UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
MFG Chemical, Inc.,	)	**Docket No. CWA-04-2008-5192**
	)	
Respondent.	)	

ORDER ON RESPONDENT'S MOTION FOR ACCELERATED DECISION

I. Procedural History

This action was initiated on December 21, 2007 by the U.S. Environmental Protection Agency Region 4 ("Complainant"), filing a Complaint charging Respondent MFG Chemical, Inc. with one count of violating Section 311(b)(3) of the Clean Water Act ("CWA") as amended by the Oil Pollution Act of 1990, 33 U.S.C. § 1321(b)(3). The Complaint alleges that on April 12, 2004, Respondent discharged 3,348 pounds of allyl alcohol from its facility in Dalton, Georgia into or upon navigable waters as defined in Section 502(7) of the CWA, 33 U.S.C. § 1362(7), namely, the Stacy Branch and Drowning Bear Creek and their adjoining shorelines.

On January 16, 2008, Respondent filed an Answer to the Complaint, admitting some allegations and denying others, asserting affirmative defenses, and requesting a hearing. On the same day, Respondent also filed a Motion for Accelerated Decision ("Motion") requesting dismissal of the Complaint on three grounds: (1) that the discharge was caused solely by the acts of a third party; (2) that Respondent paid a penalty for the same discharge alleged in the Complaint pursuant to a consent order entered into between Respondent and the Georgia Department of Natural Resources ("Georgia DNR"); and (3) that while Respondent admitted the release of allyl alcohol into the atmosphere as a gaseous cloud, there is no foundation for the allegation that 3,348 pounds of it entered any waterbodies.

After Complainant's Motion for Extension of Time to Respond to Respondent's Motion for Accelerated Decision was granted, Complainant filed a Response to Respondent's Motion for Accelerated Decision ("Response") on February 14, 2008, arguing that Respondent's Motion is completely without merit and should be denied.

II. Applicable Laws and Regulations and Undisputed Facts

The CWA was enacted to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The purpose of section 311 of the CWA

is to deter conduct causing spills or discharges of oil and hazardous substances into navigable waters, adjoining shorelines, and certain ocean waters under United States jurisdiction. *See, e.g., United States v. Marathon Pipe Line Co.*, 589 F. 2d 1305, 1309 (7th Cir. 1978). Section 311(b)(1) of the CWA sets forth a policy of "no discharge" of oil or hazardous substances into or upon such waters. 33 U.S.C. §1321(b)(1).

Section 311(b)(3) of the CWA prohibits "the discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines" and other waters of the United States, "in such quantities as may be harmful as determined by the President under paragraph (4) of this subsection," that is, "harmful to the public health or welfare or the environment of the United States." 33 U.S.C. §§ 1321(b)(3) and (b)(4). The term "discharge" is defined as including "any spilling, leaking, pumping, pouring, emitting, emptying or dumping," except as in compliance with a permit under Section 402 of the CWA and under certain other conditions not pertinent to this case. Section 311(a)(2) of the CWA, 33 U.S.C. §§ 1321(a)(2); 40 C.F.R. § 116.3. Section 311(b)(6) authorizes assessment of a penalty against "[a]ny owner, operator, or person in charge of any vessel, onshore facility or offshore facility . . . from which oil or a hazardous substance is discharged in violation of paragraph (3) . . . ." 33 U.S.C. § 1321(b)(6).

Pursuant to authority of Section 311(b)(2), EPA promulgated regulations designating substances as "hazardous substances" in 40 C.F.R. Part 116. Allyl alcohol is designated as a hazardous substance at 40 C.F.R. § 116.4. Under authority of Section 311(b)(4), EPA set forth in 40 C.F.R. Part 117 the "reportable quantities" of discharges of oil and hazardous substances which EPA determined may be harmful to the public health or welfare or the environment. Allyl Alcohol has a reportable quantity of 100 pounds, as stated in 40 C.F.R. Section 117.3.

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, 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.

Respondent is a corporation organized under the laws of Georgia, which manufactures chemicals at two locations in Dalton, Georgia, one at 1200 Brooks Road, and the other at 117 Callahan Road. Complaint and Answer ¶¶ 3, 4. On April 12, 2004, 3,348 pounds of allyl alcohol were released into the atmosphere as a gaseous vapor from Respondent's facility at 117 Callahan Road ("Facility"). Complaint and Answer ¶ 9; Response at 12-13. Allyl alcohol entered Stacy Branch and Drowning Bear Creek on April 12, 2004. Complaint and Answer ¶ 9.

III. Standards for Accelerated Decision and Dismissal

Respondent moved for dismissal and accelerated decision along with its Answer, and the parties have not yet filed prehearing exchanges, which suggests that, as Complainant points out, Respondent is requesting judgment on the pleadings. Where procedures in administrative proceedings are analogous to those in Federal court, such as accelerated decision and summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure (FRCP), then case law under the FRCP provides appropriate guidance. *CWM Chemical Services, Inc.*, 6 E.A.D. 1, 12 (EAB 1995); *Mayaguez Regional Sewage Treatment Plant*, 4 E.A.D. 772, 780-82, (EAB 1993), *aff'd, Puerto Rico Aqueduct and Sewer Authority v. EPA*, 35 F.3d 600, 606 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995). In Federal court, where matters outside the pleadings are presented by the movant and not excluded by the court, a motion for dismissal (or judgment on the pleadings) must be treated as one for summary judgment under FRCP 56. Respondent's Motion is based upon Affirmative Defenses stated in its Answer, and the Motion includes, and the first two arguments rely on, attached exhibits, that is, matters outside the pleadings. Therefore the Motion is treated under the standard analogous to FRCP 56, which is section 22.20(a) of the Rules of Practice, 40 C.F.R. Part 22. Section 22.20(a) provides, in pertinent part, that:

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts 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.

On a motion for accelerated decision, as on a motion for summary judgment, the initial determination is whether the movant has met its initial burden of showing that there exists no genuine issue of material fact, by identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show[ing] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986)(quoting FRCP 56(c)). On summary judgment, "neither party can meet its burden of production by resting on mere allegations, assertions, or conclusions of evidence." *BWX Technologies, Inc.*, 9 E.A.D. 61, 75 (EAB 2000).

On a respondent's motion for accelerated decision upon an affirmative defense, upon which it has the burden of proof, the respondent must present "evidence that is so strong and persuasive that no reasonable [factfinder] is free to disregard it," and that entitles the respondent to judgment in its favor as a matter of law. *BWX,* 9 E.A.D. at 76. "Evidence not too lacking in probative value must be viewed in the light most favorable to the party opposing the motion." *Rogers Corporation v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002). Inferences may be drawn from the evidence if they are "reasonably probable." *Id.* "Summary judgment is inappropriate when contradictory inferences can be drawn from the evidence." *Id.*

IV. Acts of a Third Party

A. Arguments of the Parties

Respondent asserts that a an accident occurred at its Facility on April 12, 2004, causing a vapor cloud of allyl alcohol to be released into the atmosphere. Motion at 1-2. The State of Georgia DNR, EPA and the U.S. Chemical Safety and Hazard Investigation Board ("CSAHIB") investigated the accident. Motion at 1. Respondent asserts that during the emergency response to the incident, the Incident Commander ("IC") from the Dalton Fire Department decided to use water to respond to the potential fire hazards. Motion at 1-2. The April 2006 CSAHIB Report on the incident states that the IC was informed during the firefighting that "firewater runoff was entering the stormwater drainage canal that flowed into nearby Stacy Branch Creek" and "[t]he IC decided that it was more important to minimize the airborne concentration of the chemical, so they continued applying water to the reactor to knock down the vapor, acknowledging that contaminated water would enter the creek." Motion at 3, and Exhibit A attached to Motion. In a public hearing on the incident, a CSAHIB official stated that the contamination of the creek occurred "partially from fire water runoff and . . . partially from the rain that was occurring that night." Motion at 3, and Exhibit B attached to Motion (Transcript of U.S. Chemical Safety and Hazard Investigation Board Public Hearing, *In the Matter of Toxic Gas and Flammable Vapor Release on April 12, 2004, MFG Chemical, Inc. Callahan Facility, Dalton, Georgia*, Public Hearing November 16, 2004). Respondent asserts that it was the decision of the Dalton Fire Department that led to water contaminated with allyl alcohol entering the creeks and causing the fish kill. Respondent argues that under Section 311(g) of the CWA, 33 U.S.C. § 1321(g), Respondent avoids liability for any discharge caused solely by a third party. Respondent concludes that "any allyl alcohol that reached the creeks was a result of actions of a party other than the Respondent and therefore the Complaint should be dismissed." Motion at 3.

Complainant's position is that Respondent cannot show that it is entitled to judgment as a matter of law, because Respondent is strictly liable for the discharge, without regard to fault, pursuant to Section 311(b)(6) of the CWA. Complainant asserts that administrative actions under Section 311(b)(6) are subject to strict liability, citing to several cases in support, including *United States v. Tex-Tow, Inc.*, 589 F.2d 1310, 1312-13 (7th Cir. 1978). Complainant asserts that Respondent incorrectly relies on Section 311(g) of the CWA, which sets forth defenses to liability for costs of clean-up and removal of hazardous spills, but which has nothing to do with liability for the discharge violation itself or liability for a penalty for the violation. Complainant asserts that in any event, Respondent could not show that the discharge was caused *solely* by an act of a third party, as Respondent admittedly discharged the allyl alcohol which mixed with the water spray and contaminated the creeks. Furthermore, Complainant argues, the CSAHIB Report states (at 31 and 37) that MFG personnel "advised the IC to spray water on the releasing vapor cloud and reactor . . . " and indicates that the IC had little or no other choice but to continue spraying water even though the creeks being contaminated as a result. Response at 11-12.

B. Discussion

Section 311(b)(6) of the CWA states that "Any owner, operator, or person in charge of any vessel, onshore facility or offshore facility – (i) from which oil or a hazardous substance is discharged in violation of paragraph [311(b)](3) . . . may be assessed a class I or class II civil penalty . . . ." Section 311(b)(6) provides for strict liability and contains no provision for any defenses. *United States v. Marathon Pipe Line Co.*, 589 F.2d 1305, 1307-1309 (7th Cir. 1978); *United States v. Coastal States Crude Gathering Co.*, 643 F.2d 1125, 1127 (5th Cir. 1981). Where a discharge of oil or hazardous substance is caused by a third party, the owner or operator of the facility from which the oil or hazardous substance was discharged is liable for penalties assessed under Section 311(b)(6). *United States v. Texas Pipe Line Co.* 528 F. Supp. 728. (E.D. Okla. 1978)(fact that third party may have been the sole cause of an oil discharge from pipeline is no defense to imposition of a penalty under Section 311(b)(6) against pipeline company), *aff'd*, 611 F. 2d 345 (10th Cir. 1979)(penalty affirmed under Section 311(b)(6) even where facility owner not at fault, and took prompt action to report spill and clean it up, recovering most of the oil); *United States v. General Motors Corporation*, 403 F. Supp. 1151, 1157 (D. Conn. 1975); *United States v. Tex-Tow, Inc.*, 589 F. 2d 1310, 1312-13 (7th Cir. 1978)(where discharge in violation of Section 311(b)(3) occurs, liability for civil penalties is placed on the owner or operator of the discharging facility rather than on third party whose act or omission was the immediate cause of the discharge). The Seventh Circuit in *Tex-Tow* explained the rationale as follows:

> Tex-Tow was engaged in the type of enterprise which will inevitably cause pollution and on which Congress has determined to shift the cost of pollution when the additional element of an actual discharge is present. These two elements, actual pollution plus statistically foreseeable pollution attributable to a statutorily defined type of enterprise, together satisfy the requirement of cause in fact and legal cause. Foreseeability both creates legal responsibility and limits it. An enterprise such as Tex-Tow engaged in the transport of oil can foresee that spills will result despite all precautions and that some of these will result from the acts or omissions of third parties. Although a third party may be responsible for the immediate act or omission which "caused" the spill, Tex-Tow was engaged in the activity or enterprise which "caused" the spill. 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.

Tex-Tow, 589 F.2d at 1314.

On the other hand, Section 311(f) of the CWA holds owners or operators of discharging facilities liable for *clean-up costs*, subject to the defenses of act of God, act of war, negligence of the United States Government, or act or omission of a third party. Section 311(g) of the CWA provides, with regard to third party liability for discharge from an onshore facility:

> where an owner or operator of a vessel, onshore facility or offshore facility, from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section, proves that such discharge . . . was caused solely by an act or omission of a third party, or was caused by such an act or omission in combination with an act of God, . . . 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 oil or substance by the United States Government* . . . .

33 U.S.C. § 1321(g)(emphasis added). These provisions, Section 311(f) and (g), clearly apply to removal costs under Section 311(c)[1] and do not address liability for penalties assessed under Section 311(b)(6).

It is undisputed that a hazardous substance was discharged on or about April 12, 2008 from Respondent's facility and that Complainant is seeking penalties in this proceeding under Section 311(b)(6) and is not seeking removal costs under Section 311(c). Therefore, any acts or omissions of a third party are not a valid defense to liability in this proceeding. Accordingly, Respondent's request for accelerated decision on this defense is denied.

V. Penalty Paid to the State

A. Arguments of the Parties

Section 311(b)(8) of the CWA provides in pertinent part that, "In determining any about of a civil penalty under paragraphs (6) . . . the Administrator . . . shall consider . . . any other penalty for the same incident . . . ." Respondent also points out that the EPA's August 1998 Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act ("Penalty Policy") states, "If the violator has already paid a penalty to a state or local government for a violation arising out of the same incident, the Agency litigation team may use the prior penalty to offset the statutorily available federal penalty . . . ." Respondent argues that the Penalty Policy allows this Tribunal to dismiss the penalty on the basis that a penalty has already been paid by Respondent pursuant to a Consent Order with the Environmental Protection Division of the Georgia DNR, namely the Georgia Department of Natural Resources Consent Order No. EPD-RMP-ERT-4402. Motion, Exhibit C attached thereto. Respondent asserts that under the Consent Order, it paid a total penalty of $26,000 pursuant to the Georgia Water Quality Control Act for the same discharge of allyl alcohol, $5,000 of which was for damages and cost recovery of the fish kill. Motion at 5 and Exhibit C attached thereto. Respondent argues that the federal and

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[1] See, *e.g., United States v Redwood City*, 640 F.2d 963 (9th Cir. 1981); *In re Complaint of Berkley Curtis Bay Co.*, 557 F. Supp. 335 (S.D. N.Y. 1983); *United States v. M/V Big Sam*, F.2d 432 (5th Cir. 1982).

state regulations involved in the Consent Order have the same goal and punish the same activities and harm. Additionally, Respondent points out that the Complaint erroneously states that the violation continued for at least two weeks while the Consent Order recognizes two days of violation leading to the fish kill. Accordingly, Respondent moves for the dismissal of the penalty on the grounds that it is duplicative of the penalty it already paid to the Georgia DNR.

Complainant alleges that 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 noncompliance with 40 C.F.R. Part 68 (regulations promulgated under authority of the Clean Air Act, containing requirements for a facility's Risk Management Program), for failure to timely report the spill, and for damages and cost recovery of the fish kill. Thus, Complainant argues, its proposed penalty in this proceeding is not duplicative of the penalty Respondent paid pursuant to the Consent Order. Furthermore, Complainant argues that there is nothing in the CWA, regulations or Penalty Policy that bars EPA from seeking a penalty where Respondent has paid a penalty for a different violation of a different statute, nor that allows a court to dismiss such a penalty. Complainant adds that it is not required to spell out its consideration of each penalty factor in the Complaint, but is merely required to consider them before assessing the penalty. Complainant notes that Respondent has not raised an argument under Sections 311(b)(11) or 309(g)(6), which provide, respectively, that civil penalties shall not be assessed under both Sections 309 and 311 for the same discharge, and that 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).

B. Discussion

As noted by Respondent, "any other penalty for the same incident" is a factor to be considered under CWA Section 311(b)(8) in determining the penalty for a violation of Section 311(b)(3). This language suggests that the penalty paid by Respondent to Georgia for the same discharge of allyl alcohol must be considered in determining the amount of a penalty assessed under Section 311(b)(6). It does not suggest that a penalty under Section 311(b)(6) is *barred* by payment of a penalty to the state entity; indeed, by explicitly allowing consideration of other penalties paid for the same incident when assessing penalties for its Section 311(b)(3) violation, Section 311(b)(8) suggests that such assessment of penalties does not bar an action for such penalties, but merely allows offset of an appropriate amount. The provision referenced in the Penalty Policy states that the Agency *litigation* team *may* use the prior penalty paid to the state to offset the statutorily available federal penalty. This provision gives the *Complainant* the *discretion* to *offset* the penalty, but does not authorize the presiding judge to dismiss a complaint on the basis of the penalty paid to the state entity. Respondent provides no citations to any other authorities in support of its argument.

Respondent's concerns imply the issue of "overfiling," which involves the practice of federal authorities duplicating enforcement actions of state authorities. *See, Harmon Industries, Inc. v. Browner*, 191 F.3d 894, 898 (8th Cir. 1999). In *Harmon*, the Eighth Circuit upheld the

dismissal of a federal enforcement action of a Resource, Conservation and Recovery Act ("RCRA") matter on the ground that the statute expressly allowed state enforcement of that statute to preclude additional enforcement by the federal government. 191 F.3d at 902. The *Harmon* Court relied on "in lieu" of language in RCRA in holding that the statute expressly limited EPA enforcement power when a state, to which EPA had already delegated enforcement authority, had already acted on the same enforcement matter as to the same defendant. *Id.* at 899-902.

Under the CWA, EPA's enforcement authority is not curtailed simply because EPA grants enforcement authority to a state agency. *United States v. City of Youngstown*, 109 F. Supp.2d 739, 741 (N.D. Ohio 2000)(rejecting the application of *Harmon* due to the plain language of the CWA); *Britton Construction Corp.*, 8 E.A.D. 261 n. 24 (EAB 1999). The plain language of the CWA does not limit the power of the EPA to pursue an action where the state entity has already sought enforcement and issued a consent order concerning similar matters, or where there are ongoing proceedings in state courts or ongoing enforcement actions on behalf of authorities for a state. *See, Southern Ohio Coal Co. v. Office of Surface Mining*, 20 F.3d 1418, 1428 (6th Cir.1994), *cert. denied*, 513 U.S. 927 (1994). "Overfiling" is thus allowed under the Clean Water Act.

However, the CWA does not allow penalty assessments under Section 309 and Section 311 for the same discharge. Section 309(g)(6) of the CWA provides, *inter alia*, that any violation for which the State has issued a final order and the violator has paid a penalty assessed under Section 309 or comparable State law, shall not be the subject of a civil penalty action under Section 311(b). Section 311(b)(11) provides that civil penalties shall not be assessed under both Section 311 and Section 309 for the same discharge.

In view of these provisions, the question is whether Respondent has paid a penalty assessed under a State law comparable to Section 309 of the CWA, which authorizes penalties for, *inter alia,* unlawful discharges of pollutants; failure to keep or submit records and reports; failure to install and maintain monitoring equipment or methods; failure to conduct sampling or provide required information under the CWA Section 308; and noncompliance with effluent limitations, pretreatment standards, and standards of performance for new sources. The Consent Order states that Respondent was assessed a $20,000 penalty for noncompliance with 40 C.F.R. Part 68, which implements the Clean Air Act and Georgia Air Quality Control Act; was assessed a $1,000 penalty for failure to provide timely notification of a release of a hazardous substance, in violation of the Official Code of Georgia Annotated (O.C.G.A.) § 12-14-3(a); and was assessed a $5,000 penalty for damages/cost recovery of the fish kill. The Consent Order did cite to O.C.G.A. § 12-5-5(a), which reads, "Any person who intentionally or negligently causes or permits any sewage, industrial waste, or other wastes, oil scum, floating debris, or other substance or substances to be spilled, discharged, or deposited in the waters of the state, resulting in a condition of pollution as defined by this article, shall be liable in damages to the state." The Consent Order also stated that Respondent discharged allyl alcohol into an unnamed tributary to Sandy Creek, Sandy Creek and Drowning Bear Creek on April 12 and 13, and that the discharge

VI. Quantity of Discharge

A. Arguments of the Parties

Respondent's position is that the Complaint's allegation that the 3,348 pounds of allyl alcohol released into the atmosphere as a gaseous vapor also entered waterbodies is without any foundation. Respondent points out that it admitted that allyl alcohol entered both the atmosphere and certain waterbodies, and that there is no dispute "as to how allyl alcohol entered waters of the U.S." Respondent argues that the Complaint does not establish how the discharge occurred in excess of a reportable quantity. Respondent claims that the allegation that all of the allyl alcohol released into the atmosphere also entered the waters is a matter of insufficient pleading. Respondent asserts that whether a discharge in excess of a reportable quantity occurred is a legal conclusion, not a fact.

Complainant points out that it alleged that Respondent discharged an amount of allyl alcohol above the reportable quantity, and therefore a harmful quantity, into navigable waters. Complainant argues that it alleged a *prima facie* case for the alleged violations of Section 311(b)(3) of the Act, 33 U.S.C. § 1321 (b)(3) by showing all four elements that took place: 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). Complainant asserts that it alleged the necessary elements to establish liability for administrative penalties 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); and 3) from which a hazardous substance is discharged in violation of Section 311(b)(3) of the Act, 33 U.S.C. § 1321 (b)(3) (Complaint ¶¶ 9, 10). Complainant asserts that, pursuant to 40 C.F.R. Part 22, it is not required to offer evidence to support the allegations at this point in the proceedings, nor to withstand a motion to dismiss for insufficient pleading. It need not prove how the discharge occurred in a harmful quantity. Complainant also points out that the Motion raises a genuine issue of material fact, in that Respondent disputes the allegation that the discharge continued for two weeks and, disputes the amount of allyl alcohol entering the water bodies. Response at 20-21.

B. Discussion

The Rules of Practice provide at 40 C.F.R. § 22.20(a) as follows:

> The Presiding Officer, upon motion of 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 complainant.

A complaint must include "a concise statement of the factual basis for each violation alleged." 40 C.F.R. § 22.14(a)(3). A complaint must set forth factual allegations that if proven establish a *prima facie* case against the respondent. On a motion to dismiss for failure to state a claim, all facts alleged in the complaint are taken as true, and all reasonable inferences are drawn in favor of the complainant. *Commercial Cartage Company, Inc.*, 5 E.A.D. 112, 117 (EAB 1994).

The necessary elements to show liability for a violation of Section 311(b)(3) of the Clean Water Act, 33 U.S.C. § 1321(b)(3), as relevant to this case, are: (1) that respondent is an owner or operator of an onshore facility; (2) from which there was a discharge of a hazardous substance; (3) into or upon navigable waters of the United States, or adjoining shorelines; (4) in quantities that by regulation, 40 C.F.R. Part 117, have been determined to be harmful.

The issue as to sufficiency of the Complaint is whether the Complainant has sufficiently pled the elements necessary to establish the violation of Section 311(b)(3) of the CWA. As to the quantities of discharge, Complainant must allege facts that indicate that the discharge occurred in quantities determined to be harmful. To succeed on a motion to dismiss the Complaint, Respondent must show that Complainant cannot prove any set of facts that would entitle it to its requested relief. *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984)(complaint may be dismissed "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations").

The regulations establish that allyl alcohol is a hazardous substance and that the reportable quantity of allyl alcohol is 100 pounds. 40 C.F.R. §§ 116.4, 117.3. The Complaint alleges that on April 12, 2004, Respondent discharged 3,348 pounds of allyl alcohol from its facility into or upon the Stacy Branch and Drowning Bear Creek and their adjoining shorelines. Complaint ¶ 9. The Complaint alleges further that this discharge was in excess of 100 pounds. Complaint ¶ 10. These allegations, if taken as true, establish a *prima facie* case against Respondent.

Respondent acknowledges that 3,348 pounds of allyl alcohol were released into the atmosphere and an unknown amount entered the waterbodies. Respondent appears to be disputing the basis for any inference that the amount of release into the air is the same as that discharged into the waterbodies. However, Respondent is merely contesting the factual basis for the clear allegations of fact in the Complaint. Respondent has not shown any grounds for dismissal of the Complaint or for granting accelerated decision in its favor on this argument.

ORDER

1. Respondent's Motion for Accelerated Decision is **DENIED**.

2. The parties shall continue in good faith to attempt to settle this matter. Complainant shall file a status report as to the status of settlement discussions on or before **April 21, 2008.**

Susan L. Biro
Chief Administrative Law Judge

Dated: March 24, 2008
Washington, D.C.

In the Matter of MFG Chemical, Inc., Respondent
Docket No. CWA-04-2008-5192

CERTIFICATE OF SERVICE

I certify that the foregoing **Order On Respondent's Motion For Accelerated Decision**, dated March 24, 2008, was sent this day in the following manner to the addresses listed below:

Maria Whiting-Beale
Staff Assistant

Dated: March 24, 2008

Original and One Copy By Pouch Mail To:

Patricia Bullock
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