UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
Don Aadsen Ford	)	Docket No. CWA-VIII-01-PII
	)	
	)	
Respondent	)	

ORDER DENYING COMPLAINANT'S MOTION
FOR ACCELERATED DECISION

Clean Water Act--By motion dated December 10, 1998, Complainant, United States Environmental Protection Agency (EPA), moved, pursuant to 40 C.F.R. Sec. 22.20(a), for accelerated decision in the above-captioned case for alleged violations of the Clean Water Act, 33 U.S.C. Sec. 1311. Complainant seeks civil penalties in the amount of $72,000 under Section 309(g) of the CWA, 33 U.S.C. Section 1319(g), and asserts that it is entitled to judgment as a matter of law. Respondent filed a Brief in Opposition to Complainant's Motion on December 30, 1998. **Held**: Complainant's Motion For Accelerated Decision is **Denied**.

Before: Stephen J. McGuire
Administrative Law Judge

Date: February 1, 1999

Appearances:

For Complainant:

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For Respondent:

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I. Introduction

On February 20, 1998, Complainant issued a Complaint and Notice of Opportunity for Hearing to Don Aadsen Ford, alleging a violation of Section 301 of the Clean Water Act, 33 U.S.C. Section 1311 (CWA). The Complaint sought a civil

penalty in the amount of $72,000 under Section 309(g) of the CWA, 33 U.S.C. Section 1319(g), for discharges of wastewater into the storm water collection system and nearby Spring Creek without the permit required by Section 402 of the CWA, 33 U.S.C. Section 1342, as set forth in the Complaint.

Complainant asserts that Respondent is an auto-repair facility located in Ronan, Montana, and is incorporated under the laws of the State of Montana. On March 11, 1998, two inspectors from the EPA and a representative of the Confederated Salish and Kootenai Tribes (Tribes) inspected the facility to determine compliance with Resource Conservation and Recovery Act (RCRA) and CWA requirements in response to notification from the Tribes' Environmental Quality Office, that Respondent had spilled fuel from above-ground storage tanks (Exhibit 1 to Complainant's Pre-Hearing Exchange)(PHE).

The inspectors allegedly observed two sumps in the north end of the facility measuring approximately 2 feet by 2 feet. EPA asserts that according to the Inspection Report, Mr. Henricksen, the "owner" of the facility, stated that the floors were flushed with NaOH and water into the sumps approximately once per week. He further stated that sludges from the sumps were removed approximately every six months, with approximately 20 to 30 gallons of sludge being removed from each sump at that time. Prior to approximately March 3, 1997, EPA argues that the sumps were connected to the facility's surface storm water collection system (Complaint, paragraph 7), which was in turn connected to a Montana Department of Transportation storm drain which feeds into Spring Creek (Complaint paragraph 8).

On April 10, 1997, EPA sent a request pursuant to section 308 of the CWA, 33 U.S.C. Section 1318, to Respondent concerning Respondent's wastewater disposal practices (Exhibit 2 to Complainant's PHE). On May 9, 1997, Respondent provided a response to this request (Exhibit 3 of Complainant's PHE). In its Response, EPA asserts that Respondent stated that the two floor drains located in the north end of the facility were installed during the 1960's and connected to the outdoor water drain system. Respondent allegedly also asserted that it appeared that the drains were connected to the existing storm water system at that time. According to the response, EPA asserts that effluent water used to wash the floors may have contained trace amounts of petroleum, grease, and anti-freeze from vehicles (Id. at 1).

EPA argues that it is undisputed, based on the Complaint, Answer and documents filed in connection with the PHE that Respondent discharged pollutants without a permit in violation of the CWA during the five years preceding the Complaint

in this matter up until March 3, 1997. As such, EPA contends that it is entitled to judgment as a matter of law, pursuant to Section 22.20(a) of the Consolidated Rules of Practice.

EPA asserts that it is undisputed that Spring Creek is and was at all times relevant to this action, "waters of the United States" as defined by 40 C.F.R. Section 122.2; that Respondent never applied for, nor received a NPDES permit for the discharge of wastewater to waters of the United States; that prior to March 3, 1997, Respondent failed to comply with Sections 301(a) and 402 of the CWA, by discharging wastewater from the facility to the storm water system and Spring Creek without a NPDES permit; and that accordingly, Respondent violated the requirements of Section 301 and 402 of the CWA and 40 C.F.R. Section 122 (Complaint at Paragraphs 11, 14, 20, and 21).

Complainant therefore alleges that Respondent having failed to raise any affirmative defenses which would preclude an Accelerated Decision of Liability, it is entitled to judgment as a matter of law, as there is no genuine issue of material fact relevant to Respondent's liability.

II. Standard For Accelerated Decision

Section 22.20(a) of the Rules of Practice, 40 C.F.R. Section 22.20(a), authorizes the Administrative Law Judge (ALJ) to "render an accelerated decision in favor of the Complainant or Respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law as to any part of the proceeding. In addition, the ALJ, upon motion of the Respondent, may dismiss an action on the basis of "failure to establish a prima facie case or other grounds which show no right to relief."

A long line of decisions by the Office of Administrative Law Judges (OALJ) and the Environmental Appeals Board (EAB), has established that this procedure is analogous to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure (F.R.C.P.). See, e.g., In re CWM Chemical Serv., Docket No. TSCA-PCB-91-0213, 1995 TSCA LEXIS 13, TSCA Appeal 93-1 (EAB, Order on Interlocutory Appeal, May 15, 1995); and Harmon Electronics, Inc., RCRA No. VII-91-H-0037, 1993 RCRA LEXIS 247 (August 17, 1993).

The burden of showing there exists no genuine issue of material fact is on the party moving for summary judgment. Adickes v. Kress., 398 U.S. 144, 157 (1970).

In considering such a motion, the tribunal must construe the factual record and reasonable inferences therefrom in the light most favorable to the non-moving party. Cone v. Longmont United Hospital Assoc., 14 F. 3rd 526, 528 (10th Cir., 1994). The mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). Similarly, a simple denial of liability is inadequate to demonstrate that an issue of fact does indeed exist in a matter. 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. In re Bickford, Inc., TSCA No. V-C-052-92, 1994 TSCA LEXIS 90(November 28, 1994).

"Bare assertions, conclusory allegations or suspicions" are insufficient to raise a genuine issue of material fact precluding summary judgment. Jones v. Chieffo, 833 F. Supp 498, 503 (E.D. Pa. 1993). The decision on a motion for summary judgment or accelerated decision must be based on the pleadings, affidavits and other evidentiary materials submitted in support or opposition to the motion. Calotex Corp. V. Catrett, 477 U.S. 317, 324 (1986); 40 C.F.R. Sec. 22.20(a); F.R.C.P. Section 56(c).

Upon review of the evidence in a case, even if a judge believes that summary judgment is technically proper, 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).

III.Discussion

In its response, Respondent asserts that Complainant's motion should not be granted as there are factual inconsistencies regarding the actual operating dates of the sumps in question and questions of fact regarding whether any materials from the sumps actually entered Spring Creek. Respondent also disputes any determination of liability without considering whether a waiver of penalties would be appropriate.

Respondent argues that certain of the assertions made by EPA in its Memorandum in support of its Motion have previously been controverted by Respondent and do not support the Motion for Accelerated Decision. First, Respondent questions EPA's statement that the purpose of the inspection was "to determine compliance

with...(RCRA) and (CWA) requirements" (EPA Memorandum at 2). Respondent asserts that the Inspection Report also establishes that EPA had advised Respondent that the "expressed purpose (of the site visit) was to *discuss* used oil and waste, generation, management, and disposal activities and Clean Water Act compliance." (Inspection Report, pp. 1-2)(Emphasis Added).

Respondent also notes that the Complaint misidentified Mr. Henricksen as the "owner" of the "Facility" (Memorandum at 3). Respondent states that Mr. Henricksen is the president of the Respondent corporation and neither he nor the Respondent owned the building where the sumps were formerly located.

Respondent also disputes the factual assertion by EPA that the storm water system was connected to a Montana Department of Transportation storm drain which feeds into Spring Creek (Memorandum at 3). In its Answer, Respondent denied the allegations contained in Paragraph 8 of the Complaint and stated affirmatively that from time to time, the storm water collection system was *not* connected to the state's storm drain (Answer par. 5).

Respondent also takes issue with EPA's citation to Respondent's information response which stated "effluent water used to wash the floors *may have contained* trace amounts of petroleum, grease and anti-freeze from vehicles" (Memorandum at 3)(Emphasis Supplied). However, Respondent asserts that EPA did not cite to the entire information response which states that "although the possibility exists that very minor traces of petroleum, grease, or antifreeze occasionally entered these drains during floor washing operations, *no documented releases have been noted from within this facility. There have been no complaints or concerns raised by either the city of Ronan or MDT regarding discharges from those drains on record."* Thus, Respondent contests the fact that any discharge was ever released into Spring Creek.

There also appears to be a dispute as to the duration of the discharges to the sump pumps. EPA states that "during the five years prior to the filing of the Complaint, until at a minimum March 3, 1997, Aadsen operated two floor sumps in the north end of the facility." (Memorandum at 5). EPA acknowledged in its Compliance Order dated February 23, 1998, that the sumps had been closed in March 1997. Thus, its factual assertion that discharges to the sumps for *five years prior* to filing of the Complaint, are an unsupportable basis for a determination of Respondent's liability, when in fact, the sumps appear to have been only open four of the five years prior to the filing of the Complaint.

Respondent has raised these matters in affirmative defenses which, in addition to the question of whether it was entitled to a waiver of penalties, is sufficient to deny Complainant a finding that Respondent violated Sections 301 and 402 of the CWA as alleged in the Complaint.

The evidence presented in the instant case establishes genuine issues of material facts regarding Respondent's liability. The argument of the parties can thus be properly measured only against the backdrop of an evidentiary hearing, which is necessary to fully develop the questions presented in this matter. Such issues preclude granting Complainant's Motion under the appropriate standard for accelerated decision.

Under separate Order, this case SHALL BE SET FOR EVIDENTIARY HEARING on the issues of liability and penalty.

IV. Order

Accordingly, for the foregoing reasons and pursuant to 40 C.F.R. Section 22.20 of the Consolidated Rules of Practice, Complainant's Motion for Accelerated Decision is **DENIED**.

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Stephen J. McGuire
Administrative Law Judge

Washington, D.C.