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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
PEPPERELL ASSOCIATES,	)	DOCKET NO. CWA-2-I-97-1088
	)	
	)	
	)	
	)	
RESPONDENT	)	

ORDER ON COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION ON LIABILITY

ORDER ON RESPONDENT'S CROSS MOTION FOR PARTIAL ACCELERATED DECISION

The Complainant, the United States Environmental Protection Agency ("EPA" or "Complainant"), filed a Motion for Partial Accelerated Decision on Liability in the above-cited proceeding on August 31, 1998. On September 14, 1998, the Respondent, Pepperell Associates ("Respondent"), submitted a Response to the Complainant's Motion for Partial Accelerated Decision on Liability, opposing the motion for accelerated decision, and a Cross Motion for a Partial Accelerated Decision. For the reasons discussed below, the EPA's Motion for Partial Accelerated Decision on Liability is granted as to Count I, in part, and is denied as to Counts II and III and Alternate Count III in the Complaint. The Respondent's Motion for Partial Accelerated Decision is denied as to all counts.

PROCEEDINGS

The Complaint in this matter, as amended, was filed against the Respondent on September 30, 1997, by the Regional Administrator for Region I of the EPA under the authority of Sections 309(g)(2)(B) and 311(b)(6)(B)(ii) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act, as amended, 33 U.S.C. §§ 1319(g)(2)(B) and 1321(b)(6)(B)(ii). [(1)] The Complaint alleges that the Respondent is liable for violations of Section 311(j)(1) of the Clean Water Act, 33

U.S.C. § 1321(j)(1), and Section 311(b)(3) of the Clean Water Act or, in the alternative, Section 307(d) of the Clean Water Act, 33 U.S.C. § 1317(d).

Specifically, Count I of the Complaint charges that the Respondent operated a facility regulated under the Oil Pollution Prevention regulations, 40 C.F.R. Part 112, without a Spill Prevention, Control, and Countermeasure Plan ("SPCC Plan") from December 1985 to July 14, 1997, in violation of Section 311(j)(1) of the Clean Water Act and the implementing regulations at 40 C.F.R. Part 112. [(2)] Count II charges that the Respondent failed to prepare an SPCC Plan from October 16, 1997, to April 16, 1998, and failed to implement the SPCC Plan within six months of installing a new aboveground oil storage tank on October 16, 1997, in violation of Section 311(j)(1) of the Clean Water Act and 40 C.F.R. § 112.5(a). Count III charges that the Respondent on October 17, 1996, discharged oil into or upon a navigable water of the United States in a quantity that has been determined may be harmful in violation of Section 311(b)(3) of the Clean Water Act; or, in the alternative (Alternative Count III), the Respondent discharged oil into a publicly owned treatment works ("POTW") in violation of a Pretreatment Standard, thereby violating Section 307(d) of the Clean Water Act.

FINDINGS OF FACT

1. The Respondent is a partnership that owns and operates a former mill located at 550 Lisbon Street, Lewiston, Maine, as "multi-use commercial/industrial rental space" ("Facility"). The Respondent has owned and operated this non-transportation onshore Facility since June 27, 1985. September 14, 1998, Affidavit of Robert Gladu ¶2; September 14, 1998, Affidavit of Ralph Sawyer ¶2; Joint Stipulations ¶¶1,4,5,6.

2. The Respondent has stored number six heating oil at its Facility at all times from June 1985 through July 14, 1997. Answer ¶6, Joint Stipulations ¶8.

3. On October 17, 1996, there was an accidental oil spill at the Respondent's Facility due to a failed gasket in the Respondent's boiler piping which resulted in the release of at least 500 gallons of number six heating oil onto the boiler room floor. The oil flowed from the boiler room floor, down a stairwell, into a condensate sump tunnel which then led to a sewer conduit beneath the Facility. The oil flowed through the sewer conduit to the sewer line beneath Lisbon Street which led directly to the Lewiston Wastewater Treatment Plant, a publicly owned treatments works ("POTW"), operated by the Lewiston-Auburn Water Pollution Control Authority ("LAWPCA"). Some of the spilled oil also flowed from the sewer conduit into a discharge culvert ("outfall"), which is the combined storm water and sewer line overflow, and then entered Gully Brook via the outfall. Joint Stipulations ¶¶10-16; Respondent's Response to Complainant's Motion for Partial Accelerated Decision at 9, Exhibit 1 (Letter to EPA from Respondent dated March 7, 1997); Complainant's Prehearing Exchange at 3.

4. Gully Brook is located about 500 feet from the Facility. Gully Brook is a manmade retention pond damned by a hydro station. During periods of high water, some of the overflow storm and untreated sewer water enters Gully Brook via the outfall. Water that enters Gully Brook from the outfall is not treated at the LAWPCA POTW. Gully Brook discharges into, and is a tributary of, the Androscoggin River. Gully Brook drains, via the Androscoggin River, Merrymeeting Bay, and Kennebec River, into the Atlantic Ocean. Joint Stipulations ¶15; Complainant's Memorandum Supporting its Motion for Partial Accelerated Decision at 15; Respondent's Prehearing Exchange at 2.

5. The Respondent's Facility has had three buried 30,000 gallon underground oil storage tanks until their removal on July 14, 1997. From June 1985 to at least October 17, 1996, the Respondent's Facility had underground storage capacity of at least 60,000 gallons of oil. At the time of the October 17, 1996, accidental spill, there were approximately 13,000 gallons of oil in one of the storage tanks. Joint Stipulations ¶¶7,26; Respondent's Prehearing Exchange at 3; Respondent's Response to Complainant's Motion for Partial Accelerated Decision - Exhibit 1 (Letter to EPA from Respondent dated March 7, 1997).

6. The Respondent notified the Maine Department of Environmental Protection of the spill at approximately 8:30 a.m. on October 17, 1996, but at no time did the Respondent notify the Federal Response Center of the Spill. Joint Stipulations ¶¶17,19. On October 17, 1996, Scott Pellerin, EPA's On-Scene Coordinator, responded to the spill and inspected the Respondent's Facility. Joint Stipulations ¶¶21, 22.

7. The Respondent has never filed with the EPA a Spill Prevention Control and Countermeasure Plan ("SPCC Plan") concerning the underground oil storage tanks. Joint Stipulations ¶27.

8. On or about October 16, 1997, the Respondent installed a 20,000 gallon aboveground oil storage tank at its Facility. Joint Stipulations ¶31.

9. The EPA received an SPCC Plan for the 20,000 gallon aboveground oil storage tank on or about April 16, 1998. The Respondent has indicated that the SPCC Plan would not be fully implemented until September 15, 1998. Joint Stipulations ¶32.

CONCLUSIONS OF LAW

1. The Respondent is a "person" within the meaning of Sections 311(a)(7) and 502(5) of the Clean Water Act, 33 U.S.C.§§ 1321(a)(7) and 1362(5), and 40 C.F.R. § 112.3.

2. The Respondent is an "owner" and "operator" of a non-transportation "onshore facility" within the meaning of Section 311(a)(6) of the Clean Water Act and 40 C.F.R. § 112.2.

3. From June 1985 to at least October 17, 1996, the Respondent's Facility has had "oil" storage capacity subjecting it to the requirements of the Oil Pollution Prevention regulations at 40 C.F.R. Part 112.

4. Gully Brook is a "navigable water of the United States" within the meaning of Sections 502(7) and 311 of the Clean Water Act and the implementing regulations at 40 C.F.R. §§ 110.1 and 112.2.

5. Due to its location, the Respondent's Facility could reasonably be expected to discharge oil in harmful quantities into Gully Brook or adjoining shorelines and, therefore, the Respondent is subject to the requirement to have prepared an SPCC Plan in writing within six months after the Facility began its operation in June 1985. Section 311(j)(1) of the Clean Water Act; 40 C.F.R.§§ 110.1, 112.2, 112.3(b).

6. On October 17, 1996, the Respondent's Facility discharged oil into Gully Brook, a navigable water.

7. The Respondent's failure to have prepared an SPCC Plan for its Facility from December 1985 to at least October 17, 1996, constitutes a violation of 40 C.F.R. Part 112 and Section 311(j)(1) of the Clean Water Act.

Standard For Accelerated Decision

The Complainant and the Respondent each have filed a motion for accelerated decision pursuant to 40 C.F.R. § 22.20, the regulation governing accelerated decisions under the Rules of Practice. Section 22.20(a) provides, in pertinent part, as follows:

> The Presiding Officer,[(3)] upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the complainant or the 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 all or any part of the proceeding. (emphasis added)[(4)]

Motions for accelerated decision under 40 C.F.R. § 22.20(a) are akin to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP").[(5)] Rule 56(c) of the FRCP provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law" (emphasis added). Thus, by analogy, Rule 56 provides guidance for adjudicating motions for accelerated decision. See In the Matter of CWM Chemical Service, TSCA Appeal 93-1, 6 E.A.D. 1 (EAB, May 15, 1995); 1995 TSCA Lexis 13.

Therefore, I look to federal court decisions construing Rule 56 of the FRCP for guidance in applying 40 C.F.R. § 22.20(a) to the adjudication of motions for accelerated decisions. In interpreting Rule 56(c), the United States Supreme Court has held that the party moving for summary judgment has the burden of showing the absence of a genuine issue as to any material fact and that the evidentiary material proffered by the moving party in support of its motion must be viewed in the light most favorable to the opposing party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1985); Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970). Further, the judge must draw all reasonable inferences from the evidentiary material in favor of the party opposing the motion for summary judgment. See Anderson, supra, at 255; Adickes, supra, at 158-159; see also Cone v. Longmont United Hospital Assoc., 14 F.3d 526, 528 (10th Cir. 1994).

In assessing materiality for summary judgment purposes, the Court has found that a factual dispute is material where, under the governing law, it might affect the outcome of the proceeding. Anderson, supra at 248; Adickes, supra, at 158-159. The substantive law identifies which facts are material. Id.

The Court has found that a factual dispute is genuine if the evidence is such that a reasonable finder of fact could return a verdict in favor of the nonmoving party. Id. Further, in Anderson, the Court ruled that in determining whether a genuine issue of fact exists, the judge must decide whether a finder of fact could reasonably find for the nonmoving party under the evidentiary standards in a particular proceeding. There must be an incorporation of the evidentiary standard in the summary judgment determination. Anderson, supra, at 252. In other words, when determining whether or not there is a genuine factual dispute, the judge must make such inquiry within the context of the applicable evidentiary standard of proof for that proceeding.

Once the party moving for summary judgment meets its burden of showing the absence of genuine issues of material fact, Rule 56(e) then requires the opposing party to offer any countering evidentiary material or to file a Rule 56(f) affidavit.[(6)] Rule 56(e) states: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial." However, if the moving party fails to carry its burden to show that it is entitled to summary judgment under established principles, then no defense is required. Adickes, supra, at 156.

The type of evidentiary material that a moving party must present to properly support a motion for summary judgment or that an opposing party must proffer to defeat a properly supported motion for summary judgment has been examined by the Court. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986); see also Anderson, supra; Adickes, supra. The Court points out that Rule 56(c) itself provides that the decision on a motion for summary judgment must be based on the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, submitted in support or opposition to the motion. With regard to the sufficiency of the evidentiary material needed to defeat a properly supported motion for summary judgment, the Court has found that the nonmoving party must present "affirmative evidence" and that it cannot defeat the motion without offering "any significant probative evidence tending to support" its pleadings. Anderson, supra, at 256 (quoting First National Bank of Arizona v. Cities Service Company, 391 U.S. 253, 290 (1968)).

More specifically, the Court has ruled that the mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment as Rule 56(e) requires the opposing party to go beyond the pleadings. Celotex, supra at 322; Adickes, supra. The Court has noted, however, that there is no requirement that the moving party support its motion with affidavits negating the opposing party's claim or that the opposing party produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Celotex, supra, at 323-324. The parties may move for summary judgment or successfully defeat summary judgment without supporting affidavits provided that other evidence referenced in Rule 56(c) adequately supports its position.

The regulation governing motions for accelerated decision under 40 C.F.R. § 22.20(a) does not define or provide examples to illustrate the meaning of the phrase "genuine issue of material fact," nor does it provide significant guidance as to the type of evidence needed to support or defeat a motion for accelerated decision. Section 22.20(a) states, in pertinent part, that the Presiding Officer may render an accelerated decision "without further hearing or upon any 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 an adjunct to this regulation, I note that under another governing regulation, a party's response to a written motion, which would include a motion for accelerated decision, "shall be accompanied by any affidavit, certificate, [or] other evidence" relied upon. 40 C.F.R. § 22.16(b).

Inasmuch as the inquiry of whether there is a genuine issue of material fact in the context of an accelerated decision is quite similar to that in the context of a summary judgment and in the absence of significant instruction from the regulation governing accelerated decisions, I believe that the standard for that inquiry as enunciated by the Court in Celotex, Anderson, and Adickes is applicable in the accelerated decision context.[(7)] See In the Matter of Mayaguez Regional Sewage Treatment Plant, NPDES Appeal No. 92-23, 4 EAD 772, 781 (EAB, Aug. 23, 1993) (wherein the Environmental Appeals Board ("EAB") adopted the standard for summary judgment articulated by the Court in Anderson to determine whether there is a genuine issue of material fact warranting an evidentiary hearing under 40 C.F.R. § 124.74 for the issuance of a permit under Section 301(h) of the Clean Water Act).

The evidentiary standard of proof in the matter before me, as in all other cases of administrative assessment of civil penalties governed by the Rules of Practice, is a "preponderance of the evidence." 40 C.F.R. § 22.24. Thus, by analogy, in determining whether or not there is a genuine factual dispute, I, as the judge and finder of fact, must consider whether I could reasonably find for the nonmoving party under the "preponderance of the evidence" standard.[(8)] In addressing the threshold question of the propriety of a motion for accelerated decision, my function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for an evidentiary hearing. See Anderson, supra, at 249.

Accordingly, by analogy, a party moving for accelerated decision must establish through the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, the absence of genuine issues of material fact and that it is entitled to judgment as a matter of law by the preponderance of the evidence. In this regard, the moving party must demonstrate, by a preponderance of the evidence, that no reasonable presiding officer could not find for the nonmoving party. On the other hand, a party opposing a properly supported motion for accelerated decision must demonstrate the existence of a genuine issue of material fact by proffering significant probative evidence from which a reasonable presiding officer could find in that party's favor by a preponderance of the evidence.

Discussion of Accelerated Decision on Liability

COUNT I

Section 311 of the Clean Water Act declares Congressional policy against discharges

of oil or hazardous substances into the navigable waters of the United States. Section 311 directs the EPA to promulgate regulations to establish methods and procedures governing the discharge of oil into United States' waters. Pursuant to Section 311(j)(1) of the Clean Water Act, the EPA promulgated the Oil Pollution Prevention regulations at 40 C.F.R. Part 112 et seq. (Spill Prevention Control and Countermeasure regulations "SPCC regulations"). (9)

The SPCC regulations apply to "owners or operators of non-transportation-related onshore...facilities engaged in ...storing...oil..., and which, due to their location, could reasonably be expected to discharge oil in harmful quantities...into or upon the navigable waters of the United States or adjoining shorelines." 40 C.F.R. § 112.1(b). The SPCC regulations do not apply where the underground buried storage capacity of the facility is 42,000 gallons or less of oil and where the storage capacity, which is not buried, is 1,320 gallons or less of oil. 40 C.F.R. §§ 112.1(d)(2)(i) and (ii). The SPCC regulations provide that owners and operators of covered facilities must prepare in writing and fully implement a Spill Prevention Control and Countermeasure Plan ("SPCC Plan") within six months and one year, respectively. 40 C.F.R. §§ 112.3.

Count I of the Complaint charges that the Respondent's failure to have prepared an SPCC Plan for its Facility from at least December 1985 to July 14, 1997, constitutes a violation of Section 311(j)(1) of the Clean Water Act and the implementing SPCC regulations at Part 112. Due to unspecified Paperwork Reduction Act issues, the EPA, for purposes of calculating a penalty, is only alleging a violation from June 1993 through July 14, 1997.

On motion for accelerated decision, the EPA argues that it is entitled to an accelerated decision finding the Respondent liable under Count I of the Complaint for operating an onshore facility without a SPCC Plan from December 1985 through July 14, 1997, in violation of Section 311(j)(1) of the Clean Water Act. The EPA contends that the Respondent is subject to the Clean Water Act and the regulations adopted pursuant thereto, including the requirement to have an SPCC Plan. Specifically, the EPA asserts that the Respondent is an "owner" and "operator" of a non-transportation onshore facility that "stores oil" within the meaning of the Clean Water Act and the SPCC regulations, and that the Respondent had underground oil storage capacity of greater than 42,000 gallons from June 1985 through July 14, 1997. The EPA further asserts that the Respondent's Facility's location on a sewer conduit creates a reasonable expectation that the Facility will discharge oil in harmful quantities into Gully Brook, a navigable water of the United States, and that in fact such a discharge occurred on October 17, 1996. Finally, the EPA argues that there is no genuine issue of material fact in dispute regarding the Respondent's liability for failure to prepare and implement an SPCC Plan from December 1985 through July 14, 1997.

On cross motion for accelerated decision, the Respondent argues that the Clean Water Act does not require the Respondent's Facility to have an SPCC Plan in place from December 1985 to July 14, 1997, because the Respondent could not have reasonably expected oil to be discharged in harmful quantities into waters of the United States or upon adjoining shorelines. The Respondent also argues that the Facility is exempt from the requirement that an SPCC Plan be prepared because its oil storage capacity was only 30,000 gallons. The Respondent claims to dispute the facts that the EPA relies upon in asserting that a SPCC Plan is required for the Facility from December 1985 through July 1997.

As a preliminary matter, I find that the material facts concerning Count I, set forth above, have not been disputed by the parties. Rather, the parties disagree as to some of the conclusions to be drawn from those facts. The Respondent, on cross motion for accelerated decision, initially argues that it disputes the facts relied on by the EPA concerning Count I in its motion for accelerated decision. I note, however, that the Respondent later argues that there are no genuine issues of material fact in dispute regarding its duty to prepare and implement an SPCC Plan from December 1985 through July 1997 and that it is entitled to dismissal of the claim that it violated the Clean Water Act by failing to have an SPCC Plan in place during the period when the Facility had a storage capacity of only 30,000 gallons

of oil. Respondent's Response to Complainant's Motion for Partial Accelerated Decision on Liability and Cross Motion for a Partial Accelerated Decision at 3, 5-6. Applying the standard for accelerated decisions, discussed above, to Count I in the instant matter, I find that there are no genuine issues of material fact for the alleged period of violation from December 1985 to October 17, 1996.

In the Respondent's Response to Complainant's Motion for Partial Accelerated Decision on Liability and Cross Motion for a Partial Accelerated Decision, the Respondent sets forth several arguments in support of its assertion that it was not required to have an SPCC Plan from December 1985 to July 1997. First, the Respondent argues that it could not reasonably be expected to discharge oil in harmful quantities into or upon the navigable waters of the United States or adjoining shorelines. In this regard, the Respondent points out that the Facility is not located on the banks of a waterway. The Respondent contends that there are no intrastate lakes, rivers, streams, wetland, or any other body of water used by interstate commerce located in close proximity to the Facility, and that the Facility is located several blocks inland from the Androscoggin River. The Respondent recognizes that a sewer conduit runs beneath the Facility and that on occasion some of the overflow water from this sewer conduit enters Gully Brook via the outfall. The Respondent, however, maintains that Gully Brook is not considered a "navigable water" pursuant to the Clean Water Act and, thus, is not a factor in this analysis.

The threshold issue in this proceeding is the jurisdictional question of whether Gully Brook, into which overflow storm and sewer water from the sewer conduit that runs beneath the Respondent's Facility is discharged, is part of the "waters of the United States," thus making the Respondent subject to the provisions of Section 311 of the Clean Water Act and the implementing regulations at 40 C.F.R. §§ 112.2 and 110.1. This question is answered in the affirmative; that is, Gully Brook is considered to be a navigable water of the United States.

The term "navigable waters," as used in the Clean Water Act, has been broadly defined by the federal courts. For example, the Tenth Circuit and Court of Claims have held that the definition of "navigable waters" within the context of the Clean Water Act is to be given the broadest possible interpretation consistent with constitutional principles. United States v. Earth Sciences, Inc., 599 F.2d 368,375 (10th Cir. 1979); Deltona Corp. v. United States, 657 F.2d 1184,1186 (Ct.Cl. 1981). The Chief Judicial Officer for the EPA has adopted this approach. Phillips Uranium Corporation, Noserock, New Mexico, NPDES Permit No. NM-0028274, 1 EAD 781,782-783 (CJO, Aug. 5, 1983).

Moreover, the United States Supreme Court has broadly interpreted the term "navigable waters" as used in the Clean Water Act. U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133-34 (1985). Noting that "Congress chose to define the waters covered by the Act broadly," the Court found that "the Act's definition of 'navigable waters' as 'the waters of the United States' makes it clear that the term 'navigable' as used in the Act is of limited import." Id. at 133. The Court further found that in adopting this broad definition of "navigable waters," "Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its power under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." Id.

Applying this definition of "navigable waters" to the instant case, I find that Gully Brook is a navigable water within the meaning of the Clean Water Act and the implementing regulations at 40 C.F.R. §§ 110.1 and 112.2. Gully Brook flows into the Androscoggin River, which the Respondent acknowledges is a navigable water. The fact that Gully Brook is a manmade retention basin or pond does not alter this determination. See Leslie Salt Co. v. United States, 896 F.2d 354,360 (9th Cir. 1990) cert. denied, 498 U.S. 1126 (1991); cf. United States v. DeFelice, 641 F.2d 1169, 1173-74 (5th Cir., Unit A, 1981) cert. denied, 454 U.S. 940 (1981) (holding that a manmade canal on private land is a navigable waterway).

Although the Respondent argues on motion for accelerated decision that water

flowing from Gully Brook must be treated by the LAWPCA POTW, its own prehearing exchange reflects that during periods of high water, the overflow storm and sewer water from the sewer conduit below the Facility enters Gully Brook via the outfall and is not treated at the LAWPCA POTW. Some of the oil discharged from the Respondent's Facility on October 17, 1996, entered Gully Brook via the outfall without being treated at the LAWPCA POTW. Thus, I need not address the argument raised by the Respondent that Gully Brook is not a navigable water because the diversion of water from Gully Brook to the LAWPCA POTW breaks the link of leading the water directly to the Androscoggin River.

Next, I address the Respondent's argument that it could not reasonably be expected to discharge oil into a navigable water due to the geographical and locational aspects the Facility. First, I note that the EPA does not allege that there was a reasonable expectation that the Facility could discharge oil directly into the Androscoggin River because of the Facility's location in relation to the River. Rather, the EPA maintains that the Facility's location on a sewer conduit creates a reasonable expectation that the Facility could discharge oil in harmful quantities into Gully Brook, a navigable water. Again, it is noted that the Facility is connected to Gully Brook through a manmade condensate sump tunnel, sewer conduit, and overflow outfall. In support of its assertion that the manmade features connecting the Facility to the waterway should not be considered, the Respondent cites 40 C.F.R. § 112.1(d)(1)(i), in part:

> (i) Onshore and offshore facilities, which, due to their location, could not reasonably be expected to discharge oil into or upon the navigable waters of the United States or adjoining shorelines. This determination shall be based solely upon a consideration of the geographical, locational aspects of the facility (such as proximity to navigable waters or adjoining shorelines, and contour drainage, (sic) etc.) and shall exclude consideration of manmade feature (sic)... (emphasis added).

First, I note, and as also pointed out by the EPA, that the Respondent's reference to 40 C.F.R. § 112.1(d)(1)(i) omits a significant portion of the regulation set forth at 40 C.F.R. § 112.1(d)(1)(i). Specifically, the omitted portions read as follows:

> ...land contour, drainage, etc. and shall...
> ...such as dikes, equipment or other structures which may serve to restrain, hinder, contain, or otherwise prevent a discharge of oil from reaching navigable waters of the United States or adjoining shorelines... (emphasis added).

By omitting these portions of the regulation, the Respondent has misstated the governing law. The regulation at 40 C.F.R. § 112.1(d)(1)(i) precludes consideration of manmade features or structures which may prevent discharged oil from reaching a navigable water. This regulation does not state that manmade features or structures which transport or convey discharged oil to a navigable water are excluded from consideration.

Further, I find no merit to the Respondent's argument that the manmade structures which conveyed the discharged oil from the Respondent's Facility to Gully Brook should not be considered in the determination of whether the Facility, due to its location, could not reasonably be expected to discharge oil into a navigable water because these structures do not constitute "geographical, locational aspects of the facility." The Respondent has cited no authority in support of its proposition that a party could avoid liability for its oil discharge and/or its need to file an SPCC Plan on the ground that the oil was transported or could be transported from its facility to the navigable water by a manmade structure or feature. Such an assertion is contrary to declared Congressional policy and stated legislative intent, as well as the SPCC regulations. Cf. Anglo Fabrics Company, Inc. and Industrial Risk Insurers v. United States, 1981 U.S. Ct. Cl. LEXIS 1315 [*22] (1981) (holding that it was unreasonable of company not to place a berm or some sort of containment device between its oil tanks and storm drains that emptied into a navigable water).

Finally, I note that there is no dispute that the Respondent's oil storage capacity during the pertinent time, in itself, establishes that the oil which could reasonably be expected to be discharged would be in "harmful quantities." In fact, the Respondent had approximately 13,000 gallons of oil in its storage tank when the spill occurred.

In its response to the EPA's motion for accelerated decision and its cross motion for accelerated decision, the Respondent also argues that it is exempt from the regulatory requirement that an SPCC Plan be prepared and implemented because its underground oil storage capacity was less than 42,000 gallons. 40 C.F.R. § 112.1(d)(2)(i). In Count I of the Complaint, the EPA alleges that at all relevant times the Respondent's Facility had oil storage capacity subjecting it to the requirements of the SPCC regulations at 40 C.F.R. § Part 112. The SPCC regulations at 40 C.F.R. § 112.2 (d)(2) provide that a facility, otherwise covered, is exempt from the SPCC regulations if its underground buried storage capacity is 42,000 gallons or less of oil and the non-buried storage capacity is 1,320 gallons or less of oil.

Specifically, the EPA alleges that prior to July 14, 1997, the Respondent's Facility had underground oil storage capacity above 42,000 gallons because it had three 30,000 gallon underground oil storage tanks. The Respondent asserts that although the Facility was equipped with three underground oil storage tanks at the time the mill was purchased in 1985, only one tank was used consistently. In this regard, the Respondent argues that two of the tanks were nonfunctioning and thus, effectively, had no storage capacity. In particular, the Respondent notes that in a March 6, 1997, letter response to an EPA request for information, the Respondent explained that it had taken all its tanks out of service except for one tank.[(10)] In response to this assertion by the Respondent, the EPA maintains that although it disputes that two tanks were taken out of service as defined by regulation at some unspecified times, there is no dispute that the Respondent is liable for failing to have an SPCC Plan from December 1985 to the yet unspecified date at which the tanks were taken out of service. As such, the EPA contends that any dispute over if, when, or how the tanks were taken out of service is relevant only to penalty as it affects a calculation of the duration of the violation and that it is not relevant to the Respondent's liability.

The undisputed facts support a finding that the underground oil storage capacity of the Respondent's Facility from December 1985 to at least October 17, 1996, was in excess of the regulatory exemption of 42,000 gallons. See 40 C.F.R. § 112.1(d)(2)(i). The Respondent acknowledges that a second tank of 30,000 gallon capacity was connected at the time of the October 17, 1996, spill and it has failed to allege a specific date as to when it took the second tank out of service. The Respondent has cited no authority for its proposition that the Facility's second tank should not be considered in calculating the storage capacity of the Facility because it was not used. Such an assertion does not meet the regulatory requirements for removing a tank from service. Further, there is no proof in the file before me that the third tank at the Facility had been completely removed from service in accordance with the SPCC regulations. See 40 C.F.R. § 112.7(e)(3)(ii). I also note that when the EPA made specific allegations, supported by documents, regarding the Facility's underground oil storage capacity, it was incumbent upon the Respondent to provide a more specific denial with supporting documentation.

Thus, I conclude that the EPA has demonstrated that for the period from December 1985 to at least October 16, 1996, there is no genuine issue of material fact that the Respondent failed to meet the claimed exemption from the regulatory requirement to have prepared and filed an SPCC Plan based on it underground oil storage capacity. However, for the additional alleged period of violation until July 1997, the Respondent has sufficiently raised a question of material fact as to whether it met the regulatory exemption, thereby requiring an evidentiary hearing.

Finally, the Respondent argues that because it never was advised or notified of the need to prepare and file an SPCC Plan until October 1996, it should not be found liable for this alleged violation. As pointed out by the EPA, the Clean Water Act is a strict liability statute. Neither the Clean Water Act nor the SPCC regulations

require notification of the applicability of the Act or the regulations before an otherwise covered facility is required to prepare and implement an SPCC Plan. See generally, United States v. Winchester Municipal Utilities, 944 F.2d 301, 304 (6th Cir. 1991); United States v. Earth Sciences, Inc., 599 F.2d 368, 374 (10th Cir. 1979); Stoddard v. Western Carolina Regional Sewer Authority, 784 F.2d 1200, 1208 (4th Cir. 1986). Liability is not precluded on the basis that there was a lack of knowledge of the governing law.

In conclusion, I find that the undisputed facts support a finding that from December 1985 to at least October 17, 1996, the Respondent violated Section 311(j)(1) of the Clean Water Act and the SPCC regulations at 40 C.F.R. Part 112 for its failure to have an SPCC Plan. To this extent, the EPA's motion for partial accelerated decision as to Count I is granted. The remaining alleged period of violation, October 18, 1996, to July 14, 1997, remains at issue and adjudication of this issue requires an evidentiary hearing.

Count II and Alternate Count III

In an Order entered on September 16, 1998, the undersigned granted the Complainant's Motion to Amend the Complaint and Prehearing Exchange. In that Order, the parties were advised that upon the filing of the Amended Complaint, the Amended Complaint would become the Complaint and that the Respondent then had twenty days to file an Amended Answer under 40 C.F.R. § 22.14(d). The Amended Complaint added Count II and Alternate Count III to the charges against the Respondent. The Amended Complaint was filed on September 29, 1998. An Amended Answer was submitted on October 2, 1998. The EPA filed its Amended Prehearing Exchange on October 6, 1998. The Respondent indicated in its Response to Complainant's Motion for Partial Accelerated Decision that it needed additional time to respond to the new charges lodged by the EPA. Inasmuch as the EPA's Amended Complaint was filed less than one month before the hearing and the Respondent's Amended Answer was just received, the parties' motions for accelerated decision on liability as to Count II and Alternate Count III will not be adjudicated at this time. These Counts will be adjudicated following the hearing.

Count III

Count III of the Complaint charges that the Respondent violated Section 311(b)(3) of the Clean Water Act for discharging oil into or upon a navigable water of the United States in a quantity that has been determined to be harmful. Specifically, the EPA alleges that on October 17, 1996, the Respondent's Facility discharged approximately 800 to 1,200 gallons of number six heating oil and that a significant portion of this oil entered Gully Brook or was discharged on its shorelines. The EPA further alleges that the October 17, 1996, discharge of oil from the Respondent's Facility caused a sheen upon or discoloration of the surface of the waterway and, therefore, was in a quantity that has been determined may be harmful pursuant to 40 C.F.R. § 110.3 which implements Sections 311(b)(3) and (4) of the Clean Water Act.

The Respondent argues that it did not violate the Clean Water Act by discharging oil in harmful quantities into a navigable water of the United States. Specifically, the Respondent contends that Gully Brook and the waste treatment center or manmade sewer lines are not "navigable waters of the United States." As discussed above under Count I, I have found that Gully Brook is a navigable water within the meaning of Section 311 of the Clean Water Act and the fact that the discharged oil reached Gully Brook through manmade structures does not affect this determination.

Next, the Respondent argues that it did not discharge oil in such quantities as may be harmful pursuant to Section 311(b)(3) of the Clean Water Act. The Respondent maintains that only 300 to 500 gallons of oil were accidentally spilled and that it believes that only a small percentage of that amount entered Gully Brook. Further, the Respondent contends that cleanup measures were implemented immediately and there was no permanent or lasting damage to Gully Brook.

Finally, the Respondent argues that there is a genuine issue of material fact regarding the amount of oil actually discharged into Gully Brook. In support of this argument, the Respondent references the affidavits of Robert R. Gladu and Ralph Sawyer. In addition, the Respondent asserts that the EPA cannot rely on its photographs to depict the "sheen" or "discoloration" of the water surface or shorelines of Gully Brook, particularly as Gully Brook contains other pollutants such as raw sewage. The Respondent, therefore, requests an evidentiary hearing to demonstrate that the amount of oil which entered Gully Brook was not harmful.

At this juncture, I believe that the Respondent has adequately raised a genuine issue of material fact that only can be properly adjudicated following an evidentiary hearing. The Respondent has raised under the preponderance of the evidence standard a genuine dispute of material fact as to the issue of whether the quantity of oil discharged into Gully Brook may be harmful. In particular, I note that under the standard for adjudicating motions for accelerated decisions, discussed above, the evidentiary material proffered by the moving party must be viewed in the light most favorable to the opposing party and all reasonable inferences from the evidentiary material must be drawn in favor of the nonmoving party. I emphasize that in making this threshold determination, I have not weighed the evidence and determined the truth of the matter but have simply determined that the Respondent has adequately raised a genuine issue of material fact for evidentiary hearing.

Conclusion

No genuine issue of material fact exists as to the Respondent's liability as alleged in Count I in the Complaint for the period from December 1985 to October 17, 1996, and to this extent the EPA is entitled to judgment as a matter of law as to Count I. The EPA's motion for partial accelerated decision on liability as to Count I is thereby granted in part. The Respondent's cross motion for accelerated decision as to Count I is denied. 40 C.F.R. § 22.20(a).

In view of the foregoing determination that the Respondent has adequately raised a genuine issue of material fact and that the file before me does not establish that the EPA is entitled to judgment as a matter of law on Count III, I conclude that the EPA's motion for accelerated decision on liability on Count III in the Complaint must be denied. 40 C.F.R. § 22.20(a). The Respondent's cross motion for accelerated decision on Count III is denied.

Count II and Alternate Count III are not adjudicated at this time in order to afford the Respondent full opportunity to respond to these Counts which were added by Amended Complaint filed on September 29, 1998.

Orders

The Complainant's Motion for Partial Accelerated Decision on Liability on Count I is Granted in part.

The Complainant's Motion for Partial Accelerated Decision on Liability on Counts II and III and Alternate Count III is Denied.

The Respondent's Cross Motion for Accelerated Decision is Denied.

The hearing in this matter scheduled to commence on October 20, 1998, remains as scheduled, but the location, as approved by both parties, has been moved to Portland, Maine. [(11)] The Regional Hearing Clerk will make appropriate arrangements for a courtroom and will retain a stenographic reporter. The parties will be notified of the exact location and of other procedures pertinent to the hearing when those arrangements are complete.

IF ANY PARTY DOES NOT INTEND TO ATTEND THE HEARING OR HAS GOOD CAUSE FOR NOT BEING ABLE TO ATTEND THE HEARING AS SCHEDULED, IT SHALL NOTIFY THE UNDERSIGNED AT THE EARLIEST POSSIBLE MOMENT.

Original signed by undersigned

_____
Barbara A. Gunning
Administrative Law Judge

Dated: 10-9-98
Washington, DC

1. The Complaint was amended by order on September 16, 1998, upon motion by the EPA. The Amended Complaint was filed on September 29, 1998. The term "Complaint" hereafter refers to the First Amended Complaint.

2. For purposes of calculating a proposed penalty, the EPA is alleging a violation only from June 1993 through July 14, 1997, due to Paperwork Reduction Act issues.

3. The term "Presiding Officer" means the Administrative Law Judge designated by the Chief Administrative Law Judge to serve as Presiding Officer. 40 C.F.R. § 22.03(a).

4. 40 C.F.R. § 22.20(a) further provides: "the Presiding Officer, upon motion of the respondent, may at any time dismiss an action without further hearing or upon such limited evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant."

5. The Federal Rules of Civil Procedure are not binding on administrative agencies but many times these rules provide useful and instructive guidance in applying the Rules of Practice. See Oak Tree Farm Dairy, Inc. v. Block, 544 F. Supp. 1351, 1356 n. 3 (E.D.N.Y. 1982); In re Wego Chemical & Mineral Corporation, TSCA Appeal No. 92-4, 4 EAD 513 at 13 n. 10 (EAB, Feb. 24, 1993).

6. Rule 56(f) states:

> (f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

7. An accelerated decision, as a summary judgment, may be rendered on the issue of liability alone despite the existence of a genuine issue as to the amount of damages. Rule 56(c) FRCP; 40 C.F.R. 22.20(a).

8. Under the governing Rules of Practice, an Administrative Law Judge serves as the decisionmaker as well as the fact finder. See 40 C.F.R. §§ 22.04(c), 22.20, 22.26.

9. Authority to promulgate these regulations was delegated to the Administrator of the EPA by Executive Order 11735, 38 Fed. Reg. 21243 on August 7, 1973.

10. In the March 6, 1997, letter to the EPA, the Respondent stated that at the time of the spill on October 17, 1996, one tank was completely out of service and a second tank was connected but not in service. The Respondent further stated that immediately following the spill it placed the second 30,000 gallon tank completely out of service.

11. The Complaint proposes the assessment of a civil administrative penalty under Section 311(b)(6)(B)(ii) of the Clean Water Act (class II civil penalty). A hearing on the record in accordance with Section 554 of Title 5 shall be held in class II civil penalty cases. Sections 311(b)(6)(C)(I) and (ii) of the CWA provide that before issuing an order assessing a class II civil penalty, the Administrator shall provide public notice of and reasonable opportunity to comment on the proposed

issuance of such order and that any person who comments on a proposed assessment of a class II penalty shall be given notice of any hearing and of the order assessing such penalty. The file before me contains proof of the public notice and the Regional Hearing Clerk reports that no comments were received.