

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY



BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
COAST WOOD PRESERVING, INC.,) Docket No. EPCRA-9-2000-0001
)
)
RESPONDENT)

ORDER DENYING COMPLAINANT'S MOTION TO FORWARD ORDER TO
ENVIRONMENTAL APPEALS BOARD

I. Background

On June 28, 2001, the undersigned Administrative Law Judge ("ALJ") issued Orders denying the Environmental Protection Agency's ("Complainant" or "EPA") Motion for Accelerated Decision and Coast Wood Preserving, Inc.'s ("Respondent" or "CWP") Cross-Motion for Accelerated Decision.^{1/} The EPA's Motion for Accelerated Decision sought summary judgment against CWP as to CWP's liability as charged under Title III of the Superfund Amendments and Reauthorization Act, 42 U.S.C. § 11001 *et. seq.*, also known as the Emergency Planning and Community Right-to-Know Act ("EPCRA"). On July 10, 2001, Complainant filed a Motion to Forward Order to Environmental Appeals Board ("Motion for Interlocutory Review"). Respondent opposes the Motion for Interlocutory Review in a memorandum dated July 30, 2001. Respondent's Memorandum in Opposition to EPA's Motion to Forward Order to Environmental Appeals Board ("Memo in Opposition to EPA's Motion").

Upon consideration of the record and the applicable legal standards, I find that the Order on EPA's Motion for Accelerated Decision does not meet the requisite regulatory standards for recommending an order for interlocutory review. Therefore,

^{1/} A hearing in this matter is scheduled for September 5, 2001.

Complainant's Motion to Forward Order to Environmental Appeals Board is DENIED.

II. Arguments

The general basis of Complainant's Motion for Accelerated Decision is that CWP's Answer to the EPA's Complaint is so clearly deficient under Section 22.15(b) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), 40 C.F.R. § 22.15(b), that under Section 22.15(d) of the Rules of Practice, 40 C.F.R. § 22.15(d), the material factual allegations contained in the Complaint should be deemed admitted.^{2/} Because the material allegations of the Complaint should be considered admitted, Complainant argues that there is no genuine issue of material fact as to Respondent's liability. Complainant therefore maintains that under Section 22.20(a) of the Rules of Practice, 40 C.F.R. § 22.20(a), accelerated decision in the EPA's favor is appropriate.^{3/}

^{2/} Rule 22.15 provides in pertinent part:

(b) Contents of the answer. The answer shall clearly and directly admit, deny or explain each of the factual allegations contained in the complaint with regard to which the respondent has any knowledge. Where respondent has no knowledge of a particular factual allegation and so states, the allegation is deemed denied. The answer shall also state: The circumstances or arguments which are alleged to constitute the grounds of any defense; the facts which respondent disputes; the basis for opposing any proposed relief; and whether a hearing is requested.

(d) Failure to admit, deny, or explain. Failure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation.

40 C.F.R. §§ 22.15(b),(d).

^{3/} Rule 22.20(a) 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

(continued...)

Complainant filed this Motion for Interlocutory Review arguing that the presiding ALJ, in rendering the decision denying the EPA's Motion for Accelerated Decision, utilized legal standards that are contrary to both the Rules of Practice and precedent from the Environmental Appeals Board ("EAB"). Specifically, Complainant argues that the ALJ failed to follow the appropriate legal standards, which Complainant characterizes as requiring "a specific as opposed to a general denial" in an Answer and that to "place 'at issue' facts in the Complaint, Respondent must plead material facts which contradict Complainant's allegations." Motion for Interlocutory Review at 2 (citing Motion for Accelerated Decision at 10). Complainant argues that the presiding ALJ "completely overlook[ed] the established requirements for an answer" and is "silent as to the issue of material fact raised by the 'complaint and answer.'" Motion for Interlocutory Review at 3 and 4-5.

In response, Respondent argues that the EPA's Motion for Interlocutory Review, which Respondent defensibly characterizes as bordering on frivolous, fails to establish the important question of law or policy component of 40 C.F.R. § 22.29(b). See Memo in Opposition to EPA's Motion at 2-3. In other words, the argument is that Complainant failed to establish that the Order denying EPA's Motion for Accelerated Decision presents such an important question of law or policy as to necessitate the "exceptional remedy" of interlocutory review. *Id.* at 3. Respondent further argues that an immediate appeal to the EAB will not materially advance the ultimate termination of the proceeding and that review after the final order is issued will not be inadequate or ineffective. *Id.* at 4.

III. Discussion

^{3/} (...continued)

material fact exists and a party is entitled to judgment as a matter of law. The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional 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.

The Rules of Practice provide that the ALJ may recommend an order or ruling for review by the EAB when (1) the order or ruling "involves an important question of law or policy concerning which there is substantial grounds for difference of opinion," and (2) "[e]ither an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or review after the final order is issued will be inadequate or ineffective." 40 C.F.R. § 22.29(b).

EPA's Motion for Interlocutory Appeal is denied on the grounds that it fails to establish that the Order denying EPA's Motion for Accelerated Decision involves an important question of law or policy concerning which there is substantial grounds for difference of opinion as required by 40 C.F.R. § 22.29(b). Because the Order does not satisfy the initial regulatory requirement for recommending interlocutory review of the Order to the EAB, I do not reach the second requirement.

Complainant, in both its Motion for Accelerated Decision and Motion for Interlocutory Review, references *Landfill, Inc.*, RCRA Appeal No. 86-8, 3 E.A.D. 461 (EPA CJO, Nov. 30, 1990), to argue that under the Rules of Practice, an Answer to a factual allegation must be specific, rather than general. Motion for Accelerated Decision at 10-11; Motion for Interlocutory Review at 2. Complainant then argues that Respondent's answers to the allegations in the Complaint do not meet this standard and, therefore, the ALJ failed to conform to established legal standards in finding Respondent's Answer sufficient for the purposes of 40 C.F.R. § 22.15. Motion for Interlocutory Review at 3.

The EPA's argument is without merit. The denial of Complainant's Motion for Accelerated Decision was in accordance with the relevant legal standards. The Complaint contains numbered paragraphs, many of which contain both factual allegations and legal conclusions. Rule 22.15(b)'s requirement to admit, deny, or explain does not apply to legal conclusions. See 40 C.F.R. § 22.15(b). In accordance with established precedent, it was found that Respondent was not required to respond to legal conclusions, even if such legal conclusions incorporate factual allegations.

In the Order Denying Complainant's Motion for Accelerated Decision, it was determined that CWP's answers in response to the factual allegations, which were numbered to correspond to

EPA's numbered paragraphs in the Complaint, were adequate responses to the Complaint's factual allegations for the purposes of 40 C.F.R. § 22.15(b). Responding to each paragraph of the Complaint individually is usual practice in specifically denying averments for the purposes of Rule 8 of the Federal Rules of Civil Procedure ("FRCP") as long as it is clear which allegations are being negated. See Wright & Miller, *Federal Practice and Procedure: Civil 2d* § 1266. While the FRCP are not binding in this civil penalty proceeding, these rules do provide a useful analogy. See *Asbestos Specialists, Inc.*, TSCA Appeal No. 92-3, 4 E.A.D. 819 (EAB, Oct. 6, 1993). Respondent's Answer makes sufficiently clear the issues at dispute in this matter. Because Respondent's Answer was deemed sufficient, Complainant's contention that the Answer is fatally defective under 40 C.F.R. § 22.15(b) and therefore all material allegations of the Complaint should be deemed admitted under 40 C.F.R. § 22.15(d) was dismissed.

Motions for accelerated decisions are akin to motions for summary judgement under Rule 56 of the FRCP. See *CWM Chemical Services, Inc.*, TSCA Appeal No. 93-1, 6 E.A.D. 1 (EAB, May 15, 1995). As such, Complainant, as the moving party, had the initial burden of proof of showing the absence of a genuine issue of material fact for hearing. See e.g. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1985), *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). As Complainant's argument that Respondent's Answer is fatally defective fails, Complainant did not fulfill its initial burden to show there is no genuine issue of material fact either as to the legal sufficiency of Respondent's Answer or Respondent's liability under EPCRA. Accordingly, under the legal standard for accelerated decisions, the EPA's Motion for Accelerated Decision was found to be without merit.

IV. Order

The June 28, 2001, Order denying the EPA's Motion for Accelerated Decision does not involve an important question of law or policy concerning which there is substantial grounds for difference of opinion. This matter, therefore, does not warrant recommendation of interlocutory review by the EAB under 40 C.F.R. § 22.29(b). Accordingly, the EPA's Motion to Forward Order to the EAB is DENIED.

So Ordered.

Barbara A. Gunning
Administrative Law Judge

Dated: July 31, 2001
Washington, DC

In the Matter of Coast Wood Preserving, Inc., Respondent
Docket No. EPCRA-9-2000-0001

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Denying Complainant's Motion To Forward Order To Environmental Appeals Board**, dated July 31, 2001, was sent this day in the following manner to the addressees listed below.

Maria Whiting-Beale
Legal Staff Assistant

Dated: July 31, 2001

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