UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
DMB North Carolina 2, LLC,	)	**Docket No. CWA-04-2002-5005**
	)	
	)	
Respondent.	)	

ORDER ON RESPONDENT'S MOTION TO DISMISS

I. Background

This action was initiated on September 27, 2002 by the filing of a Complaint under Sections 311(a)-(b) of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1321(a)-(b). The Complaint charges Respondent, DMB North Carolina 2, LLC ("DMB-2"),[1] with a violation of the CWA for the discharge of oil into or upon the waters of the United States in a quantity prohibited by Section 311(b)(6)(B)(ii) of the CWA, 33 U.S.C. § 1321(b)(6)(B)(ii).

On October 28, 2002, as part of its Answer, Respondent filed a Motion to Dismiss ("Motion"). In its Motion, Respondent claims that "EPA has produced no evidence that DMB-2 exercised possession or control over the facility at the time of the release or that DMB-2 had any direct culpability in causing the release." Answer at ¶ 24. Therefore, Respondent argues, EPA has failed to establish a *prima facie* case against it and the Complaint should be dismissed pursuant to 40 C.F.R. § 22.20.

On November 18, 2002, Complainant filed its Response to Respondent's Motion ("Response"), which advances three primary arguments.[2] Complainant first argues that the

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[1] On July 7, 2003, all the other entities originally named as Respondents in this action were dismissed with prejudice. Consequently, DMB-2 is the sole remaining respondent in this action.

[2] The Complainant also argues that Respondent did not comply with 40 C.F.R. § 22.5(b)(2) because Respondent did not serve their Answer, Motion to Dismiss, and Request for Hearing on Respondents URS Corporation and Dames and Moore Group, Inc. As a result, the Complainant asserts, Respondent's Answer and Affirmative defenses should be stricken from the record. Rule 22.5(b) requires that a copy of each document filed in the proceeding be served on each party and Rule 22.5(b)(2) requires that an answer be served personally by first class mail or by any reliable commercial delivery service. 40 C.F.R. §§ 22.5(b) and (b)(2). Respondent's

Motion should fail because the Complaint establishes a *prima facie* case against the Respondent thus satisfying 40 C.F.R. § 22.20. In this regard, the Complainant notes that at this stage of the proceeding the Rules of Practice, codified at 40 C.F.R. Part 22, do not require the production of evidence and the Complaint's contents satisfy 40 C.F.R. § 22.14(a). Second, the Complainant asserts that strict liability applies and therefore, mere ownership of the facility establishes liability under Section 311(b)(6) of the Clean Water Act without regard to fault. Finally, Complainant asserts, the Motion fails to meet the requirements of 40 C.F.R. § 22.16(a)(4).

In support of its arguments, Complainant cites, *inter alia*, to the following statements in the Complaint:

> The necessary elements to show a violation of Section 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3) are: 1) discharge (Complaint ¶ 8); 2) of oil or hazardous substance (Complaint ¶ 8); 3) into or upon navigable waters of the United States, or adjoining shorelines (Complaint ¶¶ 8, 9); and 4) in harmful quantities (Complaint ¶¶ 8, 10). . . . The necessary elements to establish liability for administrative penalties in this case pursuant to Section 311 (b)(6)(B)(ii) of the Act, 33 U.S.C. § 1321(b)(6)B(ii) are: 1) an owner (Complaint ¶¶ 3, 4); of an onshore facility (Complaint ¶ 4); 3) from which a discharge occurred in violation of Section 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3)(Complaint ¶¶ 8-10).

Response at 5.

Further, the Complainant highlights that the Complaint alleges that "15,000 gallons of oil were discharged from the Respondent['s] facility to the navigable waters of the United States . . . [and] Respondent, as owner[] of the facility, [is] liable for penalties." *Id*. at 5, 6. Furthermore, the Complainant asserts that the allegations in the Complaint, if taken as true, establish all of the requisite elements, so the Complaint sufficiently establishes a *prima facie* case for the occurrence of the violation and liability. Therefore, Complainant argues, Respondent's Motion should fail.

II. Discussion

A. Standard for Motion to Dismiss

On its face, Respondent's Motion asks the Court to dismiss the Complaint based on an absence of evidence. Rule 22.14(a) requires that each complaint contain, *inter alia*, "(1) A statement reciting the section(s) of the Act authorizing the issuance of the complaint; (2) Specific reference to each provision of the Act, implementing regulations, permit or order which

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Answer and Affirmative defenses will not be struck from the record because on November 27, 2002, Respondent properly served URS Corporation and Dames and Moore Group, Inc. with a copy of its Answer, Motion to Dismiss, and Request for Hearing.

respondent is alleged to have violated; [and] (3) A concise statement of the factual basis for each violation alleged." 40 C.F.R. § 22.14(a). It is axiomatic that a Complainant does need to provide evidentiary support for the allegations contained in the Complaint. The absence of something not required by the Rules of Practice is not cause for dismissal. A recent district court case on the relationship between a complaint and evidence is instructive:

> The issue to consider is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed, it is not the Court's function to weigh the evidence that might be presented at trial; instead, the Court must merely determine whether the complaint itself is legally sufficient.

MCI Worldcom Communications, Inc. v. North American Communications Control, Inc., No. 98 Civ.6818 LTS, 2003 WL 21279446, at *8 (S.D.N.Y. June 4, 2003) (citations omitted). Thus, Respondent prematurely argues the merits of the claim before proposed evidence is required to be submitted during the prehearing exchange.

While Respondent styles its motion as a "motion to dismiss" and cites Rule 22.20, viewing the motion in context, Respondent is actually asking for a dismissal of the Complaint for failure to state a claim upon which relief may be granted. Since there is no provision in the Rules of Practice addressing such motions, procedure and case law regarding Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP") provides guidance. The Environmental Appeals Board has found the FRCP to be instructive in analyzing motions to dismiss. *See, Commercial Cartage Company, Inc.*, 5 E.A.D. 112, 117 n.9 (EAB 1994) (citing *Asbestos Specialists, Inc.,* 4 E.A.D. 819, 827 n.20 (EAB 1993); *Wego Chemical & Mineral Corporation*, 4 E.A.D. 513, 524 n.10 (EAB 1993) (While the FRCP are not binding on administrative agencies, these rules can provide useful guidance.).

On motions to dismiss, Federal courts draw all inferences and resolve all ambiguities in the plaintiff's favor and assume that all well-pleaded facts are true. *See, Mallett v. Wisconsin Div. of Voc. Rehab.*, 130 F.3d 1245, 1248 (7th Cir. 1997); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1428 (7th Cir. 1996); *Dimmig v. Wahl*, 983 F.2d 86, 87 (7th Cir. 1993). Federal courts have stated that the "complaint must state either direct or inferential allegations concerning all of the material elements necessary for recovery under the relevant legal theory. *Griffin v. Sheahan*, Civ. No. C 2398, 1999 U.S. Dist. LEXIS 7899 (N.D. Ill., May 12, 1999); *Peaceful Family Limited Partnership v. Van Hedge Fund Advisors, Inc.*, Civ. No. C 1539, 1999 U.S. Dist. LEXIS 1838 (N.D. Ill., February 17, 1999); *Chawla v. Klapper*, 743 F. Supp. 1284, 1285 (N.D. Ill. 1990). Moreover, "on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2137 (1992) (quotation omitted). However, "the court will not strain to find inferences that do not appear from the face of the complaint." *Griffin, supra*; *Peaceful Family, supra* (citing *Lindgren v. Moore*, 907 F. Supp. 1183, 1186 (N.D. Ill. 1995)).

If any element of a claim is not alleged, or if the plaintiff can prove no set of facts in support of its claims which would entitle it to relief, then the complaint may be dismissed. *Commercial Cartage Company, Inc.*, 5 E.A.D. at 117 (complaint against carrier for violating fuel volatility regulations under Clean Air Act dismissed for failure to allege element of causation or of detection of violations at carrier's facility); *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (complaint may be dismissed "only if it is that no relief could be granted under any set of facts that could be proved consistent with the allegations"); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Thomas v. Harvard,* 45 F. Supp.2d 1353 (N.D. Ga. 1999) (dismissing claim under 42 U.S.C. § 1983, where alleged facts would not establish element, loss of tangible interest, for a claim for deprivation of a liberty interest).

B. Analysis and Conclusions

Applying the above standard, it is concluded that the Complaint has sufficiently stated a claim. First, the Complaint charges Respondent with violating Section 311(b)(3) of the CWA, 33 U.S.C. 1321 § (b)(3), and 40 C.F.R. § 110.3. Section 311(b)(3) and 40 C.F.R. § 110.3, in relevant part, prohibit the discharge of oil into or upon the waters of the United States in such quantities that may be harmful to the public health or welfare or the environment of the United States. 33 U.S.C. 1321 § (b)(3); 40 C.F.R. § 110.3. The Complaint alleges that "on or about September 3, 1998, Respondent[] discharged approximately 15,000 gallons of oil . . . into an adjacent unnamed ditch. The discharge flowed from the ditch into a nearby wetland area which discharges to the Taylor and Crawford Creeks which flow to Chocowinity Bay and eventually the Pamlico River." (Complaint ¶¶ 8,9). The Complaint further alleges that these are jurisdictional waters because they are navigable and as such are waters of the United States. 33 U.S.C. § 1362(7); 40 C.F.R. § 110.1. The Complaint sets forth a set of facts that, if true, could satisfy the elements of Section 311(b)(3) of the CWA.

Second, the Complaint cites Section 311(b)(6)(B)(ii), 33 U.S.C. 1321 § (b)(6)(B)(ii), as the administrative authority to assess a penalty for violation of Section 311(b)(3).[3] The Administrator may assess a penalty against, *inter alia*, the owners of an onshore facility that violate Section 311(b)(3). 33 U.S.C. 1321 § (b)(6). The Complaint alleges that the Respondent owned an onshore facility, "located at 357 Amilite Way, Chocowinity, Beaufort County, North

[3] Section 311(b)(6)(A) is the specific provision that provides the administrative authority to take action against "any owner, operator, person in charge of any . . . onshore facility" who violates Section 311(b)(3) of the CWA. 33 U.S.C. § (b)(6)(A). Section 311 (b)(6)(B)(ii) merely references subparagraph (A) and sets the maximum penalty and the manner in which to assess and collect that penalty. 33 U.S.C. §(b)(6)(B)(ii). While Section 311(b)(6)(A) would have added to the clarity of the Complaint, this technical error is not fatal because the factual allegations in the Complaint sufficiently put the Respondent on notice as to the basis of the claim. *Walters v. President and Fellows of Harvard College*, 616 F. Supp. 471, 474 (D. Mass.,1985) ("[A] technical error in citation, where sufficient notice of the factual basis of the claim has been stated, would not support a motion to dismiss for failure to state a claim.").

Carolina," where the alleged discharge occurred. (Complaint at ¶4). The allegations, if true, could entitle the EPA to the relief prayed for.

Discussing motions to dismiss for failure to state a claim upon which relief can be granted, the Supreme Court has stated that "[i]t is axiomatic that a complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *McLain v. Real Estate Board of New Orleans, Inc.,* 444 U.S. 232, 246 (1980) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957))." In this case, the Complainant may prove a set of facts in support of its claim that would entitle it to relief. Therefore, the Complainant has stated a claim upon which relief could be granted.

ORDER

Respondent's Motion to Dismiss is hereby **DENIED**. Respondent may renew the motion, if appropriate, at a later stage this proceeding.

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Susan L. Biro
Chief Administrative Law Judge

Dated: July 10, 2003
Washington, D.C.