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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
	)	
Pleasant Hills Authority	)	Docket No. CWA-III-210
	)	
	)	
Respondent	)	

ORDER GRANTING IN PART AND DENYING IN PART
COMPLAINANT'S MOTION FOR ACCELERATED DECISION

Clean Water Act--By motion dated December 22, 1998, Complainant, the United States Environmental Protection Agency (EPA), moved pursuant to 40. C.F.R. Section 22.20(a), for accelerated decision on liability in the above-stated case. The Motion alleges three counts of violations of the Clean Water Act, 33 U.S.C. Section 1251, *et seq.*, and asserts that EPA is entitled to judgment as a matter of law. The Complaint proposed a civil penalty in the amount of $70,000. Respondent filed a Response to Complainant's Motion on January 14, 1999. **Held:** Complainant's Motion For Accelerated Decision on Liability is **Granted in part and Denied in part.** .

Before: Stephen J. McGuire Date: February 3, 1999
Administrative Law Judge

Appearances:

For Complainant: Deane H. Bartlett
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U.S. EPA Region III
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For Respondent: Ronald J. Brown, Esq.
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I.Introduction

On March 31, 1998, Complainant issued a Complaint and Notice of Opportunity for Hearing to Respondent, Pleasant Hills Authority, alleging violations of the Clean Water Act (CWA), 33 U.S.C. Section 1252 *et seq.* The Complaint sought a civil penalty in the amount of $70,000 under subsection 309(g) of the CWA, 33 U.S.C. Section 1319(g). Respondent filed its Answer and Request For Hearing on April 24, 1998.

The Complaint alleges three Counts of alleged violations, all related to Respondent's National Pollutant Discharge Elimination System (NPDES) Permit No. 0027464[(1)]: I) Permit Effluent Violations; II) Monitoring Violations (Failure to use analytical testing methods sufficiently sensitive to demonstrate compliance with the effluent limitations contained in the Permit); and III) Pretreatment Violations (Failure to submit an approvable pretreatment program to EPA by May 30, 1997 as required by the Respondent's Permit and applicable regulations).

Complainant's motion is based on the record in this case which Complainant alleges, includes the admissions of Respondent in its Answer, in the informational reports submitted to the Pennsylvania Department of the Environment(PDE) and to EPA. To further support the motion, Complainant has attached the Declarations of Lisa Pacera, Environmental Scientist in the NPDES Branch, Office of Compliance and Enforcement, Water Protection Division, EPA Region III and Stephen Copeland, Environmental Scientist, Office of Municipal Assistance, Water Protection Division, EPA Region III.

Complainant also submitted a "Statement of Undisputed Facts" which provided *inter alia* that from September 1994 through May 1996, Respondent discharged wastewater containing pollutants in excess of the 1991 Permit limits. The pollutants discharged in excess of Respondent's Permit limits include: cyanide, phenolics and mercury (Complaint, par. 18 and attachment A to Complaint; Pacera Decl. Par. 4-6, and Attachment A, Exhibits 3-16).

EPA further states that from April 1995 through December 1995, Respondent did not use analytical testing methods sufficiently sensitive to demonstrate compliance with the effluent limitations specified in the 1991 Permit, as summarized in Attachment B of the Complaint (Complaint at par. 21) In its Answer at par.18,

Respondent asserted that "Among other findings, the Respondent determined that the independent testing laboratory utilized by the Respondent from February of 1995 to December 1995, had not sufficiently determined the NPDES Permit limits for certain pollutants, specifically cyanide, mercury, phenol and chloroform, to enable the Respondent to properly monitor levels of such pollutants.")

In the Answer at par. 21, Respondent asserted that "As a result of the EPA letter of November 30, 1995, requesting certain other information, the Respondent began reviewing sample results, testing procedures and other analyses performed by the independent testing laboratory (Mack Laboratories, Inc.), engaged by the Respondent and determined that the...laboratory had not applied the relevant effluent limitations set forth in the operative NPDES permit or permits, (Exhibit C to Respondent's Answer)." In a December 13, 1995, letter from Mack laboratories Inc. to Respondent's consultant, the former acknowledged that it had not used proper analytical methods; Pacera Decl. Pars. 7-8; Attachment A, Exhibits 3-16 and Attachment C).

Complainant's Motion further alleges that Respondent failed to submit a complete approvable Pretreatment Program by May 30, 1997 (Complaint at par. 24, Answer at pars. 24-26, Copeland Decl. at pars. 6-7, Attachment A, Exhibits 2-13 and Attachment B). It asserts that Respondent's Answer, implicitly admits the violation, as it is replete with references to portions of the pretreatment program which were submitted after the May 30, 1997 date: "Respondent developed and submitted a package dated June 2, 1997", Answer par. 24; "various comments and modifications to the Industrial Pretreatment Components were exchanged, leading to the submission of modifications to the components required by EPA by September 2, 1997"; Answer par. 25; "Item Five, identified as the City Solicitor's Statement, was submitted to EPA on February 11, 1998"; a revised submission was submitted on April 16, 1998, Answer Par. 25, 26.

Complainant argues that given the above-admissions, it is entitled to judgment on liability as a matter of law, as Respondent has admitted many of the components of Complainant's case. EPA further argues that through the submission of Discharge Monitoring Reports (DMR's), Respondent admits that it was out of compliance with the specific effluent requirements, as well as the monitoring requirements of its NPDES Permit.

EPA asserts that Respondent's violations of the effluent limitations and the monitoring requirements in the 1991 Permit are set forth in the DMR's it submitted as required by the Permit. Each of these official reports submitted by Respondent it argues, reflected an exceedence of one of the effluent limits, or that an analytical method sufficiently sensitive to determine compliance with the effluent limits was not used, constitutes an admission of liability for non-compliance. EPA argues that the courts have long held that records which the law requires to be kept may be used as admissions for the purpose of establishing civil liability and have specifically applied this to DMR's required by the CWA Student Public Interest Research Group v. P.D. Oil & Chemical Storage, 627 F. Supp 1074, 1090 (citing the legislative history of the CWA) and United States v. Ward, 448 U.S. 242,100 S. Ct. 2636 (1980).

Complainant asserts that pursuant to 40 C.F.R. Section 22.20(a), it is entitled to judgment on the issue of liability as a matter of law, as no genuine issue of material fact exists with respect to the violations alleged in the Complaint. In the alternative, Complainant seeks judgment on any element which the Court determines that no genuine issue of fact exists.

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 disputes which require further development at an evidentiary hearing. Respondent argues *inter alia,* with respect to the nineteen alleged exceedences of effluent limitations in Count I, that the record does not establish exceedences of effluent limitations, but alleges such exceedences based upon Respondent's outside testing laboratory's failure to measure limits at the appropriate tolerances. As such, Respondent argues that an evidentiary hearing is necessary to be able to determine whether or not exceedences did in fact, occur (Respondent's Response at 3).

To the extent that Complainant's motion, accompanying declarations and attached documents pertaining to Count I claim that certain pollutants were discharged from April 1995 through December 1995, in excess of effluent limits, Respondent thus disputes such allegations. Respondent further argues that with respect to Count III (Pretreatment Violations), it was subject to the cooperation of parties outside of its control, including the Pennsylvania Department of Environmental Resources and the EPA. With respect to the latter, Respondent argues that in many instances, review and approval by the EPA of submissions made by Respondent did not occur until times subsequent to the stated due date for the pretreatment program, namely May 30, 1997. Respondent offers the Declaration of Edward W. Monroe as evidence

that Respondent requested an extension of time to complete an approvable pretreatment program. (Attachment A). It further argues that EPA has failed to set forth in its Motion that Respondent has submitted all elements of an approved industrial pretreatment program.

Respondent has raised these issues in affirmative defenses which when construed in the light most favorable to Respondent, establishes genuine issues of material fact regarding Respondent's liability as to Count I (Effluent Violations) and Count III (Pretreatment Violations). As such, the Court finds that further development at an evidentiary hearing is necessary to establish Respondent's liability under these counts. Accordingly, Complainant's Motion as to Counts I and III is **Denied.**

As to the allegation that Respondent failed to use analytical testing methods sufficiently sensitive to demonstrate compliance with the effluent limitations, as contained in Count II of the Complaint (Monitoring Violations), Respondent has failed to present any defense other than to assert that the testing laboratory it retained, Mack Laboratories, Inc., had not applied the relevant effluent limitations set forth in the operative NPDES Permit.

The 1991 Permit at page 2c and the 1996 Permit at page 2b each contain the following requirement: "The sensitivity of the analytical test methods must be adequate to demonstrate compliance with the effluent limitations specified." Complaint at par. 12. Compliance and/or violation of an NPDES Permit is generally deemed compliance and/or violation of the CWA for purposes of enforcement. Section 402(k), 33 U.S.C. Section 1342(k).

Respondent's arguments as to Count II do not raise genuine issues of fact, but merely speak to issues which might factor into mitigation of any penalty assessed for such violation. Its admissions as to Count II unquestionably establish Respondent's violation of the relevant Permit monitoring requirements and as such, may be used for the purposes of determining liability. Student Public Interest Research Group, supra. Complainant is therefore entitled to judgment regarding liability as a matter of law as to Count II (Monitoring Violations). To this extent, Complainant's Motion is **Granted.**

As Respondent does not contest Complainant's jurisdictional assertions regarding ownership and operation of the wastewater treatment facility located in South Park Township, Allegheny County, Pennsylvania, a sufficient legal basis for rendering a judgment on liability for Count II (Monitoring Violations), is established (See, Complainant's Motion at 5).

Order

Accordingly, Complainant's Motion For Accelerated Decision on liability is **Granted in part**, as to Count II (Monitoring Violations); and **Denied in part**, as to Count I (Permit Effluent Violations) and Count III (Pretreatment Violations).

By separate Order this case will be SET FOR EVIDENTIARY HEARING with respect to the issue of liability for Counts I and III and the issue of the appropriateness of the civil penalty for all three counts contained in the Complaint.

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Stephen J. McGuire
Administrative Law Judge

Washington, D.C.

1. This proceeding involves two NPDES permits, both No. Pa 0027464. The first, the

"1991 Permit", became effective on June 17, 1991 and expired on June 17, 1996. The Complaint alleges violations of the effluent limits and monitoring requirements in the 1991 Permit. The second permit, the "1996 Permit", was issued on September 13, 1996 and expires on September 13, 2001. The Complaint alleges violations of the requirement in the 1996 Permit for the Respondent to develop and submit an appropriate pretreatment program by May 30, 1997.