

adjudicating motions for accelerated decision. See *CWM Chemical Service*, 6 E.A.D. 1 (EAB 1995).

The United States Supreme Court has held that the burden of showing that no genuine issue of material fact exists is on the party moving for summary judgment. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). In considering such a motion, the Tribunal must construe the evidentiary material and reasonable inferences drawn therefrom in the light most favorable to the non-moving party. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1985); *Adickes*, 398 U.S. at 158-59; see also *Cone v. Longmont United Hospital Assoc.*, 14 F.3d 526, 528 (10th Cir. 1994). Summary judgment on a matter is inappropriate when contradictory inferences may be drawn from the evidence. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002).

In assessing materiality for summary judgment purposes, the Supreme Court has determined that a factual dispute is material where, under the governing law, it might affect the outcome of the proceeding. *Anderson*, 477 U.S. at 248; *Adickes*, 398 U.S. at 158-159. The substantive law involved in the proceeding identifies which facts are material. *Id.*

The Supreme Court has found that a factual dispute is genuine if the evidence is such that a reasonable finder of fact could return a verdict in favor of the non-moving party. *Id.* In determining whether a genuine issue of fact exists, the judge must decide whether a finder of fact could reasonably find for the non-moving party under the evidentiary standards in a particular proceeding. *Anderson*, 477 U.S. at 252.

Once the party moving for summary judgment meets its burden of showing the absence of genuine issues of material fact, Rule 56(e) requires the opposing party to offer countering evidentiary material or to file a Rule 56(f) affidavit. Under Rule 56(e), "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." The Supreme Court has found that the non-moving party must present "affirmative evidence" and that it cannot defeat the motion without offering "any significant probative evidence tending to support" its pleadings. *Anderson*, 477 U.S. at 256 (quoting *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968)).

More specifically, the Court has ruled that the mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment, as Rule 56(e) requires the opposing party to go beyond the pleadings. *Celotex Corp. v. Catrett*, 477 U.S. 317 at 322 (1986); *Adickes*, 398 U.S. at 160. Similarly, a simple denial of liability is inadequate to demonstrate that an issue of fact does indeed exist in a matter. *In the Matter of Strong Steel Products*, Docket Nos. RCRA-05-2001-0016, CAA-05-2001-0020, and MM-05-2001-0006, 2002 EPA ALJ LEXIS 57 at *22 (ALJ, September 9,

2002). A party responding to a motion for accelerated decision must produce some evidence which places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing. *Id.* at 22-23; see *In re Bickford, Inc.*, Docket No. TSCA-V-C-052-92, 1994 TSCA LEXIS 90 (ALJ, November 28, 1994).

The Supreme Court has noted, however, that there is no requirement that the moving party support its motion with affidavits negating the opposing party's claim or that the opposing party produce evidence in a form that would be admissible at trial in order to avoid summary judgment. *Celotex*, 477 U.S. at 323-324. The parties may move for summary judgment or successfully defeat summary judgment without supporting affidavits provided that other evidence referenced in Rule 56(c) adequately supports its position. Of course, if the moving party fails to carry its burden to show that it is entitled to summary judgment under established principles, then no defense is required. *Adickes*, 398 U.S. at 156.

The evidentiary standard of proof in the matter before me, as in all other cases of administrative assessment of civil penalties governed by the Rules of Practice, is a "preponderance of the evidence." 40 C.F.R. § 22.24. In determining whether or not there is a genuine factual dispute, I, as the judge and finder of fact, must consider whether I could reasonably find for the non-moving party under the "preponderance of the evidence" standard.

Accordingly, a party moving for accelerated decision must establish through the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, the absence of genuine issues of material fact and that it is entitled to judgment as a matter of law by the preponderance of the evidence. On the other hand, a party opposing a properly supported motion for accelerated decision must demonstrate the existence of a genuine issue of material fact by proffering significant probative evidence from which a reasonable presiding officer could find in that party's favor by a preponderance of the evidence. Even if a judge believes that summary judgment is technically proper upon review of the evidence in a case, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. See *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979).

DISCUSSION

A. Failure to Submit Site-Specific Performance Test Plan (Count I) and Failure to Conduct Initial Performance Test (Count II)

Section 112(d) of the CAA provides that the EPA shall promulgate regulations establishing emissions standards for hazardous air pollutants (“HAPs”), which are known as National Emissions Standards for Hazardous Air Pollutants (“NESHAPs”). Accordingly, the EPA has promulgated the NESHAP for secondary aluminum production, 40 C.F.R. part 63, subpart RRR. Secondary aluminum facilities may emit a variety of pollutants, including dioxin and furans. Motion at 2. Moreover, it is undisputed that a primary regulatory purpose of the NESHAP is to control dioxin and furans, which are suspected to cause serious developmental effects in animals and humans. *Id.* (citing 64 Fed. Reg. 6949 (Feb. 11, 1999)).

Pursuant to the NESHAP, owners and operators of an affected source must come into compliance with the NESHAP by March 24, 2003. 40 C.F.R. § 63.1501(a). The term “major source” means any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year (“tpy”) or more of any HAP or 25 tpy or more of any combination of HAPs. CAA § 112(a)(1), 42 U.S.C. § 7412(a)(1). The term “area source” means any stationary source of HAPs that is not a major source. CAA § 112(a)(2). Area sources must conduct a performance test pertaining to dioxin and furans. Motion at 3. Furthermore, major sources must conduct additional tests, including tests for dioxin and furans, particulate matter, total hydrocarbon, and hydrogen chloride and must meet additional requirements under the NESHAP. *Id.* A source subject to the NESHAP must, *inter alia*, have the EPA approve a site-specific test plan and must conduct a performance test. 40 C.F.R. § 63.1511(a), (b).

In Count I, Complainant alleges that from March 24, 2003 to November 17, 2004, Respondent failed to submit a site-specific test plan in violation of Section 112 of the CAA and 40 C.F.R. § 63.1511. Complaint ¶ 17. It further alleges that on October 20, 2004, Complainant issued an Administrative Compliance Order (“Order”) to Respondent, and that Paragraphs 16-18 of that Order required Respondent to prepare and to submit a site-specific test plan as defined in 40 C.F.R. § 63.1511. Complaint ¶ 18. Finally, it alleges that Respondent’s contractor, Accurate Environmental Services (“AES”), submitted a test plan on November 17, 2004, to perform dioxin/furan testing. *Id.* Count II alleges that from March 24, 2003, to the present, Respondent failed to conduct an initial performance test in violation of Section 112 of the CAA and 40 C.F.R. § 63.1511.¹

¹ Complainant’s Motion seeks a finding of liability only as to the charges that Respondent failed to submit a site-specific test plan by March 24, 2003 and to conduct a performance test for dioxin and furans by March 24, 2003.

The key date alleged in the Complaint for Counts I and II is March 24, 2003, which is the regulatory deadline for submitting a site-specific test plan and for conducting an initial performance test. See 40 C.F.R. §§ 63.1511(a), 63.1501(a). There is no genuine dispute of material fact that Respondent did not submit a site-specific test plan by March 24, 2003 and that Respondent had not conducted an initial performance test by March 24, 2003.

Respondent submits that its good faith belief that it was not subject to the CAA is a defense. Specifically, Respondent argues, “Prior to March 23, 2003, [it] had a good faith belief that it was not subject to the CAA, in part because [it] believed that it did not emit a sufficient amount of [HAPs] to be subject to the CAA.” Response at 4 (citing CX 2, at 2). Respondent states that it relied on the representations of its outside environmental consultant in determining that it was not required to submit a test protocol or conduct a performance test. *Id.* Respondent also contends that it “only received confirmation of its non-exempt status from [the South Coast Air Quality Management District] around March 11, 2005.” *Id.* (footnote omitted). Notably, Respondent does not cite any legal support for good faith belief as a defense to liability.

Good faith is not a defense to liability under the Clean Air Act, which is a strict liability statute. See, e.g., *Friedman & Schmitt Constr. Co.*, 11 E.A.D. 302, 354 (EAB 2004), *aff’d*, Docket No. 2:04-CV-00517-WBS-DAD (C.D. Cal., Feb. 25, 2005) (unpublished). Moreover, Complainant correctly observes that notice is not required prior to enforcing Section 112 of the CAA. Reply at 3 (citing *United States v. B&W Inv. Prop.*, 38 F.3d 362, 366 (7th Cir. 1994)). Accordingly, although good faith may arguably mitigate the penalty, it does not defeat liability.

Respondent’s other arguments relate to dates *after* the March 24, 2003 deadline. See Response at 6-8. For instance, Respondent states that in response to EPA’s April 28, 2004 information request, it produced a source test report completed on August 15, 2003 by Air Gas Testing & Consulting Services. *Id.* at 6 (citing CX 7). Significantly, even the purported August 2003 test report is several months past the March 24, 2003 deadline set by the regulations.² Respondent contends that EPA’s July 20, 2004 correspondence gave Respondent the impression that it did not have to perform a further source test protocol or performance test, but Respondent makes no mention of correspondence prior to the March 24, 2003 deadline. See *id.*

Respondent also posits that even if it were required to produce a test protocol and performance test, “the EPA waived this requirement by issuing specific informational requirements from [Respondent] without mention of the same.” *Id.*

² I note Complainant’s assertion that the source test identified by Respondent “has nothing to do with any of the requirements of the Secondary Aluminum NESHAP.” Reply at 2.

Respondent argues that the purported waiver lasted at least until the EPA specifically demanded a performance test and test protocol in its Administrative Order dated October 20, 2004. *Id.*

The regulations clearly state that the deadline is March 24, 2003 for submission of the site-specific plan and for conducting the initial performance test. See 40 C.F.R. §§ 63.1511(a), 63.1501(a). As noted *supra*, the Clean Air Act is a strict liability statute, *Friedman & Schmitt Constr. Co.*, 11 E.A.D. at 354, and notice is not required prior to enforcing Section 112 of the CAA, *B&W Inv.*, 38 F.3d at 366. Respondent's arguments that the EPA waived the March 24, 2003 deadline by granting unconditional continuances and changing the number of ports required for testing are without merit. The EPA has no authority to waive the regulatory deadline, and the EPA's dealings with Respondent with regards to any alleged continuances and changes in the number of ports to be tested cannot be construed reasonably as a "waiver" of the regulatory requirements.

Complainant points out that the regulations, under limited circumstances, permit an owner or operator to apply for a waiver of the performance test from the EPA, pursuant to 40 C.F.R. § 63.7(h). Reply at 3 n.2. These regulations clearly state that until the EPA grants the waiver request, the owner or operator must comply with the requirements, 40 C.F.R. § 63.7(h)(1), and that the waiver request must be submitted prior to the performance test, 40 C.F.R. § 63.7(h)(3). Furthermore, the waiver request must be in writing. 40 C.F.R. § 63.7(h)(2). Respondent has not pointed to any purported waiver documents pre-dating the March 24, 2003 deadline, nor does the record before me contain any documents relating to the period prior to the March 24, 2003 deadline. See *Anderson*, 477 U.S. at 256 (the non-moving party on a motion for summary judgment must present "affirmative evidence" and cannot defeat the motion without offering "any significant probative evidence tending to support" its pleadings).

Respondent concludes its discussion of Counts I and II by discussing events that allegedly occurred in the year 2005, such as Respondent's "sole operating furnace" becoming inoperable. Response at 7-8. Since Respondent's explanations concern events that occurred after the March 24, 2003 deadline, they do not defeat liability on Counts I and II. At best, they may arguably impact the penalty to be assessed for the violations. For instance, the duration of a violation may affect a penalty assessment.

Accordingly, Respondent is liable on Counts I and II, being that there is no dispute of material fact that Respondent failed to timely submit a site-specific test plan and failed to timely conduct an initial performance test by March 24, 2003, and that Respondent has submitted no valid defense for its failure. I make no determination as to whether the violations continued until November 17, 2004 and to the present as alleged in Counts I and II, respectively, in the Complaint. Complainant's Motion seeks a finding of liability only as to the charges that Respondent failed to submit a site-specific test plan by March 24, 2003 and to conduct a performance test for dioxin and furans by

March 24, 2003. As such, Complainant's Motion for Accelerated Decision on Liability is **GRANTED** as to Counts I and II, as limited by the Motion.

B. Information Requests (Counts III and IV)

In Count III, titled Incomplete Response to Information Request, Complainant alleges that Respondent failed to submit a complete response to requests for information from the Complainant in violation of Section 114 of the CAA, 42 U.S.C. § 7414. Complaint ¶ 22. Complainant alleges that it sent Respondent a letter on April 28, 2004, seeking information, and that it granted an extension to July 5, 2004, for Respondent to provide the requested information, and that Complainant received Respondent's incomplete response dated June 29, 2004. Complaint ¶ 23. Complainant further alleges that on July 28, 2004, Respondent requested an extension to this information request, that Complainant received the second Section 114 response from Respondent dated August 17, 2004, and that this second response contained errors and omissions. *Id.*

In its Motion, Complainant states that in order to determine compliance with the NESHAP, it requested information from Respondent pursuant to Section 114. Motion at 9. Complainant further states that the incomplete information provided by Respondent had the effect of thwarting Complainant's attempts to determine compliance from April 28, 2004, when the information was first requested, to the present date. *Id.* The Complainant contends that there were numerous inadequate responses to information requests, regarding whether an initial performance test would be conducted at the highest production level, regarding gaseous chlorine (in relation to determining whether Respondent is a major source for HAPs), regarding whether the equipment was permanently shut down, a scale drawing of how the aluminum was processed, information on what materials are charged in the furnaces and the chip dryer, an approveable test plan, and copies of requested temperature logs for their afterburner. *Id.* at 10-12. The Complainant asserts that any one of the failures to provide complete information would be sufficient to establish Section 114 liability. *Id.* at 9. Moreover, the Complainant points out that the question of the seriousness of the failure to provide complete information would be evaluated by this Tribunal during the evidentiary hearing when deciding the appropriate penalty amount. *Id.* at 9-10.

Upon reflection of the information at issue in Count III, Complainant's myriad information requests and the responses thereto represent a daunting amount of documents at issue on a topic – "insufficiency" – that often lends itself towards contradictory inferences. Such an intricate set of facts is better resolved within the context of an evidentiary hearing.³ Alternatively, I observe that there is a genuine

³ *Cf. Roberts v. Browning*, 610 F.2d at 536 (even if the presiding judge believes that summary judgment is technically proper upon review of the evidence in a case, sound judicial policy and the exercise of judicial discretion permit a denial of such a

dispute of material fact regarding at least one of the responses. For instance, with regards to the April 28, 2004 request to provide a scale drawing to show how aluminum is processed, Respondent contends that it in fact provided two different schematics of its aluminum processing. Response at 9 (citing CX 7, CX 10). Moreover, Respondent points out that whether these schematics are sufficient for Complainant's purposes is "at minimum" a disputed question of fact. *Id.* Finally, even if I were to find that one or more responses was insufficient, the issue of the seriousness of violation for purposes of the penalty may be closely related to the nature of the violation – such as the degree to which the response(s) were insufficient. There would likely be a significant overlap in liability-related and penalty-related evidentiary material, and therefore judicial economy would be better served by analyzing both liability and the penalty on this count in the evidentiary hearing. Accordingly, accelerated decision is **DENIED** as to Count III.

Count IV, titled Failure to Respond to Information Request, alleges that on May 17, 2005, Complainant sent Respondent another information request seeking to clarify the errors and omissions in their earlier responses and to their source test plan. Complaint ¶ 26. It further alleges that Complainant requested a written reply within fourteen (14) calendar days, and that no reply was received from Respondent. *Id.* In its Answer, the Respondent states that it "believes that it submitted a complete response." Answer ¶ 26.

In the May 17, 2005 information request, Complainant directed that Respondent "shall submit the requested information via certified mail with return receipt requested" to EPA. CX 21 at 3. Complainant correctly points out that Respondent has not provided a return receipt and states that the EPA has not received a response to the May 17, 2005 information request. Motion at 13.

With regards to the May 17, 2005 information request, it requests certain information from Respondent within fourteen (14) days of receipt of the request,⁴ pursuant to Section 114 of the CAA. CX 21 at 1. In the May 17, 2005 information request, the Complainant recounts the history of the parties' past information requests and responses and other dealings between the parties, including a March 23, 2005 conference call. *Id.* at 1-2.

motion for the case to be developed fully at trial); *accord In re Barber d/b/a Barber Trucking*, Docket No. CWA-05-2005-0004 (ALJ, Dec. 7, 2005).

⁴ There appears to be no documentation in the record before me indicating when Respondent received Complainant's May 17, 2005 information request.

Reportedly, in the March 23, 2005 conference call, Respondent and AES provided clarifications to several of Complainant's questions regarding a revised source test protocol. *Id.* at 2. The May 15, 2005 information request states, "Please respond in writing to the following requests based on our March 23, 2005 conference call within the next 14 calendar days." *Id.* Specifically, May 17, 2005 letter requests information which appears to either primarily or solely relate to the performance testing of Respondent's facility. *See id.* at 2-3.

In its Response to the Motion, Respondent states that it "does not dispute that it did not respond directly to the questions raised in the May 17, 2005 request." Response at 10. However, Respondent states that it sent correspondence to the EPA subsequent to the May 17, 2005 request indicating that Respondent was no longer in an operative condition. *Id.* Presumably, Respondent refers to its June 15, 2005 letter to the Complainant, which briefly states: "Please be advised that Liston Brick has not operated its furnace since May 26, 2005 due to refractory issues. We are in the middle of curing the furnace as I write this letter." CX 23. The June 15, 2005 letter does not directly answer the questions posed by Complainant's May 17, 2005 information request. However, Respondent contends that it had and has no further plans to operate its smelting facilities, and therefore argues that the May 17 request is "superfluous." Response at 10. Moreover, Respondent disputes EPA's authority to continue its disclosure demands after Respondent ceased operating, on the ground that Respondent had ceased to be a secondary aluminum producer at that point, and that therefore the EPA lacks jurisdiction to penalize Respondent. *Id.*; *see also id.* at 8 (arguing that once Respondent ceased operating its smelting plant, it fell outside the jurisdiction of the NESHAP, because it was no longer a secondary aluminum producer at that point).

Respondent has provided evidentiary material, namely its June 15, 2005 letter (CX 23), for the proposition that it had shut down its facility, whereas the Complainant reads that same letter as Respondent being not shut down because the furnace is in the process of being repaired, and therefore argues that Respondent had not ceased to be a secondary aluminum producer. Reply at 7. In accordance with well-established summary judgment

principles, I draw all reasonable inferences in the light most favorable to the non-moving party. *See, e.g., Anderson, 477 U.S. at 255.* Accordingly, there is a genuine dispute regarding the shutdown and cessation of operations.

However, Complainant points out that under Section 114(a)(1)(G) of the CAA, the EPA may request information of "any person." Reply at 6. Specifically, Section 114(a)(1) and (a)(1)(G), provides that the EPA may request information of any person who owns or operates any emission source, and may request information of any person who the EPA "believes may have information necessary for the purposes set forth in [Section 114]" to "provide such other information as the EPA may reasonably require." Arguably, even if there were a shutdown or cessation of operations, Complainant may

have believed that the information was necessary for the purposes set forth in Section 114. Nevertheless, at this point, it is more prudent to reserve judgment, as this matter may be better addressed upon fully developing this matter within the context of an evidentiary hearing.⁵ Accordingly, accelerated decision is **DENIED** as to Count IV.

Conclusion

To summarize, I rule on Complainant's Motion for Accelerated Decision on Liability as follows:

Count I: GRANTED, as limited by Complainant's Motion.

Count II: GRANTED, as limited by Complainant's Motion.

Count III: DENIED.

Count IV: DENIED.

For the counts on which I have denied accelerated decision, I emphasize that such denial does not decide the ultimate truth of the matter, but represents a threshold determination that an evidentiary hearing is necessary.

Dated: August 10, 2006
Washington, DC

Barbara A. Gunning
Administrative Law Judge

⁵ See *Roberts v. Browning*, 610 F.2d at 536 (even if the presiding judge believes that summary judgment is technically proper upon review of the evidence in a case, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial); accord *In re Barber d/b/a Barber Trucking*, Docket No. CWA-05-2005-0004 (ALJ, Dec. 7, 2005).