11/21/95

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
U S. COAST GUARD	)	[RCRA] Docket No. 1094-07-05-3008(a)
Kodiak, Alaska	)	
	)	
Respondent	)	

ORDER DENYING MOTION FOR PARTIAL ACCELERATED DECISION AND GRANTING MOTIONS FOR OFFICIAL NOTICE

I.

For the reasons stated in its motion served September 15, 1995,[1] respondent seeks, pursuant to 40 C.F.R. § 22.20, an accelerated decision concerning liability pertaining to Count I of the complaint. Complainant filed its response in opposition to the motions on October 5. The arguments of the parties shall be repeated only to the extent deemed necessary by the undersigned Administrative Law Judge (ALJ).

The pertinent section of the Consolidated Rules of Practice, 40 C.F.R. § 22.20(a), states that the ALJ may grant an accelerated decision at any time:

> without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding (emphasis added).

[1] Unless otherwise indicated, all dates are for the year 1995.

He may look to the Federal Rules of Civil Procedure (Fed. R. Civ. P.) for guidance in interpreting the Rules. Here, the equivalent of an accelerated decision is Fed. R. Civ. P. 56 addressing summary judgment, which permits a final decision to be rendered without the time or expense of an evidentiary hearing, provided there are no genuine issues of material fact in controversy. Material facts are those which establish or refute an essential defense asserted by a party.[2] Although reasonable inferences may be drawn from the evidence, they must be viewed in the light most favorable to the party opposing the motion.[3]

There is no denying the advantages of an accelerated decision. Without attempting to be exhaustive, it eliminates frivolous or baseless claims and expedites the proceeding. Notwithstanding these vaunted virtues, however, an accelerated decision is a harsh resolution to a controversy and it must be approached with circumspection. Once it is determined that there is an issue of material fact the inquiry ends. Homan Mfg. Co. v. Long, 242 F.2d 645, 656 (7th Cir. 1957), rev'd on other grounds, 264 F.2d 158 (7th Cir. 1959). The ALJ is not empowered to resolve that issue or to weigh the evidence supporting each argument. Cox v. American Fidelity & Casualty Co., 249 F.2d 616, 618 (9th Cir. 1957). The response must set forth specific facts showing that there is a genuine issue for trial. United States v. Conservation Chemical

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[2] Words and Phrases, "Material Facts."

[3] United States v. Diebold, 369 U.S. 654-655 (1962). See also, 6 Moore's Federal Practice ¶ 56.15 [1.-00].

Company of Illinois, 733 F. Supp. 1215, 1218 (N.D. Ind. 1989). Further, a litigant opposing an accelerated decision or summary judgment must bring to the court's attention some affirmative indication that his version of the facts is not mere speculation. Connecticut Fund for the Environment v. Job Plating Company, Inc., 623 F. Supp. 207, 218, n.12 (D. Conn. 1985). The burden rests with respondent to demonstrate that there are no genuine issues of material fact concerning Count I. It is not necessary to reach and decide every single issue raised in the pleadings. Only the question of whether there is a genuine issue of material fact need be met here. Anything else beyond this, while perhaps interesting, is surplusage.

With the above backdrop, the ALJ turns to the motion. There is a genuine issue of material fact concerning Count I which precludes the granting of an accelerated decision. Starting with respondent's answer, it is peppered with the phrase, "as of May 25, 1993 [the date a comprehensive ground water monitoring evaluation was conducted at the facility] there was insufficient evidence of the existence under the Laundry Site of an 'uppermost aquifier . . . .'" (Answer at paras. 19-23.) What a party admits in his answer is binding upon him. Smith v. Chapman, 436 F. Supp. 58, 62 (W.D. Tex. 1977), aff'd, 614 F.2d 968 (5th Cir. 1980). Again, in its motion, respondent concedes a factual controversy when it states in pertinent part, "this motion will not resolve the factual issue of whether there is an 'uppermost aquifier' under the laundry site, ..." (Mot. at 3.) Complainant is correct in its view

that whether or not 40 C.F.R. § 265.90(a) applies to non-aquifer zones is a factual question concerning the existence of an aquifer beneath the laundry unit which is the subject of the complaint. The ALJ concurs in complainant's assessment that the legal issue posed by the motion cannot be fairly or adequately resolved without factual findings. The respondent's motion is premature. It is more appropriate to raise the legal issue on brief, following an evidentiary hearing during which all pertinent factual questions will be addressed. Or in complainant's words, "the determination of where to monitor groundwater is necessarily a factual issue, which must be determined on a case-by-case basis." The ALJ concurs.

The legal issue raised in the motion is significant and must be approached with caution. In this regard, it has been held that a court should not make the case hard by deciding a difficult or doubtful question of law that might not survive factual determination. Significantly, the court held further that even in a given case where it is technically proper, "sound judicial policy and the proper exercise of judicial discretion" may permit the denial of the motion and permit the case to be fully developed at the hearing. Roberts v. Browning, 610 F.2d 528, 536 (8th Cir. 1979). This is a stellar example of such a situation. The ALJ concludes that an evidentiary hearing will be necessary to resolve the troubling questions of fact and law posed in this motion.

II

Also, on September 15, respondent served a motion, pursuant to 40 C.F.R. § 22.22(f), requesting that official notice be taken of the following documents attached to the motion:

A. Consent Order and Federal Facility Compliance Agreement, Docket No. 1089-05-25-3008(h), pp. 7-8 and 33. (Complainant's Ex. 16).

B. U.S. Coast Guard, First Annual Groundwater Monitoring Report (Site 3 Coast Guard Laundry), March 1, 1994, p. 1. (Complainant's Ex. 58).

C. U.S. Coast Guard request for waiver pursuant to 40 C.F.R. § 265.90(c), May 29, 1991 (Complainant's Ex. 19).

D. EPA denial of Coast Guard waiver request. July 30, 1991 (Complainant's Ex. 21).

E. EPA OSWER 9481.06(84), agency internal guidance.

F. EPA OSWER 9481.02(85), agency internal guidance.

G. EPA OSWER 9950.1, Sept. 1986, pp. 34-36, agency internal guidance.

In its response, filed October 6, complainant does not oppose respondent's motion, provided that its therein requested motion be granted to take official notice of the following documents attached to the pleading.

A. Preamble to regulations for standards for owners, operators of hazardous waste treatment, storage, and disposal facilities. 45 F.R. 33153 (May 19, 1980).

B. Preamble to regulations for hazardous waste management systems and permitting requirements for land disposal facilities. 45 F.R. 32274 (July 26, 1982).

IT IS ORDERED that:

1. Respondent's motion for an accelerated decision be **DENIED**.

2. Respondent's motion for official notice of documents "A" through "G" above, attached to its pleading, be **GRANTED**.

3. Complainant's motion for official notice of documents "A" and "B" above, attached to its pleading, be **GRANTED**.

IT IS ORDERED FURTHER that, within **10** days of the service date of these orders, complainant get in touch with the staff of the ALJ in order to arrange a telephone prehearing conference with the parties for the purpose of scheduling a hearing date in this matter.

Frank W. Vanderheyden
Administrative Law Judge

Dated: November 21, 1995

IN THE MATTER OF U.S. COAST GUARD, KODIAK, ALASKA, Respondent,
RCRA Docket No. 1094-07-05-3008(a)

Certificate of Service

I certify that the foregoing Order, dated 11/21/95, was sent this day in the following manner to the below addressees.

Original by Regular Mail to:

Ms. Mary A. Shilcutt
Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region 10
1200 Sixth Avenue
Seattle, WA 98101

Copy by Regular Mail to:

Attorney for Complainant:

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Alameda, CA 94501-5100

Marion Walzel
Legal Staff Assistant

Dated: Nov. 21, 1995