UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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| IN THE MATTER OF | ) | |
| | ) | |
| | ) | |
| Spring Crest Fuel Co., Inc. | ) | Docket No. CWA-3-99-0009 |
| | ) | |
| | ) | |
| Respondent | ) | |

ORDER GRANTING COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION

**Clean Water Act--**By motion dated May 23, 2000, Complainant, the United States Environmental Protection Agency (EPA), moved pursuant to 40. C.F.R. Section 22.20(a), for accelerated decision on liability for counts II, III, IV, VI, VII, VIII and IX of the Complaint 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. Respondent did not file a response to Complainant's Motion. **Held:** Complainant's Motion For Partial Accelerated Decision on Liability on the above counts is GRANTED.

Before: Stephen J. McGuire
Administrative Law Judge

Date: June 28, 2000

Appearances:

For Complainant:
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For Respondent:
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## I. Introduction

On May 23, 2000, Complainant filed a Pre-Hearing Brief, or in the alternative, Motion for Partial Accelerated Decision, and in support thereof avers the following:

1. On December 30, 1998, EPA filed an administrative Complaint against Respondent, Spring Crest Fuel Company, a copy of which is attached to Complainant's Pre-Hearing Exchange as Exhibit C-6.

2. On March 11, 1999, Respondent filed its Answer to the Complaint, a copy of which is attached to Complainant's Pre-Hearing Exchange as Exhibit C-7.

3. Respondent's SPCC Plan describes its industrial and commercial activities as follows:

> Spring Crest is a Petroleum Distributor: The Ashland Bulk Plant in Butler Township, Schuylkill County, Pennsylvania handles and stores no. 2 fuel oil, various grades of motor gasoline and kerosene. Spring Crest Fuel also performs installation and servicing of fuel oil heating systems. Petroleum products are distributed to retail and commercial end-users in the Schuylkill and Northumberland County areas. The subject facility consists of three (3) above ground horizontal steel tanks and three (3) underground storage tanks. The three (3) underground storage tanks are piped to a single product dispenser island used for retail sale or motor gasoline. Upon delivery, petroleum products are transferred to their respective tanks for storage. The above-ground storage tanks serve one (1) truck loading rack equipped with one (1) loaded position where petroleum products are dispensed into tank trucks which deliver these products to Company customers, end-users, etc. Additionally, two (2) of the above ground storage tanks are piped to separate individual product dispensers used for retail sale of kerosene and no. 2 fuel oil. Petroleum products are pumped to the loading rack via above-ground pipelines; and placed into tank trucks with product loading equipment.
>
> The Ashland Bulk Plant receives its product for distribution by tanker truck. Normal hours of operation are 7:00 AM to 5:00 PM Monday through Friday. Unloading operations at this facility are random, conforming with the arrival of trucks which can occur at any time. (Respondent's SPCC plan is attached to Complainant's Pre-Hearing Exchange as Exhibit C-8).

4. As evidenced by Respondent's description of its industrial and commercial activities and its answer to Paragraphs 7, 8, and 9 of the Complaint, Respondent is the owner/operator of a non-transportation-related, on shore facility, which is involved in the gathering, storing, transferring, distributing or consuming of oil or oil products.

5. The Respondent's facility is in close proximity to the Mahonoy Creek, as evidenced by the map attached to Respondent's SPCC Plan, and as such could reasonably be expected to discharge oil to a navigable water of the United States or its adjoining shoreline. See Paragraph 5 of the Declaration of Neeraj Sharma, attached hereto as Exhibit C-12.

6. Respondent's Answer admits to a number of the violations alleged in the Complaint, as will be more fully set forth below. Additionally, the Declaration of Neeraj Sharma, attached hereto as Exhibit C-12, corroborates the allegations pled in the Complaint. Accordingly, Complainant is entitled to judgment on those Counts of the Complaint admitted to by the Respondent as noted below:

COUNT II

7. Count II of the Complaint alleges that the Respondent's facility violated 40 C.F.R. Sec. 112.7(e)(2)(ii), which requires that all bulk storage tank installations should be constructed so that a secondary means of containment is provided for the entire content of the largest single tank plus sufficient freeboard to allow for precipitation.

8. Paragraph 26 of the Complaint alleges that:

> The facility is in violation for not having, at the time of the inspection, the requisite secondary containment required by 40 C.F.R. Sec. 112.7(e)(2)(ii).

9. Respondent's Answer to Paragraph 25 and 26 states that:

> Admitted in part, denied in part, as stated. <u>At the time of the inspection the Facility did not have the requisite secondary containment system</u>, but the Operator, upon notification and subsequent to the inspection, took all steps necessary to cause the entire Facility to comply with 40 C.F.R. Sec. 112.7(e)(2)(ii) (Emphasis added).

COUNT III

11. Count III of the Complaint alleges that the Respondent's facility violated 40 C.F.R. Sec. 112.7(e)(4)(II), which requires that all facilities where rack area drainage does not flow into a catchment basin or treatment facility designed to handle spills, a quick drainage system should be used for tank truck loading and unloading areas. The containment system should be designed to hold at least maximum capacity of any single compartment of a tank truck loaded or unloaded in the plant.

12. Paragraph 30 of the Complaint alleges that:

> The facility is in violation for not having, at the time, of the inspection, the requisite secondary containment required by 40 C.F.R. Sec. 112.7(3)(4)(ii).

13. Respondent' Answer to Paragraph 30 states that:

> Respondent admits that the cited regulations applicable to the Facility tank car and tank truck loading/unloading rack (onshore) are as alleged in the Complaint. By way of further answer, SPCC Plan, Section E, addresses the question of a loading rack with the containment system described in Appendix 6 of the SPCC/PPC/SPRP. Further, all alleged violations in this regard existing at the time of the inspection were immediately addressed by Respondent and adequate drainage under the loading/unloading area was added subsequent to the inspection, putting the Facility in Compliance.(Emphasis added).

14. See Paragraph 11 of the Declaration of Neeraj Sharma, attached hereto as Exhibit C-12.

COUNT IV

15. Count IV of the Complaint alleges that the Respondent's Facility violated 40 C.F.R. Sec. 112.7(e)(9)(i), which requires that all plants handling, processing, and storing oil should be fully fenced, and entrance gates should be locked and/or guarded when the plant is not in production or is unattended.

16. Paragraph 34 of the Complaint alleges that:

> The Facility is in violation for not having, at the time of the inspection, the requisite security required by 40 C.F.R. Sec. 112.7(e)(9)(i).

17. Respondent's Answer to Paragraph 34 states that:

It is admitted that as of the date of the inspection the Facility did not have fencing as described in the cited regulations. By way of further answer, this matter was not addressed in the Inspection Report, but since receipt of the Report Respondent has elected to pursue the Butler Township Zoning Authorities to secure permits to enable placement of the described fencing. (Emphasis added).

18. See Paragraph 12 of the Declaration of Neeraj Sharma.

COUNT VI

19. Count VI of the Complaint alleges that the Respondent's Facility violated 40 C.F.R. Sec. 112.(e)(8), which requires that the owners and operators of regulated facilities must inspect the facility and record the occurrence and results of such inspections.

20. Paragraph 42 of the Complaint alleges that:

The Facility is in violation for not having, at the time of EPA's inspection, the requisite inspection records required by 40 C.F.R. Sec. 112.7(e)(8).

21. Respondent's Answer to Paragraph 42 states that:

It is admitted that inspection records were not available at the time of inspection. However, by way of further answer, Respondent consistently and regularly performed inspections in accordances with procedures developed for the Facility. (Emphasis added).

22. See Paragraph 13 of the Declaration of Neeraj Sharma, attached hereto as Exhibit C-12.

COUNT VII

23. Count VII of the Complaint alleges that the Respondent's Facility violated 40 C.F.R. Sec. 112.5(a), which requires that the owner or operator of an onshore facility subject to the requirements of the Oil Pollution Prevention Regulation to prepare and implement an SPCC plan, to amend the SPCC plan for such facility, and certify such amendment as required by 40 C.F.R. Sec. 112.5(c), and within six months implement the

amendments, in accordance with 40 C.F.R. Sec. 112.7, whenever there is a change in facility design, construction, operation or maintenance which materially affects the facility's potential for discharge of oil into or upon the navigable waters of the United States or adjoining shorelines.

24. Paragraph 46 of the Complaint alleges that:

On or before October of 1992, the Respondent materially affected the facility's potential for a discharge of oil into or upon the navigable waters of the United States or adjoining shorelines by installing one 5,000 gallon and two 8,000 gallon above-ground storage tanks.

25. Paragraph 47 of the Complaint alleges that:

The Respondent has failed to amend its SPCC plan and within six months implement the amendments to its SPCC plan, in accordance with 40 C.F.R. Sec. 112.5(a).

26. Respondent's Answer to Paragraph 46 states that:

It is admitted that Respondent, prior to November 1992, installed one 5,000 gallon an two 8,000 gallon above-ground storage tanks; however, Respondent denies materially affecting the Facility's potential for discharge of oil into or upon the navigable waters of the United States. Respondent also took other measures and steps when installing the tanks.(Emphasis added).

27. Respondent's Answer to Paragraph 48 of the Complaint states that:

It is admitted that Respondent had not, as of the date of the inspection, amended its July 1992 SPCC Plan. By way of further answer, Respondent has solicited a proposal it will accept to update its SPCC Plan, if and as required. (Emphasis Added)

28. See Paragraph 14 of the Declaration of Neeraj Sharma, attached hereto as Exhibit C-12.

COUNT VIII

29. Count VIII of the Complaint alleges that Respondent violated 40 C.F.R. Sec. 112.5(b), which requires owners and operators of an onshore facility to perform a review and evaluation of the SPCC Plan at least once every three years from

the date on which the facility becomes subject to the requirements of 40 C.F.R. Part 112.

30. Paragraph 51 of the Complaint alleges that:

The Facility is in violation of 40 C.F.R. Sec. 112.5(b) because, at the time of the inspection, it had not performed the required three year inspection.

31. Respondent's Answer to Paragraph 51 states that:

Respondent has no knowledge of the Facility being in violation as alleged and therefore the violation is denied. Respondent admits it did not update its SPCC Plan since July 1992. (Emphasis added)

32. See Paragraph 15 of the Declaration of Neeraj Sharma, attached hereto as Exhibit C-12.

33. If the Respondent had completed the requisite three year review, with the assistance of a qualified engineer, the Respondent would have been alerted to the need to amend its plan to reflect the material changes made to the facility prior to October of 1992. The failure of the Respondent to perform the necessary amendments to its SPCC Plan further evidences the Respondent's failure to perform the required three-year SPCC Plan review.

COUNT IX

34. Count IX of the Complaint alleges that Respondent's SPCC Plan was defective in ten specific areas, identified in sub-paragraph a-j respectively. Paragraph 55 (h),(i) and (j) allege that Respondent's SPCC Plan was defective because:

(h) The SPCC Plan did not include a completed Facility Response Certification Form, as required by 40 C.F.R. Sec. 112.20(e);

(i) The SPCC Plan was not amended to reflect the occurrence of material changes at the Facility, as required by 40 C.F.R. Sec. 112.5(a); and

(j) The SPCC Plan did not reflect the performance of the three year review and subsequent changes to the Plan, as required by 40 C.F.R. Sec. 112.5(b).

35. Respondent's Answer to Paragraph 55 (h),(i) and (j) states that:

(h) Admitted, in that Respondent has been unable to locate any.

(i) Admitted that the Plan was not amended to reflect all changes at the Facility.

(j) Admitted that the Plan did not reflect the performance of a three year review and subsequent changes to the Plan.

36. See Paragraph 16 of the Declaration of Neeraj Sharma, attached hereto as Exhibit C-12.

## 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 a party as to any or all parts 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..."

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 in 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).

**Order**

Examining the evidence in this case, and noting that Respondent has admitted sufficient facts upon which to base its liability, as well as having elected not to reply to Complainant's Motion, it is concluded that there are no genuine issues of material facts as to Counts II, III, IV, VI, VII, VIII, and IX that would require a formal evidentiary hearing. As such, Complainant's Motion for Partial Accelerated Decision on liability is GRANTED as it is entitled to judgment as a matter of law.

Pending settlement of this case, the evidentiary hearing in this proceeding will commence as scheduled on July 11, 2000, in Philadelphia, Pennsylvania, on issues consistent with this Order.

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Stephen J. McGuire
Administrative Law Judge

June 28, 2000
Washington, D.C.