

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of)
)
C.L. "Butch" Otter & Charles Robnett,) Docket No. CWA-10-99-0202
)
Respondents)

ORDER DENYING COMPLAINANT'S
MOTION FOR ACCELERATED DECISION

The U.S. Environmental Protection Agency ("EPA") has filed a motion for accelerated decision, otherwise commonly referred to as a motion for summary judgment. 40 C.F.R. 22.20(a). EPA seeks judgment on the liability issue only, and not on the proposed \$80,000 civil penalty. Respondents C.L. "Butch" Otter and Charles Robnett oppose this motion. Because material issues of fact exist in this case, EPA's motion for accelerated decision is *denied*.

The question here is whether respondents violated Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), by discharging dredged and/or fill material into navigable waters without authorization by a U.S. Army Corps of Engineers ("COE" or "Corps") permit, as required by Section 404 of the Act. 33 U.S.C. § 1344. In arguing that this question is to be answered in the affirmative, EPA substantially relies upon the Declaration of Greg Martinez, an Environmental Resource Specialist with the Corps of Engineers. While the Martinez declaration is generally supportive of EPA's position, it nonetheless lacks the kind of detail, particularly with respect to his wetlands delineation, necessary to show that the respondents can be found in violation of the Clean Water Act without affording them a hearing. Indeed, as the record now stands, a hearing on liability is necessary for the purpose of determining what exactly happened when respondents excavated a pond and whether their excavation activities resulted into an unlawful discharge into the waters of the United States. Accordingly, a hearing will be held to develop a factual record for purposes of determining liability and, if necessary, the appropriate civil penalty.

Finally, EPA moves to dismiss what it characterizes as respondents' counterclaims against the government. In that regard, EPA argues that respondents cannot claim in this proceeding that they suffered an economic detriment as the result of actions taken by the COE or that the assessment of a civil penalty would constitute a "taking" by the government. EPA states that this is the wrong forum for respondents to pursue these claims. Despite EPA's characterizations, it is unclear whether respondents have actually raised these matters as counterclaims. Accordingly, EPA's motion to dismiss is premature. In that regard, Otter and Robnett respond that these defenses are raised for the purpose of disputing the penalty amount proposed by EPA. Whether respondents are correct in arguing that these defenses are relevant

to the penalty issue remains to be determined. EPA may renew its objection to these defenses, in the context of relevance, when testimony is received at the hearing.

Carl C. Charneski
Administrative Law Judge

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