**UNITED STATES**
**ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

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| **In the matter of** | **)** | |
| | **)** | |
| **Invitation Energy, Inc.,** | **)** | **Docket No. CWA-03-2004-0304** |
| | **)** | |
| **Respondent** | **)** | |

**ORDER DENYING COMPLAINANT'S**
**MOTION FOR ACCELERATED DECISION**

## I. Statement of the Case

This administrative enforcement matter arises under Section 309(g) and Section 311(b)(6)(B)(ii) of the Clean Water Act ("CWA" or "the Act"). 33 U.S.C. §§ 1319(g) & 1321(b)(6)(B)(ii). In a complaint issued against Invitation Energy, Inc. ("Invitation Energy"), a company located in West Virginia, the United States Environmental Protection Agency ("EPA") charges respondent with four violations of the Act.

EPA describes Invitation Energy as "the owner and operator, within the meaning of Section 311(a)(6) of the CWA, 33 U.S.C. § 1321(a)(6), and 40 C.F.R. § 112.2 (2002), of an onshore facility consisting of an oil and natural gas production well, and three appurtenant aboveground storage tanks ('ASTs')." ¶ 15. EPA further describes respondent as engaging "in producing, gathering, storing, processing, refining, transferring, distributing or consuming oil or oil products at the Well Facility." ¶ 16.

Count I of the complaint alleges that "ongoing discharges of oil from [respondent's] Well Facility into the unnamed tributary of Briscoe Run and the Briscoe Run, and their adjoining shorelines, in quantities that have been determined may be harmful under 40 C.F.R. § 110.3 (2002), on a continuous basis from March 2003 to the present, constitute a continuing violation of Section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3)." ¶ 35.

Count II alleges that respondent failed "to prepare an SPCC Plan ["Spill Prevention Control and Countermeasure Plan"] within the time provided by the regulations, in violation of Section 311(j)(1) of the CWA, 33 U.S.C. § 1321(j)(1), and 40 C.F.R. § 112.3(b) (2002)." ¶ 58.

Count III alleges that respondent's failure "to properly control the drainage from its AST [*i.e.*, the aboveground storage tanks] containment dike at the Well Facility constitutes a violation of Section 311(j)(1) of the CWA, 33 U.S.C. § 1321(j)(1), and 40 C.F.R. § 112.7(e)(5)(ii)(A) (2002)." ¶ 65.

Count IV alleges that respondent failed to comply with two requests by the complainant for information relative to the discharge of oil from its Well Facility, a violation of Section 308(a) of the Clean Water Act. 33 U.S.C. § 1318(a). ¶¶ 68 & 76.

For Counts I, II, and III, EPA seeks a civil penalty of $264,025, pursuant to 33 U.S.C. § 1321(b)(8). ¶¶ 81 & 82. For Count IV, it seeks a penalty of $105,600, pursuant to 33 U.S.C. § 1319(g)(3). ¶ 83.

Invitation Energy is represented by Joe O'Ferrell, the company's president. Respondent's one-sentence answer to the government's complaint simply was to "request a hearing."

Thereafter, the parties submitted prehearing exchanges pursuant to 40 C.F.R. § 22.19.[1] Following this submission, EPA submitted the present motion for accelerated decision seeking summary judgment.

**II. <u>Discussion</u>**

In its motion for accelerated decision, EPA seeks judgment on the liability issues only. It does not seek judgment as to the penalty. This motion is filed pursuant to Procedural Rule 20(a), which in part provides:

> The Presiding Officer may at any time 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.*

40 C.F.R. §22.20(a) (emphasis added). *See BWX Tech., Inc.*, 9 E.A.D. 61, 74 (EAB 2000); *see also, Consumers Scrap Recycling,* CAA Appeal No. 02-06, (Jan. 29, 2004) (EAB), at 22 (evidence to be viewed in the light most favorable to the non-moving party).

The thrust of EPA's motion for accelerated decision is that respondent "has not contested the material facts and allegations set forth in the Complaint" and that, as a result, it "has established a <u>prima</u> <u>facie</u> case of Respondent's liability." Mot. at 2. In its supporting memorandum, EPA continues with this argument, essentially stating that respondent's answer did not comply with the requirements of 40 C.F.R. § 22.15(b). Mem. at 5. Therefore, in EPA's

[1] Respondent is appearing *pro se.* Its prehearing exchange submission appears to be part prehearing exchange and part amended answer.

view, the factual allegations set forth in the complaint are deemed admitted.[2] EPA reasons that it is entitled to judgment on the merits because these admitted facts support the four charges of violation.

It is the view of this Tribunal, however, that complainant has failed to support its request for summary judgment. EPA has not shown that with respect to this matter there is "no genuine issue of material fact." 40 C.F.R. 22.20(a). EPA wants judgment on the merits based upon the limited argument that a *pro se* respondent did not deny each of the allegations of its complaint. While it is beyond dispute that a failure to deny an allegation in a complaint may be deemed an admission, EPA's fatal error occurred here in not addressing the assertions made by this *pro se* respondent in its prehearing exchange (again, previously described as part prehearing exchange and part amended answer). Indeed, if anything, the facts of this case are in a state of confusion at this point. EPA did not attach any affidavits of its expected witnesses, cite to any specific admissions by respondent, or otherwise attempt to sort out this confusion and to identify reliable evidence to convince this Tribunal to take the extreme step of denying respondent a hearing on the merits.[3]

In sum, the limited record, fairly read, indicates that respondent disputes at least some, and possibly all, of the key factual allegations made in the complaint. It is not completely clear to this Tribunal just what facts respondent concedes and just what facts it disputes. In addition, aside from EPA's technical argument regarding the adequacy of Invitation Energy's answer, which this Tribunal has rejected, it is unclear as to what facts complainant believes are not in dispute and support its motion for judgment, and the basis for its belief that those facts are undisputed.[4]

Accordingly, EPA's Motion for Accelerated Decision is **denied.**

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Carl C. Charneski
Administrative Law Judge

Issued: April 13, 2005
Washington, D.C.

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[2] In many respects, EPA's motion appears to be as much a motion for a default order as it does a motion for accelerated decision.

[3] To the extent, therefore, that EPA relies upon *Bonanza Valley Aviation,* 1998 WL 846739 (Nov. 20, 1998) (ALJ), and *Burtin Urethane Corp.*, 1997 WL 737991 (Sept. 11, 1997) (ALJ), its reliance is misplaced.

[4] To the extent that EPA argues that respondent's answer is untimely, that argument also is rejected.