

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of)
)
Environmental Protection) Docket No. TSCA-3-2001-0331
Services, Inc.,)
)
Respondent)

ORDER

This matter arises under the Toxic Substances Control Act (“TSCA”). 15 U.S.C. § 2601 *et seq.* In a complaint filed against Environmental Protection Services, Inc. (“EPS”), the United States Environmental Protection Agency (“EPA”) charges three violations of TSCA Section 15(1)(C). 15 U.S.C. § 2614(1)(C).¹ Respondent, in turn, has filed a pleading titled, “Environmental Protection Services’ Motion To Dismiss Administrative Complaint And Memorandum Of Law In Support Thereof.” For the reasons that follow, respondent’s motion is *denied*.

As authority for filing this motion, respondent cites Procedural Rule 22.4(c) of the Consolidated Rules of Practice. 40 C.F.R. 22.4(c). Rule 22.4(c) is a generic listing of the authority of an administrative law judge to adjudicate issues in this proceeding. Because citation to Procedural Rule 22.4(c) is not particularly helpful in identifying the standard for reviewing respondent’s motion, the Federal Rules of Civil Procedure are looked to for guidance.

As noted, respondent styles its motion as a motion to dismiss the complaint. Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for the filing of a motion to dismiss for failure to state a claim upon which relief can be granted. Here, EPS asserts that

¹ These violations are listed in an amended complaint filed by EPA on January 29, 2002. Specifically, in Count I of the complaint EPA charges that “[r]espondent violated Condition B.1. of its EPA Approval to Commercially Store PCBs, required by 40 C.F.R. Section 761.65(d), by storing, on each of two separate occasions, PCB transformers in excess of Respondent’s maximum storage capacity.” Amend. Compl. ¶ 20. In Count II, EPA charges that on one occasion “[r]espondent violated Condition B.1. of its EPA Approval to Commercially Store PCBs, required by 40 C.F.R. Section 761.65(d), by storing PCB capacitors in excess of Respondent’s maximum storage capacity.” Amend. Compl. ¶ 23. Finally, in Count III, the complainant charges that on 12 days “[r]espondent violated 40 C.F.R. Section 761.72(a)(3) by failing to comply with the operating requirements for the primary burn chamber of its PCB scrap metal recovery oven.” Amend. Compl. ¶28.

“EPA has no factual or legal basis to support the allegations in the Administrative Complaint,” thus warranting its dismissal. Resp. Mem. at 1-2. All things considered, EPS’ motion to dismiss appears to be a Rule 12(b)(6) motion.

In analyzing a Rule 12(b)(6) motion, the courts have held that the allegations set forth in the complaint are to be taken as true and construed in the light most favorable to the plaintiff, and that all reasonable inferences are to be drawn in favor of the nonmoving party. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001); *E.E.O.C. v. St. Francis Xavier Parochial School*, 117 F.3d 621, 624-625 (D.C. Cir. 1997). Also, in determining whether a complaint fails to state a claim, a court may consider only the facts alleged in the complaint, any documents that are either attached to or incorporated in the complaint, and matters of which judicial notice may be taken. *E.E.O.C. v. St. Francis Xavier Parochial School, supra*, at 624.

However, when courts do look at material outside the pleadings, such as an affidavit attached to a motion to dismiss, consistent with the last sentence of Rule 12(b), they treat the motion not as one to dismiss, but rather as a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994), *cert. den.* 512 U.S. 1219 (1994); *see* Vol. 5A, *Wright & Miller*, § 1366 at 483.² In this case, both EPS and EPA have submitted affidavits and documents relative to the pending motion to dismiss. Whether such a conversion occurs lies within the discretion of the court. *Lynbrook v. Members of Farmington Mun. Schools Bd.*, 232 F.3d 1334, 1341-1342 (10th Cir. 2000).

With this guidance in mind, and viewing EPS’ motion as a motion to dismiss for failure to state a claim, the motion must be denied. In that regard, in the complaint EPA asserts facts, assumed to be true for the purpose of EPS’ motion, which are sufficient to prove the three alleged TSCA violations. *See* n.1, *supra*. Relying upon the pleadings alone, and without resort to any affidavits or documents filed by either party subsequent to respondent’s motion to dismiss, EPS is unable to show that a different result should obtain. *See E.E.O.C. v. St. Francis Xavier Parochial School*, 117 F.3d 621, 624 (D.C. Cir. 1997)(“To prevail on a motion to dismiss for failure to state a claim under Rule 12(b)(6), the School and the Church must show ‘beyond doubt that the plaintiff can prove no set of facts in support of his claim which would enable him to relief.’ *Conley v. Gibson*, 355 U.S. 41, 45-46 ... (1957).”

² Rule 12(b), Fed. R .Civ. P., in part provides:

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Next, this tribunal declines to convert the motion to dismiss into a motion for summary judgment. First, whether respondent is actually requesting such a conversion is unclear.³ Second, even if respondent's motion were treated as one for summary judgment, the affidavits submitted by both EPA and EPS are not sufficient to resolve all the material questions of fact presented in this case. Moreover, in addition to the affidavits both sides rely upon attached documents which are not as yet a part of the record. In short, the pleadings, affidavits, and documents submitted by both parties do not place this case in a posture suitable for summary judgment disposition. *See* 40 C.F.R. 22.20(a). Their consideration is not likely to facilitate the disposition of this action. *See Woods v. City of Galveston*, 5 F. Supp. 2d 494, 497 n.3 (S.D.Tex. 1998). Accordingly, because in any event an evidentiary hearing would be necessary to resolve the questions of fact and law presented here, respondent's motion to dismiss will not be converted to a motion for summary judgment.

For the foregoing reasons, the motion filed by EPS is *denied*.

Carl C. Charneski
Administrative Law Judge

Issued: May 20, 2002
Washington, D.C.

³ While EPA specifically objects to converting the motion to dismiss to a motion for summary judgment (*see* Compl. Sur.Rep. at 9), the fact of the matter is that EPA itself submitted material extraneous to the pleadings and in fact was the first party to submit supporting affidavits. *See Santiago v. Canon USA, Inc.*, 138 F.3d 1, 4n.5 (1st Cir. 1998)(plaintiffs invited conversion of motion to dismiss by attaching sworn statement in succeeding opposition motions).