

3/15/91

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
JAMES CUTHBERTSON, FLOYD) Docket No. RCRA-VI-832-H
RICHARDSON & POPILE, INC.,)
)
Respondents)

ORDER

For the reasons stated in its motion of January 10, 1991,¹ complainant seeks, pursuant to 40 C.F.R. § 22.20(a), hereinafter Rule, an accelerated decision in this matter on the question of liability. Respondents served their opposition to the motion on February 25, and by fax, dated March 11, complainant replied to respondent's opposition.

By way of introduction, it is rooted firmly in common sense that oral evidentiary hearings are to be used for the resolution issues of material facts. The Rule, in part, exemplifies this.² The concept of an accelerated decision is similar to that of summary judgment, and not every factual issue is a bar. The

¹ Unless otherwise indicated, all dates herein are for the year 1991.

² See generally, 3 Davis, Administrative Law Treatise, § 12.2 (2d ed. 1980).

existence of minor factual disputes would not preclude an accelerated decision. To have such an effect, the disputed issues must involve "material facts" or those which have legal probative force as to the controlling issue. Stated otherwise, a "material fact" is one that makes a difference in the litigation.³ Returning to the motion, administrative agencies are not bound by the standards of the Federal Rules of Civil Procedure (Fed. R. Civ. P.); they traditionally enjoy "wide latitude" in fashioning their own rules of procedure.⁴ Although such agencies are generally unrestricted by the technical or formal rules of procedure which govern trials before a federal court, the Fed. R. Civ. P. often guide decision making in the administrative context.

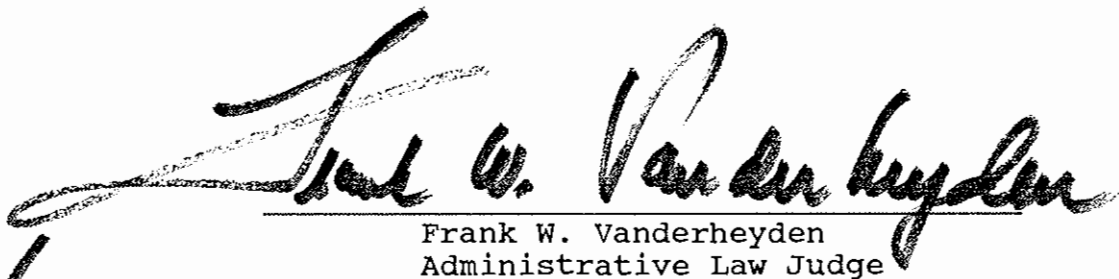
With the above backdrop, the Administrative Law Judge (ALJ) turns to opposition to complainant's motion. In support of the motion, complainant provided underlying documents. The opposition, however, submitted merely a memorandum alleging that there exist "genuine issues of material fact" stating that "[A]t the hearing on this matter respondent will offer proof" (at 6), or "[A]t the hearing of this matter, respondents will offer testimony" (at 8, 9). Promises will not suffice. An opposing party

³ Words and Phrases, "Material Fact."

⁴ See, e.g., In the Matter of Katzson Brothers, Inc., FIFRA Appeal No. 85-2 (Final Decision November 13, 1985); Oak Tree Farm Dairy, Inc. v. Block, 544 F. Supp. 1351, 1356 n.3 (E.D. N.Y. 1982); and Silverman v. Commodities Futures Trading Commission, 549 F.2d 28, 33 (7th Cir. 1977).

is not entitled to hold back evidence until trial.⁵ An adverse party must set forth specific facts showing that there is a genuine issue for trial.⁶

IT IS ORDERED, that within 10 days of the below service date, respondent shall come forward with specific facts in documentary form, including affidavits, to establish to the satisfaction of the ALJ that there exist genuine issues of material fact concerning liability in this matter.


Frank W. Vanderheyden
Administrative Law Judge

Dated: March 15, 1991

⁵ 6-Pt. 2, Moore's Federal Practice, ¶ 56.23, at 784. The attention of the parties is also invited to Fed. R. Civ. P. 11.

⁶ In the Matter of J. V. Peters & Co., Inc., et al, RCRA Appeal No. 88-3, August 7, 1990, at 23, n.22, citing Fed. R. Civ. P. 56(e); see generally, Wright & Miller, Federal Practice and Procedure: Civil § 2739, at 511 (1983).

IN THE MATTER OF JAMES CUTHBERTSON, FLOYD RICHARDSON & POPILE,
INC., Respondent,
Docket No. RCRA-VI-832-H

Certificate of Service

I certify that the foregoing Order, dated 3/15/91, was sent this day in the following manner to the below addressees:

Original by Regular Mail to:

Linda Rodriguez
Regional Hearing Clerk
U.S. EPA, Region 6
1445 Ross Avenue
Dallas, TX 75202-2733

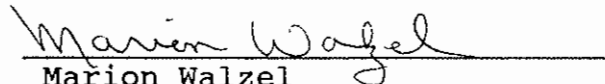
Copy by Regular Mail to:

Attorney for Complainant:

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Assistant Regional Counsel
U.S. EPA, Region 6
1445 Ross Avenue
Dallas, TX 75202-2733

Attorney for Respondent:

Allan Gates, Esquire
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Tucker
1000 Savers' Federal Building
Little Rock, AR 72201


Marion Walzel
Secretary

Dated: March 15, 1991