

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of )  
 )  
Allen Family Foods, Inc., ) Docket No. CWA-3-2001-0002  
 )  
Respondent )

ORDER DENYING EPA'S  
MOTION FOR ACCELERATED DECISION

The United States Environmental Protection Agency ("EPA") has filed a Motion for Accelerated Decision in this Clean Water Act (the "Act") case. 40 C.F.R. 22.20(a).<sup>1</sup> EPA alleges that respondent Allen Family Foods, Inc. ("Allen"), has violated Sections 301, 307, and 308 of the Clean Water Act. 33 U.S.C. §§ 1311, 1317 & 1318.<sup>2</sup> These violations allegedly involve respondent's discharge of pollutants to a Publicly Owned Treatment Works ("POTW"). In its motion for accelerated decision, EPA seeks summary judgment only as to liability; it does not seek judgement as to the \$137,500 civil penalty which it has requested. 33 U.S.C. § 1319(g). Allen denies having committed the violations and it opposes the present motion for judgment.

Briefly, Allen owns and operates a poultry processing facility located in Hurlock, Maryland. From at least 1994, it has discharged wastewater from this facility to the Town of Hurlock POTW. Ans. ¶¶ 4 & 13. Allen discharged this wastewater pursuant to a Wastewater Discharge Permit issued by the POTW. The Wastewater Discharge Permit limited the amount and, or, concentration of biochemical oxygen demand ("BOD<sub>5</sub>"), total flow, total suspended solids ("TSS"), oil and grease ("O&G"), and pH. It is this wastewater discharge that EPA asserts resulted in violations of Sections 301, 307, and 308 of the Act.

In its complaint, EPA identifies three kinds of violations. First, it alleges that since September of 1996, Allen has exceeded its Wastewater Discharge Permit for BOD<sub>5</sub> on at least 84 occasions, for total flow on at least 147 occasions, for TSS on at least 2 occasions, and at

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<sup>1</sup> Accelerated decision may be awarded "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." *Id.*

<sup>2</sup> In its initial complaint, EPA's theory of liability was based upon Sections 301 and 307 of the Clean Water Act. EPA subsequently was allowed to amend the complaint to also argue that the alleged unlawful activities of respondent violated Section 308 of the Act as well. This motion for accelerated decision was actually filed before EPA was granted permission to amend the complaint so as to raise its Section 308 argument. Nonetheless, given the fact that the motion is being denied, Allen is not prejudiced by this unusual filing sequence.

least once each for O&G and pH. Second, EPA alleges that Allen failed to report to the Town of Hurlock POTW the monitoring results of its wastewater discharges. Third, EPA alleges that Allen failed to inform the Town of Hurlock POTW when it violated the effluent limitations of its Wastewater Discharge Permit.

In support of its motion for accelerated decision, EPA methodically lists the various Wastewater Discharge Permits, correspondences, and other documents which it believes are applicable to this case. EPA also offers a cursory explanation as to what it believes these documents show, summarily concluding that they support the Agency's determination that Allen violated the Clean Water Act as alleged. Indeed, when all is said and done, EPA asserts that through this presentation it has shown that respondent is liable for "233 effluent exceedence violations, 50 failure to report violations, and 25 failure to notify violations." EPA Mem. at 16.

Despite these assertions, EPA has failed to show that there exists no genuine issue of material fact regarding the alleged violations and that it is entitled to judgment as a matter of law. In that regard, EPA relies almost exclusively upon documents which are not yet a part of the record in this case. This documentary offering falls short of what even the EPA concedes is necessary to support an award of summary judgment. For example, citing *Celotex v. Catrett*, 477 U.S. 317, 323 (1986) and Rule 56(c) of the Federal Rules of Civil Procedure, EPA submits that the absence of a genuine issue of material fact may be established by the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." EPA Mem. at 13. The various documents relied upon by EPA to support its motion do not fit within any of these categories.

Not only are these supporting documents not yet a part of the record, but even assuming that they are introduced by EPA at the hearing, and admitted into evidence, they need to be explained. The documents relied upon by EPA, as well as the documents relied upon by Allen in opposition, are technical in nature. Just what these documents stand for, and just what their significance is to the issues to be tried here, is not readily apparent to the court. If anything, the documents to which both sides cite beg the question as to what exactly happened in this case. Thus, there has been no showing by the moving party that there exists no genuine issues of material fact and that it is entitled to judgment as a matter of law.

Accordingly, EPA's motion for accelerated decision is *denied*.<sup>3</sup>

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Carl C. Charneski  
Administrative Law Judge

Issued: January 9, 2002  
Washington, D.C.

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<sup>3</sup> In opposing EPA's motion for accelerated decision, respondent fired a broadside. In addition to maintaining that EPA has not satisfied the legal standard for summary judgment, it argues that EPA does not have the authority to maintain this action, that EPA violated the Clean Water Act by not consulting with the State of Maryland before filing the complaint, that the Town of Hurlock's ordinance is not enforceable by EPA, that the Town's agent improperly administered the pretreatment program, and that the Town of Hurlock's pretreatment requirements are preempted by United States Department of Agriculture regulations governing poultry processing. Inasmuch as this court agrees with respondent that EPA has not satisfied the standard for obtaining summary judgment, it is unnecessary to address these additional arguments. The focus of this order is an evidentiary one. If respondent wishes to revisit any or all of these arguments, it can do so by proper motion.