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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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| In the matter of: |) | DOCKET NO. CWA 10-2003-0035 |
| |) | |
| ALEXANDER KOZNEK and AURORA |) | |
| COMMUNICATIONS INTERNATIONAL, |) | COMPLAINANT'S RESPONSE TO |
| INC., |) | RESPONDENTS' MOTION TO |
| |) | DISMISS ALEXANDER KOZNEK |
| Respondents. |) | |
| |) | |

I. INTRODUCTION

Pursuant to Section 22.16(b) of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" ("Part 22 Rules"), the United States Environmental Protection Agency, Region 10 ("Complainant" or "EPA") submits the following response to Respondents' Motion to Dismiss Alexander Koznek which was filed with the Regional Hearing Clerk on February 20, 2004.¹ For the reasons described below, Respondents' motion does not demonstrate that the complaint's claims against Alexander

¹ An original and one copy of Respondents' motion and supporting materials were hand-delivered to EPA's Regional Office on February 20, 2004 and filed with the Regional Hearing Clerk. See 40 C.F.R. § 22.5(a)(1) (requiring filing with the Regional Hearing Clerk of the original and one copy of each document intended to be part of the record). These materials have still not been served on counsel for Complainant as required by Section 22.5(b)(2) of the Part 22 Rules. As a result, Complainant is filing this response within 15 days of filing of Respondents' motion, rather than within 15 days of service as contemplated by Section 22.16(b) of the Part 22 Rules.

Kozned should be dismissed. Nor does Respondents' motion identify any genuine issues of material fact that would preclude an accelerated decision that Mr. Kozned's liability has been established as a matter of law. Consequently, Complainant respectfully requests that the Presiding Officer issue an order denying Respondents' motion to dismiss and granting Complainant's motion for accelerated decision that was filed the same day as Respondents' motion.

II. STANDARD OF REVIEW FOR MOTION TO DISMISS

Section 22.20 of the Part 22 Rules provides in relevant part:

The Presiding Officer, upon motion by the respondent, may at any time 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). The Environmental Appeals Board ("EAB") has held that a motion to dismiss supported by additional evidence is to be construed as a request for accelerated decision and has turned to Rule 56 of the Federal Rules of Civil Procedure ("FRCP") for guidance in considering such motions. *In re BWX Technologies, Inc.*, 9 E.A.D. 61, 74 (EAB 2000). Under FRCP 56, the party moving for summary judgment assumes the initial burden of production on its claim and "must make out a case for presumptive entitlement to summary judgment in his favor." *BWX Technologies*, 9 E.A.D. at 76 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The moving party cannot meet this initial burden of production "by resting on mere allegations, assertions, or conclusions of evidence." *Id.* at 75 (citing 11 James W. Moore *et al.*, Moore's Federal Practice § 56.13[1], [2] (3d ed. 1999)).

III. DISCUSSION

As detailed in Complainant's motion for accelerated decision, the Clean Water Act ("CWA"), defines "person" to include both corporations and individuals. 33 U.S.C. § 1362(5). Courts have found that this definition expresses Congress' clear intent to hold both corporations and the individuals controlling the operations of these corporations responsible for compliance with the Act. *See United States v. Brittain*, 931 F.2d 1413, 1419 (10th Cir. 1991) (interpreting the CWA's definition of "person" to impose liability on individuals employed by the permit-holding entity). More specifically, courts have construed the definition of "person" to impose liability on individuals who "participated in or were responsible for the violations, even when the individuals purport to act through a corporate entity." *United States v. Gulf Park Water Co.*, 972 F. Supp. 1056, 1063 (S.D. Miss. 1997) (citing *Brittain*, 931 F.2d at 1419; *United States v. Ciampitti*, 583 F. Supp. 483 (D. N.J. 1984); and *United States v. Frezzo Brothers, Inc.*, 461 F. Supp. 266 (E.D. Pa. 1978), *aff'd*, 602 F.2d 1123 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980)). In this matter, Complainant has met its burden to establish Alexander Kozned's individual liability for the CWA violations alleged in the complaint.

A. **Respondents' Motion to Dismiss Should Be Denied Because Complainant has Established Through Specific Evidence its Prima Facie Case for Alexander Kozned's Personal Liability**

Respondents' motion to dismiss references five documents in support of its contention that Alexander Kozned should be dismissed from this matter. These documents indicate that the other respondent in this case, Aurora Communications International, Inc. ("Aurora"), was established as a non-profit religious entity under Section 501(c)(3) of the Internal Revenue Code, that Aurora has a volunteer Board of Directors, that Aurora's property is "irrevocably dedicated

to religious purposes,” and that ownership of the subject property is held by Aurora. *See* Memorandum in Support of Motion to Dismiss (“Respondents’ Memo”), Exhibits A-E. Although these exhibits are not supported by affidavits, Complainant has no basis to question the accuracy of the assertions they contain. Nevertheless, even if true, none of these facts demonstrate a failure by Complainant to establish a prima facie case for Mr. Kozned’s individual liability. In fact, the documents attached to Respondents’ Memo do not appear to have any bearing on whether Mr. Kozned participated personally and directly in the activities that gave rise to the violations at issue in this case.

In the “Legal Standard” section of Respondents’ Memo, counsel for Respondents asserts, without citation or support, that Mr. Kozned “did not direct any actions taken by any of the volunteers . . . including those which the government alleges as violations of the Clean Water Act” and that Mr. Kozned “did not directly participate or authorize any actions taken by any individual or the corporation itself.” Respondents’ Memo at p. 3. These unsworn, unsupported assertions are completely at odds with the record in this case. Regardless of Aurora’s tax-exempt status, its religious purposes, its corporate structure, or its ownership of the subject property, the evidence of Mr. Kozned’s personal participation in the violations at issue in this case is overwhelming. As described in Complainant’s motion for accelerated decision, Mr. Kozned serves as Aurora’s President, Chief Executive Officer, Financial Officer, and board member. Answer at ¶ 2.3; CX-18. The exhibits attached to Respondents’ Memo indicate that Mr. Kozned is also Aurora’s “Founder” (*see* Exhibit C) and has served as the corporation’s Secretary (*see* Exhibit B) and as one of its two incorporators (*see* Exhibit D). It was Mr. Kozned who personally confronted (and expelled) the Corps inspectors during the government’s very first visit

to Site on July 7, 1998. CX-10 (August 22, 1998 Corps Memo re: "Physical Assault, V-980758, Cook Inlet"). During subsequent government site visits, Mr. Kozned has frequently met the inspectors on-site, accompanied them on the inspection, videotaped the inspection, and requested that the inspectors focus their investigations on particular locations. *See, e.g.*, North Decl. at ¶¶ 10; CX-27; CX-28, photos 18-19 (showing Mr. Kozned and his wife videotaping the July 5, 2002 inspection and suggesting the location of test pits). During these site visits, Mr. Kozned has represented himself as the individual in control of the Site and has indicated that he was the manager and decision-maker for environmental issues at the Site. North Decl. at ¶ 10. Even Respondents' answer to the complaint admits that both Aurora and Mr. Kozned have "operated or directed the operation of certain earthmoving and landclearing equipment" for the purpose of constructing various roads and radio antenna pads at the Site. Answer at ¶¶ 2.10, 2.22.

Because Complainant has established its prima facie case with respect to Mr. Kozned's personal liability and Respondents have provided no grounds which would preclude Complainant's right to relief, the Presiding Officer should deny this motion to dismiss.

B. Complainant is Entitled to Accelerated Decision on Alexander Kozned's Personal Liability

Respondents' motion also fails to demonstrate why Complainant is not entitled to accelerated decision on its claim that both Mr. Kozned and Aurora are jointly and severally liable for the CWA violations alleged in the complaint. As a result, to the extent that Respondents'

motion is construed to respond to Complainant's motion for accelerated decision on Mr. Kozned's joint and several liability, it is unpersuasive.²

Accelerated decision on an individual's joint and several liability for CWA violations is appropriate where the evidence does not reveal any genuine issue of material fact that the individual "had actual hands-on control of the facility's activities, [was] responsible for on-site management, corresponded with regulatory bodies, and [was] directly involved in the decisions concerning environmental matters." *In re Waterer, et al.*, 2004 EPA ALJ LEXIS _____ at *__, Docket No. CWA-10-2003-0007, Order on Motions at 4-5 (ALJ Moran, January 28, 2004) (quoting *Gulf Park Water Company, Inc.*, 972 F. Supp. at 1063). Nothing in Respondents' motion to dismiss raises a genuine issue of material fact with respect to any of these four factors.³

The exhibits attached to and supporting Respondents' motion address only Aurora's corporate form and ownership of the Site and are not "material" to the Presiding Officer's consideration of EPA's claims that Mr. Kozned participated in on-site construction and management, corresponded with regulatory bodies, and was directly involved in the decisions concerning environmental matters. The statements by counsel contained in the text of Respondents' Memo regarding Mr. Kozned's alleged lack of participation in Site activities do not create a "genuine issue" of fact because they are unsupported by sworn declarations or affidavits or any other adequate supporting materials as required by FRCP 56(c) and (e). *See*,

² Complainant's arguments in support of accelerated decision on Mr. Kozned's personal liability are found at Part V.C. of Complainant's February 20, 2004 motion for accelerated decision.

³ As the EAB has noted, "to defeat an adversary's motion for summary judgment, a party must demonstrate that an issue is both 'material' and 'genuine.'" *BWX Technologies*, 9 E.A.D. at 75 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1985)).

e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); *Curnow v. Ridgecrest Police*, 952 F.2d 321, 323-24 (9th Cir. 1991); *Coverdell v. Dept. of Social and Health Services*, 834 F.2d 758, 769 (9th Cir. 1987). In addition, these unsworn, unsupported statements are completely at odds with the record in this case, which is replete with evidence demonstrating that Mr. Kozned participated personally in the development of the Aurora Site, possessed the ability to control construction at the Site, and acted with knowledge of the Site's ongoing non-compliance with the CWA.

Respondents' motion fails to identify any issues of fact that are both "material" and "genuine" with respect to Mr. Kozned's individual liability. As a result, for the reasons described more fully in Complainant's motion for accelerated decision, the Presiding Officer should find Mr. Kozned jointly and severally liable for the violations alleged in the complaint.

IV. CONCLUSION

For all of the foregoing reasons, Complainant respectfully requests that the Presiding Officer deny Respondents' Motion to Dismiss Alexander Kozned and find Mr. Kozned jointly and severally liable for the CWA violations alleged in the complaint.

Respectfully submitted this 8th day of March, 2004.



R. DAVID ALLNUTT
Assistant Regional Counsel

CERTIFICATE OF SERVICE

In the Matter of Alexander Kozned, et. al., No. CWA-10-2003-0035, I hereby certify that copies of COMPLAINANT'S RESPONSE TO RESPONDENTS' MOTION TO DISMISS ALEXANDER KOZNEDE were sent to the following persons in the manner specified on the date below:

Original and one true and correct copy, by hand delivery;

*Carol Kennedy, Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Mail Stop ORC-158
Seattle, Washington 98101*

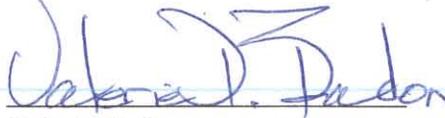
True and correct copies, by Pouch Mail **and by facsimile** to:

*The Honorable William B. Moran
Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460*

One true and correct copy, by first class U.S. Mail to:

*John R. Spencer
Spencer & Loescher, PLLC
1326 Tacoma Ave. S., Suite 101
Tacoma, Washington 98402-1983*

Dated: 3/8/04



Valerie Badon
Environmental Protection Agency