



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY



REGION 4 Atlanta, Georgia

IN THE MATTER OF: )
PAUL SMITH )
RESPONDENTS ) DOCKET NO. 404-96-101

ORDER DENYING COMPLAINANT'S MOTION FOR SANCTIONS

This is a proceeding for Class I administrative penalties brought by the Director of the Water Management Division of the United States Environmental Protection Agency, Region IV ("Complainant") against Paul Smith ("Respondent") for alleged unlawful discharges of fill material into navigable waters in violation of Section 301(a) of the Clean Water Act ("Act"), 33 U.S.C. § 1311(a) without authorization by an Army Corps of Engineers ("COE") permit as required by Section 404 of the Act, 33 U.S.C. § 1344.

The rules applicable to this proceeding are the proposed "Consolidated Rules of Practice Governing the Administrative Assessment of Class I Civil Penalties Under the Clean Water Act, 56 Fed. Reg. 29,996 (July 1, 1991) ("Part 28").

On July 8, 1996, the undersigned issued a Report of Prehearing Conference in which the parties were ordered to provide responses to information requests within 30 days of receipt. The Order for the exchange of prehearing information had also contained a denial of an earlier motion filed by Complainant for entry of default as to liability or summary determination of liability. That motion for summary determination rested solely on what Complainant considered to be an inadequate response to the Administrative Complaint. In the July 8, 1997, Report of Prehearing Conference, it was indicated

that Respondent would not be held in default and the exchange of prehearing information was scheduled. Although Complainant punctually and diligently complied with the prehearing exchange schedule, Respondent failed to respond to Complainant's request for information on or before the August 12, 1996, deadline. This resulted in the Complainant filing the Motion for Sanctions on August 19, 1996, authorized by § 28.24(e) of the Non-APA rules, which is now before this tribunal. This subsection provides sanctions for failure to comply with the requirements of § 28.24 of the rules. Based upon Respondent's failure to timely provide any and all of the information requested, Complainant seeks an order prohibiting Respondent from presenting witnesses [28.24(e)(i)], presenting documents [28.4(e)(ii)], and presenting evidence of economic benefit or avoided cost [28.24(e)(iv)]. On August 23, 1997, only four days after filing the Motion for Sanctions, and prior to there being a ruling on that motion, Complainant filed a Motion for Summary Determination. Due to the severe impact of imposing sanctions, by Order dated September 30, 1996, Respondent was provided opportunity to show cause why sanctions should not be imposed. Attached to Respondent's October 11, 1996, response to the Order to Show Cause, were the documents responding to the Complainant's Information Request that were due two months earlier. Respondent argued that sanctions were not warranted because 1) information had already been submitted to Complainant in response to other pleadings, and 2) terminal illness, death and health problems of the Respondent and Respondent's counsel's family had substantially hindered the complete preparation and response in this matter. In addition to filing the response late, and serving it improperly<sup>(1)</sup>, Respondent also incorrectly alleged that Complainant had never responded to his request for information either, an allegation which Respondent vehemently denied as a "blatant falsehood" (See "Complainant's Reply to Respondent's Response to the Order to Show Cause"). Although the Motion for Sanctions is ripe for determination, a decision on the Motion for Summary Determination would be premature, as a ruling on what can be admitted into evidence, and/or made part of the administrative record is a prerequisite to granting or denying summary determination as to liability.

#### The Motion for Sanctions

"The purpose of the prehearing exchange is to facilitate the administration of justice at the hearing by avoiding the possibility of surprise documentary evidence of testimony", In the matter of New London Oil Company, Inc., Docket No. III-90-025-DS, Order on Motion for Sanctions.

In reviewing the documents submitted by Respondent, it appears that only two were not previously part of the Administrative Record, either through the Complainant's initial

filing or as part of the Complainant's own Response to the Respondent's Information Request. Respondent should not be sanctioned from using that which was before the Complainant for some time, as it would not constitute surprise documentary evidence of testimony. Therefore, only the newly submitted evidence should be addressed. The first such "new" exhibit submitted as part of Respondent's late response, is that labeled Exhibit "G", an affidavit of a bulldozer operator, Charles Edwards.<sup>(2)</sup> The second such document is Exhibit "H" to the Response, which contains a deed not included with those submitted by Complainant as exhibits 16 and 17 to the Motion for Summary Determination. Therefore, any sanction imposed would be limited to these two documents.

Section 28.24(c)(2) of the Non-APA Rules regarding the timing of the information exchange under Clean Water Act cases, states that "...the Presiding Officer may, for good cause shown, extend the deadline for the parties to provide information as required by paragraph (b) of this section for a period not to exceed thirty days. The Presiding Officer may grant, in sequence, subsequent extensions of up to thirty days each upon an individual showing of good cause for each extension." Particularly helpful, is the language contained at the preamble to this section that "[G]ood cause for delaying the exchange includes the illness of a participant". Had Respondent moved for such an extension based upon his poor health, an extension would most certainly have been granted.

Since grounds existed for submitting the prehearing information after the due date, had Respondent so requested, to prohibit the use of that information would only serve to punish Respondent for failing to move for an extension, while hindering the finding of facts in dispute. As long as Complainant will not be surprised at any hearing held as a result of this decision, then justice in this matter would be best served by denying the motion.<sup>(3)</sup>

Based upon the reasons set forth above, Complainant's Motion for Sanctions is hereby **DENIED**.

Date: \_\_\_\_\_  
Susan B. Schub \_\_\_\_\_ Presiding Officer

Since the issue of surprise is tantamount to determining whether or not to impose sanctions, it is important to note that introduction of the material subsequent to the filing by Complainant of the Motion for Summary Determination, would indeed prejudice the outcome of that decision. Complainant should in no way be prejudiced.

<sup>1</sup> Service was only completed upon the Regional Hearing Clerk, who then provided a copy to the undersigned, while presumably delivering a copy to Complainant as well.

<sup>2</sup> Notwithstanding the fact that Respondent had made earlier reference to the

existence of a dozer operator whose first name was Charles (see "Answer to Exhibit 'B'", which is part of Exhibit 7 of Complainant's August 23, 1996, Motion for Summary Determination on the Issue of Liability), such fragmented information is certainly not sufficient notice of the witness that Respondent intended to call.

<sup>3</sup> By cover letter to this Order, Complainant is being provided the opportunity to address in what way, if any, the documents now made part of the record as a result of this decision impact upon summary determination of liability.

*Last Updated: August 1, 2000*