UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
NORMAN C. MAYES,	)	Docket No. RCRA-04-2002-0001
RESPONDENT	)	

ORDER ON COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY AND PENALTY AMOUNT WITH REFERENCE TO TANK #3

Background

This civil administrative penalty proceeding arises under the authority of Section 9006 of the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (collectively referred to as "RCRA"), 42 U.S.C. § 6991e. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-22.32.

On March 25, 2002, the United States Environmental Protection Agency, Region IV ("Complainant") filed a Complaint against Norman C. Mayes ("Respondent"), alleging violations of Section 9003 of RCRA, 42 U.S.C. § 6991b, and its implementing regulations for the standards and requirements for underground storage tanks ("USTs") found in 40 C.F.R. Parts 280 and 281.[1] Respondent filed an Answer on April 23, 2002, contesting the EPA's jurisdiction and denying or claiming to have no knowledge of the allegations made by Complainant.

Pursuant to the Prehearing Order entered on October 9, 2002,

[1] Pursuant to Section 9004 of RCRA, 42 U.S.C. § 6991c, the Administrator of the U.S. Environmental Protection Agency granted the State of Tennessee authorization to administer certain portions of RCRA in lieu of the federal program. The State of Tennessee's rules for the regulation of underground storage tanks storing petroleum are set forth at the Tennessee Hazardous Waste Management Regulations Act, Chapter 1200-1-15.01.

the parties filed their prehearing exchange. The hearing in this matter is set for June 9 through 13, 2003 in Knoxville, Tennessee.

On April 7, 2003, Complainant filed a Motion for Accelerated Decision on Liability and Penalty Amount with Reference to Tank #3 ("Motion"). In its Motion, Complainant argues that there exist no genuine issues of material fact with respect to Respondent's liability for its acts or omissions with reference to the UST identified in the Complaint as tank AV #3 ("tank #3"). Complainant asserts that it has proposed a reasonable and appropriate penalty pursuant to the statutory factors and the applicable penalty policy.

Respondent filed its Response to Complainant's Motion for Accelerated Decision on Liability and Penalty Amount with Reference to Tank #3 ("Response") on April 16, 2003. Respondent contends that the Motion should be denied because there are genuine issues of material fact regarding tank #3 and the proposed penalty is not reasonable or appropriate.

On May 8, 2003, Respondent submitted a Motion in Limine to Suppress Certain Evidence Obtained by an Unlawful Search and Seizure.[2]

Standard for Accelerated Decision

Section 22.20(a) of the Rules of Practice authorizes the Presiding Officer[3] 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 judgment as a matter of law." 40 C.F.R. § 22.20(a) (emphasis added).

As Complainant has noted, 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").[4] *See, e.g., In re BWX Technologies*, RCRA (3008) Appeal

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[2] The certificate of service for the Motion in Limine refers to another document.

[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. §§ 22.3(a), 22.21(a).

[4] The FRCP 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); *Wego Chemical & Mineral Corporation*, TSCA

No. 97-5, 2000 EPA App. LEXIS 9 at *34-35 (EAB, April 5, 2000); *In the Matter of Belmont Plating Works*, Docket No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65 at *8 (ALJ, September 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" (emphasis added). Therefore, federal court decisions interpreting Rule 56 provide guidance for adjudicating motions for accelerated decision. *See CWM Chemical Service*, TSCA Appeal 93-1, 6 E.A.D. 1 (EAB, May 15, 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; *see also Cone v. Longmont United Hospital Assoc.*, 14 F.3d 526, 528 (10th Cir. 1994). Summary judgment on a matter is inappropriate when contradictory inferences may be drawn from the evidence. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002).

In assessing materiality for summary judgment purposes, the Supreme Court has determined that a factual dispute is material where, under the governing law, it might affect the outcome of the proceeding. *Anderson*, 477 U.S. at 248; *Adickes*, 398 U.S. at 158-159. The substantive law involved in the proceeding 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.* 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. *Anderson*, 477 U.S. 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

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Appeal No. 92-4, 4 E.A.D. 513 at 13 n. 10 (EAB, February 24, 1993).

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. Under Rule 56(e), "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." The Supreme 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*, 477 U.S. 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 Corp. v. Catrett*, 477 U.S. 317 at 322 (1986); *Adickes*, 398 U.S. at 160. Similarly, a simple denial of liability is inadequate to demonstrate that an issue of fact does indeed exist in a matter. *In the Matter of Strong Steel Products*, Docket Nos. RCRA-05-2001-0016, CAA-05-2001-0020, and MM-05-2001-0006, 2002 EPA ALJ LEXIS 57 at *22 (ALJ, September 9, 2002). A party responding to a motion for accelerated decision must produce some evidence which places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing. *Id.* at 22-23; *see In re Bickford, Inc.*, Docket No. TSCA-V-C-052-92, 1994 TSCA LEXIS 90 (ALJ, November 28, 1994).

The Supreme 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*, 477 U.S. 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. Of course, 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*, 398 U.S. at 156.

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, 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.[5] 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*, 477 U.S. at 249.

Accordingly, 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. Even if a judge believes that summary judgment is technically proper upon review of the evidence in a case, 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).

Discussion

Complainant argues that there exist no genuine issues of material fact regarding Respondent’s liability for its acts or omissions in connection with tank #3 and that it has proposed a reasonable and appropriate penalty for these violations pursuant to the statutory factors and the applicable penalty policy. Complainant submits that tank #3 was an UST as that term is defined at 40 C.F.R. §280.12 and thus was subject to the statutory and regulatory requirements which were designed to protect human health and the environment from releases emanating from USTs.

Complainant alleges that Respondent was the “owner” and/or “operator” of an “UST” or “UST system” which contained “regulated substances,” and that Respondent failed to comply with the regulatory requirements for release detection, permanent closure, and site assessment for tank #3. Specifically, Complainant charges that Respondent failed to provide a method of release detection for tank #3 by December 22, 1993, to close permanently tank #3 by April

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[5] 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. §§ 22.4(c), 22.20, and 22.26.

1998, and to assess the site for releases by April 1998. Further, Complainant submits that it has sustained its burden of proving the appropriateness of the proposed penalties for the violations with respect to tank #3.

In its Response, Respondent argues that accelerated decision is not warranted because there are genuine issues of material fact as to its alleged liability for tank #3 violations as previously set forth both in its Answer to the Complaint as well as information provided in the prehearing exchange.[6]

In the Complaint and its Motion, Complainant alleges that Respondent put tank #3 in temporary closure in April 1997. In its Answer to the Complaint, Respondent denies that it put tank #3 in temporary closure. In fact, Respondent claims that tank #3 was never temporarily closed. Rather, Respondent alleges that there was a change-in-service for tank #3 and, thus, the permanent closure requirements of 40 C.F.R. part 280, subpart G and the upgrade requirements of 40 C.F.R. § 280.21 are inapplicable.

Respondent claims that tank #3 was not subject to the release detection requirements of 40 C.F.R. § 280.40 pursuant to the exception provided in 40 C.F.R. § 280.70(a) because tank #3 has been empty since 1997. There is conflicting evidentiary material concerning the issue of whether there was a change-in-service for tank #3, including the question of whether tank #3 was empty.

I observe that there is no dispute that Respondent did not have release detection before April 1997. Thus, Respondent would be subject to the release detection requirements before that date. However, as acknowledged by Complainant, the five-year statute of limitations precludes the assessment of any penalty for the failure to have release detection for tank #3 prior to March 25, 1997.[7]

I also observe that if Respondent were not to establish that there was a change-in-service or that the requirements for a change-in-service were not met under 40 C.F.R. § 280.71, and there was no temporary closure of tank #3 as alleged by Respondent, then Respondent's liability for failure to have release detection for tank #3 possibly could extend until the permanent closure of the

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[6] If Respondent wishes to rely on information contained in the prehearing exchange, such information should be specifically referenced. *See Anderson*, 477 U.S. at 256, *supra*.

[7] Complainant initially found that the five-year statute of limitations applies from the date of inspection rather than the date the Complaint was filed. *See* Complainant's proposed Exhibit 2; Complainant's Motion for Accelerated Decision at 20.

tank on July 9, 2001 and its possible liability for failure to permanently close the tank would not commence until December 23, 1998.

Based on the record before me, I find that genuine issues of material fact exist concerning Respondent's alleged liability for violating Section 9003 of RCRA and 40 C.F.R. §§ 280.40, 280.70(c) with reference to tank #3 and that Complainant has not established that it is entitled to judgment as a matter of law. 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 Respondent has adequately raised genuine issues of fact for evidentiary hearing and that Complainant has not established that it is entitled to judgment as a matter of law. As such, Complainant's Motion for Accelerated Decision on Liability and Penalty Amount with Reference to Tank #3 must be denied.

Order

Complainant's Motion for Accelerated Decision on Liability and Penalty Amount with Reference to Tank #3 is denied.[8]

Barbara A. Gunning
Administrative Law Judge

Dated: May 22, 2003
Washington, DC

[8] Respondent's Motion in Limine is pending. The response period for Complainant to submit a response to Respondent's Motion in Limine has not yet expired. *See* 40 C.F.R. § 22.16.

In the Matter of Norman C. Mayes, Respondent
Docket No. RCRA-04-2002-0001

CERTIFICATE OF SERVICE

I certify that the foregoing **Order On Complainant's Motion For Accelerated Decision On Liability And Penalty Amount With Reference To Tank #3,** dated May 22, 2003, was sent this day in the following manner to the addressees listed below.

Maria Whiting-Beale
Legal Staff Assistant

Dated: May 22, 2003

Original and One Copy By Pouch Mail to:

Patricia Bullock
Regional Hearing Clerk
U.S. EPA
Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303-8960

Copy By Pouch Mail and Facsimile to:

Debra S. Benjamin, Esquire
Elizabeth E. Davis, Esquire
Associate Regional Counsel
U.S. EPA
Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303-8960

Copy by Regular Mail and Facsimile to:

Rebecca A. Bell, Esquire
Law Office of Rebecca A. Bell
Franklin Square
9724 Kingston Pike, Suite 202
Knoxville, TN 37922