was to insure the proper management of hazardous waste. 45 Fed. Reg. 33085 (May 19, 1980). There were hundreds

of instances of damages to human health or the environment from dumping of hazardous waste. *Id.* The incidents caused ground water and surface water pollution; destruction of aquatic life and aquatic habitat; destruction of wildlife and vegetation; and increased mortality and sickness of workers as a result of fires, explosions and generation of toxic emissions. *Id.*

RCRA defines a hazardous waste as a solid waste which may "cause, or significantly contribute to an increase in serious irreversible or incapacitating reversible, illness." 42 U.S.C. § 6904(5). The United States Environmental Protection Agency ("USEPA" or "EPA") has the authority and responsibility to identify hazardous wastes and to regulate the generation, transportation, treatment, storage and disposal of those hazardous wastes. 42 U.S.C. § 6921-6925.

Congress, in passing the Used Oil Recycling Act of 1980 on October 15, 1980 (Pub. L. 96-463) and HSWA, supplemented the basic requirements for the regulation of hazardous waste with the authority to regulate used oil. Those requirements are found in section 3014 of the RCRA, as amended. 42 U.S.C. §6935. As part of these requirements, Congress required EPA to promulgate regulations to protect the public health and the environment from the hazards associated with recycled oil.

On September 10, 1992, EPA promulgated final regulations covering the management of used oil. EPA concluded that the regulations were necessary since the storage practices at used oil facilities resulted in many known instances of used oil mismanagement. The management standards were designed to address the potential hazards associated with improper storage and handling of used oil. These regulations cover a variety of handlers of used oil, including generators of used oil.

Section 3006 of RCRA provides states with the opportunity to obtain authorization to administer their equivalent and no less stringent hazardous waste and used oil management programs in lieu of the corresponding federal regulations. *See* 42 U.S.C. § 6926; *In re: Strong Steel Products, LLC*, 2005 EPA ALJ LEXIS 84, at *29 (Apr. 7, 2005); *Chemical Waste Management, Inc., v. Templet,* 967 F.2d 1058, 1059-60 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1048. EPA may enforce the authorized state regulations. *United States v. Elias*, 269 F.3d 1003, 1010-11 (9th Cir. 2001). EPA may issue an order requiring compliance and assessing a penalty for any past or current violation of the state regulations. EPA may assess a penalty of up to $37,500 per day for each violation alleged in the Complaint.[2]

Pursuant to Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), EPA granted the State of Indiana final authorization to administer its state hazardous waste program in lieu of the federal base RCRA program effective January 31, 1986. 51 Fed. Reg. 3778 (Jan. 31, 1986). The federally-authorized Indiana regulations that govern generators of hazardous waste are codified at 329 Indiana Administrative Code (I.A.C.) §§ 3.1-7-1 *et seq.* The federally-authorized Indiana regulations that govern facilities that treat, store or dispose of hazardous waste, and that govern the owners and operators of such facilities, are codified at 329 I.A.C. §§ 3.1-9-1 *et seq.* (Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities), and 329 I.A.C. §§ 3.1-10-1 *et seq.* (Interim Status Standards for Owners and Operators

[2] *See* 42 U.S.C. §6928(a) and the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, which authorizes periodic upward adjustment of this penalty to reflect inflation. Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule, published at 40 C.P.R. Part 19, EPA may assess a civil penalty of up to $37,500 for violations that occur after January 12, 2009.

of Hazardous Waste Treatment, Storage, and Disposal Facilities).[3]

B. REGULATORY BACKGROUND

1. Federal Hazardous Waste Management[4]

The RCRA regulatory program regulates companies which generate, transport, treat, store and dispose of hazardous waste. Proper identification of a waste is a critical first step in determining the regulatory status of that waste. 40 C.F.R. § 262.11; *In re: Aguakem Caribe, Inc.*, 2011 EPA ALJ LEXIS 24, at *89-93 (Dec. 22, 2011).

On May 19, 1980, EPA promulgated the hazardous waste regulations. 45 Fed. Reg. 33085. The definition of hazardous waste contained in section 1004(55) of RCRA is central to the RCRA regulatory program. That definition identifies a hazardous waste as one that either causes or significantly contributes to an increase in mortality or serious irreversible or incapacitating illness. 42 U.S.C. § 6903(5). It also identifies as a hazardous waste a solid waste which poses a substantial present or potential hazard to human health or the environment. *Id.* When this definition is coupled with section 3001 of RCRA, 42 U.S.C. § 6921, it is clear that when EPA makes a decision to identify or list a solid waste as hazardous it has made a decision that the waste presents or may present a substantial threat to human health or the environment.

Section 3001 of RCRA and the regulations EPA adopted in Part 261 of Title 40 of the

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3 Indiana was subsequently authorized for its equivalent to the used oil management and universal waste requirements.

4 The Indiana hazardous waste management program is equivalent to and no less stringent than the federal hazardous waste management program. *See* 42 U.S.C. § 6926(b). In many instances the Indiana hazardous waste program incorporates by reference the federal regulations. *See* 329 I.A.C. §§ 3.1-1-7, 3.1-4-1(a), 3.1-5 (3)-(7), 3.1-6-1(b), 3.1-7-1(1), 3.1-9-1(1), 3.1-11-1(1).

Code of Federal Regulations, 40 C.F.R. Part 261, provide two methods for determining whether a waste is a hazardous waste - either by listing or by exhibiting an identified characteristic. EPA developed four characteristics and lists of hazardous waste from specific and non-specific sources. 40 C.F.R. Part 261. Toxicity is one of the characteristics. 40 C.F.R. § 261.24. The toxicity characteristic identifies wastes which if improperly disposed may release toxic materials in sufficient amounts to pose a substantial hazard to human health or the environment. 43 Fed. Reg. 58949, 58952 (Dec. 18, 1978).

Once a waste is identified as a hazardous waste, RCRA establishes a comprehensive cradle-to-grave tracking and management system for that waste. *Strong Steel Products*, 2005 EPA ALJ LEXIS 84, at *24; *City of Chicago v. Env't Defense Fund*, 511 U.S. 328, 331-32 (1994). That management system requires as its first step that all companies that generate, transport, treat, store or dispose of hazardous waste notify EPA or an authorized state of their hazardous waste activity. *See* 42 U.S.C. § 6930; *Environmental Defense Fund, Inc. v. Lamphier*, 714 F.2d 331, 334 (4th Cir. 1983). Shipments of hazardous waste must be properly managed from the point of generation to shipment off-site to a company which is permitted to treat, store or dispose of the hazardous waste. *See* 42 U.S.C. § 6928(d); *United States v. McDonald & Watson Waste Oil Co.*, 933 F.2d 35, 47 (1st Cir. 1991). The Uniform National Hazardous Waste Manifest (Manifest) is critical in tracking the movement of hazardous waste off-site. *See* 40 C.F.R. § 262.20-262.23; *In re Pyramid Chem. Co.*, 11 E.A.D. 657, 671 (2004). Prior to being shipped off-site, hazardous waste must be properly labeled and stored and must be routinely inspected to ensure that it is being stored correctly. *See* 40 C.F.R. § 262 Subparts B and C. The company must take actions to address releases and must also have contingency

plans addressing the sudden release of hazardous waste from the facility. *See* 40 C.F.R. § 264 Subparts C, D, and F; *Titan Wheel Corp. v. United States EPA*, 291 F. Supp. 2d 899, 904 (S.D. Iowa 2003). Companies must follow special management requirements for certain hazardous waste which are usually referred to as universal wastes. *In re Mercury Vapor Processing Technologies, Inc.*, 2012 EPA ALJ LEXIS 50, at *46-47 (Dec. 14, 2012).

2. Federal Used Oil Management

On September 10, 1992, EPA codified the used oil management regulations in Part 279 of Title 40 of the Code of Federal Regulations, 40 C.F.R. Part 279. The management standards adopted in the final used oil management rules were the mechanism through which EPA proposed to control the risks posed by used oil and thus protect human health and the environment. 57 Fed. Reg. 41000, 41575 (Sept 10, 1992). Those standards included, but were not limited to, proper responses to releases of used oil and labelling of containers of used oil.

V. PROCEDURAL BACKGROUND

On March 17, 2014, EPA issued a Complaint to Respondent pursuant to 3008(a) of RCRA, 42 U.S.C. §6928(a). Respondent submitted an Answer dated April 18, 2014. On June 10, 2014, the Presiding Officer issued her *Prehearing Order*. Complainant timely filed its prehearing exchange on July 17, 2014. Pursuant to a request filed by Respondent, the Presiding Officer extended the date for it to submit its prehearing exchange and similarly for the Complainant to submit a rebuttal prehearing exchange. *See Order on Motion for Enlargement of Time to File Prehearing Exchange*, August 14, 2014. *("Order").* The Respondent filed its prehearing exchange on or about September 9, 2014. On September 19, 2014, the Complainant timely filed its rebuttal prehearing exchange. The Presiding Officer established October 21, 2014 as the deadline for filing of dispositive motions, including motions for accelerated decision.

Order, p. 7.

VI. STANDARD OF REVIEW

An accelerated decision may be rendered as to "any or all parts of a proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as [the Presiding Officer] 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). Although the Federal Rules of Civil Procedure do not apply, the summary judgment standard in Rule 56(c) provides guidance for accelerated decisions. *See In Re: Consumers Scrap Recycling, Inc.,* 11 E.A.D. 269, 285 (EAB 2004); *P.R. Aqueduct and Sewer Auth. v. U.S. EPA,* 35 F.3d 600, 607 (1st Cir. 1994).

Under Rule 56(c), the moving party bears the initial responsibility of identifying those parts of materials in the record which it believes demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Caltrett,* 477 U.S. 317, 323 (1986). The movant may cite to materials in the record or by use of affidavits or other materials. *Id* at 323.

VII. FACTUAL BACKGROUND

EPA conducted a compliance evaluation inspection of Respondent's facility on April 2, 2008, and a sampling inspection on March 19, 2009. April 11, 2008, Inspection Report, Sue Rodenbeck Brauer, Complainant's Exhibit 6, (CX 6)[5]; April 23, 2008, Inspection Report, Spiros Bourgikos, (CX 7); and May 8, 2009, Inspection Reports and Sampling Results, Spiros Bourgikos and Sue Rodenbeck Brauer (CX 14). Summit had not submitted a notification of hazardous waste activity form and did not have a hazardous waste permit for the treatment, storage or disposal of hazardous wastes at its facility. Declaration of Spiros Bourgikos ("SB") ¶

5 Copies of referenced exhibits, except CX 18, are attached. A copy of CX 18 and a full copy of all of Complainant's exhibits may be found in Complainant's Prehearing Exchange.

30.[6] While on-site on March 18, 2009, and subsequently, EPA determined that Summit did not have a contingency plan and did not have a hazardous waste training plan as required by the hazardous waste regulations. SB ¶¶ 31 and 33.

Summit owns and operates an automobile scrap recycling facility located at 6901 West Chicago Avenue, Gary, Indiana ("the Summit Site" or "Site"). CX 13, CX 000398. The property where Summit conducts its scrap recycling business is bounded on the north by Chicago Avenue, on the northeast by Industrial Avenue (also referred to as U.S. Route 12 or Airport Road) and on the Southeast by the E&J Railroad and the Gary Airport. *Id*.

On April 2, 2008, and March 18, 2009, EPA inspected the Site to determine Summit's compliance with the used oil and hazardous waste regulations. SB ¶ 5 and Declaration of Sue Rodenbeck Brauer ("SRB") ¶ 4. At the time of the inspections, Summit operated two vehicle crushers ("crushers") at the Site. Once crushed, the vehicles were transported off-site to another facility for shredding. By March 19, 2009, Summit had purchased and installed a shredder at the Site. SB ¶8.

Summit collected gasoline, batteries, mercury, catalytic converters and tires with aluminum wheels prior to placing the automobiles into the crusher. CX 13, CX000398. Summit collected the gasoline by simply puncturing the gas tank and allowing the contents to gravity flow to a catch basin and then to a 2,500 gallon horizontal tank. SRB ¶ 7; CX 6, CX000187. This gasoline collection operation was conducted in a shed that had three sides and a roof. *Id.* The area was commonly referred to as the "gasoline recovery shed." *Id.*

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6 Complainant is included a copy of the Declarations of Spiros Bourgikos and Sue Rodenbeck Brauer.

The car crushers were located on concrete pads located within the Site. Summit did not remove, prior to crushing, used automotive liquids from the vehicles such as engine and crankcase oils, anti-freeze, transmission and power steering fluids and windshield wiper fluid "used automotive fluids." SB ¶¶ 9 and 10; SRB ¶ 7. As part of the car crushing operations these used automotive fluids would drain from the crushed cars at the vehicle crushers. CX 6, CX 000187; CX 7, CX 000210-212; and CX 14, CX 000485-487. These liquids were collected in 5 gallon buckets, 55 gallon drums or larger tanks located on Site. *Id.* The crushed vehicles were placed either on drip pans or the ground. *Id.* Used automotive fluids would collect either in the drip pans or on the ground. *Id.* Crushed vehicles were stacked on top of each other and shrink wrapped for transportation off-site. Used automobile oils dripped from the sides of these shrink wrapped vehicles. *Id.* Summit collected used auto batteries in various containers. *Id.* They were shipped off-site. Drums were stored throughout the Site, including but not limited to, inside and outside the gasoline recovery shed. *Id.*

During the March 18, 2009, inspection EPA observed two 55-gallon drums inside a metal box with a brownish liquid with an oily sheen in the area east of Crusher #1. CX 14, CX000487. In or around the gasoline recovery shed EPA observed a large green tank, a red tank and 39 drums. SRB ¶10; CX 14, CX000488; SB ¶ 15. The green tank was inside a steel box that had about one foot of a reddish liquid that appeared to be red-died diesel fuel and may have been automatic transmission fuel. SRB ¶ 10. There was a diesel smell in the area. SB ¶15; SRB ¶10; CX 14, CX000488. The red tank was located inside a tank outside the gasoline recovery shed. SRB ¶ 10. Near the tank was a moldable mud that appeared to be dirt mixed with oil. *Id.* In the other areas of the Summit Site, there were dark puddles with a sheen that

appeared to be gasoline and automotive liquids with oils. SRB ¶ 9. There was dirt saturated with oil, pools of water with an oily sheen and dark soils stained with oil. SRB ¶ 10. The Summit employees informed EPA that the 39 drums contained liquids from the crushing of the automobiles. SRB ¶11. The drums were stacked tightly next to each other without enough space to move among them. SB ¶ 17. None of the drums or tanks mentioned in this paragraph were marked with the words hazardous waste or used oil. SB ¶¶ 10, 11, 15 and 25. EPA observed a four-sided box that held broken automobile batteries. SB ¶ 16. The batteries were thrown in the box haphazardly without any space between them. *Id.* There was no top to the box. *Id.* The container was not labelled. *Id.*

EPA collected samples from 4 of the 39 drums located in the gasoline recovery shed. SB ¶¶ 17-19. EPA sent the samples to its Central Regional Lab (CRL) to determine if they exhibited any of the characteristics of hazardous waste. *Id.*

CRL determined that the four drums sampled from the gasoline recovery shed contained benzene concentration above the regulatory level of 0.5 mg/L. Specifically, sample SCN 3180905 collected from a Drum 1 had a benzene concentration of 4.30 mg/L; sample SCN 3180908 collected from Drum 2 had a benzene concentration of 14.2 mg/L; sample SCN 3180911 collected from Drum 3 had a benzene concentration of 213 mg/L; and sample SCN 3180914 collected from Drum 4 had a benzene concentration of 1,080 mg/L. CRL reported that Drum 3 contained a liquid waste with a flash point below 140° Fahrenheit (F). Specifically sample SCN 3180912 collected from a Drum 3 had a flash point of 76.9° F. SB ¶ 19.

During the March 18, 2009, inspection Summit's employees informed EPA that the drums

were filled with liquids from the crushing of the automobiles. SRB ¶ 11. They also stated that Summit did not separate anti-freeze from other automotive liquids either before or after crushing. *Id.*

Summit admitted the contents of the 39 drums were waste oils collected from March 5 to March 18 from the drain pads that were located at the facility. CX 16, p. CX000739; SRB ¶¶ 7 and 10. Summit indicated that the contents of the drums were then pumped into and accumulated in a tank located at the Summit facility and subsequently picked up by Beaver. CX 16, p. CX000737-9. Beaver picked up 3,000 gallons of the accumulated liquids and sent them for recycling at its Hodgkins, Illinois facility. CX 16, p. CX000738, Response 4. Beaver's driver wrote on the receiving ticket that the shipment was from the pump out of "48 drums and pumped out drum overflow containment box's (*sic*). Drums mixed with A/F H20 – some gas." Once at Beaver, the liquids were placed in a tank that was used to separate water from oil with heat and/or acids. SRB ¶ 18-20. Typically, Beaver would then take the oils from that tank and either place them in fuel oil tanks or sell them or further treat them before placing them in fuel oil tanks. *Id.*

VIII. UNDISPUTED FACTS

The following undisputed facts are based on the admissions in Summit's Answer to the Complaint, its prehearing exchange or in its information request response:

1. On October 6, 2009, Summit submitted a response to an information request EPA sent it pursuant to Section 3007 of RCRA. CX 15 and 16.

2. The contents of the 39 drums located in the gasoline recovery area were collected from March 5 to March 18 from the drain pads that were located at the facility. CX 16, p. CX000739, Response 8.

3. The contents of the drums were pumped into and accumulated in a tank located at

the Summit facility. CX 16, p. CX000739, Response 7.

4. Summit arranged for Beaver Oil to pick up the accumulated liquids and sent them for recycling. CX 16, p. CX000738, Response 4.

5. Beaver Oil on March 21, 2009, arrived at Summit and collected 3,000 gallons of the accumulated liquids which Summit identified as oil. CX 16, p. CX000737-38, Response 2.

6. A tracking ticket 28672 was used and an Invoice 152262 was associated with this shipment. Id.

7. Tracking ticket 28672 states that the 3,000 gallons were from a pump out of "48 drums and pumped out drum overflow containment box's (*sic*). Drums mixed with A/F H20 – some gas." CX 16, CX000741. See CX 18, p. CX000786 for a legible copy.

8. Beaver recycled the shipment. CX 16, CX 000738.

9. Summit did not and does not have an analysis of the contents of the drums or the 3,000 gallons. CX 16, CX000737, Response 2.

IX. ANALYSIS

A. Counts 1-4

Counts 1-4 of the Complaint allege that Summit violated specific provisions of the RCRA hazardous waste regulations when it generated, mixed and shipped off-site the 39 drums of waste automotive liquids located in or near the gasoline recovery area. Central to these allegations is that the contents of the 39 drums (used automotive liquids) were first solid wastes and then hazardous wastes.

1. Solid Wastes

The Indiana regulation at 329 I.A.C. §§ 3.1-4-1 and 3.1-6-1 *et seq.* and 40 C.F.R. § 261.2 define "solid waste" as any discarded material that is not excluded by 40 C.F.R. § 261.4(a) or that is not excluded by variance granted under 40 C.F.R. §§ 260.30 and 260.31. "Discarded material" is further defined to include any material that is abandoned or recycled. 329 I.A.C. §

3.1-4-1(b), 40 C.F.R. § 261.2(a)(2)(i)(A) and (B). An abandoned material is defined as any material that is disposed, incinerated, burned or stored or accumulated prior to disposal, incineration or burning. 329 I.A.C. § 3.1-4-1(b); 40 C.F.R. §261.2(b). An abandoned material that is stored prior to being abandoned is a solid waste.

A material which is processed to recover a useable product or regenerated is a recycled material. 329 I.A.C. §3.1-4-1(b); 40 C.F.R. § 261.2(c)(5) and (7). A recycled material is a solid waste if it is either burned for energy recovery, used to produce fuel or otherwise contained in fuels or are spent materials that are reclaimed. 329 I.A.C. §3.1-4-1(b); 40 C.F.R. §261.2(c)(2)(A), (B) and (c)(3).

A spent material is any material which is used and as a result of contamination can no longer serve the purpose for which it was produced. 329 I.A.C. § 3.1-6-1(b); 40 C.F.R. §261.2(c)(1). A spent material is reclaimed if it is processed to recover a usable product or regenerated. 329 I.A.C. §3.1-6-1(b); 40 C.F.R. § 261.2(c)(4).

Materials that are stored prior to recycling are a solid waste. 329 I.A.C. §3.1-6-1(b); 40 C.F.R. § 261.2(c). Similarly used oil is defined as any oil that has been refined from crude oil, or any synthetic oil, that has been used and as a result of such use is contaminated by physical or chemical impurities.

Summit admitted in its October 6, 2009, information request response that the contents of the used automotive liquids in the 39 drums were waste oils collected from March 5 to March 18 from the drain pads that were located at the facility. CX 16, p. CX000739; SRB ¶¶ 7 and 10. Summit indicated that the used automotive liquids were then pumped into and accumulated in a tank located at the Summit facility. CX 16, p. CX000739, Response 7. Summit's admission of

the automotive liquids being waste oil means that they were solid wastes since used oils are defined as solid wastes. Used automotive oils are "used oils" and "spent materials" since engine and transmission oils, anti-freeze and brake fluid are processed from crude and when used in automobiles become contaminated with chemical and physical impurities such as gasoline, metals, sediments, water and anti-freeze. SRB ¶¶ 3 and 20.

The used automotive oils at Summit are "used oils" and "spent materials" since they consisted of engine and transmission oils, anti-freeze or brake fluid that were contaminated with gasoline, water and anti-freeze. CX 16, CX 000740-741. The used automotive oils could not be used without further treatment as demonstrated by the fact that they were placed in treatment tanks at Beaver's Hodgkin's facility where water was removed from them. SRB ¶¶ 15-19, CX 16, CX000740. Both Beaver and Summit acknowledge that this process was recycling. CX 16, CX000738; CX 18, CX000777. The used automotive liquids were reclaimed as that word is defined because a usable product oil was recovered from its treatment at Beaver. Consequently, since the used automotive liquids were a "spent material" that was "reclaimed" it was a "solid waste" as those terms are defined in 329 I.A.C. §§ 3.1-4-1(a) and 3.1-6-1(b); 40 C.F.R. §§260 and 261. They were stored in drums and an accumulation tank at the Summit facility from at least March 5 until March 21, 2009. CX 16, CX000737 and 000739. Consequently, they were solid waste because they were stored prior to being recycled.

Summit asserts in its Answer that the used automotive liquids are not solid wastes because they are "sold as substitutes for commercial chemical products."[7] Respondents in an

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7 For the sake of this Motion the Complainant will treat this as an affirmative defense since if Summit were to prove it the violations alleged in Counts 1-4 would not exist. Since the Complainant has the burden to discuss in a motion for accelerated decision the affirmative

enforcement action who claim that a certain material is not a solid waste must submit appropriate documentation to demonstrate that "there is a known market or disposition for the material and that they meet the terms of the exemption or exclusion." 329 I.A.C. § 3.1-6-2(2). Summit has not submitted any documentation to support its claim with either its Answer or its Prehearing Exchange. Further, the facts do not support such a claim. Summit does not cite to a particular exemption when it makes its argument. It appears, however, that Summit may be attempting to argue that the used automotive liquids were "effective substitutes in an industrial process," 329 I.A.C. § 3.1-6-5(a), or "used or reused as effective substitutes for a commercial chemical product," 329 I.A.C 3.1-6-1-2, 40 C.F.R. § 261.2(e)(1)(ii). The Indiana rules are more specific than the federal rules in determining the conditions under which a respondent may claim the "commercial chemical product" exemption. 329 I.A.C. § 3.1-6-2(14), 3.1-6-5 and 3.1-4-25.1 require that the secondary material be used in the manufacturing process without any intervening reclamation or recovery (329 I.A.C. § 3.1-6-5(e)(1)), must be transported directly between the generator and the user (329 I.A.C. §3.1-6-5(e)(2), cannot be burned for energy recovery (329 I.A.C. § 3.1-6-5(e)(7), and must be legitimately incorporated into an industrial or manufacturing process to make a usable product without intervening reclamation or recovery (329 I.A.C. § 3.1-4-25.1). The facts demonstrate that these used automotive liquids were transported off-site to Beaver for reclamation. Beaver did not use these wastes in a manufacturing or industrial process without first reclaiming them. Further, these used oils were ultimately blended, after reclamation, for fuel use. That fuel use may have been to burn the wastes for energy recovery.

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defenses the Complainant is addressing this defense at this point since it flows most directly from this discussion. *See In re: Paco Swain Realty, LLC*, Docket No. CWA-06-2012-2712, Order on Complainant's Motion for Accelerated Decision, (July 23, 2014), p.14.

Consequently, they were not used as an effective substitute in an industrial process or for a commercial chemical product. Further, the available evidence indicates that the oil fraction of these used vehicle oils, after they were reclaimed, may have processed to be used as fuels. SRB ¶ 19. Such materials are solid wastes and the exemptions in 329 I.A.C. § 3.1-6-5(a) and 3.1-6-2, (40 C.F.R. 261.2(e)(1)(i) and (ii)) are inapplicable).

2. Hazardous Waste

Since the used automotive liquids shipped off-site on March 21, 2009, are solid wastes the next inquiry is whether they are hazardous wastes. A solid waste is a hazardous waste if it exhibits a characteristic of hazardous of hazardous waste in 329 I.A.C. § 3.1-6-1(b) and 40 C.F.R. 261, Subpart C. A solid waste is an ignitable characteristic hazardous waste if it has a flash point less than 140 °F. 329 I.A.C. § 3.1-6-1(b); 40 C.F.R. §261.21. One of the drums had a flash point of 76.9 °F. SB ¶ 19. A solid waste has the characteristic of toxicity if it has a concentration of benzene greater than 0.5 mg/l. All four drums had benzene concentrations greater than 0.5 mg/l. SB ¶ 19. The benzene concentrations were 1,080 mg/l, 213 mg/l, 14.20 mg/l and 4.30 mg/l. Consequently, the used automotive liquids EPA tested in the four drums were hazardous waste.

A mixture of a characteristic hazardous waste with a non-hazardous waste is a hazardous waste. *See* 329 I.A.C. § 3.1-6-1(b) (incorporating by reference 40 C.F.R. § 261.3(b)(3), (c)(1) and (d) which states that a characteristic hazardous waste remains a characteristic hazardous waste until it no longer exhibits the characteristic). The shipment from Summit contained the contents of the 4 drums. The mixture of the benzene characteristic hazardous waste in the 4 drums with the remaining liquids in the accumulation tank was a mixture of a characteristic

hazardous waste and a non-hazardous waste. The resultant mixture was a characteristic hazardous waste. Respondent did not submit any sampling data for that shipment. It did not meet its burden to demonstrate that the resultant mixture did not exhibit the benzene characteristic. *See American Chemistry Council v. EPA,* 337 F.3d 1060, 1065 (D.C. Cir. 2003)(upholding EPA's "anti-dilution" or "mixture" and stating that it is the defendant's burden to demonstrate that a mixture involving a characteristic hazardous waste was not characteristically hazardous). Consequently, the shipment of 3,000 gallons that Beaver transported off-site on March 21, 2009, contained characteristic hazardous waste and should have been handled as a hazardous waste.

3. Generator

Having established that the used automotive liquids are hazardous wastes it is now necessary to turn to the specific alleged violations and the supporting evidence. Counts 1-4 have their genesis in the Generator Standards contained in 329 I.A.C. § 3.1-7 and 40 C.F.R. Part 262. These standards are applicable to generators of hazardous where a generator is defined to include those persons "whose act or process produces a hazardous waste." 329 I.A.C. § 3.1-4-1(a); 40 C.F.R. 260.10. Summit was the generator of the hazardous wastes at issue in the complaint since it generated the used automotive liquids by virtue of its automobile crushing, liquid collection and accumulation in containers and mixture of the liquids in the accumulation tank. Consequently, it was a generator of hazardous waste.

4. Count 1

Count 1 alleges that Summit failed to correctly characterize the waste as hazardous waste. A *sine qua non* of the hazardous waste analysis requirements is that the generator properly

characterize its wastes. *Strong Steel Products*, 2005 EPA ALJ LEXIS 84, at *327. It may rely on either knowledge or sampling. An analysis reliant on knowledge must be "rooted in some substantive analysis that produces a written record." *Id.* at * 331. A generator must update or conduct a new analysis if it has reason to believe the composition of the waste stream has changed. *Id.* at *327.

Summit did not have any waste determinations related to the 39 drums.[8] CX 16, CX000737. It relied on Beaver to analyze its wastes. Beaver did not submit an analysis of the drum contents.[9] Summit did not label the contents of the drums as either hazardous waste or used oil. SB ¶ ¶ 15 and 17. Summit's failure to label its drums is an indication that Summit characterized the automotive liquids as non-hazardous and not used oil. SB ¶ 15-17; CX 16, CX 000737. Summit treated the contents of the drums as non-hazardous even though they were tested and were determined to be hazardous wastes. EPA's sampling demonstrated that four of the drums were hazardous wastes. CX 14, SB ¶ 19. When it mixed these four drums with the contents of the remaining 35 drums and other materials in the accumulation tank the accumulated liquids became hazardous waste by virtue of the mixture rule. This mixture was not properly

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8 In response to EPA's information request Beaver submitted its analyses of Summit's waste streams. CX 18, CX 000794-000815. There is no analysis for the shipment EPA sampled. Additionally, the analyses are inapplicable since they were not for a mixture, were not sampled for flash or benzene, was for only one automobile liquid – anti-freeze (CX 18, CX 000803 – 000815) and was from 18-36 months old. (CX 18, CX 000794 and 000803-000815). Given the variability in this waste stream (i.e., gasoline and other constituents may have not been completely drained from each vehicle prior to crushing) this analysis was not adequate to meet the generator requirements.

9 It is irrelevant that another entity conducted the waste analysis. The regulations clearly state that it is the generator's responsibility. Further, for the purpose of determining liability it is irrelevant that Beaver or Summit incorrectly characterized its wastes since RCRA is a strict liability statue which is construed liberally, *Unites States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1989).

characterized. Summit has not submitted any information that would raise a genuine issue of material fact related to this alleged violation.

5. Counts 2 and 3

Count 2 alleges that Summit failed to have an EPA identification number for the transportation of the hazardous waste off-site. Count 3 alleges that Summit failed to use a Uniform National Manifest when it transported the hazardous waste off-site.

329 I.A.C. §§ 3.1-7-1, and 3.1-7-1-10 to 13 require a generator of hazardous waste to comply with, among other things, 40 C.F.R § 262.12. This rule in turn requires a generator who treats, stores or disposes of hazardous waste to have an U.S. EPA identification number prior to treating, storing, disposing or transporting or offering for transport of hazardous waste. An entity obtains a U.S.EPA identification number by submitting a notification form - EPA Form 8700-12. This notification is also required by Section 3010(a) of RCRA, 42 U.S.C. § 6930(a).

EPA determined that Summit did not submit a Notification of Hazardous Waste Form and consequently was not assigned an EPA hazardous waste identification number. SB ¶ 22. Beaver transported off-site the shipment with the used automotive liquids on or about March 21, 2009. CX 16, CX 000739. The only shipping papers associated with this shipment were an Invoice (152262) and a receiving Ticket (28672). SRB ¶¶ 14-16; CX 16, CX 000740-741; CX 18, CX 000792. None of these have an EPA identification number. These documents are not Uniform Hazardous Waste Manifests. Consequently, Summit shipped the used automotive liquids off-site without an EPA identification and without using a hazardous waste manifest. Summit has not submitted any information that would raise a genuine issue of material fact related to this alleged violation.

6. Count 4

Count 4 alleges that while it stored the drums on-site it did not have a permit and did not comply with the temporary storage requirements for generators. In particular, Summit did not have a contingency plan,[10] did not conduct weekly inspections, did not label the contents of the drums and did not have documentation of required training. Storage is defined as the temporary holding of hazardous waste for a temporary time, after which it is treated, stored or disposed elsewhere. 329 I.A.C. § 3.1-4-1(a); 40 C.F.R. §260.1.

On March 18, 2009, Summit had four drums of hazardous waste stored at its gasoline recovery area. Between March 19 and 21, 2009, Summit mixed these 4 drums with the 35 drums located in the gasoline recovery area and other drums to collect 3,000 gallons of liquid wastes. The liquid wastes were hazardous wastes by virtue of the mixture rule. They were accumulated in a tank located on-site. On March 21, 2009, Beaver collected the 3,000 gallons of hazardous waste and shipped them to Beaver's facility for further treatment. Summit's actions of holding the hazardous waste on-site for a period of days and then arranging for their shipment off-site to Beaver constituted the "temporary holding" of hazardous waste with subsequent treatment elsewhere. Consequently, Summit was storing hazardous waste on-site. Summit did not have a hazardous waste treatment, storage or disposal permit. SB ¶ 22. It did not have a contingency plan, it did not conduct weekly inspections, it did not conduct the required training and it did not label the drums. SB ¶¶ 14-17, 24-26. Consequently, Summit

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10 Summit asserts for Count 6 that it had a Spills Prevention, Control and Countermeasures (SPCC) Plan. Answer, p. 2. An SPCC plan that meets the requirements of 40 C.F.R. §112 may be used as part of the required contingency plan, provided it has certain additional requirements. 329 I.A.C. § 3.1-7-1, 40 C.F.R. §§ 262.34(a)(4) and 265.52(b). Summit has not submitted its SPCC plan to demonstrate that it met these requirements. Its SPCC plan apparently did not meet these requirements since IDEM determined they did not have an SPCC compliant plan until October 7, 2011. See, *5/4/10 Trip Report*, Item 2. IDEM did not indicate if the SPCC plan addressed the additional contingency plan requirements. *Id.*

violated the temporary storage requirements for generators. Summit has not submitted any information that would raise a genuine issue of material fact related to this alleged violation.

B. Counts 5 and 6

Counts 5 and 6 allege violations of the used oil management standards as applied to generators of used oil. 329 I.A.C. §13-1-4, 40 C.F.R. Part 279. EPA has proven in Section 1, *Solid Wastes,* that the used automotive liquids are "used oil" as that term is defined in 329 I.A.C. §§ 13-2-1(1) and 13-2-19; 40 C.F.R. Part 279.1. Similarly, Summit was a "used oil generator" by virtue of its generating the used oil from the crushing operations and the used automotive liquids which were "used oils." Count 5 alleges that Summit failed to label several 55-gallon drums and containers as "used oil" as required by 329 I.A.C. § 3.13-4-3(d), 40 C.F.R. § 279.22(c)(l). The evidence shows that the 39 drums in the gasoline recovery shed contained "used oils." All 39 drums contained used automotive liquids which were "used oil" and were not labelled.[11] The 35 drums, prior to being mixed with the four drums, contained used automotive liquids that were "used oils" and were not labelled. Consequently, at least 35 drums contained "used oil" and were not labelled. Additionally, the large green tanks and the small red tank located near the gasoline recovery area contained "used oils" and were not labelled. Summit has not submitted any information that would raise a genuine issue of material fact related to this alleged violation. Consequently, Summit's failure to store used oil in containers marked with the words "used oil" violated 329 I.A.C. § 13-4-3(d), 40 C.F.R. § 279.22(c)(1).

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11 The evidence demonstrates that 4 of the drums contained hazardous wastes. To the extent the Presiding Officer agrees with this assessment then the 4 drums are not regulated under as the used oil management standards and should have been labelled "hazardous waste" not "used oil." See, 329 I.A.C. §13-3-1(b)(2), 40 C.F.R. § 279.10(a) and (b)(2). To the extent they are not hazardous waste then they are used oil and did not have labels.

Count 6 alleges that Summit failed to adequately respond to releases of used oil as required by 329 I.A.C. § 3.13-4-3(e)(1)-(5), 40 C.F.R. §§ 279.22(d)(1) -(4). EPA observed automotive fluids on the ground between stacks of cars and in areas around the gasoline recovery area. SRB ¶ 8. The soils were contaminated with used oil and anti-freeze from crushing operations. SRB ¶ 9. On the pad outside the gasoline recovery area dirt was mixed with oil which formed into a moldable mud. SRB ¶ 10. The dirt was saturated with oil and there was a pool of water with a sheen on it. *Id.* The soils in front of the water was dark and appeared to be stained with oil. *Id.* These spills of oil where from the crushing operations including, but not limited to drips from vehicles where automotive oils were still flowing from them.

Summit denies that it did not properly stop, contain or clean-up spills of used oil. Answer, p. 2. It asserts that it has a Spills Prevention, Control and Countermeasures (SPCC) plan which covers the proper response to releases of spills of oil. *Id.* Further, it cites to an October 7, 2011, inspection by the Indiana Department of Environmental Management (IDEM) as evidence that its SPCC program is in compliance with 40 C.F.R.§ 112.

Summit misses the mark with its Answer. Count 6 alleges that they did not actually clean-up releases observed on March 18, 2009. A plan is not a substitute for action.[12] It is not a substitute for evidence that the used oil was properly removed and subsequently handled.

The only information that Summit submitted related to actual clean-up indicates that IDEM determined that on May 4, 2010, there were releases of used oil on the property that had not been

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12 Interestingly, Summit appears to have been operating under a February 12, 2004, SPCC plan that IDEM determined was not in compliance until October 10, 2011. See, Respondent's Answer, Attachment - *"Description of Violations and Further Action Enforcement Follow-up Inspection 10/7/11 for 5/4/10 Inspection, ("5/4/10 Trip Report"), Item #2.*

cleaned-up and that those releases may have been cleaned-up by July 20, 2010.13 This may indicate that the releases observed on March 18, 2009, were not cleaned-up for almost eighteen months, until July 20, 2010. Taking 18 months to clean-up the releases is not a proper clean-up and management of the released used oil as required by 329 I.A.C. § 3.13-4-3(e), 40 C.F.R. §§ 279.22(d).

C. **Count 7**

Count 7 alleges that Summit failed to comply with the universal waste standards for small quantity handlers of universal waste. A small quantity handler of universal waste must manage universal waste batteries in a way that prevents releases of any universal waste or components of a universal waste to the environment. 329 I.A.C. § 3.1-16-1, 40 C.F.R. § 273.13(a). EPA observed broken batteries haphazardly thrown into a four-sided box located on-site. SB ¶16 and 25. The lead plates of the batteries were broken with the lead plates exposed inside the box. *Id.* The box did not have a lid to cover its top. SB ¶ 16 and 25 and CX 14, CX 000489. Summit's mismanagement of the batteries in the box combined with its failure to have a top on the box was insufficient to prevent a release. Summit has not submitted any information that would raise a genuine issue of material fact related to this alleged violation.

A small quantity handler of universal waste is required to mark the containers with the accumulation start date or maintain an inventory system capable of determining when the accumulation was started. 329 I.A.C. § 3.1-16-1, 40 C.F.R. §273.15(c). At the time of the

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13 See, *5/4/10 Trip Report,* Item 1 documenting IDEM's findings at the time of the October 11, 2011 site visit the spills of oil had been clean-up. The Respondent, however, fails to demonstrate that the spills IDEM observed and documented as cleaned-up are the same as the spills EPA observed. IDEM appears to be referencing spills that were reported on February 8, 2005 and May 11, 2006 near the fuel dispensing tanks and the hydraulic oil dispensing barrels. EPA observed spills near the crushers, the gasoline recovery area and between the stack of vehicles.

March 18, 2009 inspection the container holding the batteries was not marked and Summit did not have an inventory system that met the requirements of 329 I.A.C.§ 3.1-16-1, 40 C.F.R. §273.15(c). SB ¶ 16. Summit has not submitted any information that would raise a genuine issue of material fact related to this alleged violation.

A small quantity handler of universal waste is to provide all employees who handle or manage the universal waste with training. 329 I.A.C. § 3.1-16-1, 40 C.F.R. §273.16. On March 18, 2009 inspection Summit did not have a training program for handling of universal waste. SB ¶ 24. It was handling universal waste at that time. Summit has not submitted any information that would raise a genuine issue of material fact related to this alleged violation.[14]

X. CONCLUSION

There is no material issue of fact disputing that Summit is liable for the violations alleged in Counts 1-7 of the Complaint. Respondent's affirmative defenses do not state any material issues of fact to defeat this Motion for Accelerated Decision. Complainant has met its burden and consequently respectfully requests that this motion be granted and that Respondents be found liable as a matter of law for the violations alleged in Counts 1-7 of the Complaint and that Respondents' affirmative defenses be dismissed.

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14 Summit's Answer supports that training was not provided to its employees until somewhere between July 20, 2010, and October 7, 2011. See, *5/4/201 Trip Report,* Item 9, stating that a July 20, 2010, letter from Summit states that "staff *will be (emphasis added)* trained" and IDEMs' notes that as of October 7, 2011, there existed at the facility a "log of employees trained."

RESPECTFULLY SUBMITTED,

October 22, 2014
Date

Richard J. Clarizio, Associate Regional Counsel

10/21/14
Date

Gary Steinbauer, Associate Regional Counsel

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	**Docket No.**
	)	
Summit, Inc.	)	**Proceeding to Assess a Civil Penalty**
6901 West Chicago Avenu	)	**Under Section 3008(a) of the Resource**
Gary, Indiana	)	**Conservation and Recovery Act,**
	)	**42 U.S.C. § 6928(a)**
U.S. EPA ID #: INX 000 028 902	)	
	)	**RCRA-05-2014-0006**
Respondent.	)	
	)	

MOTION FOR ACCELERATED DECISION
LIABILITY COUNTS 1-7
AND
MOTION TO DISMISS
RESPONDENT'S AFFIRMATIVE DEFENSES

Complainant hereby moves the Presiding Officer to grant Complainant's request for accelerated decision on Respondents' liability for Counts 1-7 as alleged in the Complaint and to dismiss Respondents' affirmative defenses. In support of this Motion Complainant submits the attached Memorandum of Law and the declarations of Spiros Bourgikos and Sue Rodenbeck Brauer.

RESPECTFULLY SUBMITTED,

October 22, 2014
Date

Richard J. Clarizio, Associate Regional Counsel
U.S. EPA, Region 5, Office of Regional Counsel

10/21/14
Date

Gary Steinbauer, Associate Regional Counsel
U.S. EPA, Region 5, Office of Regional Counsel

CERTIFICATE OF SERVICE

I hereby certify that on 10/21/14, 2014, I served the *Complainant's Motion and Memorandum of Law requesting Accelerated Decision as to Counts 1-7 and to Dismiss Respondent's Affirmative Defenses* in *In re: Summit, Inc.,* Docket No. RCRA-05-2014-0006, in the following manner:

Original via oalj electronic filing to: oaljfiling@epa.gov
One copy via USPS Express Overnight Delivery to:

Sybil Anderson
U.S. EPA, Headquarters Hearing Clerk
Ronald Reagan Building, Room M1211
1300 Pennsylvania, N.W.
Washington, D.C. 20460

M. Lisa Buschmann, Administrative Law Judge
U.S. EPA, Office of Administrative Law Judges
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