UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
1836 REALTY CORPORATION,	)	Docket No. CWA-2-I-98-1017
	)	
	)	
RESPONDENT	)	

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ON COUNTS I AND II ORDER SCHEDULING HEARING

Introduction

This civil administrative penalty proceeding arises under Section 311(b)(6)(B)(ii) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act, as amended, 33 U.S.C. § 1321(b)(6)(B)(ii). The United States Environmental Protection Agency ("EPA" or "Complainant") has filed a Complaint against 1836 Realty Corporation ("Respondent"), charging the Respondent with three counts of violating the Clean Water Act and its implementing regulations at 40 C.F.R. Parts 110 and 112.[(1)]

Specifically, Count I of the Complaint charges that the Respondent operated an onshore facility regulated under the Oil Pollution Prevention regulations, 40 C.F.R. Part 112, without having prepared a Spill Prevention Control and Countermeasure Plan ("SPCC Plan") from October 1994 to at least March 19, 1998, in violation of Section 311(j)(1) of the Clean Water Act and the Oil Pollution Prevention regulations at 40 C.F.R. Part 112, commonly referred to as the Spill Prevention Control and Countermeasure regulations ("SPCC regulations"). Count II charges that the Respondent's failure to have prepared an SPCC Plan for its facility from March 20, 1997, to August 25, 1998, constitutes a violation of 40 C.F.R. Part 112 and Section 311(j)(1) of the Clean Water Act.[(2)] Count III charges that the Respondent on September 11 and 30, 1997, and October 7, 1997, discharged oil from its facility into or upon the navigable waters of the United States or adjoining shorelines in a quantity that has been determined may be harmful under 40 C.F.R. 110.3 in violation of Section 311(b)(3) of the

Clean Water Act. The EPA proposes a civil administrative penalty of $54,133 for these alleged violations. [(3)]

On December 18, 1998, the Respondent submitted a Motion for Summary Judgment on Counts I and II of the Complaint. The EPA opposes the motion for summary judgment. For the reasons discussed below, the Respondent's Motion for Summary Judgment on Counts I and II will be denied.

Standard For Accelerated Decision and Decision to Dismiss

The Respondent has filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure ("FRCP") and "Section 22.16" of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits ("Rules of Practice"). Respondent's Memorandum in Support of its Motion for Summary Judgment on Counts I and II, p. 1. Initially, I point out that these proceedings are governed by the Rules of Practice, 40 C.F.R. §§ 22.01-22.32. The Federal Rules of Civil Procedure are not binding on administrative agencies but many times these rules provide useful and instructive guidance in applying the Rules of Practice. See Oak Tree Farm Dairy, Inc. v. Block, 544 F. Supp. 1351, 1356 n. 3 (E.D.N.Y. 1982); In re Wego Chemical & Mineral Corporation, TSCA Appeal No. 92-4, 4 EAD 513 at 13 n. 10 (EAB, Feb. 24, 1993).

The regulation governing accelerated decisions and decisions to dismiss is found at Section 22.20 of the Rules of Practice, 40 C.F.R. § 22.20. Section 22.20(a) of the Rules of Practice provides as follows:

The Presiding Officer,[(4)] upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the complainant or the 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 all or any part of the proceeding. (emphasis added). In addition, the Presiding Officer, upon motion of the respondent, may at any time dismiss an action without further hearing or upon such limited 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).

Motions for accelerated decision and dismissal under 40 C.F.R. § 22.20(a) are akin to motions for summary judgment under Rule 56 of the FRCP.[(5)] Rule 56(c) of the FRCP provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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" (emphasis added). Thus, by analogy, Rule 56 provides guidance for adjudicating motions for accelerated decision. See In the Matter of CWM Chemical Service, TSCA Appeal 93-1, 6 EAD 1 (EAB, May 15, 1995).

Therefore, I look to federal court decisions construing Rule 56 of the FRCP for guidance in applying 40 C.F.R. § 22.20(a) to the adjudication of motions for accelerated decisions. In interpreting Rule 56(c), the United States 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 evidentiary material proffered by the moving party in support of its motion must be viewed in the light most favorable to the opposing party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1985); Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970). Further, the judge must draw all reasonable inferences from the evidentiary material in favor of the party opposing the motion for summary judgment. See Anderson, supra, at 255; Adickes, supra, at 158-159; see also Cone v. Longmont United Hospital Assoc., 14 F.3d 526, 528 (10th Cir. 1994).

In assessing materiality for summary judgment purposes, the Court has found that a factual dispute is material where, under the governing law, it might affect the outcome of the proceeding. Anderson, supra at 248; Adickes, supra, at 158-159. The substantive law identifies which facts are material. Id.

The Court has found that a factual dispute is genuine if the evidence is such that a reasonable finder of fact could return a verdict in favor of the nonmoving party. Id. Further, in Anderson, the Court ruled that in determining whether a genuine issue of fact exists, the judge must decide whether a finder of fact could reasonably find for the nonmoving party under the evidentiary standards in a particular proceeding. There must be an incorporation of the evidentiary standard in the summary judgment determination. Anderson, supra, at 252. In other words, when determining whether or not there is a genuine factual dispute, the judge must make such inquiry within the context of the applicable evidentiary standard of proof for that proceeding.

Once the party moving for summary judgment meets its burden of showing the absence of genuine issues of material fact, Rule 56(e) then requires the opposing party to offer any countering evidentiary material or to file a Rule 56(f) affidavit.[(6)] Rule 56(e) states: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial." However, if the moving party fails to carry its burden to show that it is entitled to summary judgment under established principles, then no defense is required. Adickes, supra, at 156.

The type of evidentiary material that a moving party must present to properly support a motion for summary judgment or that an opposing party must proffer to defeat a properly supported motion for summary judgment has been examined by the Court. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986); see also Anderson, supra; Adickes, supra. The Court points out that Rule 56(c) itself provides that the decision on a motion for summary judgment must be based on the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, submitted in support or opposition to the motion. With regard to the sufficiency of the evidentiary material needed to defeat a properly supported motion for summary judgment, the Court has found that the nonmoving party must present "affirmative evidence" and that it cannot defeat the motion without offering "any significant probative evidence tending to support" its pleadings. Anderson, supra, at 256 (quoting First National Bank of Arizona v. Cities Service Company, 391 U.S. 253, 290 (1968)).

More specifically, the Court has ruled that the mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment as Rule 56(e) requires the opposing party to go beyond the pleadings. Celotex, supra at 322; Adickes, supra. The Court has noted, however, that there is no requirement that the moving party support its motion with affidavits negating the opposing party's claim or that the opposing party produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Celotex, supra, at 323-324. The parties may move for summary judgment or successfully defeat summary judgment without supporting affidavits provided that other evidence referenced in Rule 56(c) adequately supports its position.

The regulation governing motions for accelerated decision under 40 C.F.R. § 22.20(a) does not define or elaborate on the phrase "genuine issue of material fact," nor does it provide significant guidance as to the type of evidence needed to support or defeat a motion for accelerated decision. Section 22.20(a) states, in pertinent part, that the Presiding Officer may render an accelerated

decision "without further hearing or upon any 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 an adjunct to this regulation, I note that under another governing regulation, a party's response to a written motion, which would include a motion for accelerated decision, "shall be accompanied by any affidavit, certificate, [or] other evidence" relied upon. 40 C.F.R. § 22.16(b).

Inasmuch as the inquiry of whether there is a genuine issue of material fact in the context of an administrative accelerated decision is quite similar to that in the context of a judicial summary judgment and in the absence of significant instruction from the regulation governing accelerated decisions, the standard for that inquiry as enunciated by the Court in Celotex, Anderson, and Adickes is found to be applicable in the administrative accelerated decision context.

Moreover, review by the Environmental Appeals Board ("EAB") in determining whether there is a genuine issue of material fact requiring an oral evidentiary hearing is governed by an "administrative summary judgment" standard which was articulated recently by the EAB in Green Thumb Nursery, Inc., FIFRA Appeal No. 95-4a, 6 EAD 782, 793 (EAB, Mar. 6, 1997). Under this standard, there must be timely presentation of a genuine and material factual dispute, similar to judicial summary judgment under FRCP 56, in order to obtain an evidentiary hearing. Otherwise, an accelerated decision based on the documentary record is sufficient. Id. Compare In the Matter of Mayaguez Regional Sewage Treatment Plant, NPDES Appeal No. 92-23, 4 EAD 772, 781 (EAB, Aug. 23, 1993) (wherein the EAB adopted the standard for summary judgment articulated by the Court in Anderson to determine whether there is a genuine issue of material fact warranting an evidentiary hearing under 40 C.F.R. § 124.74 for the issuance of a permit under Section 301(h) of the CWA).

The evidentiary standard of proof in the matter before me, as in all other cases of administrative assessment of civil penalties governed by the Rules of Practice, is a "preponderance of the evidence." 40 C.F.R. § 22.24. Thus, by analogy, in determining whether or not there is a genuine factual dispute, I, as the judge and finder of fact, must consider whether I could reasonably find for the nonmoving party under the "preponderance of the evidence" standard.[(7)] In addressing the threshold question of the propriety of a motion for accelerated decision, my function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for an evidentiary hearing. See Anderson, supra, at 249.

Accordingly, by analogy, a party moving for accelerated decision must establish through the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, the absence of genuine issues of material fact and that it is entitled to judgment as a matter of law by the preponderance of the evidence. In this regard, the moving party must demonstrate, by a preponderance of the evidence, that no reasonable presiding officer could not find for the nonmoving party. On the other hand, a party opposing a properly supported motion for accelerated decision must demonstrate the existence of a genuine issue of material fact by proffering significant probative evidence from which a reasonable presiding officer could find in that party's favor by a preponderance of the evidence.

DISCUSSION

In the instant matter, the Respondent moves for summary judgment in its favor on the grounds that no genuine issue of material fact remains in this action regarding the Respondent's liability under Count I (SPCC Plan violation) and Count II (continuing SPCC Plan violation), and that the Respondent is entitled to judgment as a matter of law on these issues.

Specifically, the Respondent argues that it was not subject to the SPCC regulations at 40 C.F.R. Part 112 because its "facility is not located in an environmentally sensitive" area as referenced in the Complainant's proposed Exhibit 14. The Respondent also argues that it was not subject to the SPCC regulations because its facility could not reasonably be expected to discharge oil into navigable waters. In this regard, the Respondent points out that on an October 11, 1996, visit to the Respondent's facility to perform an above-ground inspection, an inspector for the Rhode Island's Department of Environmental Management ("RIDEM") responded "no" to a question on the inspection form as to whether the facility is located in an environmentally sensitive area. The Respondent therefore argues that this answer serves as evidence that the inspector felt that the above-ground tank did not present any threat to the environment and further that the inspector did not believe that a spill at the facility could reasonably be expected to enter navigable waters.

Finally, the Respondent argues that the EPA is asserting that the Respondent's facility should have prepared an SPCC Plan and was subject to the SPCC regulations based on facts that were not available until after the alleged SPCC Plan violation occurred. In other words, the EPA, for purposes of the summary judgment motion, is relying on the 1997 spill to establish that the Respondent's facility was subject to the SPCC regulations years prior to the

spill based on its alleged reasonable expectation that oil could reasonably be expected to enter a navigable water. As such, the Respondent asserts that the EPA has not alleged any genuine issue of material fact that would prove that the Respondent's facility was subject to the SPCC regulations.

The EPA counters that the motion for summary judgment should be denied. Specifically, the EPA argues that the Respondent's assertion that its facility is not located in an environmentally sensitive area is totally irrelevant to the question of whether the facility needs to develop an SPCC Plan under 40 C.F.R. Part 112. The EPA maintains that a review of the definition of "navigable waters of the United States" in Section 502(7) of the Clean Water Act, 33 U.S.C. 1362(7), and 40 C.F.R. 110.1(a) shows that there is no requirement that in order for a water body to be a "navigable water" it must be located in "an environmentally sensitive area." I agree. The EPA also persuasively argues that the Respondent's assertion that its facility is not reasonably likely to discharge oil into a navigable water because it is not located in an environmentally sensitive area is contrary to the Clean Water Act and its implementing regulations.

Next, the EPA disagrees with the Respondent's argument that the fact that its facility may have discharged oil in 1997 is irrelevant to determining whether it needed an SPCC Plan before that date. First, the EPA maintains that evidence of the subsequent spill is highly relevant as it confirms that there was in fact a "reasonable likelihood" of the oil reaching the water from the Respondent's facility. Second, the EPA submits that the 1997 spill is relevant because the SPCC Plan violation is a continuing violation that commenced in 1993 and continued until at least August 25, 1998. The EPA's position concerning the relevancy of the spill to the need for an SPCC Plan is clearly sufficient to defeat the motion for dismissal. This is not to say, however, that the alleged spill, in itself without further evidence, is sufficient to sustain the conclusion that during the entire period of the alleged SPCC Plan violation there was a reasonable expectation that the Respondent's facility could discharge oil in harmful quantities into a navigable water.

Third, the EPA contends that it intends to present evidence that, even aside from the 1997 spill, it was reasonable to assume that a discharge of oil from the Respondent's facility might reach navigable waters based on the topography of the site, etc. At this point, I note that the EPA to have more effectively responded to the motion for dismissal, could have referenced "significant probative evidence tending to support" its pleadings rather than relying on the proffer of its prehearing exchange. Regardless, the record before me is

adequate to demonstrate that a genuine issue of material fact exists and that the Respondent is not entitled to judgment as a matter of law.

Finally, the EPA objects to the Respondent's averments concerning the RIDEM inspector's beliefs as to whether there was a reasonable expectation that oil from the Respondent's facility could reach a navigable water. According to the EPA, the RIDEM inspector will testify to exactly the opposite conclusions put forth by the Respondent. As such, genuine issues of material fact exist in this case requiring an evidentiary hearing.

Accordingly, the Respondent's motion for summary judgment or dismissal is Denied.

Hearing

The parties have filed their prehearing exchange in this matter pursuant to the undersigned's Prehearing Order entered on June 17, 1998.[(8)] The file reflects that the parties have engaged in limited settlement negotiations in this matter.

United States Environmental Protection Agency ("EPA") policy, found in the Rules of Practice at Section 22.18(a), 40 C.F.R. § 22.18(a), encourages settlement of a proceeding without the necessity of a formal hearing. The benefits of a negotiated settlement may far outweigh the uncertainty, time, and expense associated with a litigated proceeding. However, the pursuit of settlement negotiations or an averment that a settlement in principle has been reached will not constitute good cause for failure to comply with the requirements or schedule set forth in this Order. The parties are hereby directed to hold another settlement conference on this matter on or before **April 27, 1999,** to attempt to reach an amicable resolution of this matter. See Section 22.04(c)(8) of the Rules of Practice, 40 C.F.R. § 22.04 (c)(8). The Complainant shall file a status report regarding such conference and the status of settlement on or before **May 11, 1999.**

In the event the parties have failed to reach a settlement by that date, they shall strictly comply with the requirements of this order and prepare for a hearing. In connection therewith, on or before **May 28, 1999**, the parties shall file a joint set of stipulated facts, exhibits, and testimony. The time allotted for the hearing is limited. Therefore, the parties must make a good faith effort to stipulate, as much as possible, to matters which cannot

reasonably be contested so that the hearing can be concise and focused solely on those matters which can only be resolved after a hearing.

Both parties are reminded that this proceeding is governed by the Rules of Practice, 40 C.F.R. §§ 22.01-22.32. Section 22.19(b) of the Rules of Practice, 40 C.F.R. § 22.19(b), provides that documents that have not been exchanged and witnesses whose names have not been exchanged shall not be introduced into evidence or allowed to testify without permission of the undersigned.

Further, the parties are advised that every motion filed in this proceeding must be served in sufficient time to permit the filing of a response by the other party and to permit the issuance of an order on the motion before the deadlines set by this order or any subsequent order. Section 22.16(b) of the Rules of Practice, 40 C.F.R. § 22.16(b), allows a 10-day period for responses to motions and Section 22.07(c), 40 C.F.R. § 22.07(c), provides for an additional 5 days to be added thereto when the motion is served by mail. Both parties are hereby notified that the undersigned will not entertain last minute motions to amend or supplement the prehearing exchanges absent extraordinary circumstances.

ORDER

The Respondent's Motion for Summary Judgment on Counts I and II is Denied.

The Hearing in this matter will be held beginning at 9:30 a.m. on Tuesday, **June 8, 1999**, in Providence, Rhode Island, continuing if necessary on June 9 and 10, 1999.[(9)] The Regional Hearing Clerk will make appropriate arrangements for a courtroom and retain a stenographic reporter. The parties will be notified of the exact location and of other procedures pertinent to the hearing when those arrangements are complete.

IF EITHER PARTY DOES NOT INTEND TO ATTEND THE HEARING OR HAS GOOD CAUSE FOR NOT BEING ABLE TO ATTEND THE HEARING AS SCHEDULED, IT SHALL NOTIFY THE UNDERSIGNED AT THE EARLIEST POSSIBLE MOMENT.

Original signed by undersigned

_____

Barbara A. Gunning
Administrative Law Judge

Dated: 3-23-99
Washington, DC

1. The Complaint was amended by Order on March 17, 1999, upon motion by the EPA.

2. The alleged onset date for the Respondent's alleged SPCC Plan violation as cited in Count II of the amended Complaint appears to be erroneously stated as March 20, 1997, rather than March 20, 1998.

3. The designation of the proposed penalties in the amended Complaint appears to be in error. The EPA proposes penalties of $39,283 for Count I and $14,850 for Count II. There is no proposed penalty for Count III. The EPA's prehearing exchange filed on October 14, 1998, includes an October 14, 1998, memorandum of the revised proposed penalty calculation which indicates that the EPA is seeking a $39,283 penalty for Counts I and II and a $14,850 penalty for Count III. The term "Complaint" hereafter refers to the Amended Complaint.

4. The term "Presiding Officer" means the Administrative Law Judge designated by the Chief Administrative Law Judge to serve as Presiding Officer. 40 C.F.R. § 22.03(a).

5. The Federal Rules of Civil Procedure are not binding on administrative agencies but many times these rules provide useful and instructive guidance in applying the Rules of Practice. See Oak Tree Farm Dairy, Inc. v. Block, 544 F. Supp. 1351, 1356 n. 3 (E.D.N.Y. 1982); In re Wego Chemical & Mineral Corporation, TSCA Appeal No. 92-4, 4 EAD 513 at 13 n. 10 (EAB, Feb. 24, 1993).

6. Rule 56(f) states:

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

7. Under the governing Rules of Practice, an Administrative Law Judge serves as the decisionmaker as well as the fact finder. See 40 C.F.R. §§ 22.04(c), 22.20, 22.26.

8. The Complainant's unopposed Motion for Enlargement of Time to File USCG Documents and Photographs is granted. The United States Coast Guard documents and photographs were filed by the EPA on October 19, 1998.

9. The Complainant's opposed Motion in Limine to Exclude Witnesses and Documents Listed in Respondent's Prehearing Exchange and the Complainant's opposed Motion to Strike Respondent's Defense of Ability to Pay remain pending.