

**UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC**

**In the Matter of: V.P. RACING FUELS, INC.**

FAA Order No. 2007-10

Docket No. CP06SW0001  
DMS No. FAA-2006-23725<sup>1</sup>

Served: August 2, 2007

**ORDER DENYING APPEAL**<sup>2</sup>

V.P. Racing Fuels, Inc., the respondent in this matter, has appealed from a written initial decision<sup>3</sup> by Administrative Law Judge (ALJ) Isaac D. Benkin.<sup>4</sup> In his initial decision, the ALJ assessed a \$30,000 civil penalty against V.P. Racing Fuels for violations of the Hazardous Materials Regulations (HMR).<sup>5</sup> V.P. Racing Fuels argues in

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<sup>1</sup> Materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing through the Department of Transportation's Docket Management System (DMS). Access may be obtained through the following Internet address: <http://dms.dot.gov>.

<sup>2</sup> The Administrator's civil penalty decisions, along with indexes of the decisions, the rules of practice, and other information, are available on the Internet at the following address: [http://www.faa.gov/about/office\\_org/headquarters\\_offices/agc/pol\\_adjudication/AGC400/Civil\\_Penalty/](http://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/AGC400/Civil_Penalty/). In addition, Thomson/West publishes Federal Aviation Decisions. Finally, the decisions are available through LEXIS (TRANS library) and WestLaw (FTRAN-FAA database). For additional information, see the website.

<sup>3</sup> A copy of the ALJ's written initial decision is attached. (The initial decision is not attached to the electronic versions of this decision nor is it included on the FAA website.)

<sup>4</sup> V.P. Racing Fuels did not file a separate appeal brief, although 14 C.F.R. § 13.233(c) requires that the appellee file an appeal brief. V.P. Racing Fuels' amply explained its position in its notice of appeal, and as a result, V.P. Racing Fuels will not be required to file a separate appeal brief. *I.e.*, In the Matter of Butte Aviation, Inc., FAA Order No. 2004-1 (April 6, 2004). The notice of appeal is deemed as an appeal brief, as well as a notice of appeal. Complainant's motion to dismiss V.P. Racing Fuels' appeal for failure to perfect is denied. The Administrator has opted to issue this decision and order, rather than giving the agency attorney an opportunity to file a reply brief, because additional briefing is unnecessary for the resolution of this appeal.

<sup>5</sup> Complainant had sought a \$38,250 civil penalty.

its appeal that the ALJ should not have allowed Complainant to introduce any evidence at the hearing because the agency attorney failed to comply with the ALJ's discovery order in a timely fashion. For the reasons explained below, V.P. Racing Fuels' appeal is denied.

The history of this case is as follows. The agency attorney filed the complaint in this matter on September 8, 2005. Under the Rules of Practice, 14 C.F.R. §§ 13.209 and 13.211(e), V.P. Racing Fuels was required to file a written answer, or a motion under 14 C.F.R. §§ 13.208(d) or 13.218(f)(1)-(4), within 35 days. V. P. Racing Fuels filed neither an answer nor a motion. The agency attorney filed a motion to deem the allegations in the complaint admitted and to limit the hearing to the issue of sanction, and the ALJ granted the motion. The ALJ issued a notice, scheduling the hearing for July 27, 2006, and ordering "each party ... [to] serve on the other party and deliver to the Judge by July 21, 2006, one copy of each exhibit to be offered at the hearing and a list of witnesses together with a summary of their proposed testimony." The agency attorney complied with the ALJ's discovery order late, and as a result, V.P. Racing Fuels' representative did not receive Complainant's Witness and Exhibit List until July 26, 2006. (Tr. 10.) V.P. Racing Fuels' representative requested at the hearing that the ALJ preclude Complainant from introducing any exhibits or presenting any witnesses. (Tr. 9-10.) The ALJ denied the motion because "the FAA's neglect, though hardly praiseworthy, did not really prejudice you or your ability to prepare your case." (Tr. 12.)

Under 14 C.F.R. § 13.220(n), an ALJ may preclude the admission of evidence or witness testimony at a hearing if a party fails to comply with a discovery order. However, preclusion in such cases is not mandatory under that rule. In the Matter of

Watts Agricultural Aviation, Inc., FAA Order No. 1991-8, at 9, n.9 (April 11, 1991). In general, it is inappropriate to preclude evidence because of a party's tardy response to discovery, unless the other party was prejudiced in the preparation of its case by the late response. *Id.*; In the Matter of American Airlines, Inc., FAA Order No. 1989-6 at 6 (December 21, 1989).

V.P. Racing Fuels has not claimed that it was unable to prepare its defense in this case because of the agency attorney's late compliance with the ALJ's discovery order. Indeed, V.P. Racing Fuels possessed three of Complainant's seven exhibits –Exhibit No. 3 (the Material Safety Data Sheet), Exhibit No. 5 (the letter of investigation sent to V.P. Racing Fuels), and Exhibit No. 6 (V. P. Racing Fuels' response to the FAA's letter of investigation) – prior to the hearing. Further, V.P. Racing Fuels must have been aware of the information contained in Government Exhibit No. 4, which was a short summary of enforcement actions taken against V.P. Racing Fuels for violations of the HMR.<sup>6</sup> Also, as the ALJ noted at the hearing, Government Exhibit No. 7 – a Federal Register excerpt containing the FAA's penalty guidelines in hazardous materials cases<sup>7</sup> – is publicly available. Consequently, V.P. Racing Fuels has not proven that it was prejudiced by the late response by the agency attorney to the ALJ's discovery order, or that the ALJ's denial of its motion to preclude Complainant's evidence was in error.

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<sup>6</sup> In one case, VP Racing Fuels had received a letter of correction, and in the other case, it was assessed a \$20,000 civil penalty.

<sup>7</sup> 64 Fed. Reg. 19443 (April 21, 1999).

In light of the foregoing, V.P. Racing Fuels' appeal is denied.<sup>8</sup>

MARION C. BLAKEY, ADMINISTRATOR  
Federal Aviation Administration

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<sup>8</sup> This decision shall be considered an order assessing civil penalty unless Respondent files a petition for review within 60 days of service of this decision with the U.S. Court of Appeals for the District of Columbia Circuit or the U.S. court of appeals for the circuit in which the respondent resides or has its principal place of business. 14 C.F.R. §§ 13.16(d)(4), 13.233(j)(2), 13.235 (2007). *See* 71 Fed. Reg. 70460 (December 5, 2006) (regarding petitions for review of final agency decisions in civil penalty cases).