UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
SAN PEDRO FORKLIFT,	)	DOCKET NO. CWA-09-2009-0006
	)	
	)	
RESPONDENT	)	

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

A hearing in this matter has been scheduled to commence on January 24, 2011. On November 12, 2010, Complainant United States Environmental Protection Agency ("Complainant") filed a Motion for Partial Accelerated Decision on Liability ("Motion") along with a Memorandum in Support of Complainant's Motion for Partial Accelerated Decision on Liability ("Memo"). On November 29, 2010, Respondent San Pedro Forklift ("Respondent") requested and received a 10-day extension of time to file its response to the Motion. On December 10, 2010, Respondent submitted its Opposition to Motion for Partial Accelerated Decision for Liability; Memorandum of Points and Authorities in Support Thereof; Declarations of Terry Balog and Peter Balov ("Response"). On December 20, 2010, Complainant filed a Reply to Opposition to Motion for Partial Accelerated Decision ("Reply").

I. Complainant's Position

In its Motion, Complainant seeks an accelerated decision finding Respondent liable for violating Sections 301(a) and 308(a) of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1301(a), 1308(a), by discharging pollutants into waters of the United States without a valid CWA permit, and by failing to submit a Notice of Intent ("NOI") for permit coverage under the applicable General Permit within the period established by regulation, as alleged in Counts 1 and 2 of the Complaint. *See* Motion at 1.

In support of its Motion, Complainant argues that through the various filings in this case, including the Prehearing Exchanges, the Answers filed by Respondent, and the instant

Motion, it has demonstrated each element necessary to prove liability under Counts 1 and 2, and is entitled to judgment as a matter of law. Memo at 8. Specifically, Complainant argues that with respect to Count 1, discharge of pollutants without a permit, it has proven:

1. that Respondent is a "person" under the CWA because it is a California corporation according to the California Secretary of State, Memo at 8;

2. that Respondent discharged storm water containing pollutants because Respondent's own Storm Water Pollution Prevention Plan ("SWPPP") "states that '[w]ater discharging from the facility enters the municipal storm drain system,'" Memo at 8-9, and additionally that models designed by Complainant's proposed expert demonstrate that storm water discharges are likely during storm events in excess of 0.2 inches of precipitation, Memo at 9;

3. that the storm water discharged contained pollutants as defined by the CWA because Respondent operates a motor freight transportation facility and "classifies itself under SIC Code 4213, which . . . falls under Sector P of the EPA [NPDES Multi Sector General Permit for Stormwater Discharges Associated with Industrial] Activity ("MSGP")," Memo at 9-10, and because Complainant's inspectors observed several "pollutant sources" such as trash, tires, and heavy oily sediment around the east storm drain, Memo at 11;[1]

4. that the discharge was from a point source because the SWPPP "states that 'water on [the] property flows to two discharge points (storm drains) along our southern perimeter,'" Memo at 13, a statement confirmed by EPA's inspectors in the May

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[1] In its Reply, Complainant stresses its argument that "Respondent classified itself under SIC Code of [sic] 4213" and argues that Respondent's own SWPPP "flies directly in the face" of any argument to the contrary. Reply at 4. Complainant then refers to an EPA Fact Sheet that describes the breadth of the term "vehicle and equipment maintenance," arguing that "even if vehicle repair does not occur at Respondent's facility, the vehicle operation and maintenance [] that are not disputed can cause oil and fuel leaks [] and are pollutant sources of concern for storm water." *Id.* Complainant also points out that Respondent "does not deny that vehicle *washing* takes place at the facility," which Complainant asserts "clearly" brings Respondent within the ambit of the Fact Sheet. Reply at 5.

17, 2007, Inspection Report, *Id.*;

5. that the storm drains discharge into waters of the United States because the receiving body, the Dominguez Channel, is a tributary to the Los Angeles Harbor, a body that is navigable-in-law, Memo at 14;

6. that Respondent did not obtain a permit before discharge because Respondent "admits in its Answer that it did not apply for coverage under the California General Permit until December 2007 - seven months after EPA's first inspection of the facility and eight years after Respondent began leasing and operating the facility," Memo at 15, citing Ans. p. 4.

With respect to Count 2, the alleged failure to submit a Notice of Intent to be covered under the California General Permit, Complainant argues that it has proven Respondent's liability under Section 308(a) of the CWA, 33 U.S.C. § 1318(a), and the implementing regulations found at 40 C.F.R. §§ 112.21(c) and 122.26(c)(1). Memo at 15. Specifically, Complainant argues that because Respondent's discharges of storm water are "associated with industrial activity," Respondent is required to apply for a NPDES permit. Memo at 16. Complainant alleges that the "NOI data base" indicates that Respondent did not file an NOI until December 12, 2007, and before that date, it was not covered by any CWA permit. *Id.*

In addition to arguing that it has demonstrated proof of liability for Counts 1 and 2, Complainant also argues that none of the three defenses advanced by Respondent in its Amended Answer find support in either the law or the evidence in the record. Memo at 16-17. According to Complainant, the three defenses at issue are "(1) No Legal Duty To Obtain a Permit (2) Selective Enforcement in Violation of the Equal Protection Clause and (3) Fair Notice in Violation of the Due Process Clause." Memo at 16. Complainant argues that none of these defenses defeats liability as to Counts 1 and 2 and concludes that accelerated decision is a proper remedy. Memo at 23-24.

Complainant asserts that the "No Legal Duty" defense is invalid on its face as Respondent admits that it is the operator of the facility and as such has the duty under the regulations to seek the appropriate CWA permit. Memo at 17. As to the "Selective Enforcement" defense, Complainant argues that this claim fails as a matter of law because Respondent has failed to plead the EPA's decision to seek a penalty against Respondent "was in bad faith based on such impermissible considerations as race, religion, or the desire to prevent the exercise of

Constitutional rights," which Complainant argues is a necessary element of any selective enforcement claim. Memo at 18.

As to the "Fair Notice" defense, Complainant states that it is:

> unclear whether Respondent's notice argument concerns the content of the 'permit requirements' or the procedures used to promulgate and publicize these requirements [or] whether the 'permitting requirements' referred to are the applicable regulations that obligate Respondent to submit information in an application or the requirements of the permit itself.

Memo at 20.[2] Despite these multiple ambiguities, Complainant concludes that whatever the intended argument, it should fail as a matter of law for the following reasons:

1. Ignorance of the law is no defense, Memo at 20.

2. The regulations are sufficiently clear because they state that "dischargers of storm water associated with industrial activity [must] apply for an individual permit or seek coverage under a promulgated storm water general permit." Memo at 21.

3. Any challenge to the regulations themselves is untimely and cannot proceed. Memo 22 citing 33 U.S.C. § 1369(b)(1).

II. Respondent's Position

Respondent disputes many of the factual assertions made in the Motion and Memo. In its Response, Respondent argues that the unsettled issue of a "commingled plume" raises a genuine issue of material fact as to the source of the alleged pollutants,[3]

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[2] Complainant speculates in its Reply that Respondent appears to define "fair notice" as individualized notification by either EPA or the prior tenant that a CWA permit is required. Reply at 12. Complainant thoroughly disputes this position, citing *Roger Barber, d/b/a Barber Trucking*, Docket No. CWA-05-2005-0004, 2007 EPA ALJ LEXIS 17 at *49 (EPA ALJ May 11, 2007) and *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947).

[3] In its Reply, Complainant argues that the potential presence of a "commingled plume" will have no bearing on

disputing the results of EPA's inspection with reference to its own "[s]ampling of facility storm water [which] indicated no presence of pollutants in regulatory levels as defined and confined of Respondent [sic] as the source." Response at 7.[4] Respondent also argues that the preceding operator, the Port of Los Angeles, failed to obtain its own permit and "never notified or informed Respondent as a tenant to apply for such a permit" when Respondent took over as operator at the facility. Response at 9-10.

Respondent also appears to dispute the industrial activity classification listed in the Motion and Memo, arguing that "Respondent's business has been classified *by EPA* under the [SIC] Code 4213. . . ." Response at 3 (emphasis in original). Respondent contests the accuracy of Complainant's description of the activities that regularly occur at the facility and argues that many of the "pollutant sources" identified in the EPA Inspection Report are left over debris from the prior tenant. Response at 4.

Lastly, Respondent expands on its Selective Enforcement defense, arguing that Complainant singled out Respondent while leaving other similarly situated violators untouched, Response at 8, but neglects to address the second prong of the Selective Enforcement Doctrine relating to the discriminatory motive and effect. *See U.S. v. Smithfield Foods, Inc.*, 969 F. Supp. 975, 985 (E.D. Va. 1997).

III. Legal Standard

Section 22.20(a) of the Rules of Practice authorizes the Administrative Law Judge 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

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Respondent's liability for failure to obtain a permit nor its liability for "the ultimate discharge of pollutants." Reply at 7, citing 55 Fed. Reg. 47990, 48010 (Nov. 16, 1990).

[4] Complainant observes in its Reply that Respondent is probably referring to sampling that occurred in October 2009 according to Complainant's Exhibit 6, p. 16. Reply at 6.

judgment as a matter of law.

40 C.F.R. § 22.20(a).

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"). *See, e.g., BWX Technologies, Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000); *Belmont Plating Works*, Docket No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65 at *8 (EPA ALJ Sept. 11, 2002). 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.

Fed. R. Civ. P. 56(c). Therefore, federal court decisions interpreting Rule 56 provide guidance for adjudicating motions for accelerated decision. *See CWM Chemical Service*, 6 E.A.D. 1 (EAB 1995).

The United States Supreme Court has held that the burden of showing that no genuine issue of material fact exists is on the party moving for summary judgment. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). In considering such a motion, the Tribunal must construe the evidentiary material and reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1985); *Adickes*, 398 U.S. at 158-59. Summary judgment on a matter is inappropriate when contradictory inferences may be drawn from the evidence. *Rogers Corp. v. Envtl. Prot. Agency*, 275 F.3d 1096, 1103 (D.C. Cir. 2002).

Once the party moving for summary judgment meets its burden of showing the absence of genuine issues of material fact, Rule 56(e) requires the opposing party to offer countering evidentiary material or to file a Rule 56(f) affidavit. The Supreme Court has found that the non-moving party must present "affirmative evidence" and that it cannot defeat the motion without offering "any significant probative evidence tending to support" its pleadings. *Anderson*, 477 U.S. at 256 (quoting *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968)).

IV. Discussion

The parties in this case have filed numerous proposed exhibits and made substantial arguments in support of their respective positions. The parties also engaged in the good practice of including sworn affidavits along with their briefings for the instant Motion. However, I find that there remain several genuine issues of material fact and several practical considerations, which make an accelerated decision inappropriate.

Initially, I note that neither Respondent's Answer nor its Amended Answer offer specific admissions or denials to the individual allegations contained in the Complaint. Instead, Respondent offers a narrative response to the allegations. *See* Ans. Moreover, the parties did not opt to file any joint stipulations, thus leaving the record devoid of any express agreement as to the critical facts of this case. While Complainant does diligently provide references to its various proposed exhibits, I find that it has not carried its burden of proving the absence of any genuine issue of material fact.

To take one example, Complainant makes several references to Respondent's alleged classification under SIC 4213, a threshold issue that bears on the applicability of the General Permit and NOI regulations. The basis of this classification is far from clear. Complainant claims that Respondent "classifies itself" as such, Memo at 9, and appears to rely on Complainant's proposed Exhibits 5 & 6, which are copies of Respondent's 2008 and 2009 Annual Reports for Storm Water Discharges submitted to the State of California. *See* Memo at 22, citing Complainant's PHE Exh. 5. However, Respondent claims that EPA independently chose this classification and specifically disputes the types of activities that actually occur at the facility. Response at 3. I note that Complainant's reliance on documents the postdate the period of alleged violation is problematic and find that it does not meet the standard for granting accelerated decision.[5] The merits of these arguments are best explored at hearing.

Furthermore, I find that granting the Motion will not eliminate the need for substantial testimony at the hearing. Noting that the Motion only addresses two of the three counts, I also perceive there to be an overlap between at least some of the

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[5] The same could be said for those arguments that rely on Respondent's SWPPP, which also appears to postdate the relevant time period as identified in the Complaint. *See* Compl. ¶ 36; Complainant's PHE Exh. 12, p. 3.

evidentiary materials Complainant would submit on liability and the evidential materials it would submit with respect to penalty. Moreover, under the Federal Rules of Civil Procedure, 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). For all of these reasons, I find that accelerated decision is an inappropriate remedy. Accordingly, the Motion is **DENIED.**

Barbara A. Gunning
Administrative Law Judge

Dated: January 7, 2011
Washington, DC

In the Matter of *San Pedro Forklift*, Respondent.
Docket No. CWA-09-2009-0006

CERTIFICATE OF SERVICE

I hereby certify that copies of this **Order Denying Complainant's Motion for Partial Accelerated Decision on Liability**, issued by Barbara Gunning, Administrative Law Judge, in CWA-09-2009-0006 were sent to the following parties on this 7th day of January 2011, in the manner indicated:

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Dated: January 7, 2011
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