

to what it characterizes as "unsubstantiated" allegations in the complaint and in an affidavit of an EPA official offered by Complainant in support of its motion for summary judgment.²

The parties have been unable to settle. Complainant moved for "accelerated" decision, or summary judgment, as to both liability and civil penalty. Respondent filed a cross motion for summary judgment, a motion to dismiss, and a motion for "special limited discovery" of the names of S & S Landfill, Inc. employees to whom Complainant believes the oral requests were made, and the dates of the requests.

Complainant relies principally upon an affidavit of the EPA official who conducted the inspections of Respondent's facility. The affidavit states that a request was made orally for Respondent's waste shipment records for November and December, 1991, in the course of the January, 1992, inspection of Respondent's facility. However, this official's report of the inspection for that date does not mention a request for November and December records or any other records. Subsequently, in a March, 1992, letter to Respondent's officials, reference is made to requests for records, but not specifically to a request for November and December, 1991, records.³ Since there were other inspections of respondent's facility in which requests for waste

² Affidavit of Mr. Douglas E. Foster, Attachment I to Complainant's motion for and memorandum in support of "accelerated" decision, February 10, 1994.

³ Letter from John P. Daley, EPA's Region III NESHAP Asbestos Coordinator, to Mr. Ronald I. Levine, S & S Landfill Inc. official (March 19, 1992).

shipment records were made⁴, other than the November and December, 1991, records, the letter does not establish that a request for the November and December records was in fact made. It is not disputed that Respondent has supplied waste shipment records for February and March, 1992. Respondent maintains that these were the only records requested by EPA.

It is clear that summary judgment cannot be granted to either Complainant or Respondent. The complaint alleges that Respondent failed or refused to furnish waste shipment records for November and December, 1991, upon request. Respondent denies that such a request was made. In this case, it is not a "mere" denial, but one given some credence by the undisputed fact that respondent did furnish waste shipment records for later dates. In deciding summary judgment motions, the entire record must be viewed "in the light most hospitable to the party opposing summary judgment, indulging all reasonable inferences in that party's favor."⁵ As the parties are aware, summary judgment lies when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A "genuine" issue "exists if there is 'sufficient evidence supporting the claimed factual dispute' to require a choice between 'the parties' differing

⁴ October 17, 1991; January 15, 1992; and April 9, 1992. See Complainant's pretrial exchange exhibits 1, 2, and 4.

⁵ Griggs-Ryan v. Smith, 904 F.2d 111, 115 (1st Cir. 1990) (citing Brennan v. Hendrigan, 888 F.2d 189, 191 (1st Cir. 1989); Mack v. Great Atlantic and Pacific Tea Co., 871 F.2d 179, 181 (1st Cir. 1989)).

versions of the truth at trial.'"⁶ While evidence which is "merely colorable, or is not significantly probative" will not preclude summary judgment,⁷ here, it is not possible for respondent to "set forth specific facts showing there is a genuine issue for trial"⁸ because of the specific dispute in question. Complainant asserts that a request was made, based upon an affidavit from the official who says he made the request, and a letter which does not specifically request the records at issue here. Respondent denies that the request was made. In this case, it would be difficult to furnish "specific facts" or "hard evidence"⁹ that the request was not made. In order to be scrupulously fair, and "indulging all reasonable inferences"¹⁰ in Respondent's favor, it will be held that Respondent's case survives Complainant's summary judgment challenge.

Evaluating next Respondent's summary judgment motion, Complainant's evidence must also be construed "in the light most hospitable" to Complainant. Here, an affidavit from the federal official who conducted the inspection of Respondent's premises and says he requested the records is sufficient to create a genuine issue as to whether an oral request was made.

⁶ Id.

⁷ Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250 (1986).

⁸ Fed. R. Civ. P. 56(e).

⁹ Griggs-Ryan, 904 F. 2d at 115.

¹⁰ Id.

Accordingly, the factual dispute in this case must be tried, unless the parties can agree to settle.

It is clear, too, that Respondent's Motion to Dismiss must be denied. The Consolidated Rules of Practice, 40 CFR Part 22, contain no specific standard by which to judge a motion to dismiss. When the Consolidated Rules are silent, however, guidance may be obtained from other statements of the law, such as the Federal Rules of Civil Procedure (FRCP).¹¹ With regard to FRCP 12(b)(6) motions to dismiss for failure to state a claim upon which relief can be granted, the Supreme Court has stated that "[i]t is axiomatic that a complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'"¹² In addition, for purposes of deciding motions to dismiss in civil actions, the allegations of the complaint are to be taken as true.¹³ In the instant case, the allegations of the complaint, if taken as true, do state a cause of action and establish a prima facie case for a violation of 40 CFR § 61.154(i) by Respondent.

In the event of a trial on this issue, some limited

¹¹ See In the Matter of Chautauqua Hardware Corporation, EPCRA Appeal No. 91-1, Order on Interlocutory Review (June 24, 1991), at 10 n. 10.

¹² McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232, 246 (1980) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

¹³ United States v. Gaubert, 499 U.S. 315, 327 (1991); Hughes v. Rowe, 449 U.S. 5, 9 (1980); Jenkins v. McKeithen, 395 U.S. 411, 421-22 (1969).

discovery may have to be granted, since the dispute is whether an oral request was made for the November and December, 1991, reports¹⁴ and since credibility determinations will have to be made. A ruling on Respondent's motion for limited discovery will be deferred pending continued settlement efforts, which are encouraged by the attached Order.

Accordingly, both motions for summary judgment ("accelerated" decision), as well as Respondent's Motion to Dismiss will be denied.

ORDER

1. Complainant's motion for "accelerated" decision is denied.
2. Respondent's motion for "accelerated" decision is denied.
3. Respondent's motion to dismiss is denied.
4. The parties shall resume efforts to settle this matter, and shall report upon status during the week ending **October 21, 1994.**

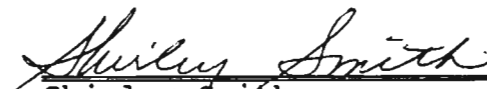

J. F. Greene
Administrative Law Judge

Dated: September 22, 1994
Washington, D.C.

¹⁴ No written request specifically for November and December, 1991, waste shipment records appears to have been made to Respondent. Complainant correctly points out that requests for records pursuant to 40 CFR §61.154(i) are not required to be made in writing. However, the sufficiency of such requests is a different matter from whether an oral request can be proven in the face of a dispute.

CERTIFICATE OF SERVICE

I hereby certify that the original of this Order was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on September 23, 1994.



Shirley Smith
Legal Staff Assistant
for Judge J. F. Greene

NAME OF RESPONDENT: S & S Landfill, Inc.
DOCKET NUMBER: CAA-III-002

Ms. Lydia Guy
Regional Hearing Clerk
Region III - EPA
841 Chestnut Building
Philadelphia, PA 19107

Charles McPhedran, Esq.
Office of Regional Counsel
Region III - EPA
841 Chestnut Building
Philadelphia, PA 19107

Alfred L. Schubkegel, Jr.
S & S Grading, Inc.
P. O. Box 368
Route 309 North
Drums, PA 18222