

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

**IN THE MATTER OF:** )  
 )  
**MINNESOTA METAL FINISHING, INC.,** ) **Docket No. RCRA-05-2005-0013**  
 )  
**Respondent** )

**ORDER ON RESPONDENT'S  
MOTION FOR ACCELERATED DECISION**

**I. Background**

Respondent Minnesota Metal Finishing, Inc. (MMF) is a Minnesota corporation which owns and operates a plant located at 909 Winter Street NE, Minneapolis, Minnesota, and engages in the business of plating steel with zinc and anodizing aluminum. This action was initiated on August 26, 2005 by the U.S. Environmental Protection Agency Region 5 (Complainant), filing an Administrative Complaint and Compliance Order charging Respondent with five counts of violating the Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C. §§ 6901 *et seq.*, and certain federal and state regulations promulgated to implement RCRA, codified as 40 C.F.R. Parts 260 through 279, and Minnesota Rules (Minn. R.) 7045.0292 and 7045.0450 through 7045.0551. In the course of its operations, Respondent generates more than 1,000 kilograms per month of hazardous waste, including solid plating waste and spent plating and anodizing bath solutions containing corrosive substances such as sulfuric acid and nitric acid. Consequently, Respondent is a large quantity generator of hazardous waste, as set out in the applicable regulations.

On September 1, 2006, upon motion, Complainant filed a Second Amended Complaint ("Complaint"). The Complaint charges MMF with the following five counts of violation, in brief:

Count 1: Respondent failed to adequately train certain of its employees, as well as create and maintain records of such training and employee job titles and descriptions, in violation of Minn. R. 7045.0558, Subparts 1-3, 5, 6.A-D (40 C.F.R. §§ 265.16(a)(1)-(3), (b), (c), (d)(1)-(4));

Count 2: Respondent failed to include in its facility's Contingency Plan an evacuation plan, a named primary emergency coordinator, office telephone numbers for emergency coordinators, arrangements agreed to by local emergency

responders, and identification of emergency equipment capability, in violation of Minn. R. 7045.0572, Subparts 4.C-F (40 C.F.R. §§ 265.52(c)-(f));

Count 3: Respondent failed to maintain and operate its facility to minimize the possibility of fire, explosion, or any unplanned release to air, soil or water of hazardous waste or hazardous waste constituents, in violation of Minn. R. 7045.0566, Subpart 2 (40 C.F.R. § 265.31);

Count 4: Respondent failed to provide its employees with immediate access to an internal alarm or emergency communication device, and a device to summon external emergency responders, in violation of Minn. R. 7045.0566, Subparts 3.B and 5 (40 C.F.R. §§ 265.32(b) and 265.34(a)); and

Count 5: Respondent failed to qualify for a conditional generator exemption from the hazardous waste storage facility permit and operational requirements, and therefore required, but failed to obtain, a permit from federal or state authorities for the storage of hazardous waste, in violation of Minn. R. 7001.0030 and 7001.0520, Subpart 1.A.

The Complaint proposes an aggregate civil penalty of \$300,000 for the violations and requests a Compliance Order. Respondent filed an Answer denying the violations and raising affirmative defenses, including the failure to state a claim. The parties each filed prehearing exchanges, and several motions which have been ruled upon.

One of these motions, filed on June 23, 2006 by Complainant, was a Motion for Accelerated Decision on Liability as to all five counts, which was opposed by Respondent. By Order dated January 9, 2007 (“January 9 Order”), accelerated decision was granted in favor of Complainant as to the allegation in Count 1 that Respondent failed to maintain records of training and employee job titles and descriptions, and therefore accelerated decision was also granted as to Count 5. Accelerated decision was denied as to Counts 2, 3 and 4, and as to the allegations in Count 1 that Respondent failed to provide hazardous waste training to certain personnel, on the basis that facts material to these alleged violations were contested or not fully developed.

On March 2, 2007, Respondent submitted a Motion for Accelerated Decision and Memorandum of Law in Support (“Motion”) requesting dismissal of Count 3 and the allegations in Count 1 that Respondent failed to provide hazardous waste training to certain personnel. On March 23, 2007, Complainant filed a Memorandum in Opposition to the Motion (“Response”), and on April 6, 2007, Respondent submitted a Reply Memorandum in Support of its Motion (“Reply”).

The hearing in this matter is scheduled to commence on May 22, 2007.

## **II. Standards for Accelerated Decision**

The procedural rules applicable to this case, Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 (“Rules of Practice”), authorize an Administrative Law Judge 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,” and to “dismiss a proceeding without further hearing or upon such limited additional 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.” 40 C.F.R. § 22.20(a).

Motions for accelerated decision under 40 C.F.R. § 22.20(a) are analogous to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure (“FRCP”). *See, e.g., BWX Technologies, Inc.*, 9 E.A.D. 61, 74-75, 2000 App. LEXIS 9, \*34 (EAB 2000); *Belmont Plating Works*, EPA Docket No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65, \*8 (ALJ, Order Granting in Part and Denying in Part Complainant’s Motion for Accelerated Decision on Liability, Sept. 11, 2002). Therefore, federal court rulings on motions for summary judgment under FRCP 56 provide guidance for adjudicating motions for accelerated decision under Rule 22.20(a) of the Rules of Practice. *See CWM Chemical Service*, 6 E.A.D. 1, 95 EPA App. LEXIS 20, \*25 (EAB 1995).

Rule 56(c) of the FRCP provides that summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law.” Thus, summary judgment is to be decided on the “pleadings, depositions, answers to interrogatories, and admissions on file, together with [] affidavits” (FRCP 56(c)), but in addition, a court may take into account any material that would be admissible or usable at trial. *Horta v. Sullivan*, 4 F.3d 2, 8 (1<sup>st</sup> Cir 1993)(citing, 10A Charles A. Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice and Procedure § 2721 at 40 (2d ed. 1983)); *Pollack v Newark*, 147 F. Supp. 35 (D.N.J. 1956)(In considering a motion for summary judgment, a tribunal is entitled to consider exhibits and other papers that have been identified by affidavit, or otherwise made admissible in evidence), *aff’d*, 248 F.2d 543 (3rd Cir. 1957), *cert. denied*, 355 U.S. 964 (1958). Such material may include documents produced in discovery. *Hoffman v. Applicators Sales & Service, Inc.*, No. 05-1543, 2006 U.S. App. LEXIS 4164 \* 15 (1<sup>st</sup> Cir., Feb. 22, 2006)(citing, 11 James M. Moore, *et al.*, Moore’s Federal Practice § 56.10 (Matthew Bender 3<sup>rd</sup> ed.)(courts generally accept use of documents produced in discovery as proper summary judgment material)).

The burden is on the party moving for summary judgment to show that there exists no genuine issue of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1985). In considering such a motion, the tribunal must construe the factual record and reasonable inferences therefrom in the light most favorable to the non-moving party. *Cone v. Longmont United Hospital Ass’n*, 14 F.3d 526, 528

(10th Cir. 1994). Although the finder of fact may draw inferences from the evidence, they must be “reasonably probable,” and based on more than speculation. *Rogers Corp. v. EPA*, 275 F.3d 1096 (D.C. Cir. 2002). Summary judgment is inappropriate when contradictory inferences may be drawn from the evidence. *Id.* Any unexplained gaps in materials submitted by the moving party, if pertinent to material issues of fact, also justify denial of a motion for summary judgment. *O’Donnell v. United States*, 891 F.2d 1079 (3<sup>rd</sup> Cir. 1989). The court’s function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for an evidentiary hearing. *Anderson v. Liberty Lobby*, 477 U.S. at 249. If a defendant moves for summary judgment based on lack of proof of a material fact, the judge must determine whether a reasonable jury could find by a preponderance of the evidence presented that the plaintiff is entitled to a verdict; “the mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient.” *Anderson*, 477 U.S. at 252.

### **III. Oral Argument**

In its Motion, Respondent requests an oral argument on the Motion. The Rules of Practice provide that this Tribunal “may permit oral argument on motions in its discretion.” 40 C.F.R. § 22.16(d). Looking to Federal court practice for guidance, it is noted that a district court “should have ‘wide latitude’ in determining whether oral argument is necessary before rendering summary judgment.” *Bratt v. International Business Machines Corp.*, 785 F.2d 352, 363 (1<sup>st</sup> Cir. 1986). “Where affidavits . . . and other documentary material indicate that the only issue is a matter of law, and where the briefs have adequately developed the relevant legal arguments, it is not error to deny oral argument,” whereas oral argument is appropriate where the motions for summary judgment depend on “difficult questions of law and alleged questions of fact.” *CIA Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 411 (1<sup>st</sup> Cir. 1985). It is appropriate to deny oral argument on a motion for accelerated decision where the motion, responses and supporting material clearly show that there is a genuine issue of material fact. Therefore, oral argument is particularly suitable and productive for complex matters of law, or mixed questions of law and fact, that are not fully elucidated by the written materials supplied.

The discussions presented in the Motion, Response and Reply sufficiently explain the issues relevant to the Motion, and it is clear, as discussed below, that there are genuine issues of fact that are material to liability for Counts 1 and 3. An oral argument would not be of any significant assistance in resolving the Motion. Respondent’s request for an oral argument is therefore denied.

### **IV. Relevant Regulatory Provisions**

A large quantity generator may store hazardous waste on-site without a RCRA permit or having interim status, if the generator meets certain requirements, as provided in Minn. R. 7045.0292 (emphasis added):

Subpart 1. Large quantity generator. A large quantity generator may accumulate hazardous waste on site without a permit or without having interim status if:

A. all accumulated hazardous waste is, within 90 days of the accumulation start date, treated on site in compliance with part 7045.0211 or shipped off site in compliance with part 7045.0208;

B. the waste is placed in containers which meet the standards of part 7045.0270, subpart 4, and are managed in accordance with parts 7045.0594, subpart 2, 7045.0596, subpart 3, and 7045.0626; \*\*\*\*

C. tanks and containers are clearly labeled with the waste accumulation start date, which must be visible for inspection; or for tanks or containers that are not used as shipping containers, the generator may maintain a clearly designated and legible log of transactions which includes accumulation start dates, clearly identifies each tank or container, and is available for inspection;

D. storage areas are protected from unauthorized access and inadvertent damage from vehicles or equipment;

E. containers that hold free liquids are placed on a containment surface that is impermeable to the wastes stored and, if outside, is curbed;

F. all waste containers and tanks are labeled with the words "Hazardous Waste" and a description that clearly identifies their contents to employees and emergency personnel; and

G. the requirements of parts 7045.0558; 7045.0562, subparts 1 and 2; 7045.0566 to 7045.0576; and 7045.1315, subpart 1, item D are fulfilled regarding *personnel training*, ignitable, reactive, or incompatible waste, *preparedness and prevention*, contingency planning, and waste analysis for restricted wastes.

Subpart 2. Accumulation start date. A generator's accumulation start date begins when the generator initiates accumulation in a container or tank. The accumulation start date for satellite accumulation is provided for in subpart 8, item D.

Similarly, the Federal regulations at 40 C.F.R. § 262.34 provide, in pertinent part:

(a) . . . a generator may accumulate hazardous waste on-site for 90 days or less without a permit or without having interim status, provided that:

(1) The waste is placed:

(I) In containers and the generator complies with the applicable requirements of subparts I [Use and Management of Containers] , AA, BB, and CC [Air Emission Standards] of 40 C.F.R. part 265 . . . .

\* \* \* \*

(4) The generator complies with the requirements for owners and operators in Subparts C [Preparedness and Prevention] and D [Contingency Plan and Emergency Procedures] in 40 C.F.R. part 265, with 265.16, and with 40 CFR 268.7(a)(5).

(b) 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 CFR parts 264 and 265 and the permit requirements of 40 CFR part 270 . . . . \* \* \* \*

A generator may also collect hazardous waste at “satellite accumulation areas,” as provided in Minn. R. 7045.0292 Subpart 8 (emphasis added), in pertinent part:

Satellite accumulation. Items A to D apply to all generators of hazardous waste.

A. A generator may, without a permit or interim status and without complying with subparts 1 to 7, accumulate as much as 55 gallons of hazardous waste . . . per waste stream per each point of generation provided the generator complies with items B to D.

B. The generator must:

- (1) comply with part 7045.0626, subparts 2 to 4 and 6;
- (2) clearly label each container with the words "Hazardous Waste" and a description that clearly identifies its contents to employees and emergency personnel;
- (3) *comply with parts 7045.0566 [Preparedness and Prevention] and 7045.0568 if a large quantity or small quantity generator . . . .*;
- (4) provide that outdoor satellite accumulation areas are protected from unauthorized access and inadvertent damage from vehicles or equipment; and
- (5) provide that containers that hold free liquids are placed on a containment surface that is impermeable to the waste stored and, if outside, is curbed.

C. In addition, the generator must:

- (1) for a container or containers located within the immediate working area of the specific process producing the waste, provide direct control and visual inspection of the satellite accumulation area by persons directly responsible for the specific process producing the waste; or
- (2) for a container or containers not located in the immediate working area, inspect the containers and areas where containers are

stored, at least weekly, looking for leaks and for deterioration caused by corrosion or other factors and keep a written record of the dates and findings of these inspections.

The Federal regulation provides at Section 262.34(c) for satellite accumulation, as follows:

(1) A generator may accumulate as much as 55 gallons of hazardous waste . . . in containers at or near any point of generation where wastes initially accumulate, which is under the control of the operator of the process generating the waste, without a permit or interim status and without complying with paragraph (a) of this section provided he:

- (I) Complies with §§ 265.171, 265.172, and 265.173(a) of this chapter [requirements of Use and Management of Containers] ; and
- (ii) Marks his containers either with the words “Hazardous Waste” or with other words that identify the contents of the containers.

In turn, the Preparedness and Prevention rule, Minn. R. 7045.0566, with which the generator must comply in order to be exempt from the requirements of a RCRA permit or interim status, provides as follows, in subpart 2:

Facilities must be maintained and operated to minimize the possibility of a fire, explosion, or any unplanned sudden or nonsudden release to air, land, or water of hazardous waste or hazardous waste constituents which could threaten human health or the environment.

The Federal Preparedness and Prevention rule of 40 C.F.R. § 265.31 is almost identical.

The Employee Training and Recordkeeping Requirements set forth in Minn.R.7045.0558 provide as follows:

Subpart 1. In general. Hazardous waste facility personnel must successfully complete a program of classroom instruction or on-the-job training that teaches them to perform their duties in a way that ensures the facility's compliance with the requirements of this chapter. The owner or operator shall ensure that this program includes all the elements described in the document required by subpart 6, item C.

\* \* \* \*

Subpart 3. Minimum program requirements. The training program must include instruction which teaches facility personnel hazardous waste management procedures relevant to the positions in which they are employed, including contingency plan implementation procedures. The training program must be

designed to ensure that facility personnel are able to respond effectively to emergencies by familiarizing them with emergency procedures, emergency equipment, and emergency systems, including, where applicable:

- A. procedures for using, inspecting, repairing, and replacing facility emergency and monitoring equipment;
- B. key parameters for automatic waste feed cutoff systems;
- C. communications or alarm systems;
- D. procedures for response to fires or explosions;
- E. procedures for response to ground water contamination incidents; and
- F. procedures for shutdown of operations.

The Federal regulation, 40 C.F.R. § 265.16, is almost identical to the Minnesota Employee Training rule:

(a)(1) Facility personnel must successfully complete a program of classroom instruction or on-the-job training that teaches them to perform their duties in a way that ensures the facility's compliance with the requirements of this part.

\* \* \* \*

(d) The owner or operator must maintain the following documents and records at the facility:

(1) The job title for each position at the facility related to hazardous waste management . . . .

## **V. The Parties' Arguments**

### **A. Respondent's Motion**

Respondent in its Motion asserts that the floor and tanks referred to in the Complaint are in the processing/manufacturing area of the plant and are not used for the storage of hazardous waste. Respondent argues that the Preparedness and Prevention rules of Minn. R. 7045.0566 and 40 C.F.R. § 265.31 do not apply to *processing* floors (or office floors, warehouse floors or parking lots) at a manufacturing plant, but only to the area in the plant where hazardous waste is centrally *stored*. In support, MMF cites to preambles of hazardous waste rules, in 45 Fed. Reg. 76624, 76625 (Nov. 19, 1980); 49 Fed. Reg. 49568, 49570 (Dec. 20, 1984); 51 Fed. Reg. 10146, 10164 (March 24, 1986); 71 Fed. Reg. 29712, 29723 (May 23, 2006). MMF also cites to *Wheeling-Pittsburgh Steel Corp.*, EPA Docket No RCRA-III-080-CA, 1998 WL 1032182 (ALJ, Feb. 5, 1998) and *Vernon Village, Inc. v. Gottier*, 755 F. Supp. 1142, 1154 (D. Conn. 1990). Respondent asserts further that its central storage area is a regulated hazardous waste facility which is in full compliance with the regulations. Its other operational hazardous waste unit is a neutralization/pretreatment/wastewater treatment facility. MMF argues that only these areas constitute a "facility" within the meaning of the applicable rules.

In further support of its Motion, MMF attaches an Affidavit, dated March 1, 2007, of Dana J. Wagner, a Certified Hazardous Materials Manager employed by Leisch Associates, who reviewed the design and operation of MMF's plant. The Affidavit states that the plant contains a number of discrete functional areas and facilities, including a shipping area, warehouse area, office area, laboratory area, processing/manufacturing area, hazardous waste neutralization/pretreatment/wastewater treatment facility, satellite accumulation area and hazardous waste storage facility. The Affidavit asserts that hazardous waste is stored at the central accumulation area and a satellite accumulation area within the MMF plant, and that the other areas, including the manufacturing area, are not used for treatment, storage and disposal of hazardous waste and therefore are not subject to the RCRA standards for treatment, storage and disposal of hazardous waste. The Wagner Affidavit (¶¶ 11, 12) asserts that MMF's satellite accumulation area is not subject to all of the storage standards, such as the Preparedness and Prevention rule, because the hazardous waste is stored in approved containers and removed to the central accumulation area within the required time frame specified in 40 C.F.R. § 262.34(c).

Attached to the Affidavit, marked as Exhibit A, is a floor plan of MMF's property. The floor plan shows a central accumulation area within the warehouse and adjacent to the polishing and sanding area, and it shows the warehouse adjacent to the processing and manufacturing area. The satellite accumulation area is shown within the neutralization/pretreatment/wastewater treatment area, which is adjacent to the processing and manufacturing area. Wagner Affidavit, Exhibit A. Also attached to the Affidavit is a letter to MMF from the Minnesota Pollution Control Agency, dated January 13, 1984, stating that MMF's immediate elementary neutralization process is excluded from hazardous waste permitting requirements. Wagner Affidavit, Exhibit B. Therefore, the neutralization/pretreatment/wastewater treatment facility is exempt from RCRA treatment, storage and disposal regulations, including those at issue in Counts 1 and 3, leaving only the central accumulation area as a RCRA facility subject to those regulations.

As to Count 1, Respondent characterizes the allegations in the Complaint as asserting that MMF's employees were required to obtain training to ensure that *the facility floor* was in compliance with the preparedness and prevention rule, and that the floor and tanks referenced in the Complaint are in the processing/manufacturing area of the plant and not used for storage of hazardous waste. The central storage area is undisputedly in full compliance with all applicable rules, Respondent states.

#### B. Complainant's Response

Complainant asserts that the Preparedness and Prevention rule, Minn. R. 7045.0566 Subpart 2 and 40 C.F.R. § 265.31, and the employee training requirements, Minn R. 7045.0558 and 40 C.F.R. § 265.16, reach any area of the property where hazardous wastes are being *managed*. Complainant explains that a large quantity generator can maintain its exemption from the permit or interim status requirements only if it meets certain conditions. Complainant points out that, as reflected in the January 9 Order, there is a dispute of fact as to whether MMF

satisfied those conditions.

Complainant asserts that one of the requirements to meet the exemption is that the generator comply with the accumulation times for storage of hazardous wastes under Minn. R. 7045.0292 and 40 C.F.R. § 262.34. Acknowledging that the term “accumulation” is not defined in the regulations, Complainant submits that it means short-term storage and that its meaning can be determined by reference to the definitions of “storage” in RCRA § 1004(33) (“the containment of hazardous waste . . .”) and 40 C.F.R. § 260.10 (“the holding of hazardous waste for a temporary period, at the end of which the hazardous waste is treated, disposed of or stored elsewhere.”). Complainant points out that “satellite accumulation” means initial accumulation at various points of generation, which is then removed to a central storage area. Therefore, the satellite accumulation may occur in processing areas, and must comply with certain regulatory requirements, such as placement of the hazardous waste into marked containers, in order for the generator to maintain an exemption from permit or interim status requirements. If the satellite accumulation requirements are not complied with, Complainant reasons, then the temporary holding of waste becomes subject to the 90-day accumulation requirements of Minn. R. 7045.0292 Subpart 1. If those requirements are not satisfied, then the “temporary holding” of hazardous waste becomes “storage” of hazardous waste, subject to the standards for hazardous waste treatment, storage and disposal facilities under a permit or interim status, including the Preparedness and Prevention rule and training and recordkeeping requirements. Complainant submits that the “accumulation time” provisions of the regulations enables enforcement against generators based on what they are doing with the hazardous waste rather than how they characterize portions of their plant. Otherwise, a generator could store hazardous waste in unlabeled containers in its parking lot and argue that it is not a RCRA-regulated unit, creating a loophole that would defeat the regulations’ purpose.

Complainant asserts that the information it has tendered shows that MMF has failed to meet the conditions necessary for exempt status. Complainant points out the observations of Hennepin County Inspector Michael Risse, as documented in his Affidavit (“Risse Aff.”), that on May 17, 2001, June 12, 2001 and August 7, 2001, there were cracks, corrosion, peeling floor coating and a hole in or on MMF’s process area floor, that the floor was wet throughout the anodizing area, and that solid, liquid and sludge spilled, dripped, flowing and pooled onto and into a hole in the process area floor. Complainant points to laboratory analysis of samples of the materials taken from the floor on June 12, 2001, showing that they were hazardous waste. Complainant’s Prehearing Exchange Exhibit (“C’s Ex.”) 3 pp. 2, 3, 31-36, 42. Complainant also points to documentation of MMF employees’ statements that the floor was cleaned once per year. C’s Ex. 1 p. 4; C’s Ex. 4 p. 2; Affidavit of U.S. EPA Inspector Howard Caine (“Caine Aff.”) ¶ 40.

MMF has submitted information which was held in the January 9 Order to create genuine disputes of material fact as to Count 3, Complainant asserts, and the Wagner Affidavit does not resolve any issue of fact. The Affidavit is irrelevant in that it describes the current condition of the plant, not the condition at the times at issue in the Complaint, Complainant argues, and it does not respond to Complainant’s evidence in support of the proposition that hazardous wastes

were accumulating for extended periods on, and corroding, and escaping through cracks in, Respondent's plant floor.

As to Count 1, Complainant asserts that the hazardous waste training requirement is a condition of the exemption allowing generators to accumulate hazardous waste for 90 days. Complainant argues that MMF makes essentially the same erroneous argument as with Count 3, and because the January 9 Order concluded that genuine issues of material fact exist as to Count 1, Respondent's Motion should be dismissed. Complainant refers to the very limited documentation, provided by MMF during the May 17, 2001 inspection, as to employee training. C's Ex. 1 pp. 33-354; C's Ex. 9; Caine Affidavit ¶¶ 16, 28. Complainant asserts that this documentation does not reference any training to ensure compliance with hazardous waste regulation. Complainant asserts further that MMF's written training descriptions in effect from August 25, 2000 through May 31, 2004 do not include directions as to cleaning up spilled hazardous waste as quickly as possible as required by Minn. R. 7045.0275, as to inspecting and preventing or repairing damage to the facility floor, or as to minimizing the possibility of releasing spilled hazardous waste through damaged flooring. C's Ex. 21.

Finally, Complainant argues that the Federal Register preambles and cases cited by Respondent do not support its Motion. Because the regulations address areas of a facility where hazardous wastes are managed, and there is a dispute of fact as to whether MMF stored wastes at locations other than its central storage area and thus failed to satisfy the conditions for maintaining exempt status, Complainant concludes, the Motion should be denied.

### C. Respondent's Reply

Respondent argues in its Reply that the presence of hazardous waste on a processing floor without containment is not, as a matter of law, "storage" of hazardous waste. Complainant admits that the hazardous waste it allegedly found on the processing floor was not containerized, there is no evidence to suggest that MMF stored hazardous waste on the processing floor, and therefore there was no storage of hazardous waste, MMF reasons. Respondent asserts that Complainant has not submitted any evidence suggesting that any *solids* on the processing floor were hazardous, as the samples taken were liquids.<sup>1</sup> The liquids were not containerized, and pooling of any spilled liquid hazardous waste on the floor, without containment, is not, as a matter of law, storage of hazardous waste, MMF argues. "Storage" under RCRA requires that the waste be contained and ultimately intended to be removed, citing to *Strong Steel Products, LLC*, EPA Docket Nos. RCRA-5-2001-0016, CAA-5-2001-0020, MM-5-2001-0006, 2005 EPA ALJ LEXIS 26 \*261-63, n. 146 (ALJ, April 7, 2005) and cases cited therein. Respondent reiterates that the storage standards, including Preparedness and Prevention, only apply to areas used for storage of hazardous waste, citing *Project XL Site-Specific Rulemaking for US Filter Recovery Services, Roseville, MN and Generators and Transporters of USFRS XL Waste*, 65 Fed. Reg.

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<sup>1</sup> There was a sample described as "solid," designated as AF-2, which consisted of chunks of concrete flooring, sand and gravel. C's Ex. 3 pp. 3, 34

50284, 50292 (Aug. 17, 2000)(“The preparedness and prevention standards require the generator to maintain and operate the storage area so as to minimize the possibility of fire, explosion or any unplanned sudden or nonsudden release of the hazardous waste . . . .”)

## **V. Discussion**

### **A. Count 3**

Count 3 of the Complaint alleges that “[f]rom on or about May 17, 2001 to August 7, 2001, the floor of the facility was degraded and had cracks in it,” and that “[f]rom May 17, 2001 through August 25, 2005, the floor of Respondent’s Facility was corroded, cracked, and compromised.” Compl. ¶¶ 138, 181. The term “Facility” is defined broadly in the Complaint as MMF’s entire property: the “contiguous land and structures, other appurtenances, and improvements on the land, located at 909 Winter Street NE, Minneapolis, Minnesota.” Compl. ¶ 12. Complainant asserts that “Respondent uses the Facility to hold discarded material for temporary periods, before the material is shipped from the Facility site for treatment, storage, or disposal elsewhere.” Compl. ¶ 13.

The allegations in Count 3 specify that the cracked, corroded and compromised areas, including holes and peeling floor coating, are located between and next to tanks containing substances which have various hazardous waste codes. Count 3 alleges that the cracks, stains, corrosion and holes in the floor, and peeling floor coating “created . . . [and] did not minimize the possibility of an unplanned sudden or nonsudden release to the land of hazardous waste or hazardous waste constituents which could threaten human health or the environment.” Compl. ¶¶ 182, 183. Count 3 concludes in Paragraphs 184, 185 and 186 of the Complaint that:

184. Respondent’s failure to maintain and operate its facility to minimize the possibility of a fire, explosion or any unplanned sudden or nonsudden release to air, land or water of hazardous waste or hazardous waste constituents which could threaten human health or the environment, failed to comply with the condition in Minn. R. 7045.0292 Subpart 1.G [40 C.F.R. § 262.34(a)(4)], for exemption from the hazardous waste storage permit requirement.

185. From May 17, 2001, through August 25, 2005, Respondent failed to qualify for a conditional generator exemption from regulation of the Facility as a storage facility, and was operating a hazardous waste storage facility at the Facility, and was subject to the requirements of Minn. R. 7045.566, Subpart 2 [40 CFR § 265.31].

186. Respondent’s failure to maintain and operate its facility to minimize the possibility of a fire, explosion or any unplanned sudden or nonsudden release to air, land or water of hazardous waste or hazardous waste constituents which could threaten human health or the environment, constituted violations of Minn. R.

7045.0566, Subpart 2 [40 C.F.R. § 264.31][sic]<sup>2</sup>

In the January 9 Order, it was held that Respondent failed to qualify for a conditional generator exemption from the hazardous waste storage facility permit and operational requirements. Therefore, the allegations in Paragraphs 184 and 185 are moot.

At issue now in Count 3 is whether Respondent violated Minn. R. 7045.0566 Subpart 2, which provides in relevant part, “Facilities must be maintained and operated to minimize the possibility of . . . any unplanned sudden or nonsudden release to air, land or water of hazardous waste or hazardous waste constituents . . .” Minn. R. 7045.0566 Subpart 2 and 40 C.F.R. § 265.31 (emphasis added).<sup>3</sup> The elements of a violation of this provision are:

- (1) that a facility
- (2) was not maintained and operated to minimize the possibility of
- (3) any unplanned sudden or nonsudden release to air, land or water
- (4) of hazardous waste or hazardous waste constituents.

The question presented by the Motion is whether Respondent has shown that it is entitled to judgment as a matter of law that the areas at issue in Count 3 are not a “facility” and are not part of MMF’s “facility” within the meaning of the applicable regulations, and that there are no genuine issues of material fact as to that issue.

The Complaint does not specify any area or areas of MMF’s property as a “facility” that is used for storage of waste. *See*, Compl. ¶¶ 12, 13, 185. Complainant in its Response indicates that the Preparedness and Prevention rule applies to any area on the property where hazardous wastes are being “managed,” which includes any “temporary holding” of hazardous waste, which in turn includes areas where hazardous waste *spills and is allowed to accumulate on the floor* for an indeterminate period.<sup>4</sup> Response at 1, 12-15.

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<sup>2</sup> The citation to 40 C.F.R. § 264.31 appears to be a typographical error. The correct citation should be 40 C.F.R. § 265.31.

<sup>3</sup> The Preparedness and Prevention regulations apply, with exceptions not applicable here, “to owners and operators of all hazardous waste facilities.” Minn. R. 7056.0566 subpart 1, 40 C.F.R. §§ 264.30 and 265.30.

<sup>4</sup> The plating and anodizing solutions contained in the tanks in the processing area are not alleged to be hazardous waste, although they are alleged to have a hazardous waste code, as they are being utilized in the plating and anodizing operations and therefore are not “discarded materials.” A “hazardous waste” must meet the definition of “solid waste,” which is defined as a “discarded material,” which includes a material which is “abandoned” by being “disposed of” or “accumulated, stored or treated . . . before or in lieu of being disposed of . . .” 40 C.F.R. § 261.2.

Respondent's position is that only the areas used for *containerized* storage are subject to the Preparedness and Prevention rule, and therefore, only its "central accumulation area" is the "facility" subject to Minn. R. 7045.0566.

The Minnesota rules define "facility" for purposes of the hazardous waste regulations as:

A. all contiguous land and structures, other appurtenances, and improvements on the land used for treating, storing, or disposing of hazardous waste. A facility may consist of several treatment, storage, or disposal operational units, such as one or more landfills, surface impoundments, or combinations thereof; and

B. for the purpose of implementing corrective action under part 7045.0485, all contiguous property under the control of an owner or operator seeking a permit under parts 7001.0010 to 7001.0730 or subtitle C of RCRA

Minn. R. 7045.0020 subpart 24. The Federal regulations provide, in 40 C.F.R. § 260.10, an almost identical definition of "facility" for purposes of 40 C.F.R. Parts 260 through 273. Thus, except for purposes of corrective action, a "facility" does not necessarily include an entire property, but only includes the land, and structures, appurtenances and improvements thereon, *which is used for* treating, storing or disposing of hazardous waste, and consists of, at least, a single hazardous waste management unit or multiple units. A "hazardous waste management unit" is defined as "a contiguous area of land on or in which hazardous waste is placed, or the largest area in which there is significant likelihood of mixing hazardous waste constituents in the same area." Minn. R. 7045.0020; 40 C.F.R. § 260.10. An example is a "container storage area," but "[a] container alone does not constitute a unit; the unit includes containers and the land or pad upon which they are placed." *Id.*

For further illumination as to the meaning of the term "facility," it is appropriate to examine any explanations of the term in preambles to the relevant Federal regulations, from which the state regulations are derived. *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta* 458 U.S. 141, 158 (1982). The Interim Final Rule amending the Standards Applicable to Generators of Hazardous Waste states as follows, in pertinent part:

### III. Application of Requirements to All Accumulation Areas

In promulgating the regulations establishing the requirements for on-site accumulation, EPA assumed that accumulation generally would occur in *discrete areas in the manufacturing complex where wastes would be held prior to shipment* to a treatment, storage or disposal facility. Technical standards for tanks or containers, the preparation of contingency plans and similar *requirements are appropriate for* loading docks, storage buildings and sheds, and other *areas in a manufacturing complex where hazardous wastes are collected and accumulated.*

Members of the regulated community, however, have pointed out that, within a manufacturing complex, there may be dozens of places where hazardous wastes

are collected during daily operations prior to taking a container containing hazardous waste to the loading dock or other accumulation area. These commenters have questioned the appropriateness of applying the requirements of § 262.34 to each place where hazardous wastes may be initially collected.

EPA believes, however, that *the requirements of § 262.34 are appropriate for both centralized and satellite accumulation areas*. The Agency, however, is soliciting information on whether, in some situations, different requirements should govern these accumulation activities.

Whether at satellite or centralized accumulation areas, the hazardous waste requires proper management in order to minimize the threat to human health and the environment. The requirements of § 262.34 are designed to provide such protection. Containers that meet DOT specifications and tanks that meet Part 265 design and operating requirements appear necessary and appropriate for the accumulation of hazardous waste regardless of whether the accumulation occurs at a centralized facility or in different places within a plant. *The other requirements of § 262.34 similarly appear appropriate to **all accumulation activities on the site of generation**; these include marking and labeling containers; weekly inspections of containers; locating of containers holding ignitable and reactive wastes away from the property line; requirements concerning *preparedness and prevention*, contingency plans and emergency response and personnel training. The protection that these requirements ensure appear appropriate and necessary **wherever hazardous wastes are accumulated**.*

45 Fed. Reg. 76624, 76625 (November 19, 1980)(emphasis added).

In 1984, EPA amended the generator standards to allow an exemption from compliance with some of the 90-day accumulation standards for satellite accumulation areas. EPA decided to exempt satellite accumulation areas from the requirements of contingency plans, personnel training and most standards for management of containers in 40 C.F.R. part 265 subparts I and J. 49 Fed. Reg. 49568 (Final Rule, Dec. 20, 1984); 48 Fed. Reg. 118 (Proposed Rule, Jan. 3, 1983). However, EPA did not discuss or change its rationale of applying Preparedness and Prevention standards to all accumulation activities satellite accumulation areas. In 1986, in the preamble of the rule setting forth standards for small quantity generators, EPA specifically addressed the scope of application of the Preparedness and Prevention rule, as follows, in pertinent part:

This commenter was also concerned that EPA's broad definition of "facility" could require that preparedness and prevention measures be maintained throughout every portion of the generator's property instead of just those areas where waste is accumulated. EPA has never intended its broad definition of "facility" (see 50 FR 28712) to be used in application of the preparedness and prevention regulations; rather, the definition of "facility" in § 260.10 is used. Applying this narrower definition makes clear that the preparedness and

prevention regulations only require the generator to *take those precautions* and maintain that equipment *necessary to ensure that they are adequately prepared to respond to emergencies relating to the **hazardous waste operations** of the facility*. If special equipment or precautions are not needed for this purpose in areas of a facility *where hazardous wastes are not **managed***, then a generator is not expected to maintain them in those areas. At the same time, however, *other precautions, such as adequate aisle space, may be needed in areas outside of the **immediate waste accumulation area*** in order to ensure adequate access to emergency equipment in the event of a fire, explosion, or release of hazardous waste or hazardous waste constituents.

51 Fed. Reg. 10146, 10163-10164 (March 24, 1986)(emphasis added). The 1980 preamble text quoted above indicates that the term “facility,” in the context of applying the Preparedness and Prevention rule to generators, includes all areas where hazardous wastes are accumulated. According to the 1986 preamble text, the term “facility” encompasses areas of “hazardous waste operations,” where hazardous wastes are “managed,”<sup>5</sup> but the context of the discussion indicates that these areas refer to areas where hazardous wastes are accumulated. Both preambles make clear that the term “facility” does not mean all portions of the generator’s property.

It is not clear from the regulations or their preambles that the term “accumulate” is synonymous with “storage,” but the operative term in the Preparedness and Prevention rule is the term “facility.” Areas of “accumulation” of hazardous waste reasonably can be considered areas that are *in fact* “used for . . . storing . . . hazardous waste,” whether or not the accumulation or storage is intentional. Minn. R. 7045.0020 subpart 24; 40 C.F.R. § 260.10. There is no requirement in the term “facility” that the owner or operator *intends* to store the hazardous waste.

However, there does not appear to be a bright-line boundary or scope of the term “facility.”<sup>6</sup> For example, there is no indication found in the regulations or their preambles as to whether “facility” encompasses an entire building or room in which there is a certain area where hazardous waste is accumulated, or merely an area immediately around the hazardous waste containers. Indeed, EPA stated in the 1986 preamble that since the Preparedness and Prevention requirements “are structured such that specific equipment and procedures are required only on an ‘as needed’ basis, the existing regulation provides complete flexibility for hazardous waste generators to tailor their preparedness and prevention activities to the specific kinds of wastes

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<sup>5</sup> The term “management” or “hazardous waste management” is defined in 40 C.F.R. § 260.10 as “the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous waste.”

<sup>6</sup> The scope of the term “facility” in the regulations may vary with the context. For example, Minn. R. 7045.0558 Subpart 6 provides in part: “Personnel records. The following documents and records must be maintained at the facility . . .,” which as a practical matter may include an office area and not specifically the hazardous waste management unit.

handled at the facility.” 51 Fed. Reg. 10146, 10163 (Final Rule, March 24, 1986).

The other Federal Register preambles cited by Respondent also indicate that “facility” encompasses any areas where hazardous waste is accumulated. The August 2000 preamble refers generally to waste accumulation and storage areas, and does not exclude non-central hazardous waste accumulation areas from the definition of “facility” or from application of the Preparedness and Prevention rule. *Project XL Site-Specific Rulemaking for US Filter Recovery Services, Roseville, MN and Generators and Transporters of USFRS XL Waste*, 65 Fed. Reg. 50284, 50292 (Aug. 17, 2000)(“The generators may accumulate the hazardous waste in containers, tanks, drip pads or containment buildings, provided each of these units meets the specific requirements [such as] Preparedness and Prevention . . . The preparedness and prevention standards require the generator to maintain and operate the storage area . . .”). The May 2006 preamble specifically excludes college laboratories, which normally would be considered satellite accumulation areas, from the requirements. *Standards Applicable to Generators; Subpart K - Standards Applicable to Academic Laboratories*, 71 Fed. Reg. 29712 (Proposed Rule, May 23, 2006)(“Colleges and universities must comply with 262.23(a) or (d) at the central accumulation area, if and when, unwanted materials are brought from laboratories to a central accumulation area . . . EPA is proposing that laboratories . . . will no longer be subject to the satellite accumulation provisions,” but are instead subject to new subpart K of 40 C.F.R. part 262). The decisions cited by Respondent, *Wheeling Pittsburgh*, *supra* and *Vernon Village*, *supra*, also do not support Respondent’s position.

There is no dispute that Respondent had a central hazardous waste storage area on site and that the Preparedness and Prevention rule would apply to that area. There is documentation that sludges from the filter press drop-off box, solids that accumulate in the pits around the receiving tanks in MMF’s elementary treatment/neutralization unit, and floor scrapings are collected and stored in “totes,” which are bags with a capacity of a cubic yard. C’s Ex. 1 pp. 3, 4, 6; C’s Ex. 3 pp. 17, 18; C’s Ex. 4 pp. 3, 4, 5, 16. Documents submitted by Complainant indicate that the totes (cubic yard bags) were stored in a hazardous waste storage area as early as May 17, 2001.<sup>7</sup> C’s Ex. 4 pp. 16, 18; C’s Ex. 16 pp. 10, 13; C’s Ex. 21 p. 3; C’s Ex. 29 p. 14. Complainant does not dispute, or refer to any evidence contradicting, the evidence that the hazardous waste containers were in a central accumulation area. Complainant only suggests generally that the Wagner Affidavit, which refers to the hazardous waste central accumulation area, is “directed to the current condition of Respondent’s facility, and not to the condition in 2001 . . . .” Response at 16. Therefore, Complainant does not raise any genuine issue of fact as to the existence of MMF’s central accumulation area during the relevant time period.

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<sup>7</sup> Also on MMF’s site was a portable 1100 gallon tank into which spent plating bath solutions and waste liquids from the anodizing process are placed, and from which liquids are removed and shipped off-site by U.S. Filter within a few hours of placement into the tank. C’s Ex. 1 p. 4; C’s Ex. 4 p. 4; C’s Ex. 12 p. 5. It is not clear from the documents submitted where this “portable” container was located.

There is also no dispute that the areas at issue in Count 3 are located where the anodizing and zinc plating tanks are, which Respondent refers to as the “processing area.” The Complaint describes the locations of the alleged violations (*i.e.*, the holes and corroded, cracked and peeling floor areas) as areas near the nickel seal tank, between Tanks 10 and 11, near Tanks 8 and 9, near the rinse tank on the anodize line, near Tank 30, between Tanks 25 and 26, between Tanks 7 and 8, between Tanks 12 and 13, and near Tank 23. Compl. ¶¶ 144-146, 157, 158, 160, 163-170 and 176. Complainant does not dispute that MMF’s central accumulation area is not located in these areas. *See*, Motion, Wagner Affidavit, Exhibit A.

The question thus is whether Complainant has shown *prima facie* that hazardous waste was “accumulated” in MMF’s processing area. The Complaint does not allege that the processing area or areas at issue in Count 3 constitute a place where hazardous wastes are “stored” or “accumulated,” or that they constitute a “facility” within the meaning of the applicable regulations. The only allegation in Count 3 as to any substance on the floor is the allegation that on June 12, 2001, “a liquid was trickling into the hole in the floor near tank 9.” Compl. ¶ 159. The Complaint does not allege that the liquid was a hazardous waste. However, Complainant refers to documents in the Prehearing Exchange which indicate that hazardous wastes spilled onto the floor, accumulated, and were later removed.

For example, reports of the inspection on May 17, 2001 states that there was sludge on the floor by the filter-press drop-off box and MMF representative Mr. Ludwig “stated that he thought that the sludge had been stored on the ground for a couple of weeks.” C’s Ex. 1 pp. 3, 6; C’s Ex. 4 p. 2, 5. The sludge was also seen in the same area on June 12, 2001 and August 7, 2001. C’s Ex. 3 p. 4; C’s Ex. 5 p. 1. An inspection report and “Violations Summary” suggest that the box under the filter press could be a satellite accumulation area. C’s Ex. 4 p. 5; C’s Ex. 6 p. 5. The reports state that there was solid accumulation near the electrocleaner tank,” and that the floors are cleaned once per year. C’s Ex. 1 pp. 3, 4; C’s Ex. 4 p. 3. Also on May 17, 2001, “a great deal of solids, liquids and sludges” were observed on the floor in the zinc plating area. C’s Ex. 4 p. 2. Waste was observed on the floor within a curbed area under the tank in Pit 1 and found to contain hazardous waste. C’s Ex. 4 p. 3; C’s Ex. 3 pp. 4-5, 38, 42. Pit 1 and the filter press drop-off box may have been located in or near the neutralization/pretreatment/wastewater treatment unit, but the evidence does not establish whether the sludge from the filter box and waste from the area of Pit 1 would be exempt from regulation as part of that unit. *See*, Motion p. 4, n. 1; Wagner Affidavit ¶ 8. Liquid was observed to be “stored” in Pit 2 during the inspections of May 17, June 12 and August 7, 2001 and liquid flowing into Pit 2 was found to include hazardous waste characteristics. C’s Ex. 3 p. ; C’s Ex. 4 p. 3; C’s Ex. 6 p. 4. During the June 12 inspection, the inspectors observed that Tank 9 was full of a very strong acid and that MMF representative Mr. Logan said it was not used anymore and that it had not been used for three years. C’s Ex. 3 p. 3. Near Tank 9 a sample of liquid on the floor was found to have hazardous characteristics. C’s Ex. 3 pp. 2, 33, 42. A sludge an inch or two deep sampled from the floor at one corner of the zinc plating area, was found to have characteristics of hazardous waste. C’s Ex. 3 pp. 5, 39. A “Violations Summary” resulting from these inspections describes MMF as storing hazardous waste in secondary containment areas surrounding the process tanks. C’s Ex. 6 p. 2. A Notice of Inspection, dated April 27, 2004, requesting MMF to correct violations

observed from an inspection on April 2, 2004, describes flooring and trenches in several areas being “used for waste accumulation and storage.” C’s Ex. 19 p. 3.

Respondent’s position, that these wastes were not “containerized” and therefore cannot meet the definition of “storage” or “facility” subject to the Preparedness and Prevention rule, is not supported by the text of the applicable regulations or by the authorities MMF cites. The term “storage” is defined in the regulations as “the holding of hazardous waste for a temporary period, at the end of which the hazardous waste is treated, disposed of, or stored elsewhere.” Minn. R. 7045.0020 Subpart 87; 40 C.F.R. § 260.10. The term “storage” is defined in RCRA as “the containment of hazardous waste, either in a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste.” RCRA §1004(33). The terms “holding” and “containment” are not defined in the applicable regulations or in RCRA. The term “containment” is *not* synonymous with “container,” which is defined “any portable device in which a material is stored, transported, treated, disposed of, or otherwise handled.” Minn. R. 7045.0020 subpart 11; 40 C.F.R. § 260.10. “Containment” has a broad meaning, as evidenced by the fact that it is included in the terms “containment building” and “secondary containment,” which are structures or structural components which are not portable and which include impermeable flooring or other surface underlying the waste. *See*, 40 C.F.R. part 265 subpart DD; 40 C.F.R. § 265.193. Indeed, the term “storage” includes “indoor storage,” defined in the Minnesota regulations as “storage within a permanently constructed building consisting of at least a roof and three walls permanently affixed to an impermeable floor placed on the ground.” Minn. R. 7045.0020 subpart 43a. The term “storage” not only encompasses certain types of storage units as set out in the regulations, but also encompasses a “miscellaneous unit,” defined as “a hazardous waste management unit where hazardous waste is treated, stored, or disposed of and that is *not* a container, tank, surface impoundment, pile, land treatment unit, landfill, incinerator, boiler, industrial furnace, underground injection well with appropriate technical standards under Code of Federal Regulations, title 40, part 146, containment building, corrective action management unit, staging pile, or unit eligible for a research, development, and demonstration permit under part 7001.0712. Minn. R. 7045.0020 subpart 58a (emphasis added).

*Strong Steel, supra*, and the cases cited therein, held that hazardous waste which is on and in the ground *outdoors*, is not encompassed by the term “storage,” and thus they do not suggest a pertinent narrow interpretation of the term “storage.” *Strong Steel* involved hazardous waste placed on a deteriorated asphalt pad which had contaminated the soil underneath, and could not be considered “contained.” In *Connecticut Coastal Fishermen's Ass'n. v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1316 (2nd Cir. 1993) the court stated that lead shot scattered in the waters of Long Island Sound were not “contained” or “held” and there was no intention of removing it and therefore it did not involve hazardous waste storage. In *United States v. Power Engineering Co.*, 10 F. Supp. 2d 1145, 1160 (D. Colo. 1998), the court held that open waste piles of contaminated soil, accumulated for several years on land so that hazardous waste or constituents thereof may enter the environment, constituted “disposal” and thus did not constitute illegal “storage” of hazardous waste, under the definition of “storage” in Section 1004(33) of RCRA: the “containment of hazardous waste . . . in such a manner as not to constitute disposal . . . .” The facts of those cases are distinct from those in the present case, in

which waste is placed on a floor inside a building. Respondent has not shown that a floor area of a building cannot be a hazardous waste accumulation area and thus a “facility” within the meaning of the applicable regulations.

Nevertheless, given the concerns noted in the documents submitted by Complainant that hazardous constituents from the substances on the floor may leach through the flooring and into the ground underneath, there may be some question as to whether there is “storage” or “disposal” of hazardous waste on the processing floor. *See*, C’s Ex. 6 p. 2; C’s Ex. 7 p. 1; C’s Ex. 17 p. 1. “Disposal” is defined as “the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid or hazardous waste into or on any land or water, and at which waste will remain after closure.” 40 C.F.R. § 260.10. Complainant, however, has not alleged in the Complaint that MMF disposed of hazardous waste.

Respondent has not shown as a matter of law that the areas described in Count 3 are clearly excluded by the terms “storage” or “facility” as defined in the applicable regulations and relevant case law. Genuine issues of material fact remain as to whether hazardous waste was “accumulated” or “stored” in the areas at issue in Count 3. Because Respondent has not shown that there are no genuine issues of material fact that the areas at issue in Count 3 are not a “facility” or part of MMF’s “facility” within the meaning of the applicable regulations, its Motion is DENIED as to Count 3.

#### B. Count 1

Count 1 of the Complaint alleges, in part, that Respondent did not provide certain of its Hazardous Waste Handlers/Waste System Monitors “with hazardous waste personnel training that taught [them] to perform [their] duties in a way that ensured the facility’s compliance with the requirement of Minn. R. 7045.0566 to minimize the possibility of releases of hazardous waste to air, soil or water, or with other requirements of Minn. R. Chapter 7045 relevant to [their] position.” Compl. ¶¶ 61, 66, 71 (Paragraph 71 omits the last phrase). Count 1 further alleges that Respondent did not provide Emergency Coordinators with hazardous waste personnel training to ensure the facility’s compliance with the hazardous waste requirements and to ensure they were able to respond effectively to emergencies. Compl. ¶¶ 57-83.

The Employee Training and Recordkeeping requirement provides that “Hazardous waste *facility* personnel” must complete training “that teaches them to perform their duties in a way that ensures the *facility's* compliance with the requirements of this chapter.” Minn.R.7045.0558 Subpart 1 (emphasis added). The applicable regulations require hazardous waste training for hazardous waste storage areas. Respondent views Count 1 as reflecting failure to train personnel as to the areas referenced in Count 3, based on language in the allegations of Count 1 reflecting the allegations of Count 3. However, Count 1 also alleges failure to train Emergency Coordinators as to responding effectively to emergencies, which allegation does not reflect the allegations relevant to Count 3. Therefore, the allegations of Count 1 may also apply to MMF’s central hazardous waste storage area, which Respondent does not dispute is a “facility.”

Respondent has not shown the absence of genuine issues of material fact and that it is entitled to judgment as a matter of law, that Count 1 does not apply to a “facility” subject to the hazardous waste training requirements.

**ORDER**

1. Respondent’s request for an oral argument is **DENIED**.
2. Respondent’s Motion for Accelerated Decision is **DENIED**.

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Susan L. Biro  
Chief Administrative Law Judge

Dated: April 19, 2007  
Washington, D.C.