UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF:

MFG Chemical, Inc. 1200 Brooks Road Dalton, GA 30719 Respondent.	Docket No. CWA-04-2008-5192

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION FOR ACCELERATED DECISION

In support of its Response to Respondent's Motion for Accelerated Decision, Complainant, RCRA Division Director, United States Environmental Protection Agency, Region 4 (EPA), by its undesigned counsel, states as follows:

I. INTRODUCTION

These proceedings and Respondent's Motion are governed by the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits," codified at 40 C.F.R. Part 22 (Consolidated Rules).

A. Standard of Review

1. Motion for Accelerated Decision

Section 20 of the Consolidated Rules sets out the threshold for obtaining an accelerated decision: if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, the Presiding Officer may render an accelerated decision. 40 C.F.R. § 22.20(a).

The Consolidated Rules do not define or provide examples to assist in determining what is a "genuine issue of material fact." However, a motion for accelerated decision is similar to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure (FRCP).[1] The FRCP, although not binding on administrative agencies, provide useful guidance in applying the Consolidated Rules.[2] Rule 56(c) of the FRCP provides that summary judgment "shall be rendered ... if the pleadings ... 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." The Supreme Court has held that the party moving for summary judgment has the burden of showing the absence of a genuine issue as to any material fact, and that the evidence offered by the moving party to support its motion must be viewed in the light most favorable to the opposing party.[3] The Environmental Appeals Board (EAB) has adopted the Supreme Court standard under FRCP 56 in determining whether there is a genuine issue of material fact warranting a hearing under 40 C.F.R. Part 124.[4]

In determining whether a fact is "material," the Supreme Court has noted that a factual dispute is material where it might affect the outcome of the proceeding.[5] In addition, the Court

---

[1] *In The Matter of Green Oil Company,* Docket No. CWA-07-2002-0059, at 2 (January 31, 2003); *In the Matter of Pepperell Associates,* Docket No. CWA-2-I-97-108, at 4, 6 (October 9, 1998).

[2] *In re Wego Chemical & Mineral Corporation,* 1992 EPA ALJ Lexis 58 (April 15, 1992); TSCA Appeal No. 92-4, 4 E.A.D. 513 at 13 n.10 (E.A.B., February 24, 1993).

[3] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1985), *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157-59 (1970).

[4] *In the Matter of Mayaguez Regional Sewage Treatment Plant*, NPDES Appeal No. 92-23, 4 EAD 772, 781 (EAB, Aug. 23, 1993); *Pepperell,* at 6.

[5] *Id.*

has found that a factual dispute is "genuine," if the evidence is such that a finder of fact could return a verdict in favor of the nonmoving party.[6] The Supreme Court has also held that the appropriate evidentiary standard of a particular proceeding is what governs the assessment of whether there is a genuine issue of material fact.[7] The Consolidated Rules state that the appropriate evidentiary standard to be applied in this case is a "preponderance of the evidence." 40 C.F.R. § 22.24(b). As such, Respondent's burden in its Motion for Accelerated Decision is to prove the absence of a genuine issue of material fact, such that a reasonable finder of fact could not return a verdict in favor of Complainant, based on a preponderance of evidence, and that it is therefore entitled to judgment as a matter of law.

2. Motion to Dismiss[8]

The Consolidated Rules also address when a proceeding may be dismissed. 40 C.F.R. § 22.20 states that "[t]he Presiding Officer, upon motion of the Respondent, may at any time dismiss a proceeding . . . on the basis of failure to establish a prima facie case or other grounds which show no right to recovery on the part of Complainant." The EAB's decision in *Commercial Cartage Company, Inc.*, noted that to determine if dismissal is warranted, the allegations in a complaint are to be taken as true, and all reasonable inferences drawn in favor of

---

[6] *Adickes*, at 158-159.

[7] *Anderson*, at 252.

[8] Notwithstanding that Respondent has styled its Motion as one for accelerated decision, after each point Respondent makes in its Motion, it seeks dismissal of the Complaint. Motion at 3, 5, 7. The standard for obtaining dismissal of the Complaint is different than that for obtaining an accelerated decision, and is therefore being addressed separately.

the Complainant.[9] In addition, pursuant to FRCP 12(b)(6), all facts alleged in the complaint are taken as true and all reasonable inferences are drawn in favor of the complainant.[10]

Further, FRCP 8(a), also known as "notice pleading", does not require a claimant to set out in detail the facts upon which he bases his claim. To be sufficient, the complaint must contain: "(1) a short and plain statement of the grounds upon which the court's jurisdiction depends ... (2) a short and plain statement of the claim showing that the pleader is entitled to relief ... and (3) a demand for judgment for the relief the pleader seeks." FRCP 8(a), Claims for Relief.[11]

The Supreme Court has also decided cases involving the appropriateness of dismissing a complaint, and concluded that "it is axiomatic that a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[12] Thus, Respondent's burden in its requests to have the Complaint dismissed is to prove that the Complainant has not sufficiently established a prima facie case against Respondent, and that there are no set of facts that would entitle EPA to its requested relief.

---

[9] *In the Matter of Commercial Cartage Company, Inc.*, 5 E.A.D. 112, 117, 1994 EPA App. LEXIS 58 (EAB, February 22, 1994).

[10] *Asbestos Specialists, Inc.*, TSCA App. 92-3 n.20 (EAB October 6, 1993); 1993 EPA App. Lexis 7: 4 E.A.D. 819 (October 6, 1993) citing, *Bank v. Pitt*, 928 F.2d 1108, 1109 (11th Cir. 1991). *See also, In the Matter of Lilly Del Caribe, Inc.*, EPA Docket No. EPCRA-02-99-4001 (June 21, 1999); 1999 EPA ALJ Lexis 28 (June 21, 1999). *See also, United States v. Gaubert*, 499 U.S. 315, 327 (1991).

[11] *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957).

[12] *McLain v. Real Estate Board of Orleans, Inc.*, 444 U.S. 232, 246 (1980) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

B. Summary of Pleadings

The Complaint in this matter was filed December 21, 2007. The Complaint contains one count and alleges the Respondent violated Section 311 of the Federal Water Pollution Control Act, commonly referred to as the "Clean Water Act"(Act or CWA), as amended by the Oil Pollution Act of 1990 (OPA), 33 U.S.C. § 1321, by discharging a harmful quantity of allyl alcohol, a hazardous substance, into the waters of the United States. This violation arose out of Respondent's April 12, 2004, discharge of approximately 3,348 pounds of allyl alcohol from Respondent's chemical manufacturing facility located in Dalton, Georgia, into or upon the Stacey Branch and Drowning Bear Creek and their adjoining shorelines. The Complaint seeks a penalty up to the statutory maximum of $157,500 for this violation.

Respondent filed an Answer and Request for Hearing on January 16, 2008. Simultaneously, Respondent filed a Motion for Accelerated Decision. In its Answer and also in its Motion, Respondent admits that there was a discharge of allyl alcohol from its facility into Stacey Branch and Drowning Bear Creek (Answer ¶ 9, Motion at 5-6), but asserts: 1) that the discharge was caused by third parties and thus Respondent has a complete defense based on the acts of third parties and the Complaint should be dismissed; 2) that Respondent has paid a penalty to the State of Georgia for this violation and therefore the penalty should be dismissed as duplicative; and 3) that EPA's quantification of the discharge of allyl alcohol into waters of the U.S. lacks foundation, and therefore the Complaint should be dismissed.

C. Summary of EPA's Argument

Respondent's Motion for Accelerated Decision is completely without merit, and should be denied.[13] Respondent is strictly liable for the discharge of a harmful quantity of hazardous substances into the waters of the United States. Respondent incorrectly relies on a provision of the Act that only applies to third party liability for actual costs of clean up or removal of hazardous substance spills, and has nothing to do with liability for the violation itself or liability for a penalty. As a result, Respondent cannot demonstrate it is entitled to judgment as a matter of law. In addition, EPA considered the statutory factors in Section 311(b)(8) of the CWA, including that Respondent paid another penalty for this incident, when determining the amount of the proposed civil penalty to assess against Respondent in the Complaint. Further, the penalty Respondent paid to the State of Georgia was not for a violation of Georgia's Water Quality Control Act (GWQCA), but rather was for violation of Georgia's air statute. Finally, EPA's Complaint alleges that Respondent discharged an amount of allyl alcohol in a harmful quantity (in excess of the reportable quantity). On this point, Respondent's Motion clearly demonstrates that there is a genuine issue of material fact. As such, Respondent has not met its burden for either an accelerated decision or dismissal of the Complaint. EPA's recitation of the facts and its pleading in the Complaint is sufficient to withstand a Motion for Accelerated Decision, or, in the alternative, a Motion to Dismiss.

[13] In addition, Respondent cannot alternately succeed if its Motion is interpreted as one to dismiss the Complaint.

D. Statutory Requirements[14]

Section 311(b)(3) of the CWA prohibits the discharge of hazardous substances into or upon the navigable waters of the United States or adjoining shorelines in such quantities that have been determined may be harmful to the public health or welfare or environment of the United States. 33 U.S.C. § 1321(b)(3). "Hazardous substances" are defined under Section 311(a)(14), to mean "any substance designated pursuant to..." Section 311(b)(2) of the CWA. 33 U.S.C. § 1321(a)(14). 40 C.F.R. Part 116 designates hazardous substances pursuant to Section 311(b)(2) of the Act, and applies to discharges of such hazardous substances. Pursuant to 40 C.F.R. Part 116, discharge "includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping...." 40 C.F.R. § 116.3.

Pursuant to Section 311(b)(4) of the Act, the President through the Administrator determined that discharges of hazardous substances into or upon the navigable waters of the United States in such quantities that have been determined may be harmful to the public health or welfare or the environment of the United States are discharges of hazardous substances in excess of the reportable quantities listed in 40 C.F.R. § 117.3.[15] Navigable waters of the United States are defined to include all "waters of the United States such as intrastate lakes, rivers, streams, ... the use ... of which affect interstate commerce including, but not limited to: [i]ntrastate lakes,

---

[14] Although not mentioned in the Complaint, Respondent, in its Motion, references Section 311(g) of the CWA. 33 U.S.C. §1321(g). As discussed more thoroughly in Section II.B., below, Section 311 of the CWA contains provisions for clean up and removal of hazardous substance spills (*see* Section 311(c) and (e) of the Act), and liability for those cleanup and removal costs (*see* Section 311(f), (g) and (h) of the Act.) Section 311(g) of the Act only addresses third party liability for those clean up and removal costs; it does not address penalties. *See* Section 311(g), 33 U.S.C. § 1321(g).

[15] 40 C.F.R. § 117.1(a).

rivers, streams, and wetlands which are utilized by interstate travelers for recreational or other purposes; and [i]ntrastate lakes, rivers, streams, and wetlands from which fish or shellfish are or could be taken and sold in interstate commerce; and [i]ntrastate lakes, rivers, stream, or wetlands which are utilized for industrial purposes by industries in interstate commerce." 40 C.F.R. § 116.3. *See also* 33 U.S.C. § 1362(7).

Section 311(b)(6) establishes EPA's authority to take administrative actions against "any owner, operator, or person in charge of any vessel, onshore facility, or offshore facility" from which hazardous substances are discharged in violation of Section 311(b). 33 U.S.C. § 1321(b)(6).

II. RESPONDENT'S RELIANCE ON SECTION 311(g) IS MISPLACED

Section 311 of the CWA provides for strict liability: Violators are liable for penalties without regard to fault. In addition, Respondent's Motion for Accelerated Decision is without merit because the section of the CWA cited by Respondent does not apply to its liability for the discharge of a harmful quantity of hazardous substances into navigable waters of the United States, and therefore cannot be a defense to Respondent's liability. Respondent has not and cannot cite to any authority for its assertions that Section 311(g) applies to this matter, and therefore cannot demonstrate that based on Section 311(g) of the CWA it is entitled to judgment as a matter of law.

A. Section 311(b)(6) of the CWA Provides for Strict Liability

Administrative actions brought pursuant to Section 311(b)(6) of the CWA are subject to strict liability. 33 U.S.C. § 1321(b)(6).[16] Therefore, owners and operators of facilities from which hazardous substances are discharged in harmful quantities into navigable waters of the United States are liable for penalties without regard to fault.[17] The Seventh Circuit in *Tex-Tow* explicitly addressed the question of causation and its relation to Section 311's strict liability scheme. The Court ultimately held that the "'cause' of the spill is the [p]olluting enterprise rather than the [c]onduct of ..." a third party. *Tex-Tow*, 589 F.2d at 1316. The Court recognized that an enterprise "can forsee that spills will result despite all precautions and that some of these will result from the acts or omissions of third parties ... Congress had the power to make certain oil-related activities or enterprises the 'cause' of the spill rather than the conduct of a third party. With respect to the civil penalty Congress has exercised this power." *Id.* at 1314. EPA has properly filed the Complaint in this matter against the Respondent as the owner of an onshore facility that discharged a harmful quantity of hazardous substances into a water of the United

---

[16] *In The Matter Of Crown Central Petroleum*, Corp., Docket No. CWA-08-2000-06, at 14, 71 (January 8, 2002); *In The Matter Of ALDI, Inc.*, Docket No. CWA-7-2000-0015 at 4 (February 7, 2001); *See U.S. v. Coastal States Crude Gathering Co.*, 643 F.2d 1125, 1127 (5th Cir. 1981) *reh'g denied*, 647 F.2d 1122, *cert. denied*, 454 U.S. 835; *U.S. v. Tex-Tow, Inc.*, 589 F.2d 1310, 1312-13 (7th Cir. 1978); *U.S. v. Marathon Pipe Line Co.*,589 F.2d 1305, 1306-7 (7th Cir. 1978). Although these cases involved discharges of oil, the statutory provision applies to discharges of either oil or hazardous substances.

[17] *See South Port Marine, LLC v. Gulf Oil Ltd. Partnership*, 234 F.3d 58, 66 (1st Cir. 2000) (OPA); *Metlife Capital Corp.*, 132 F.3d at 820 (OPA); *United States v. West of England Ship Owner's Mut. Protection & Indem. Ass'n*, 872 F.2d 1192, 1193-97, 1200 (5th Cir. 1989) (CWA); *United States v. Oswego Barge Corp.*, 664 F.2d 327, 340 (2d Cir. 1981) (CWA); *Conoco*, 916 F. Supp. at 583 (OPA); *Montauk Oil Transp. Corp. v. Steamship Mut. Underwriting Ass'n*, No. 90 Civ. 5702, 1996 WL 340000 at *1 (S.D.N.Y. June 19, 1996) (CWA); *In re Oriental Republic of Uruguay*, 821 F. Supp. 928, 930-31 (D. Del. 1992) (CWA).

States. As set forth above, under the Act, Respondent is strictly liable for penalties for the discharge of hazardous substances. The CWA statutory scheme sets forth an exclusive list of defenses to liability for clean up costs, none of which are applicable to CWA Section 311 penalties.[18] In *V-1*, the defendant argued that it was not liable for civil penalties and removal costs because the United States improperly failed to consider other potential sources of contamination. *Id.* at 6. The court dismissed this affirmative defense and held that EPA was not required to identify all potentially responsible persons. *Id.*, at 7.

EPA alleged MFG was the owner of the facility at the time of the discharge, (Complaint ¶ 4), and Respondent has admitted it owned the facility at the time of the discharge (Answer ¶ 4). Hence, Respondent's contention in its Motion that a third party was responsible and as a result it cannot be liable, is erroneous in the face of a strict liability statute. Accordingly, Respondent has not met its burden that it is entitled to judgment as a matter of law, and therefore Respondent's Motion for Accelerated Decision should be denied.

B. Section 311(g) of the CWA Only Addresses Third Party Liability for Removal Costs; Section 311(g) of the CWA Does Not Address Liability for Penalties

Section 311(g) provides for a defense for liability only for the cost of clean up and removal of hazardous substance spills.[19] It does not apply to penalties assessed, as in the case at

---

[18] *U.S. v. V-1 Oil Co.*, Memorandum Decision and Order, Civil No. 96-0454-E-BLW, 4-6, (D. Idaho 1999) (Order on Motion to Strike Affirmative Defenses).

[19] 33 U.S.C. 1321(g); *West of England* at 1196 -1197; Although *West of England* references Section 311(f) of the Act when discussing liability for clean up and removal costs and its inapplicability to penalty actions, the statutory scheme and language of Section 311(f) and (g) of the Act discuss the same removal and cleanup costs. *See In The Matter of Olympic Tug and Barge Company, Inc. v. U.S.*, Nos. C88-978D, C89-1361D, 1990 WL 166368 (W.D. Wash.), 32 ERC 1381, 1990 A.M.C. 1671 (March 5, 1990) at 3 ("Section 311(g) is similar to Section 311(f)");

bar, for the discharge of hazardous substances into the navigable waters of the United States. As stated in *Tex-Tow*, the "owner or operator of a discharging facility is liable to [sic] a section 1321(b)(6) civil penalty even where it exercised all due care and a third party's act or omission was the immediate cause of the spill".[20] The language of Section 311(g) of the Act is clear on its face. Section 311(g) provides that "[i]n any case where an owner or operator of ... an onshore facility from which ... a hazardous substance is discharged in violation of subsection (b)(3) of this section, proves that such discharge of ... hazardous substance was caused solely by an act or omission of a third party, ... such third party shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for removal of such ... substance...." 33 U.S.C. § 1321(g). Clearly, Section 311(g) provides a defense to liability for clean up costs when the spill was caused by a third party. There is no mention anywhere in Section 311(g) that it provides a defense to liability for the spill itself or for penalties associated with the spill. As Section 311(g) of the CWA cannot provide a defense to Respondent's liability under Section 311(b)(3) and (6), and Respondent cannot show it is entitled to judgment as a matter of law, EPA requests that Respondent's Motion for Accelerated Decision be denied.

In addition, even though Section 311(g) of the CWA is not applicable, Respondent could not meet the burden of Section 311(g), which requires that the discharge must have been caused solely by an act of a third party.[21] Respondent has admitted in its Answer and in its Motion that

---

[20] *Tex-Tow*, at 1316. While *West of England* (1989) and *Tex-Tow* (1978) predate OPA 1990, OPA 1990 did not amend Section 311(g). Indeed, the *West of England* court relies upon and cites the 1969 Senate Committee Report. 872 F.2d at 1196.

[21] 33 U.S.C. § 1321(g).

it discharged the allyl alcohol from its facility (Answer ¶ 9, Motion at 1, 5-6).[22] Respondent cites to the U.S. Chemical Safety and Hazard Investigation Board (CSB) Investigation Report to try to establish that the Incident Commander (IC) for the Dalton Fire Department made the decision to use water to contain the toxic vapor cloud of allyl alcohol that had formed during the release from the facility. This contention forms the basis for Respondent's assertion that the discharge was caused by a third party. However, Respondent fails to note that on a previous page of the CSB Report, it states that MFG personnel "advised the IC to spray water on the releasing vapor cloud and reactor...."[23] In addition, the CSB Report also discusses the use of the unmanned water cannons as an effective method to contain and absorb the releasing toxic vapor, and the need to stay safely upwind of the toxic vapor cloud.[24] Notwithstanding that later in the response the IC continued using water spray even though it was contaminating the nearby creeks, the CSB Report makes it clear that the IC had little or no other choice.[25] Further, the argument that the IC caused the violation of Section 311(b)(3) of the Act is without merit. Clearly, without Respondent's discharge of allyl alcohol, there would not have been a violation of Section 311(b) of the CWA.

---

[22] In its Motion at pages 2-3, Respondent cites to and attaches as its Exhibit A, page 37 of the U.S. Chemical Safety and Hazard Investigation Board Investigation Report, "Toxic Chemical Vapor Cloud Release," MFG Chemical Inc., April 12, 2004, Report No. 2004-09-I-GA (CSB Report). The Abstract of the CSB Report states that "[n]o part of the conclusions, findings, or recommendations of the CSB relating to any chemical incident may be admitted in evidence or used in any action or suit for damages arising out of any matter mentioned in an investigation report." EPA will therefore reference the CSB Report solely to clarify the assertions made by Respondent in its Motion.

[23] CSB Report at 31.

[24] CSB Report, at 36.

[25] CSB Report, at 37.

It was the combination of the water spray mixed with the allyl alcohol from Respondent's facility that contaminated the creeks. Hence Respondent could not prove that the discharge of the allyl alcohol into the navigable waters was caused solely by the IC's water spray. Therefore, Respondent cannot prove it is entitled to judgment as a matter of law, and EPA requests that Respondent's Motion for Accelerated Decision be denied.

III. EPA'S PENALTY DEMAND IS APPROPRIATE

A. Respondent Did Not Pay a Penalty for Georgia Water Quality Control Act Violation; Respondent Paid a Penalty for Georgia Air Violation and Paid Damages for a Fish Kill

Respondent mischaracterizes its 2004 Consent Order with the Environmental Protection Division, Georgia Department of Natural Resources (GAEPD). Respondent states in its Motion that "[t]he total penalty paid under the Consent Order, pursuant to the Georgia Water Quality Control Act, was $26,000, of which $5,000 was for damages and cost recovery of the fish kill." (emphasis added) (Motion at 5). However, the Consent Order clearly states that the "facility shall pay to the State of Georgia Department of Natural Resources, Environmental Protection Division the sum of twenty thousand dollars ($20,000.00). This is the penalty for not being in full compliance with 40 CFR Part 68." (emphasis added) (GAEPD Order ¶ 1). 40 C.F.R. Part 68, entitled Chemical Accident Prevention Provisions, contains the requirements for a facility's Risk Management Program, the absence of which MFG was cited for by the GAEPD Consent Order. (GAEPD Order at 1, 5th "whereas" paragraph). The remaining $6,000 paid to GAEPD was for failure to timely report the spill ($1,000), and for damages/cost recovery of fish kill ($5,000). (GAEPD Order ¶ 4). Clearly, then, Respondent has not paid any penalty to GAEPD for violation

of the Georgia Water Quality Control Act (GWQCA) and any assertions by Respondent to the contrary are erroneous given the express language of the Consent Order.

In addition, the Consent Order clearly states that the GAEPD and Respondent "desire to resolve the matter of alleged violations associated with the Risk Management Program; and ... [that the o]rder shall not constitute a finding or adjudication of violations of any [other] State law, rules or regulations by the Facility...." (GAEPD Order at 3, 5th and 6th "whereas" paragraphs). Therefore, it is also clear that the GAEPD Order was not intended to resolve Respondent' violations of the GWQCA. Respondent's assertions to the contrary, EPA's proposed penalty is not duplicative of a penalty already paid by Respondent to GAEPD, and EPA's penalty should not be dismissed, as Respondent requests in its Motion. Respondent cannot prove it is entitled to judgment as a matter of law, and its Motion should therefore be denied.

B. EPA's Proposed Penalty Considers Other Penalties Paid by Respondent for the Same Incident

The statutory language of Section 311(b)(8) requires EPA to consider many factors, including "any other penalty for the same incident..." when determining the amount of a civil penalty. 33 U.S.C. § 1321(b)(8). Notwithstanding Respondent's mischaracterizations of penalties paid to GAEPD, EPA does request the Administrator to consider the other penalties Respondent has already paid for this incident when seeking the assessment of penalties for its Section 311(b)(3) violation. (Complaint at 3, Proposed Penalty Section). In addition, there is nothing in the CWA, the regulations, or EPA's "Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act" (Penalty Policy) that bars EPA from seeking a penalty for

a CWA Section 311(b)(3) violation where Respondent has paid a penalty for a different violation of a different statute.[26] Nor is there any provision in the Penalty Policy that allows a Court to dismiss the penalty Complainant seeks in this case because a separate penalty may have been paid to GAEPD.[27]

Complainant, in its Proposed Penalty Section of the Complaint, clearly states that it proposes that "the Administrator, after considering the statutory penalty factors set forth at Section 311(b)(8) of the Act, issue a Final Order assessing administrative penalties against the Respondent ...." (emphasis added) (Complaint at 3). 40 C.F.R. Part 22 allows for a Complaint to be issued without a specific penalty demand. 40 C.F.R. § 22.14(a)(4)(ii). It does require, however, that the Complaint include the days of violation for which a penalty is sought, a brief explanation of the severity of each violation alleged and a recitation of the statutory penalty authority applicable for each violation in the Complaint. 40 C.F.R. § 22.14(a)(4)(ii). Each of these are addressed in the Proposed Penalty Section of EPA's Complaint. 40 C.F.R. Part 22 does not require that Complainant spell out its consideration of each factor enumerated in the CWA in its Complaint. Rather, it is sufficient that the Complainant consider the factors before assessing

---

[26] *But see* Section 311(b)(11) of the CWA, stating that " [c]ivil penalties shall not be assessed under both this section and section 1319 of [the CWA] for the same discharge." 33 U.S.C. § 1321(b)(11); *but see also* Section 309(g)(6), providing that where a State is diligently prosecuting an action under a comparable state law, or where a final order has been issued under a comparable state law, a violation shall not be subject to a penalty action under Section 311(b). 33 U.S.C. § 1319(g)(6). Note, Respondent has not raised either of these arguments in its Motion or its Answer and Affirmative Defenses.

[27] Respondent makes this assertion at page 4 of its Motion. Respondent notes that the Penalty Policy allows (not mandates) Complainant to use a prior penalty to offset the penalty in this case, but fails to note that the Penalty Policy gives discretion to EPA as to how much, if any, offset may be appropriate. In addition, Respondent fails to note that the Penalty Policy is a settlement policy.

the penalty. As a result, Respondent has not made any showing that the proposed penalty is erroneous in law and fact, and therefore cannot demonstrate that it is entitled to judgment as a matter of law, and Respondent's Motion should therefore be denied.[28]

IV. EPA'S COMPLAINT MEETS THE REQUIREMENTS OF 40 C.F.R. PART 22

EPA alleges in its Complaint that Respondent discharged an amount of allyl alcohol above the reportable quantity, and therefore in a harmful quantity, to navigable waters of the United States. (Complaint ¶ 10). EPA is not required at this point in the administrative proceedings to offer evidence to support its allegations. In addition, Respondent's Motion identifies that there is a genuine issue of material fact concerning the amount of allyl alcohol discharged into the navigable waters of the United States, the answer to which clearly affects the outcome of this case. However, Respondent's Motion characterizes this point as a matter of insufficient pleading.[29]

---

[28] As noted above, at footnote 4, Respondent characterizes its Motion as one for accelerated decision. Yet, after its arguments about EPA's proposed penalty, Respondent states that the "penalty should be dismissed ...." Motion at 5. If the Court interprets this statement as in fact seeking to dismiss the Complaint, Respondent's arguments would also fail. As noted below in Section IV.B. and D., the Complaint meets the requirements of 40 C.F.R. Part 22, and establishes a prima facie case against Respondent. Respondent's arguments about the duplicativeness of the penalty do not alter the sufficiency of the Complaint. Respondent cannot therefore establish Complainant's failure to establish a prima facie case or other grounds which show no right to recovery on the part of Complainant.

[29] As noted above, and in footnote 8, much of Respondent's Motion for Accelerated Decision in fact argues for dismissal of the Complaint. Respondent's last argument is more clearly an argument to dismiss the Complaint as opposed to an argument in favor of a motion for accelerated decision. As a result, EPA will again address this argument as if it were made pursuant to a motion to dismiss, as well as part of Respondent's Motion for Accelerated Decision.

A. Motion to Dismiss

As discussed above, the Consolidated Rules address when a proceeding may be dismissed. 40 C.F.R. § 22.20 states that "[t]he Presiding Officer, upon motion of the Respondent, may at any time dismiss a proceeding . . . on the basis of failure to establish a prima facie case or other grounds which show no right to recovery on the part of Complainant." The Complaint does not have to prove the allegations and does not have to provide evidence to support the allegations. In this case, the Complaint states that Respondent was the owner of a facility from which a hazardous substance was discharged in harmful quantities to navigable waters of the United States, or adjoining shorelines, and, as such, is liable for administrative penalties. Therefore, Complainant has sufficiently pled the elements necessary to establish the violation and Respondent has not made the requisite showing that EPA "can prove no set of facts" that would entitle EPA to its requested relief.

The necessary elements to show a violation of Section 311(b)(3)of the Act, 33 U.S.C. § 1321(b)(3) are: 1) discharge (Complaint ¶ 9); 2) of oil or hazardous substance (Complaint ¶ 9); 3) into or upon navigable waters of the United States, or adjoining shorelines (Complaint ¶¶ 6, 9); and 4) in harmful quantities (Complaint ¶¶ 10).[30] The Complaint establishes all four elements. Therefore, the Complaint is sufficient to establish a prima facie case for the occurrence of the alleged violation.

The necessary elements to establish liability for administrative penalties in this case pursuant to Section 311(b)(6)(A) of the Act, 33 U.S.C. § 1321(b)(6)(A) are 1) an owner (Complaint ¶¶ 3, 4); 2) of an onshore facility (Complaint ¶ 5); 3) from which a hazardous

---

[30] *See Crown Central Petroleum*, at 66-67; *ALDI, Inc.*, at 3-4.

substance is discharged in violation of Section 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3) (Complaint ¶¶ 9-10).[31] The Complaint sets forth all three elements. Therefore, the Complaint is sufficient to establish a prima facie case for liability for an administrative penalty based on the alleged violation, and the Complaint should not be dismissed.

B. EPA's Prima Facie Case Against Respondent

As noted above, allyl alcohol is a hazardous substance identified in 40 C.F.R. Part 116. The reportable quantity of allyl alcohol, as established by 40 C.F.R. Part 117 is 100 pounds. Pursuant to 40 C.F.R. § 117.1(a), 100 pounds is therefore the quantity of allyl alcohol that may be harmful when discharged in violation of Section 311(b)(3) of the CWA. The Complaint specifically alleges that Respondent discharged 3,348 pounds of allyl alcohol from its facility into the Stacey Branch and Drowning Bear Creek, navigable waters of the United States, and their adjoining shorelines in violation of Section 311(b)(3)of the Act, 33 U.S.C. § 1321(b)(3). Complaint ¶ 9. In its Answer and Motion, Respondent admits that it discharged 3,348 pounds of allyl alcohol, and that the discharge reached navigable waters of the United States. Answer ¶ 9, Motion at 5-6. In addition, Respondent's "evidence" in support of its Motion includes documents that support EPA's allegations.[32]

---

[31] *ALDI, Inc.*, 3-4.

[32] *See* CSB Report at 28-29, 31, 36-38; GAEPD Order at 3, ¶¶ 1, 4. Respondent also makes an unclear, puzzling reference to the EPCRA matter Respondent settled with EPA, without explaining how the EPCRA CAFO is supporting Respondent's assertions. Respondent states that "[a] reading of the [EPCRA CAFO] ... eliminates any factual dispute as to the allegations underlying this aspect of the Motion." Motion at 6. This is the only reference in the Motion to the EPCRA CAFO. However, upon reading the CAFO, one does not find any evidence to support Respondent's contention that the Complaint's quantification of the discharge of allyl alcohol into waters of the United States lacks foundation.

The Complaint also alleges that as a result of the violation of Section 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3), Respondent, as the owner of the facility, is liable for penalties pursuant to Section 311(b)(6)(B)(ii) of the Act, 33 U.S.C. § 1321(b)(6)(B)(ii). Complaint ¶ 11. Accordingly, the Complaint provides sufficient information, that if taken as true, would establish the occurrence of the violation and the liability of Respondent for penalties. As a result, the Complaint is sufficient to establish a prima facie case against Respondent, and Respondent's Motion should be denied.[33]

C. Materials Outside the Pleadings May Not Be Considered

EPA is not required to produce outside evidence to support its Complaint in order to withstand a motion to dismiss.[34] Notwithstanding, evidence does exist to support the allegations in the Complaint. However, this evidence steps beyond the scope of the Motion.[35] As noted in *Lilly Del Caribe,* "Respondent's response to EPA's request for information [and other items] ... are not relevant for consideration on Respondent's Motion to Dismiss, which challenges the sufficiency of the Complaint, and not the merits of the action."[36] As a result, Respondent's contention in its Motion that "the Complaint does not establish how the discharge occurred in

---

[33] *See Cartage, supra,* at 117.

[34] *In the Matter of Lilly Del Caribe, Inc.*, EPA Docket No. EPCRA-02-99-4001 (June 21, 1999); *In the matter of Puerto Rico Aqueduct and Sewer Authority*, EPA Docket No. EPCRA-02-99-4003 (October 4, 1999).

[35] *Id.*

[36] *Id. See Ayres v. City of Chicago,* Civ. No. 97-2176, 1999 U.S. Dist Lexis 1981 (N.D. Ill., February 22, 1999) (on motion to dismiss under Fed. Rule Civ. Pro. 12(b)(6), "materials such as affidavits which are outside the pleadings of the Complaint must be explicitly excluded from the Court's examination") (citing, *Carter v. Stanton,* 405 U.S. 669, 671 (1972)).

excess of a reportable quantity" is not a basis for determining that EPA failed to establish a prima facie case against Respondent. EPA does not have to prove in the Complaint how the discharge occurred in a harmful quantity. EPA's Complaint simply has to establish a prima facie case against Respondent that the discharge did occur in a harmful quantity, which it does. Therefore, Respondent's Motion should be denied.

D. EPA's Complaint Meets the Requirements of 40 C.F.R. Part 22

40 C.F.R. § 22.14(a) sets out the required content of a complaint, which must include, among other things, specific reference to each provision of the statute or implementing regulations which a respondent is alleged to have violated,[37] and a concise statement of the factual basis for each violation alleged.[38] EPA's Complaint contains references to the relevant section of the CWA which Respondent is alleged to have violated (Complaint ¶¶ 10). In addition, the Complaint sets forth the factual basis for the violation (Complaint ¶¶ 3-10). The Complaint, therefore, alleges sufficient facts to establish a prima facie case against Respondent, and Respondent's Motion should be denied.

E. There is a Genuine Issue of Material Fact

Notwithstanding that Respondent seeks dismissal of the Complaint in its Motion, the Motion is styled as a Motion for Accelerated Decision. However, the Motion itself provides a genuine issue of material fact. As Respondent notes in its Motion, it "disputes that allegation ... that the alleged discharge continued for at least two weeks ...." Motion at 2. In addition, Respondent disputes the amount of allyl alcohol that entered the waterbodies as a result of its

---

[37] 40 C.F.R. § 22.14(a)(2).

[38] 40 C.F.R. § 22.14(a)(3).

discharge. Motion at 5-6. Therefore, Respondent's own assertions create a genuine issue of material fact, which defeats its Motion for Accelerated Decision. Therefore, Respondent's Motion should be denied.

V. CONCLUSION

Based upon the foregoing, EPA respectfully requests that the Court enter an Order denying the Motion for Accelerated Decision, and in the alternative, denying Respondent's Motion to Dismiss.

Respectfully submitted,

February 14, 2008
Date

Joan Redleaf Durbin
Associate Regional Counsel
U.S. Environmental Protection Agency
Region 4
SNAFC, 61 Forsyth Street, SW, 13th Floor
Atlanta, Georgia 30303
(404) 562-9544

CERTIFICATE OF SERVICE

I certify that the foregoing COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION FOR ACCELERATED DECISION, and accompanying MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION FOR ACCELERATED DECISION, in the Matter of MFG Chemical, Inc., Docket No. CWA-04-2008-5192, and this Certificate of Service, was served upon the following persons, in the manner specified, on the date below:

Original and one copy hand-delivered:	Ms. Patricia Bullock, Regional Hearing Clerk U.S. EPA Region 4 Sam Nunn Atlanta Federal Center 61 Forsyth Street SW Atlanta, GA 30303-8960
Copy by facsimile and pouch mail	Chief Administrative Law Judge Susan Biro U.S. EPA Mail Code 1900L 1200 Pennsylvania Avenue, N.W. Washington, D.C. 20460 Facsimile number: 202-565-0044
For Respondent: Copy by certified mail, return receipt requested:	Lee A. DeHihns, III Alston & Bird LLP 1201 West Peachtree Street Atlanta, GA 30309-3424 (404) 881-7151
For Complainant: Copy hand-delivered	Joan Redleaf Durbin Associate Regional Counsel U.S. Environmental Protection Agency Region 4 SNAFC, 61 Forsyth Street, SW, 13th Floor Atlanta, Georgia 30303 (404) 562-9544

Dated this 14 day of February, 2008.

2008 FEB 14 PM 4:21
EPA REGION 4
HEARING CLERK

Mary A. Bell

Mary A. Bell
Legal Assistant
US EPA, Region 4
61 Forsyth Street, SW
Atlanta, GA 30303
404-562-9508