UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
841 Chestnut Building
Philadelphia, Pennsylvania 19107

IN THE MATTER OF:	(	DOCKET NO. III-90-025-DS
	(	
New London Oil Company, Inc.	(	
Eatontown, New Jersey	(	
RESPONDENT	(	
	(	Proceedings under Section 1423(c)
Ulf Injection Facility	(	of the Safe Drinking Water Act
(PAS2R949AWAR)	(	42 U.S.C. § 300h-2(c)
Tidioute, Pennsylvania	(	

ORDER ON MOTION FOR SUMMARY DETERMINATION

This is an administrative enforcement proceeding under Section 1423(c) of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300h-2(c), being conducted in accordance with the United States Environmental Protection Agency (EPA) "GUIDANCE ON UIC ADMINISTRATIVE ORDER PROCEDURES," issued November 26, 1986 (GUIDANCE). This ORDER denies Respondent New London Oil Company, Inc.'s Motion for Summary Determination.

On March 6, 1990 the Water Management Division Director of EPA's Region III issued a Notice of Violation, Intent to Issue Administrative Order with Penalty and Opportunity to Request a Hearing, in the form of a cover letter and proposed Administrative Order, alleging that Respondent was in violation of SDWA, 42 U.S.C. §§ 300 et seq., and the Underground Injection Control (UIC) regulations, 40 C.F.R. Parts 144, 146 and 147. Acting under Section 1423(c)(2) of the SDWA, 42 U.S.C. § 300h-2(c)(2), the Division Director (Complainant) proposed to issue a final Administrative Order requiring Respondent to comply with

the SDWA and the UIC regulations and assessing a civil penalty of $1,000 for the violations alleged in the proposed Administrative Order.

Complainant's March 6, 1990 Notice informed Respondent of the alleged violation and the applicable law and regulations, the general nature of the procedure for issuing administrative orders and assessing civil penalties, the amount of the proposed penalty, the right to request a hearing within 30 days of receipt of the Notice,[1] the fact that a final order may be issued after 30 days if Respondent did not request a hearing and that such an order would become effective 30 days after issuance unless it was appealed under Section 1423(c)(6) of the SDWA, 42 U.S.C. § 300h-2(c)(6). Complainant's Notice also invited Respondent to confer informally with EPA concerning the alleged violations or the amount of the proposed penalty, and supplied the name and telephone number of an individual for Respondent to contact to ask questions, to request a hearing or to arrange an informal conference.[2]

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[1]Complainant's March 3, 1990 transmittal letter informed Respondent that: "EPA will conduct this hearing pursuant to the procedures required by this Section of the SDWA," referring to Section 1423 (c)(3), 42 U.S.C. § 300h-2(c)(3), "and specified in the enclosed Guidance on UIC Administrative Order Procedures." Complainant apparently neglected to enclose the EPA GUIDANCE.

[2]Complainant's Notice did not specify the amount of the maximum penalty that may be assessed for each violation or the address of the person of the person to whom Respondent must send a request for hearing as required by the GUIDANCE, §§ 144.102(d)(2) and (7).

On March 28, 1990 Respondent filed its "Response To Proposed Administrative Order," denying the allegations of SDWA violations, and requested a hearing.[3] On July 9, 1990 the EPA Regional Administrator designated the Presiding Officer. On August 29, 1990 Respondent moved for Summary Determination under the GUIDANCE, § 144.104(f).[4] Complainant filed its Response, in accordance with a schedule set by the Presiding Officer, on September 25, 1990.

GUIDANCE § 144.104(f) provides that:

> (1) Any participant in a hearing to be held under this subpart may move, with or without supporting affidavits and briefs, for a summary determination upon any of the issues being adjudicated, on the basis that there is no genuine issue of material fact for determination...
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> (2) Any other participant may file and serve a response to the motion or a countermotion for summary determination, in accordance with a schedule to be set by the Presiding Officer. When a motion for summary determination is made and supported, a participant opposing the motion may not rest upon mere allegations or denials but must show, by affidavit or by other materials subject to consideration by the Presiding Officer, that there is a genuine issue of material fact for determination at the hearing...
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> (4) No oral argument shall be had on the motion. the Presiding Officer shall rule on the motion promptly after responses to the motion are filed under subpargraph (2).

In ruling on a motion for summary determination the Presiding Officer's function is to determine whether any genuine

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[3]Complainant received the Response on March 30, 1990. The Regional Hearing Clerk received the Response on June 15, 1990.

[4]Respondent's Motion was styled "Motion for Summary Judgment."

issue of fact exists, not to resolve factual issues. United States v. Diebold, Inc., 369 U.S. 654 (1962). In deciding a motion for summary determination the Presiding Officer may consider the entire record of the case, not just the motion papers. Keiser v. Coliseum Properties, Inc., 615 F. 2d 406 (CA5, 1980). Summary determination is appropriate where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, where no genuine issue remains for trial. Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 (1944). The Presiding Officer must deny a motion for summary determination where there is a genuine issue as to any material fact. Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970). The moving party has the burden of establishing clearly the lack of any triable issue of fact by the record properly before the Presiding Officer, and the moving party's papers are carefully scrutinized while those of the party opposing the motion are on the whole indulgently regarded. Bishop v. Wood, 426 U.S. 341 (1976).

If all issues are decided by summary determination, no hearing is held and the Presiding Officer prepares a recommended decision. If summary determination is denied or if partial summary determination is granted, the Presiding Officer is to issue a statement of findings and reasons, interlocutory in

character[5], and the hearing is to proceed on the remaining issues. GUIDANCE § 144.104(f)(5).

Respondent's Motion for Summary Determination must be denied. Respondent's Motion is not supported by briefs or affidavits. Taking the record before me as a whole, I find an abundance of issues in dispute. Respondent's Response to Proposed Administrative Order challenges almost every allegation of material fact set forth in the Proposed Administrative Order, either by direct denial or by stating that Respondent "... is without sufficient information to confirm or deny the averments contained herein and demands strict proof thereof." Respondent's Motion contains a "Recital of Facts on Record" which relates a history of contacts between the parties that begins in 1986, but with one exception, addressed below, there is insufficient support in the record regarding Respondent's recitation to warrant summary determination.

Complainant's Response to the Motion admits some of Respondent's Recitation to be accurate, but resists dismissal of the action. Complainant reduces Respondent's Motion to two basic assertions: 1) inadequate prior EPA notice to Respondent and 2) a third party (Olympia Oil Services, Inc.) facility operator is

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[5]The matters determined in the issues so framed are not foreclosed in the sense that the Presiding Officer cannot alter his conclusions. The Presiding Officer retains full power to make one complete determination on all aspects of the case in his recommended decision. Coffman v. Federal Laboratories, 171 F.2d 94 (CA3, 1948).

contractually responsible to Respondent for compliance at the subject facility.

Complainant correctly asserts that the SDWA does not require prior notice of enforcement in a non-primacy state. Compare Section 1423(c)(1) of the SDWA, 42 U.S.C. § 300h-2(c)(1), requiring EPA to give 30 day notice to alleged violator and to primacy state to allow state to institute an enforcement action, with Section 1423(c)(2), 42 U.S.C. § 300h-2(c)(2).[6] Pennsylvania is not a SDWA primacy state. 40 C.F.R. Part 147, Subpart NN. Although Respondent challenged this assertion, contained in Finding No. 1 of the Proposed Administrative Order, this matter appears to be "not reasonably in dispute and...ascertainable from readily available sources of known accuracy," and subject to the "official notice" provision of GUIDANCE § 144.109(i).[7]

Respondent's contract with Olympia Oil Services, Inc. (Olympia) is not in the record of this proceeding. The Presiding Officer cannot determine that the contract requires Olympia to meet all regulatory requirements concerning the subject facility, as Respondent argues in Paragraph 13 of its Motion. Even if the

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[6]Pennsylvania received notice of the issuance of the Proposed Administrative Order in accordance with GUIDANCE § 144.102(b)(1)(D), as part of the public notice process required under Section 1423(c)(3)(B) of the SDWA, 42 U.S.C. § 300h-2(c)(3)(B).

[7]Prior to taking notice of a matter, the Presiding Officer must give the parties an opportunity to show why notice should not be taken. Accordingly, the parties may, within thirty days of the date of this ORDER, show the Presiding Officer why he should not take official notice of 40 C.F.R. Part 147, Subpart NN.

contract were in the record and did create enforceable obligations between the Respondent and Olympia, there would remain genuine issues of material fact for determination in the proceeding. The UIC regulations impose requirements on "owners or operators" of regulated facilities. 40 C.F.R. Parts 144, 146, 147, passim. A UIC operator need not be the one doing the hands-on work at the facility; it is only necessary that he/she possess the authority to do so and the capacity to direct compliance with the law. In Re Ernest E. Musgrove, EPA Docket No. 4-UICC-041-88 (Recommended Decision of Presiding Officer Zylpha K. Pryor, March 8, 1990). Private agreements between or among owners, operators, tenants, their respective agents, contractors, employees etc. are among the things EPA may take into account when considering whom to hold responsible for regulatory violations, but they are not the controlling factor in every situation. EPA may also consider prior actions by the parties in connection with the regulated activity, prior dealings with the regulatory agencies, control over access to the facility, control over information necessary for compliance, the relative distribution of economic benefit derived from the operation of the facility and any other pertinent factors in determining who should be held accountable for compliance with the law.[8] In some instances EPA may choose to

[8]EPA precedent and guidance on this matter is scant. EPA's Office of Pesticides and Toxic Substances issued final policy guidance entitled, "Responsibility for Compliance with PCB Rule" on March 4, 1982, which discusses compliance responsibilities in landowner/equipment user situations. This policy is not

proceed against more than one "person" involved in a noncompliant facility. At this point in this case it would be premature to find that the Respondent's agreement with Olympia absolved Respondent of all SDWA compliance responsibilities.

There is one issue which may be eliminated from the proceeding as a result of this Motion. The last allegation made in the Proposed Administrative Order (Finding No. 8) was that "[n]o apparent action by Respondent has been taken to resolve the violations." Complainant conceded the inaccuracy of this allegation on page 2 of its Response to the Motion. All other issues raised in this case remain unresolved pending hearing.

Respondent's Motion for Summary Determination is **DENIED.**

The parties may, within thirty days of the date of this ORDER, show the Presiding Officer why he should not take official notice of 40 C.F.R. Part 147, Subpart NN.

Date: OCT 5 1990

Benjamin Kalkstein
Presiding Officer

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controlling in this case, but the Presiding Officer found its analysis to be useful.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 9

IN THE MATTER OF:	
Bay Decking Co., Inc.,	U.S. EPA Docket No. RCRA-09-90-0005
Respondent	

ORDER EXTENDING TIME TO RESPOND;
DENYING MOTION FOR POSTPONEMENT OF HEARING

By motion filed October 5, 1990, the Respondent seeks to (1) postpone the time for its response to the complaint[1] by 30 days to November 8, 1990; (2) postpone the conduct of the hearing in this matter to a date at least 30 days after its response is filed; and (3) postpone certain submittal dates in the compliance order portion of the complaint.[2]

The Respondent and the EPA attorney have stipulated to the 30 day extension of time for the Respondent's response to the complaint and for conduct of the hearing, in order to attempt to resolve this matter by consent. They have also agreed to the requested changes in the proposed compliance order.

Section 22.07(b) of the Consolidated Rules, 40 C.F.R. §22.07(b), provides that a motion for extension of time may be granted "for good cause shown, and after consideration of prejudice to other parties."

On the basis of the stipulation filed by the Respondent and EPA and the supporting affidavit of Respondent's counsel, it appears that there is good cause for the requested extension of time to file the response and that there will be no prejudice to

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[1]On October 5, 1990 the Respondent filed a request for a hearing pursuant to RCRA § 3008(b), 40 U.S.C. §6928(b). Respondent's present request apparently seeks to postpone filing the complete answer required by Section 22.15(b) of the Consolidated Rules, 40 C.F.R. § 22.15(b).

[2]The motion is addressed to the "Presiding Officer." Section 22.16(c) of the Consolidated Rules of Practice provides that the Regional Administrator, rather than the Presiding Officer, shall rule on all motions made before an answer to the complaint is filed. The Regional Administrator has delegated the authority to decide this motion to the Regional Judicial Officer pursuant to Section 22.04(b)(3) of the Consolidated Rules.

any party from the extension.

The extension of time for conduct of the hearing, however, will not be granted at this time. No Presiding Officer has been appointed for this case since the Respondent has not yet filed its answer. 40 C.F.R. §22.21(a). In the usual course of events a hearing on this matter could not be scheduled in less than thirty days after Respondent files its answer, due to the fact that the Presiding Officer must give twenty days' notice of the hearing and it typically takes more than ten days to transfer the case file to the Chief Administrative Law Judge and for the Chief ALJ to appoint a Presiding Officer. See 40 C.F.R. §22.21(a). Accordingly, an extension of time for the conduct of the hearing appears unnecessary at this time.

The amendments to the proposed Compliance Order agreed to by the Respondent and EPA appear to be necessary in light of the thirty day extension of time to file an answer. In addition, I note that the amendments could have been made unilaterally by the Complainant under 40 C.F.R. 22.14(d).

IT IS THEREFORE ORDERED THAT:

(1) The time for Respondent's response to the complaint is extended to November 8, 1990;

(2) The request to postpone the conduct of the hearing is denied;

(3) The proposed Compliance Order is amended in accordance with the parties' agreement as contained in their Amended Stipulation filed October 15, 1990.

Dated: 10-16-90

Steven W. Anderson
Regional Judicial Officer