UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)
	)
THE COUNTY OF HURON, THE HURON COUNTY DRAIN COMMISSION, NICOL & SONS, INC.,	) DOCKET NO. 5-CWA-97-010
	)
RESPONDENTS	)

ORDER DENYING COMPLAINANT'S SECOND MOTION TO POSTPONE HEARING

ORDER DENYING RESPONDENTS HURON COUNTY DRAIN COMMISSION'S AND NICOL & SONS, INC.'S MOTION FOR ACCELERATED DECISION TO DISMISS COMPLAINT

Motion to Postpone Hearing

In an Order entered on May 28, 1998, the undersigned granted the parties' joint motion to postpone the hearing in the above- cited matter. On August 14, 1998, the Complainant, the Environmental Protection Agency ("EPA") filed a Second Motion to Postpone Hearing. The motion was received by the Office of Administrative Law Judges on August 25, 1998. In support of this motion, the EPA states that Mr. Bill Leiteritz, a witness for the EPA, will be unavailable for the hearing as scheduled for October 6 to 9, 1998, due to a previously planned vacation. In addition, previous commitments by the EPA and the Respondents preclude rescheduling until November. The EPA moves for postponement of the hearing until November 10, 1998.(1) Counsel for the EPA states that Respondents Huron County Drain Commission and Nicol & Sons, Inc. do not object to this motion.(2)

The EPA's motion for postponement of the hearing is denied for lack of good cause.(3) This hearing has been scheduled for several months and the original hearing was rescheduled. The stated reason for the motion does not constitute sufficient cause for postponement, particularly at this late date. See 40 C.F.R. § 22.21(c).

Motion for Accelerated Decision

On August 21, 1998, Respondents Huron County Drain Commission and Nicol & Sons, Inc. submitted a motion for accelerated decision to dismiss the claim.(4) The motion is opposed by the EPA.

Standard For Accelerated Decision

The Respondents have filed a motion for accelerated decision pursuant to 40 C.F.R. § 22.20, the regulation governing accelerated decisions. Section 22.20(a) provides, in pertinent part, as follows:

> The Presiding Officer,[(5)] upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the complainant or the respondent as to all or any part of the proceeding, 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)(6)

Motions for accelerated decision under 40 C.F.R. § 22.20(a) are akin to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP").(7) Rule 56(c) of the FRCP provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law" (emphasis added). Thus, by analogy, Rule 56 provides guidance for adjudicating motions for accelerated decision. See In the Matter of CWM Chemical Service, Docket No. TSCA-PCB-91-0213, 1995 TSCA Lexis 13, TSCA Appeal 93-1 (EAB, May 15, 1995).

Therefore, I look to federal court decisions construing Rule 56 of the FRCP for guidance in applying 40 C.F.R. § 22.20(a) to the adjudication of motions for accelerated decisions. In interpreting Rule 56(c), the United States Supreme Court has held that the party moving for summary judgment has the burden of showing the absence of a genuine issue as to any material fact and that the evidentiary material proffered by the moving party in support of its motion must be viewed in the light most favorable to the opposing party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1985); Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970). Further, the judge must draw all reasonable inferences from the evidentiary material in favor of the party opposing the motion for summary judgment. See Anderson, supra, at 255; Adickes, supra, at 158-159; see also Cone v. Longmont United Hospital Assoc., 14 F.3d 526, 528 (10th Cir. 1994).

In assessing materiality for summary judgment purposes, the Court has found that a factual dispute is material where, under the governing law, it might affect the outcome of the proceeding. Anderson, supra at 248; Adickes, supra, at 158-159. The substantive law identifies which facts are material. Id.

The Court has found that a factual dispute is genuine if the evidence is such that a reasonable finder of fact could return a verdict in favor of the nonmoving party. Id. Further, in Anderson, the Court ruled that in determining whether a genuine issue of fact exists, the judge must decide whether a finder of fact could reasonably find for the nonmoving party under the evidentiary standards in a particular proceeding. There must be an incorporation of the evidentiary standard in the summary judgment determination. Anderson, supra, at 252. In other words, when determining whether or not there is a genuine factual dispute, the judge must make such inquiry within the context of the applicable evidentiary standard of proof for that proceeding.

Once the party moving for summary judgment meets its burden of showing the absence of genuine issues of material fact, Rule 56(e) then requires the opposing party to offer any countering evidentiary material or to file a Rule 56(f) affidavit.(8) Rule 56(e) states: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of

his pleading, but must set forth specific facts showing there is a genuine issue for trial." However, if the moving party fails to carry its burden to show that it is entitled to summary judgment under established principles, then no defense is required. Adickes, supra, at 156.

The type of evidentiary material that a moving party must present to properly support a motion for summary judgment or that an opposing party must proffer to defeat a properly supported motion for summary judgment has been examined by the Court. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986); see also Anderson, supra; Adickes, supra. The Court points out that Rule 56(c) itself provides that the decision on a motion for summary judgment must be based on the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, submitted in support or opposition to the motion. With regard to the sufficiency of the evidentiary material needed to defeat a properly supported motion for summary judgment, the Court has found that the nonmoving party must present "affirmative evidence" and that it cannot defeat the motion without offering "any significant probative evidence tending to support" its pleadings. Anderson, supra, at 256 (quoting First National Bank of Arizona v. Cities Service Company, 391 U.S. 253, 290 (1968)).

More specifically, the Court has ruled that the mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment as Rule 56(e) requires the opposing party to go beyond the pleadings. Celotex, supra at 322; Adickes, supra. The Court has noted, however, that there is no requirement that the moving party support its motion with affidavits negating the opposing party's claim or that the opposing party produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Celotex, supra, at 323-324. The parties may move for summary judgment or successfully defeat summary judgment without supporting affidavits provided that other evidence referenced in Rule 56(c) adequately supports its position.

The regulation governing motions for accelerated decision under 40 C.F.R. § 22.20(a) does not define or provide examples to illustrate the meaning of the phrase "genuine issue of material fact," nor does it provide significant guidance as to the type of evidence needed to support or defeat a motion for accelerated decision. Section 22.20(a) states, in pertinent part, that the Presiding Officer may render an accelerated decision "without further hearing or upon any 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 an adjunct to this regulation, I note that under another governing regulation, a party's response to a written motion, which would include a motion for accelerated decision, "shall be accompanied by any affidavit, certificate, [or] other evidence" relied upon. 40 C.F.R. § 22.16(b).

Inasmuch as the inquiry of whether there is a genuine issue of material fact in the context of an accelerated decision is quite similar to that in the context of a summary judgment and in the absence of significant instruction from the regulation governing accelerated decisions, I believe that the standard for that inquiry as enunciated by the Court in Celotex, Anderson, and Adickes is applicable in the accelerated decision context.[(9)] Compare In the Matter of Mayaguez Regional Sewage Treatment Plant, NPDES Appeal No. 92-23, 4 EAD 772, 781 (EAB, Aug. 23, 1993) (wherein the Environmental Appeals Board ("EAB") adopted the standard for summary judgment articulated by the Court in Anderson to determine whether there is a genuine issue of material fact warranting an evidentiary hearing under 40 C.F.R. § 124.74 for the issuance of a permit under Section 301(h) of the Clean Water Act).

The evidentiary standard of proof in the matter before me, as in all other cases of administrative assessment of civil penalties governed by the Rules of Practice, is a "preponderance of the evidence." 40 C.F.R. § 22.24. Thus, by analogy, in determining whether or not there is a genuine factual dispute, I, as the judge and finder of fact, must consider whether I could reasonably find for the nonmoving party under the "preponderance of the evidence" standard.[(10)] In addressing the threshold question of the propriety of a motion for accelerated decision, my function is not to weigh the evidence and determine the truth of the matter but to

determine whether there is a genuine issue for an evidentiary hearing. See Anderson, supra, at 249.

Accordingly, by analogy, a party moving for accelerated decision must establish through the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, the absence of genuine issues of material fact and that it is entitled to judgment as a matter of law by the preponderance of the evidence. In this regard, the moving party must demonstrate, by a preponderance of the evidence, that no reasonable presiding officer could not find for the nonmoving party. On the other hand, a party opposing a properly supported motion for accelerated decision must demonstrate the existence of a genuine issue of material fact by proffering significant probative evidence from which a reasonable presiding officer could find in that party's favor by a preponderance of the evidence.

Discussion

The EPA filed the Complaint in this matter against the Respondents on July 18, 1997, under the authority of Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act, as amended, 33 U.S.C. § 1319(g). The Complaint alleges that the Respondents on or about May 8, 1996, discharged pollutants from a source point into navigable waters without a Permit for Dredge and Fill Material pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344, in violation of Section 301 of the Clean Water Act, 33 U.S.C. 1311. Specifically, the EPA alleges that the Respondents added dredged spoil from a backhoe into areas that were inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances did support, a prevalence of vegetation typically adapted for life in saturated soil conditions and which are adjacent to Lake Huron. The EPA proposes a civil administrative penalty of $125,000 for this alleged offense.

On August 21, 1998, the Respondents submitted a motion for accelerated decision to dismiss the complaint. The Respondents argue that the May 8, 1996, activity at issue was to maintain an established drain and thus this activity falls within one of the exemptions from the permit requirements pursuant to Section 404(f) of the Clean Water Act. In this regard, the Respondents note that Section 404(f) of the Clean Water Act specifically provides a limited exemption for the discharge of dredged or fill material "for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, **or the maintenance of drainage ditches**" (emphasis added). The Respondents argue that they are entitled to judgment as a matter of law.

In support of this argument, the Respondents submit the August 18, 1998, affidavit of Mr. Vernon L. Rounds, the Huron County Deputy Drain Commissioner. Respondents' Exhibit 1. In this affidavit, Mr. Rounds states that during the May 8, 1996, project to maintain the Stapleford County Drain, the contractor for the Drainage District deposited spoil within the granted 50 foot northern easement of the Stapleford Drain and that the spoils were placed on top of the spoils from the original drain project in 1914 and maintenance project in 1943. According to Mr. Rounds, the Drainage District conducted an engineering review, using the old grade of the ditch as a reference point for the ditch maintenance plans, the ditch was neither widened nor deepened, and the accumulated sediments on the bottom of the ditch were removed. In addition, the Respondents cite a Meeting Record dated June 17, 1996, which is listed as the Complainant's proposed Exhibit O, in support of its position that the May 8, 1996, project was for maintenance of an established drain. Respondents' Exhibit 3.

The EPA opposes the motion for accelerated decision to dismiss the complaint. The EPA maintains that there is a genuine issue of material fact and, therefore, the motion should be denied. Specifically, the EPA maintains that the factual allegation, as made in the Complaint, that the Respondents added dredged spoil from a backhoe into wetlands adjacent to Lake Huron is supported by the proposed testimony of its witnesses and Exhibits 1-4, 6, 7, 10, 11, 13-20, 22, and 23 listed in its prehearing exchange.

Further, the EPA argues that the affidavit of Mr. Rounds, dated August 18, 1998,

does not support the Respondents' motion. The EPA asserts that Mr. Rounds fails to state that on May 8, 1996, he was not at the Stapleford Drain to witness what Nicol & Sons, Inc. did at the drain and fails to state facts to demonstrate that the Respondents were only maintaining the Stapleford Drain. Specifically, the EPA maintains that Mr. Rounds fails to state the historic contours of the Stapleford Drain and the old spoil piles and what contours and spoil piles Nicol & Sons, Inc. left at the drain on May 8, 1996. Finally, the EPA asserts that the affidavit of Mr. Rounds contradicts his earlier statement on or about November 4, 1996, to an agent of the Bay City Times Newspaper.

The EPA has persuasively argued that the Respondents have failed to demonstrate that there is no genuine issue of material fact that on May 8, 1996, they discharged dredged or fill material onto historic discharges of dredged or fill material adjacent to the Stapleford Drain to maintain the drain which is an activity exempted from the requirements of the Clean Water Act pursuant to Section 404(f)(1)(C) of the Clean Water Act, and that they are entitled to judgment as a matter of law. This genuine issue of material fact raised by the EPA can be properly adjudicated only following a full evidentiary hearing. I emphasize that in making this threshold determination, I have not weighed the evidence and determined the truth of the matter but have simply determined that the EPA has raised a genuine issue of material fact for evidentiary hearing.

In view of the foregoing determination that the EPA has adequately raised a genuine issue of material fact and that the file before me does not establish that the Respondents are entitled to judgment as a matter of law, the Respondents' motion for accelerated decision to dismiss the complaint is denied. See Section 22.20(a) of the Rules of Practice, 40 C.F.R. § 22.20(a).

ORDERS

The Complainant's Second Motion to Postpone Hearing is **Denied**.

The Respondents' Motion for Accelerated Decision to Dismiss Claim is **Denied**.

The Hearing in this matter will be held beginning at 9:30 a.m. on Tuesday, **October 6, 1998**, in the Bay City area of Michigan, continuing if necessary on October 7 and 8, 1998.[(11)] The Regional

Hearing Clerk will make appropriate arrangements for a courtroom and retain a stenographic reporter. The parties will be notified of the exact location and of other procedures pertinent to the hearing when those arrangements are complete.

Original signed by undersigned

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Barbara A. Gunning
Administrative Law Judge

Dated: 9-11-98
Washington, DC

1. November 11, 1998, is a federal holiday.

2. Counsel for the EPA states that he was unable to contact counsel for Respondent County of Huron.

3. The hearing remains as scheduled for October 6, 1998. However, the location is changed to the Bay City, Midland, Saginaw area in Michigan in order to obtain adequate facilities.

4. Respondents Huron County Drain Commission and Nicol & Sons, Inc., who are represented by the same attorney, have filed jointly their prehearing exchange and this motion for accelerated decision. Respondent County of Huron has not responded to the motion for accelerated decision. Hereafter, the term Respondents refers to Respondents Huron County Drain Commission and Nicol & Sons, Inc.

5. The term "Presiding Officer" means the Administrative Law Judge designated by the Chief Administrative Law Judge to serve as Presiding Officer. 40 C.F.R. § 22.03(a).

6. 40 C.F.R. § 22.20(a) further provides: "the Presiding Officer, upon motion of the respondent, may at any time dismiss an action without further hearing or upon such limited evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant."

7. The Federal Rules of Civil Procedure are not binding on administrative agencies but many times these rules provide useful and instructive guidance in applying the Rules of Practice. See Oak Tree Farm Dairy, Inc. v. Block, 544 F. Supp. 1351, 1356 n. 3 (E.D.N.Y. 1982); In re Wego Chemical & Mineral Corporation, TSCA Appeal No. 92-4, 4 EAD 513 at 13 n. 10 (EAB, Feb. 24, 1993).

8. Rule 56(f) states:

> (f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

9. An accelerated decision, as a summary judgment, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Rule 56(c) FRCP; 40 C.F.R. 22.20(a).

10. Under the governing Rules of Practice, an Administrative Law Judge serves as the decisionmaker as well as the fact finder. See 40 C.F.R. §§ 22.04(c), 22.20, 22.26.

11. As previously noted in the Prehearing Order of September 12, 1997, and the Order Scheduling Hearing dated April 29, 1998, Sections 309(g)(4)(A) and (B) of the Clean Water Act provide that before issuing an order assessing a class II civil penalty, the Administrator shall provide public notice of and reasonable opportunity to comment on the proposed issuance of such order and that any person who comments on a proposed assessment of a class II penalty shall be given notice of any hearing and of the order assessing such penalty. On September 8, 1998, the EPA filed proof of the publication of the public notice of this action in the Huron Daily Tribune on September 15, 1997. The EPA also filed copies of four comments filed in response to this public notice. The persons who filed these comments are being advised of the hearing by the Office of the Administrative Law Judge. See Sections 309(g)(4)(A) and (B) of the Clean Water Act and Section 22.38 of the Supplemental Rules of Practice Governing the Administrative Assessment of Class II Penalties Under the Clean Water Act, 40 C.F.R. § 22.38.