UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
DAVID EBY	)	Docket No. CWA-10-2000-0091
Respondent	)	
	)	

ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION FOR ACCELERATED DECISION

AND

SETTING CASE FOR HEARING

Introduction

On June 5, 2000, the Environmental Protection Agency Region 10 (Complainant) filed a complaint in this matter alleging that David Eby (Respondent) discharged pollutants into a water of the United States without a Clean Water Act ("CWA") section 404 permit. Respondent filed an Answer on July 10, 2000 and an order establishing prehearing procedures was issued August 7, 2000. The Complainant filed his prehearing exchange on September 18, 2000 and filed a motion for default on October 23, 2000 based on Respondent's failure to file a prehearing exchange. Based on Respondent's good cause objection and his prehearing exchanged filed October 30, 2000, the motion was denied by order issued November 15, 2000.

Pursuant to 40 C.F.R. § 22.16(a) and 22.20(a), on February 2, 2001, Complainant filed a motion for accelerated decision on liability and on affirmative defenses in this proceeding. Respondent filed a motion of an extension of time to respond on February 20, which was granted. Respondent's objection to the motion was filed on March 29 as ordered. Complainant argues that there are no issues of material fact regarding whether Respondent discharged dredged or fill material without a CWA section 404 permit. For the reasons set forth below, Complainant's motion is *granted* in part and *denied* in part.

Background

In 1997, Respondent began construction on a restaurant and lodge on the banks of the Henry's Fork of the Snake River in central Idaho. He began building part of the lodge in wetlands before applying for a section 404 permit. The Army Corps of Engineers (Corps) discovered Respondent working in the wetlands and allowed him to apply for an after the fact ("ATF") permit, which was issued March 1999. Complaint ¶6; Answer ¶6. The permit allowed him to keep the work he had begun and to fill in an additional .04 acres of wetlands to complete the project. The permit also required him to install silt curtains (while he finished the construction work) in order to prevent runoff. Corps of Engineers Permit. Complaint, Complainant's Exhibit 17.

At issue is work done on the construction cite *after* the issuance of the permit. The Corps inspected the site on April 29, 1999 and discovered that Respondent had constructed a parking lot and filled in additional wetlands behind his lodge. Brochu Declaration & Attached Inspection Report. This work *was not* included in the 1999 permit nor was an additional permit issued for this work. Additionally, Complainant alleges that the silt curtains were not in place at the time of the inspection. However, Respondent argues that the curtains were in place "at all times pertinent hereto" and that he was authorized to place the additional fill in the wetland. Respondent's Objection ¶2.

Discussion

Liability

The Presiding Officer may render an accelerated decision in favor of a party if there exists no genuine issue of material fact and a party is entitled to judgment as a matter of law. 40 C.F.R. § 22.20(a). The moving party bears the burden of showing that there is no material fact in dispute. In re City of Salisbury, MD, Docket No. CWA-III-219 (July 30, 1999). In establishing liability in this proceeding, Complainant must prove that Respondent is a person, who discharged pollutants, from a point source into the waters of the United States, without a permit. See Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 922 (5th Cir. 1983).

First, Respondent denies that he is a "person" within the meaning of the CWA. Answer ¶4. However, this argument is without merit as the CWA defines a "person" as "an individual, corporation, partnership, associate, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. § 1362(5). Secondly, while Respondent admits placing fill into the wetland pursuant to assurances from Corps' officials, he denies that a discharge occurred. Answer ¶12; Eby Declaration ¶12. Complainant submitted photographs of the site during a November 1999 inspection. These photographs show dirt in the wetlands next to and behind Respondent's lodge. Brochu Declaration Attachment 4; Attachment 1. Respondent has not submitted evidence which demonstrates how this is not a discharge. Third, Complainant must prove that Respondent discharged from a point source. Complainant alleges that Respondent used some form of heavy equipment as that is the only reasonable way to bring the material to the site and spread it on the property. While Respondent admits using equipment to "perform some of the excavation, " he argues that Complainant has not proven that it was used to fill in the wetlands. Answer ¶10. Given Respondent's statement, the presence of a back hoe/front end loader on the property at the time of the inspection, and the tire tracks through the fill material, it is reasonable to infer that the equipment was used to fill the wetlands.

Respondent also denies that he filled in "wetlands." Answer ¶5. The regulations implementing the CWA define "waters of the United States" to include " 'wetlands' adjacent to waters (other than waters that are themselves wetlands)." 40 C.F.R. § 122.2(g). Both the Corps and Respondent's consultants (Biota Research & Consulting, Inc.) have identified the area next to Respondent's lodge as wetlands. Brochu Declaration ¶6 and Brochu Declaration, Attachment 1, pg. 6 (ATF Permit Application). Respondent has not shown that the area in question is outside the jurisdiction of the CWA. Therefore, the work and the area in question are subject to a section 404 permit.

Additionally, there is no dispute regarding the issuance of a section 404 permit. When Respondent applied for the ATF permit in October 1997, he applied for the dimensions of the existing lodge, but had plans to build a parking lot. Eby Declaration ¶9. Respondent states that Ray Kagel of the Corps was aware of his plans and told him seek a modification later rather than include the entire project in the initial application. Eby Declaration ¶8. However, during the April 1999 inspection, Brochu found that Eby had placed fill *in excess of* the ATF permit.

Similarly, on June 8 and November 2, 1999, Brochu's inspections revealed fill in wetlands *beyond* the scope of the ATF permit. Brochu Declaration ¶¶ 8, 9. During the June inspection, Respondent asked Brochu about the modification and was told to correct the problems with the current permit before seeking a modification. There is no evidence that the filled wetlands discovered during the inspections were covered under the original permit, nor has there been any showing that Respondent applied for a modification of the original permit.

Respondent was aware that he needed a permit to complete his plans and did so without authorization. Respondent argues that the fill was authorized "under color of an appropriate permit." Respondent's Objection ¶2. The CWA is clear that "the discharge of any pollutant by any person shall be unlawful" unless in compliance with the permitting sections of the act. See 33 U.S.C. § 1311(a). Respondent does not explain, nor is there any support in the statute or the regulations, showing how a discharge can be authorized without a section 404 permit. Respondent contends that there are a number of witnesses to his conversation with Ray Kagel regarding the plans and the alleged statement by Kagel that modification of the ATF permit could be requested by Respondent later. Even viewing this evidence in the light most favorable to the non-moving party (Respondent), it does not change the fact that Respondent's permit does not cover the planned area and that he continued to work on the property after he was told by Brochu, Kagel's successor, that he could not modify the permit. If a pending application is not enough to relieve a party of liability, then statements made by the Corps on how to proceed, in the absence of an application, cannot excuse the violation as well. See Weber v. Trinity Meadows Raceway, Inc., 42 ERC 2063, 2072 (ND. Tex. 1996). Since Respondent filled wetlands without a section 404 permit, there are no questions of material fact regarding the violation and an accelerated decision on liability in favor of the Complainant is warranted.

Complainant also alleges that Respondent violated the conditions of the 1999 ATF permit. The ATF permit required Respondent to install silt curtains between the construction areas and waterways until the construction was compete and the soil stabilized. Corps' Permit pg. 2, Complainant's Motion, Complainant's Exhibit 17. Brochu's inspection report states that there were no curtains in place during the April 29, 1999 inspection. Brochu Declaration ¶7 and Attachment 2. In Respondent's Objection ¶2 and Eby's Declaration ¶2, Respondent states that silt curtains were in place "at all times pertinent hereto." Upon review, there appears to be a question as to whether these curtains were in place during construction and at the time of the inspection. Therefore, it is not appropriate at this time to grant a motion for accelerated decision on this issue. Therefore, the motion is denied as to this issue. This denial is without prejudice to a final determination of this issue in the initial decision.

Respondent's Defenses

In his defense, Respondent raises the defenses of waiver and estoppel.[1] For the reasons discussed below, these defenses are rejected. Respondent argues that the agreement to perform mitigation under the terms of the ATF permit settles the claim. Answer ¶23; Respondent's Objection ¶4. However, Respondent mistakes the purpose of the mitigation. Under the Corps' regulations, the Corps can either seek enforcement action or require a violator to seek an ATF permit. 33 C.F.R. § 326.2 However, an ATF will not be issued until any required remediation is completed. 33 C.F.R. § 326.3(e). Respondent's permit was issued *after* the Corps discovered he was working in the wetlands on his property. Complainant Motion 1. The ATF resolved the violation. However, this case centers on Respondent's failure to limit the fill areas to those

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[1]In their Answer, Respondent also raised the defense of failure to state a claim. However, in his objection to the motion, Respondent concedes that Complainant has alleged a cause of action for which relief may be granted.

designated in the ATF, and not the mitigation required in the permit. This is a separate cause of action and is not waived by agreements made during the ATF application process.

Secondly, Respondent has not sufficiently addressed the defense of estoppel. An essential element of estoppel is affirmative government misconduct. United States v. Harvey, 661 F. 2d 767, 773 (9th Cir. 1981), cert. denied 459 U.S. 833 (1982). Even if Kagel told Respondent that he could seek a modification later, Respondent has not shown that he (Respondent) was also told he could fill in the additional wetlands not covered by the ATF without a permit. Thus, no affirmative misconduct has been demonstrated. Accordingly, Respondent's defense of estoppel is rejected.

Conclusion

The hearing in this matter is scheduled for **October 24, 2001**, in Idaho Fall, Idaho commencing at 9:00 a.m. The hearing is estimated to last for 2 days.

The Regional Hearing Clerk is directed to obtain a courtroom and court reporter and to inform the parties and the undersigned of these arrangements.

There will be a telephone conference call approximately two weeks before the hearing to discuss hearing procedures.

Complainant, after consulting with Respondent, shall file a status report on August 15, 2001 and September 28, 2001

Dated: June 29, 2001

Charles E. Bullock
Administrative Law Judge