UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
GREEN OIL COMPANY	)	**Docket No. CWA-07-2002-0059**
	)	
Respondent	)	

ORDER ON MOTION FOR PARTIAL ACCELERATED DECISION AS TO LIABILITY

On October 7, 2002, the Complainant, United States Environmental Protection Agency (EPA), filed its Motion for Partial Accelerated Decision, along with a "Memorandum of Points and Authorities in Support of Motion for Partial Accelerated Decision as to Liability" (hereinafter EPA Memorandum). EPA's motion seeks accelerated decision against Respondent on the issue of liability as to both counts and seeks to limit the hearing to penalty matters. The motion pertains to alleged violations by Green Oil Company ("Green" or Respondent) of oil spill prevention regulations promulgated under the Clean Water Act (CWA) as amended by the Oil Pollution Act of 1990.

Count I of the Complaint alleges that in April, 1999, Respondent violated CWA Section 311(b)(3), 33 U.S.C. § 1321(b)(3), by discharging harmful amounts of oil into or upon navigable waters of the United States. Count II of the Complaint alleges that Respondent violated 40 C.F.R. § 112.7 by failing to prepare a written Spill Prevention, Control and Countermeasure Plan (SPCC Plan). On October 28, 2002[1], Respondent filed its Opposition to Complainant's Motion for Accelerated Decision along with its "Memorandum of Points and Authorities in Opposition." Thereafter, EPA filed a Reply.

I. Standard for Accelerated Decision

These proceedings are governed by the "Consolidated Rules of Practice," 40 C.F.R. § 22.1 *et seq*., instead of the Federal Rules of Civil Procedure. *Katzon Bros., Inc. v. U.S. EPA*, 839 F.2d 1396, 1399 (10th Cir. 1988); *see also Baker v. Latham Sparrowbush Assoc.*, 72 F.3d 246, 255 (2d Cir. 1995). The Rules of Practice authorize the Court to "[R]ender an accelerated decision in favor of a party as to any or all parts of the proceeding . . . if no genuine issue of material fact exists and

[1] The Court, upon Motion by Respondent, extended Respondent's deadline to file a response to Complainant's Motion for Partial Accelerated Decision as to Liability until November 1, 2002. Order Granting Extension, October 30, 2002.

a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a). A motion for accelerated decision is analogous to a motion for summary judgment under Rule 56 of the Federal Rules of Procedure. *In re CWM Chem. Servs.,* Inc., 6 E.A.D. 1 (E.P.A., "Order on Interlocutory Appeal," 1995); *In the Matter of Chem Lab Products, Inc.*, Docket No. FIFRA-9-2000-0007, 2001 EPA ALJ LEXIS 10 ("Order Granting Complainant's Motion for Accelerated Decision as to Liability," Jan. 26, 2001). Granting a motion for accelerated decision is appropriate only when the moving party demonstrates that there exists no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986). In deciding such motions, the Court views the evidence in a light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). The Complainant, if the moving party, must establish all elements of the prima facie case to prevail in its motion for accelerated decision.

II. Count I of the Complaint – Harmful Discharge of Diesel Fuel to Navigable Waters

Count I of the Complaint charges the Respondent with a violation of CWA § 311(b)(3), 33 U.S.C. § 1321(b)(3) and 40 C.F.R. § 110.3, which prohibits discharges of harmful amounts of oil or hazardous substances into or upon navigable waters of the United States. The Complaint alleges that Respondent, on or about April 16, 1999, discharged diesel fuel into a storm drain, which drain flows to a tributary of Walnut and Clear Creeks, which then drain into the Osage River and, thereafter to the Lake of the Ozarks. From there, those waters empty into the Missouri River and, finally, into the Mississippi River. Amended Complaint ¶ 19. In its Answer, Respondent admitted that Walnut Creek, Clear Creek, Osage River, Lake of the Ozarks, the Missouri River, and the Mississippi River are navigable waters as defined by 40 C.F.R. § 110.1 but it did not admit that it discharged harmful quantities of diesel fuel to any of these waters, and specifically "denie[d] that any release of diesel fuel at Respondent's premises ever reached or impacted any of these water ways in any quantity or concentration which could conceivably be deemed harmful..." Answer ¶ 15.

In support of its Motion, EPA cites to a report by Mid-America Environmental, Respondent's environmental contractor, which stated that the fuel reached a drainage ditch behind Respondent's premises, which carried it to an intermittent stream, which is a tributary of Walnut Creek. Complainant's Memo for Accelerated Decision at 7-8; Complainant's Prehearing Exchange Exhibit (PHX) 10 ¶¶ 6, 17. Complainant also refers to a report prepared by an inspector for the Missouri Department of Conservation, prepared the day after the alleged spill, stating that diesel fuel was observed on the "town branch" of Walnut Creek. Complainant's PHX 6 ¶ 10. EPA also referred to the National Response Center record which lists "Creek" as one of the media affected by the spill. PHX 4.

To counter these factual contentions, Respondent's counsel identified two eyewitnesses who are expected to testify at hearing that the spilled diesel fuel did not enter the storm drain and did not leave Respondent's premises. Respondent's Memorandum of Points and Authorities in Opposition to EPA's Motion for Partial Accelerated Decision as to Liability (hereinafter Respondent's Opposition Memo) at 4-5; Respondent's PHX ¶¶ II.1, II.3. Respondent's referenced summary of

expected testimony[2] was included as part of its prehearing exchange to refute Complainant's factual claims. A summary of expected testimony may be considered "probative evidence" for the purposes of ruling on a motion for accelerated decision.

In its reply, Complainant argued that "the storm drain and intermittent stream which admittedly received oil as a result of the spill along this approximately four-block stretch are also included within the definition of 'navigable waters.'" Reply at 3. However, Respondent has specifically denied that the diesel entered the storm drain, and intends to call at least two witnesses at hearing to testify to that effect. Answer ¶ 15; Respondent's Opposition Memorandum at 4-5. Furthermore, Complainant has not provided enough factual evidence to make a determination at this stage on whether the "intermittent stream" it refers to in its reply is a "navigable water" as defined by 40 C.F.R. § 110.1.

As mentioned, an accelerated decision is appropriate only when it is determined that no genuine issue of material fact exists and a party is entitled to judgment as a matter of law. 40 C.F.R. § 22.20. A court may in accordance with sound judicial policy and in the exercise of judicial discretion deny summary judgment and permit the case to be fully developed at trial. Regarding this Count, the Court determines that the Respondent has raised such genuine issues of material fact. The Complaint alleges that Respondent discharged diesel fuel into storm drains which flow to a tributary of Walnut and Clear Creeks, which creeks drain into the Osage River and from there to other waters, eventually emptying into the Missouri and Mississippi Rivers. Specifically, EPA claimed in Count I that this fuel "caused a film or sheen upon the surface of the *creek*, on *adjoining shorelines*, or caused a sludge or emulsion to be deposited *beneath the surface or upon* [the creek's] *adjoining shorelines.*" Complaint at ¶ 23. (Emphasis added) Respondent, in its Memo in Opposition, notes that when it made its response to EPA's Request for Information it did not concede that any fuel reached the Creek. Rather, the information supporting EPA's claim was derived from Respondent's environmental contractor, Mid-American Environmental, through Mr. Whitley, who is that company's operations manager. Based upon an investigation by Respondent's Counsel, Respondent expects to advance witnesses who will challenge Whitley's conclusion that fuel reached Walnut Creek.[3] Further, Respondent expects another witness to testify that no harm was done to any fish or wildlife as a result of the spill.

Whether the diesel fuel spilled reached a navigable water is a material issue to prove a violation of CWA § 311(b)(3). Because of these contradictory submissions on where the diesel

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[2] Respondent also referenced documents included in the prehearing exchanges to point out inconsistencies in accounts of how much oil was spilled.

[3] *See In the Matter of Consumers Recycling, Inc.*, CAA-5-2001-002, 2002 WL 2005522, (E.P.A.), Aug. 22, 2002, where the court noted Respondent's intention, as related in its prehearing exchange, to present testimony to support its factual contentions in denying motion for accelerated decision.

fuel contamination stopped, there remains a genuine dispute of material facts to this count. Therefore, summary judgment on liability for Count I is not appropriate.

III. Count II of the Complaint – Failure to Develop and Implement a Spill Prevention Control and Countermeasures Plan

Count II of the Complaint charges Respondent with violation of Section 311(j) of the CWA and 40 C.F.R. Part 112.7, which require certain owners and operators of onshore oil storage facilities to prepare a written SPCC Plan. According to EPA, to establish this violation it must show that the Respondent was the owner or operator of an onshore facility; that it was engaged in storing and distributing oil or oil products; that it either has or reasonably could be expected to discharge oil into navigable waters, in quantities that may be harmful, and that the facility has an unburied storage facility of more than 1,320 gallons. EPA Memorandum at 9. EPA relies upon the Respondent's admissions to establish the ownership, onshore facility status, and the oil storage and distribution elements. *Id*. at 10. Regarding the element of forseeability, EPA asserts that in addition to relying upon its assertions for Count I, it was "forseeable and reasonable" to expect that oil from the facility could reach navigable waterways. To show this, it relies upon Respondent's admissions: through the response to EPA's request for information, which relates that oil could flow from the facility to a storm drain and from their to an intermittent stream which is asserted to be a tributary of Walnut Creek; and through the SPCC Plan Respondent later prepared.

In its Memorandum in Opposition, Respondent "acknowledge[d] that it had not prepared and maintained an SPCC Plan at the El Dorado Springs facility prior to the release." R's Memo at 5 -6. This is consistent with its answer, in which is admitted to most of the elements needed to prove liability for this count. In its Answer Respondent has admitted that it is an owner or operator of a non-transportation related onshore facility engaged in storage of oil or oil production with an aboveground storage capacity of greater than 1,320 gallons. Answer ¶¶ 7-10, 12. Respondent has also admitted that at the time of the spill in Count I, it did not have a written SPCC Plan. Answer ¶ 23. In its Answer Respondent denied, however, that due to its location, it could reasonably be expected to discharge oil in harmful quantities into or upon navigable waters. Answer ¶ 11. *But see* Answer ¶ 22, admitting that Respondent was required by Section 311(j) to prepare an SPCC Plan in writing in accordance with 40 C.F.R. § 112.7.

To support its claim that due to Respondent's location, it could reasonably be expected to discharge oil in harmful quantities into or upon navigable waters, Complainant cites the SPCC Plan that Respondent eventually prepared. *See* Complainant's Memo for Accelerated Decision at 11, *citing* Complainant's PHX Exhibit 10. In that SPCC Plan, Respondent describes a scenario where a ruptured or disconnected fill line could cause a discharge that could flow to Walnut Creek based on Respondent's location and the direction of flow from the facility. *See* Complainant's PHX Exhibit 10 attached SPCC Plan at 3. Respondent admitted that Walnut Creek is a navigable water. Answer ¶15. Respondent's facility has a storage capacity of 53,034 gallons, and each tank at the facility has a volume of at least 8,000 gallons. Complainant's Memo for Accelerated Decision at 12, *citing* Complainant's PHX Exhibit 10 ¶ 12. The

determination of whether it is reasonable to expect that a facility could discharge oil in harmful quantities into or upon navigable waters shall be based solely upon the locational aspects of a facility excluding manmade features such as dikes and berms. 40 C.F.R. § 112.1(d)(1)(i) (1998).

Respondent provided no factual evidence to counter Complainant's claims with respect to this count, and admits that there is no genuine issue of material fact for this count as to liability.[4] Response to Motion at 6. Such uncontradicted admissions can satisfy the movant's burden of establishing the absence of any genuine issues of material fact. *Celetox Corp. v. Catrett*, 477 U.S. 323 (1986), *In the Matter of Belmont Plating Works*, 2002 W.L. 31297645 (E.P.A.), September 11, 2002. Because of the location of Respondent's facility in relation to Walnut Creek and the large amount of oil that could potentially be released, it could reasonably be expected that Respondent could discharge oil in harmful quantities into or upon navigable waters. Respondent therefore violated 40 C.F.R. § 112 because it failed to prepare an SPCC Plan in accordance with 40 C.F.R. § 112.7.

ORDER

Complainant's Motion for Partial Accelerated Decision is **DENIED as to Count I** of the Complaint against Respondent Green Oil Co. but **GRANTED as to Count II.**

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William B. Moran
United States Administrative Law Judge

Dated: January 31, 2003
Washington, D.C.

[4]Respondent does not concede any penalty issues.

In the Matter of Green Oil Co., Respondent
Docket No. CWA-07-2002-0059

CERTIFICATE OF SERVICE

I certify that a true copy of **Order On Motions For Accelerated Decision,** January 31, 2003 was sent this day in the following manner to the addressees listed below.

_____
Nelida Torres
Legal Staff Assistant

Dated: January 31, 2003

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