

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	
URBAN DRAINAGE AND FLOOD)	
CONTROL DISTRICT, and KEMP)	Docket No. CWA-VIII-94-20-PII
& HOFFMAN, INC.,)	
)	
Respondents.)	

ORDER ON MOTION FOR ORAL DEPOSITIONS

On June 19, 1995¹, respondent filed a motion seeking oral depositions pursuant to 40 C.F.R. § 22.19(f). Complainant responded in opposition to this motion on July 5. Thereafter, respondent was granted leave by the undersigned Administrative Law Judge (ALJ) to file a reply to complainant's opposition. Respondent's pleading was submitted on August 3.

A motion for discovery is governed by 40 C.F.R. § 22.19(f)(1). This section provides for discovery beyond the prehearing exchange when there is a determination: (i) that such discovery will not unreasonably delay the proceeding; (ii) that the information is not otherwise obtainable; and (iii) that the information has significant probative value. A party seeking to depose a witness must also satisfy the requirements of 40 C.F.R. § 22.19(f)(2). The critical language regarding depositions is that the same may only be granted upon a showing of good cause, and a finding that the

¹ Unless otherwise stated, all dates are for the year 1995.

information cannot be obtained by "alternative methods," or that the "relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing."

Respondent seeks to depose four witness on the basis that their sworn testimony is necessary for responding to complainant's partial accelerated decision (PAD) motion. Before turning to the merits of the motion, some initial thoughts are in order. The ALJ has a large amount of discretion in determining discovery issues. Each request is resolved according to the specific circumstances surrounding the case. Discovery can serve many valuable purposes, such as narrowing of issues and expediting the hearing. However, discovery is not a fishing expedition for one party to rely on the other to manufacture evidence for its case.

The first individual respondent seeks to depose is Timothy T. Carey (Carey), Project Manager, U.S. Army Corps of Engineers, Tri-Lakes Project Office, Littleton, Colorado. Carey is scheduled to appear as a witness. His deposition is sought on the grounds that it is needed in order to "inquire into, examine and test" Carey's statements and conclusions in his affidavit, which was submitted in support of complainant's PAD motion. Respondent further asserts that in the interest of fairness and equity, it should be entitled to investigate the "mere conclusions" of this affidavit because no documentary evidence can be located to support those conclusions.

Respondent has failed to demonstrate that good cause exists for taking Carey's deposition. Before any discovery can be granted, a party must state the nature of the information expected

to be discovered. 40 C.F.R. § 22.19(f)(3)(ii). Complainant correctly points out that respondent does not explain what information is sought from Carey other than that it wants to "cross-examine" his statements and conclusions. While respondent need not specify every detail of inquiry, a general nature of the information expected is required. Respondent's pleadings, however, stand mute on this requirement. Instead, it focuses on testing the basis of Carey's "mere conclusions." This basis for seeking a deposition simply cannot be viewed with favor under the discovery rules. If respondent disagrees with the conclusions in Carey's affidavit, then it should list its reasons in the opposition to complainant's PAD motion. However, discovery will not be used as scavenger hunt to generate a genuine issue of material fact. Moreover, respondent will have every opportunity to test Carey's conclusions at the hearing, if this proceeding progresses to that stage.

Respondent also seeks to depose John H. Morton, ex-Chief of Regulatory Branch, U.S. Army Corps of Engineers, Omaha, Nebraska; Jerry Folkers, Civil Engineering Tech, U.S. Army Corps of Engineers, Omaha, Nebraska; and Douglas J. Clemetson, Chief of Hydrology and Meteorology Section, U.S. Army Corps of Engineers (Corps), Omaha, Nebraska. None of these individuals is listed as a witness. Respondent asserts that it needs to depose the above on the grounds that they have knowledge on: how "headwaters" are determined under Section 404 of the CWA; how the "headwaters" of Coal Creek were determined, along with the supporting documents;

and the fact that the Corps does change the "headwaters" on occasion based upon the actual flow of the body of water. It is urged that this information is needed to assess the accuracy of the Corps' "headwaters" determination, and whether or not this determination was arbitrary and capricious.

There can be no doubt that this information on Coal Creek's "headwaters" clearly has significant probative value to respondent's defense. Both parties acknowledge that the discharges at issue would be allowed under the Corps' Nationwide Permit 26, if the discharges were located above the "headwaters" of Coal Creek.

Despite the significance of this information, respondent's request fails to surmount the "not otherwise obtainable" hurdle in Section 22.19(f)(1)(ii). First, the regulation in 33 C.F.R. § 330.2(d), explains how "headwaters" are defined for purposes of Section 404 of CWA in sufficient detail. It is found that this regulation speaks for itself, and any deposition is not likely to produce evidence of significant probative value over and above what the regulation already spells out. Second, Carey's affidavit provides the exact location for the "headwaters" of Coal Creek. (Complainant's Mot. for Accelerated Decision, Carey Aff. ¶ 7.) Respondent has stated that it will produce its own experts to establish a contrary determination for Coal Creek's "headwaters." Third, regarding the documents used to support the "headwaters" determination for Coal Creek, respondent states that its Freedom of Information Act (FOIA) request uncovered no documents. Documents

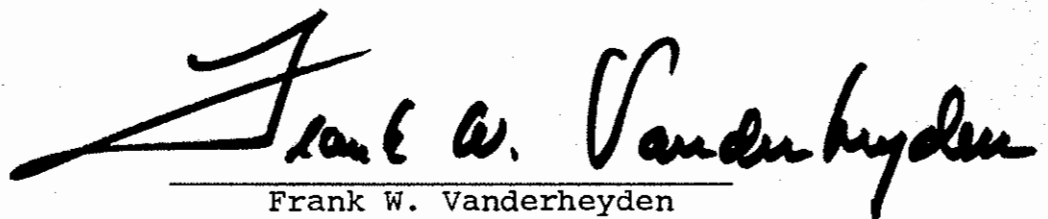
cannot fall within the meaning of "not otherwise obtainable" if they do not exist.

Notwithstanding the above finding, it is recognized that the basis for Coal Creek's "headwaters" determination is crucial to respondent's defense. Complainant's PAD motion asserts that respondent's discharges were not exempt from obtaining a permit because these discharges were downstream from the "headwaters" of Coal Creek. This allegation is based upon Carey's affidavit. Considering respondent's empty-handed FOIA result, respondent's ability to prepare its defense is dependent on discovering the basis supporting the Coal Creek "headwaters" determination from Corps' personnel. Therefore, a compelling case for further discovery exists. However, respondent simply has not demonstrated that the desired information cannot be obtained by other means or that this pertinent information will not be preserved by a witness at the hearing as required by Section 22.19(f)(2)(i),(ii). In fact, Carey's expected testimony will cover information on location of the "headwaters" of Coal Creek, and other matters relating to the Corps' regulations. Nonetheless, where no documents are purported to exist, equitable considerations demand that information on this subject is necessary for preparing its defense to the PAD motion, where potential liability is at stake. Further, in the event that this matter proceeds to hearing, then further discovery will serve to narrow, simply and clarify this key issue. It is concluded that respondent may seek to obtain the desired information by serving interrogatories on Carey, since the same is

scheduled to testify on this issue at hearing, and complainant relies on his affidavit to establish the Coal Creek "headwaters" determination.

IT IS ORDERED that:

1. Respondent's motion for oral depositions be DENIED.
2. Respondent may serve interrogatories on Timothy T. Carey, limited to the underlying basis supporting the "headwaters" determination of Coal Creek. Further, the interrogatories shall not exceed 30 in number, and shall be served within 30 days of the service date of this order. The response shall be 30 days from the service date of same.



Frank W. Vanderheyden
Administrative Law Judge

Dated: August 31, 1995

IN THE MATTER OF URBAN DRAINAGE AND FLOOD CONTROL DISTRICT, and
KEMP & HOFFMAN, INC., Respondents,
Docket No. CWA-VIII-94-20-PII

Certificate of Service

I certify that the foregoing Order, dated 8/31/95, was sent this day in the following manner to the below addressees:

Original by Regular Mail to:

Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region VIII
999 18th Street - Suite 500
Denver, CO 80202-2466

Copy by Regular Mail to:

Attorney for Complainant:

Elizabeth S. Bohanon, Esquire
Assistant Regional Counsel
U.S. Environmental Protection
Agency, Region VIII
Denver Place - Suite 500
999 18th Street
Denver, CO 80202-2466

Attorney for Respondents:

Edward J. Krisor, Jr., Esquire
SHOEMAKER, WHAM, KRISOR &
SHOEMAKER
1666 South University Blvd.
Denver, CO 80210

Dated: August 31, 1995

Marion Walzel
Marion Walzel
Legal Staff Assistant