UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
	)	
Freudenberg-NOK	)	Docket No. CWA-5-98-006
	)	
	)	
Respondent	)	

ORDER DENYING COMPLAINANT'S MOTIONS FOR ACCELERATED DECISION AND TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES

Clean Water Act--By motion dated April 7, 1999, 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 violations of the Clean Water Act, 33 U.S.C. Section 307(d) and asserts that it is entitled to judgment as a matter of law. Complainant also filed, in accordance with 40 C.F.R. Section 22.16, a Motion to Strike Respondent's Affirmative Defenses numbered 1 and 2 in its Answer. Respondent filed a response to Complainant's Motions on April 12, 1999. Complainant filed a reply on April 22, 1999, and on May 6, 1999, filed a Motion for Leave to File Substituted Reply Motion Regarding Accelerated Decision on Liability. Thereafter, Respondent filed a response to Complainant's Substituted Reply Motion on May 12, 1999. **Held:** Complainant's Motion For Accelerated Decision on Liability and Motion to Strike Respondent's Affirmative Defenses are **Denied.**

Before: Stephen J. McGuire
Administrative Law Judge

Date: May 14, 1999

Appearances:

For Complainant:

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I. Introduction

On September 18, 1998, Complainant issued a Complaint and Notice of Opportunity for Hearing to Respondent, Freudenberg-NOK, alleging violations of the Clean Water Act(CWA), 33 U.S.C. Section Part 403 et seq. The Complaint sought a civil penalty in the amount of $137,500 under subsection 309(g) of the CWA, 33 U.S.C. Section 1319(g). Respondent filed its Answer and Request For Hearing on October 13, 1998.

The Complaint alleges two Counts of violations, each related to Section 307(b) of the Act, 33 U.S.C. Section 1317(b), 40 C.F.R. 403.6, which pertains to the National Pretreatment Standards specifying quantities or concentrations of pollutants which may be discharged to a publicly owned treatment works (POTW), by existing or new Industrial Users in specific industrial subcategories established as separate regulations under the appropriate Subpart of 40 C.F.R. Chapter I, Subchapter N.

Complainant's Motion for Accelerated Decision is based on the record in this case, particularly paragraphs 1-49 of the Complaint, and the following proposed Findings of Fact that:

1. Complainant is, by lawful delegation, the Director, Water Division, Region 5, U.S. EPA;

2. Respondent is Freudenberg-NOK, a general partnership, formed under the laws of the State of Delaware, with a place of business at 821 South Lake Road, South, Scottsburg, Indiana (Facility);

3. At all times relevant to this Complaint, Respondent owned the facility noted above, and operated a precision molded rubber products manufacturing process at that location;

4. At all times relevant to this Complaint, Respondent was engaged in the manufacture of precision molded rubber products, typically components for brake systems, fuel systems

and transmissions, for the automotive and aerospace industry. Manufacturing processes include: mixing, heating, extruding; molding, trimming, rolling, and cooling of rubber products.

5. At all times relevant to this Complaint, Respondent discharged wastewater generated during the manufacturing process to the Scottsburg POTW.

6. Respondent was and is an industrial user discharging process waste water resulting from the production of molded, extruded, and fabricated rubber products, processing more than 10,430 kg/day (23,000 lbs/day) of raw materials;

7. The City of Scottsburg is the owner and operator of Scottsburg POTW and the Scottsburg sewerage system which provides collection and treatment of wastewater from domestic sources and industrial users;

8. The Scottsburg POTW discharges pollutants to McClain Ditch, a tributary of Stucker Fork, which is a tributary of the Muscatatuck River;

Count One

9. During the period from November 1, 1996 through February 26, 1997, the Daily Monitoring Reports submitted by Respondent, for outfall 001 at its Scottsburg facility, show that on 26 separate occasions the pH levels were reported at concentrations of 10 standard units or higher,- as detailed in the Table of Violations attached to the Complaint in this matter as Exhibit A;

10. During the period from November 1, 1996 through February 26, 1997, on 26 separate occasions, Respondent discharged, through outfall 001, effluent containing pH levels at concentrations in excess of 10 standard units, as detailed in the Table of Violations attached to the Complaint in the matter as Exhibit A.

Count Two

11. Respondent's wastewater discharges contain Oil and Grease;

12. During the period from January 2, 1997 through January 9, 1998, the Daily Monitoring Reports submitted by Respondent, for outfall 001 at its Scottsburg facility, show that

on 27 separate occasions the Oil and Grease levels in discharges of process wastewater were reported at concentrations greater than 100 milligrams per liter, as detailed in the Table of Violations attached to the Complaint in this matter as Exhibit B;

13. During the period from January 2, 1997 through January 9, 1998, on 27 separate occasions, Respondent discharged effluent from outfall 001 containing Oil and Grease levels exceeding 100 milligrams per liter, as detailed in the Table of Violations attached hereto as Exhibit B.

As a result of the alleged violations, Complainant asserts that as to Count One, Respondent's discharges or process wastewater with pH concentrations exceeding the pretreatment standard of 9.5 standard units, on 26 separate days, as reported in the Daily Monitoring Reports, constitute 26 violations of Section 307(d) of the Act, 33 U.S.C. Section 1317(d). Respondent, as a person subject to the Act, is subject to civil penalties pursuant to Section 309(g) of the Act, 33 U.S.C. Section 1319(g) for its violations of Section 307(d) of the Act, 33 U.S.C. Section 1317(d), and, pursuant to 40 C.F.R. Section 403.5(d), the local limits established by the Scottsburg POTW pursuant to City of Scottsburg ordinance No. 1988-7, (adopted April 18, 1988).

As to Count Two, Complaint asserts that Respondent's discharges of wastewater containing Oil and Grease, for outfall 001 show that on 27 separate occasions, the Oil and Grease levels in discharges of process wastewater were reported in concentrations greater than 100 milligrams per liter, as detailed in the Table of Violations. As such, Complainant asserts that Respondent, as a person subject to the Act, is subject to civil penalties pursuant to Section 309(g) of the Act, 33 U.S.C. Section 1317(g), for its violations of Section 307(d) of the Act, 33 U.S.C. Section 1317(d); and the Categorical Standards established at 40 C.F.R. 428.76.

In addition, Complainant requests the undersigned to Strike Respondent's Affirmative Defenses numbered 1 and 2 in its Answer. Complainant's position is prefaced on the notion that Respondent's affirmative defenses should be stricken because they raise no issues of fact or law that would support them.

Upon review of the merits of this case and the complexity of the issues raised by the parties, there remain questions of material facts that require a formal evidentiary hearing.

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 CWI Chemical Serv., Docket No. TSCA-PCB-91-0213, 1995 TSCA LEXIS 13, TSCA Appeal 93-l (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

A. Count One

In response to Complainant's Motions, Respondent asserts that there remain genuine issues of material fact which preclude findings favorable to Complainant. Moreover, Respondent disputes that an admitted violation of a local limit automatically equates a violation of the Clean Water Act.

Respondent argues that in order for a local limit to be federally enforceable, it must have been promulgated in accordance with 40 C.F.R. 403.5(c). Respondent has alleged two affirmative defenses based upon an argument that the Scottsburg POTW local limits were not so promulgated, and in fact are being enforced in violation of the Administrative Procedure Act (APA) and Due Process. Respondent submits that the Scottsburg POTW is not operating under a federally approved Pretreatment Program in accordance with 40 C.F.R. 403.5(c) (1) and thus, there is no evidence that would show that the local limit on high pH effluent at the Scottsburg POTW was necessary to prevent interference or pass-through or to ensure compliance with its NPDES permit in accordance with 40 C.F.R. 403.5(c) (2).

As to Count One and the two affirmative defenses raised in its Answer, Respondent has raised factual and legal arguments which, even if not ultimately persuasive, are entitled to be fully heard at an evidentiary hearing. As stated *In the Matter of 3M Company (Minnesota Mining and Manufacturing)*, Docket No. TSCA-88-H-06 (August 7, 1989): *"The* general *policy is against denying* a *party the opportunity to support his contention in more depth at trial. If there are either questions of fact, mixed questions of law and fact, or disputed questions of law pertaining to the defense, the motion must be denied. For the movant to succeed, the Court must be convinced that there are no questions of fact, that any questions of law are clear and not in dispute, and that*

under no set of circumstances could the *defenses succeed... A motion to strike is not the proper device for placing the actual merits of the party's pleading in issue."*

As required by 40 C.F.R. Section 22.15(b), Respondent has identified "circumstances or arguments which are alleged to constitute grounds of defense" and "facts which Respondent intends to place at issue" in its Answer, and supplemented these required elements with the materials and witnesses identified as part of Respondent's Prehearing Exchange.

Respondent's first affirmative defense states in pertinent part that "EPA's pretreatment regulations provide that a local limit is not enforceable as a Pretreatment Standard under Section 307 of the Clean Water Act unless it meets the requirements of 40 C.F.R. 403.5(c)..." The fact in issue is whether the Scottsburg POTW adopted its local limits in accordance with Section 403.5(c). The regulations at 40 C.F.R. 403(b) (2) state that discharges with pH lower than 5.0 shall not be introduced into a POTW. However, Respondent argues that the rule makes no mention of a restriction on discharges with regard to high pH. Thus, since high pH is not harmful to a POTW's treatment systems and would not cause interference, pass-through, or difficulty in complying with an NPDES permit, Respondent asserts that it is at least questionable whether the local limit restricting alkaline pH has been developed in accordance with Section 403(c) (2).

Respondent further notes that it was unable to comment on the local limits as required under Section 403.5(c) (3), as Respondent was not formed until more than a year after the local ordinance creating the local limits at the Scottsburg POTW was passed. Respondent has at least, *pro forma,* raised the issue of the legitimacy of EPA's enforcement of the local limits of the Scottsburg POTW. Once raised, Complainant, as a fundamental element of its burden of proof, must demonstrate that its enforcement and this action are based upon legitimate Pretreatment Standards and show that the Scottsburg, POTW's local limits were developed in accordance with Section 403.5(c). This issue is the subject of significant factual and legal difference between the parties and its resolution can only be properly addressed and fully developed at an evidentiary hearing.

Thus, Complainant's Motion to Strike Respondent's First Affirmative Defense is **Denied.**

Respondent's Second Affirmative Defense provides that: *"The local limit for pH has never been* subject *to EPA review and*

approval or other procedures under the Administrative Procedure Act (APA). Therefore, enforcement of the local limit by EPA as a federal Pretreatment Standard violates Due Process and is not authorized by the Clean Water Act."

Respondent alleges that there was no opportunity for anyone to comment on EPA's attempted enforcement of these local limits at the federal level, as such intent to enforce was never published in the Federal Register. Respondent similarly contends that the local limits being enforced against it are not Pretreatment Standards enforceable by EPA as they were not promulgated in accordance with 40 C.F.R. 403.5(c). If not persuasive as a matter of law, Respondent has at least raised a legitimate defense based on questions of mixed fact and law which should be further developed at hearing before adjudicating the merits of EPA's enforcement action.

Accordingly, Complainant's Motion to Strike Respondent's Second Affirmative Defense is similarly **Denied** pending an evidentiary hearing.

Complainant has thus not demonstrated that it is entitled to summary judgment against Respondent in connection with the allegations contained in Count One of the Complaint. Although this issue may ultimately turn on the question of law asserted by Complainant, there remains mixed questions of fact as to whether the Scottsburg POTW local limits were promulgated in accordance with 40 C.F.R. 403.5(c). Both parties will thus be allowed the opportunity at hearing to introduce evidence and witness testimony to establish whether the Scottsburg POTW is operating under a federally approved Pretreatment Program in accordance with Section 403.5(c) (1).

The pleadings thus indicate that this issue poses, *inter alia,* a genuine question of material fact, with proper resolution possible only after full development of the issue at an evidentiary hearing.

Accordingly, Complainant's Motion for Accelerated Decision on Liability as to Count One is **Denied.**

B. Count Two

Respondent also argues that while some of its discharges contain Oil and Grease (O&G), this does not mean that all

discharges did. Respondent asserts that the mere presence of O&G in its discharges bears no relation to whether Respondent has violated its O&G effluent limits on the 27 occasions alleged by Complainant.

Respondent admits that it *reported 27* apparent violations of its effluent guidelines in its monthly Discharge Monitoring Reports (DMR's). However, Respondent states that while being required by law to report apparent violations on the DMR, Respondent repeatedly qualified its reports in the letters accompanying those DMR's (Complainant's Exhibit 3). In the accompanying letters, Respondent stated that it did not believe that it was experiencing true O&G exceedences, and reported on its continuing good faith efforts to isolate the cause of the apparent exceedences.

Respondent also noted in those letters that it had discovered that the source of the apparent exceedences was a silicone agent used as a mold release agent, and requested a change in test method (Complainant's Prehearing Exchange, Exhibit 8). Thus, Respondent argues that it first suspected and then proved that its apparent exceedences were not caused by true O&G discharges. As such, Respondent argues that it is unfair for EPA to regard the exceedences reported on the DMR's as an admission of wrong-doing when doing so ignores the extenuating circumstances laid out in the accompanying documentation.

Respondent cites to *Friends of the Earth v. Facet Enterprises, Inc.,* 618 F.Supp. 532 (W.D.N.Y. 1984), wherein admissions in DMR's were found not to be conclusive proof of the violation reported, and were found not to be a basis for summary judgment. However, some of the apparent violations in *Friends* seemed to have been attributed to typographical errors in the DMR's and would appear distinguishable from the facts of the instant case.

Respondent also sets forth evidence that only hydrocarbons were intended to be regulated by O&G and that Respondent's violations of the effluent standards were caused by silicone. By June 1997, Respondent had voluntarily conducted Total Hydrocarbon testing using EPA method 1664, and had discovered that the actual amount of hydrocarbons in its wastewater was much lower than that shown by the test results under EPA Method 413.1 (the method specified for measuring O&G in the permit issued by the local POTW). Respondent's Answer asserts that using head-to-head comparison of the two test methods, Respondent was able to show that only one of the six apparent exceedences for June 1997,

was due to excessive hydrocarbons in its discharges.

Complainant argues that Respondent was required to use Method 413.1. However, Respondent asserts in its Answer, that the EPA Region V Administrator, Valdas V. Adamkus, issued a letter on April 26, 1996, stating that he was granting region-wide permission to substitute Method 1664 for Method 413.1, pending the expected promulgation of Method 1664 (Attachment 3). Respondent argues that nowhere in the letter does the Regional Administrator impose the requirement of seeking an amendment of a permit in order to use the new method. Rather, Respondent submits that the choice of which method to employ was entirely up the discretion of testing laboratories.

EPA strongly contests Respondent's interpretation of the Region V Administrator's letter stating that the language of the letter limits the use of the Alternate Test Procedure (ATP) "specifically to laboratories within Region 5 performing analyses for NPDES permittees in Region 5." EPA argues that the scope of this limited use ATP does not include Respondent, laboratories performing analyses for Respondent, or any other Industrial User or its laboratory. EPA alleges Respondent does not have an NPDES permit or permission to use an ATP. The parties' disputed arguments clearly demonstrate a mixed question of law and fact regarding the background and scope of the Regional Administrator's letter and whether any new test methods could be used by Respondent for O&G determinations.

EPA further notes the February 11, 1998, correspondence from David Lawson, Respondent's Corporate Health, Safety and Environment Manager to Region 5 requesting an ATP for Oil & Grease at the Scottsburg facility (Attachment 2, EPA Reply Brief). Specifically, EPA states that in response to Respondent's letter, the Analytical Methods Staff in Washington, D.C. recommended disapproval of the ATP application (Attachment 3, EPA Reply Brief). Thereafter, on November 3, 1998, the Acting Regional Administrator wrote to Mr. Lawson, informing him that Region 5 disapproved the application for the ATP based on the Analytical Methods Staff recommendation (Attachment 4, EPA Reply Brief).

EPA thus submits that Respondent misinterpreted the requirements of the law, sought to test for a different parameter and by a different analytical method than the one required by law, and made impermissible changes to that substituted method without seeking prior approval from the agency. EPA has cited to Federal Register Notices, the statute and federal regulations in

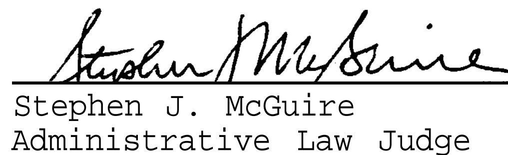
support of its motion for accelerated decision on liability.

Despite EPA's arguments, the evidence presented in the instant case pertaining to Count Two establishes sufficient questions of mixed fact and law which require further development at an evidentiary hearing. Given the nature of the outstanding issues, the undersigned, without further evidentiary development, is unable to address the merits of Complainant's arguments on the preponderance of evidence standard set forth at 40 C.F.R. Section 22.24 of the Rules of Practice.

Accordingly, Complainant's Motion for Accelerated Decision on Liability on Count Two is **Denied.**

IV. Order

For the reasons stated, Complainant's Motion for Accelerated. Decision on Liability and Motion to Strike Respondent's Affirmative Defenses are therefore, **Denied.**



Stephen J. McGuire
Administrative Law Judge

Washington, D.C.

NAME OF RESPONDENT: Freudenberg-NOK
DOCKET NUMBER: CWA-5-98-006

CERTIFICATE OF SERVICE

I hereby certify that the original of this Order Denying Complainant's motions for Accelerated Decision and To Strike Respondent's Affirmative Defenses are sent to the counsel for the complainant and counsel for the respondent on May 14, 1999.

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