

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of

Urban Drainage and Flood
Control District,

Docket No. CWA-VIII-94-20-PII

and

Kemp & Hoffman, Inc.

Respondents

ORDER ON MOTIONS FOR ACCELERATED DECISION
and
ORDER SCHEDULING HEARING

Proceedings

The Complaint in this proceeding charges the Respondents with discharging fill into the waters of the United States without a permit issued pursuant to Section 404 of the Clean Water Act ("CWA") , in violation of the CWA §301 (a), 33 USC §1311 (a). The Complaint seeks a joint civil penalty of \$125,000 for these violations. In their Answers, Respondents have asserted as an affirmative defense that their activities did not require such a permit since they were conducted above the "headwaters" of the subject stream, and were thus authorized by Nationwide Permit 26.

Complainant filed a Motion for Partial Accelerated Decision on June 5, 1995, seeking a ruling that no genuine issues of material facts exist as to the liability of Respondents. Before responding to the motion, Respondents moved and were granted leave to conduct discovery in order to shed light on the issue of the location of the headwaters of the subject stream, Coal Creek. After that discovery, in the form of interrogatories served on members of the Army Corps of Engineers, was completed, Respondents filed their response in opposition to Complainant's motion, and its Motion to Dismiss the Complaint, on July 25, 1996. The parties have each filed further replies, with the last filed by Complainant on December 9, 1996.

This Order denies both parties' motions for accelerated decision on the basis that a genuine issue of material fact exists concerning the headwaters location on Coal Creek.

Standard for Accelerated Decision

The EPA Rules of Practice, at 40 C.F.R. §22.20(a), empower the Presiding Officer to render an accelerated decision "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." Numerous decisions by the EPA Office of Administrative Law Judges and Environmental Appeals Board have noted that this procedure is analogous to the motion for summary judgment under Section 56 of the Federal Rules of Civil Procedure. See, e.g., In re CWM Chemical Serv., TSCA Appeal 93-1 (EAB, Order on Interlocutory Appeal, May 15, 1995).

The burden of showing there exists no genuine issue of material fact is on the party moving for summary judgment. Adickes v. Kress, 398 U.S. 144, 157 (1970). In considering such a motion, the tribunal must construe the factual record and reasonable inferences therefrom in the light most favorable to the non-moving party. Cone v. Longmont United Hospital Assoc., 14 F.3d 526, 528 (10th Cir., 1994). The mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986) . The decision on a motion for summary judgment or accelerated decision must be based on the pleadings, affidavits, and other evidentiary materials submitted in support or opposition to the motion. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) ; 40 C.F.R. §22.20(a); F.R.C.P. §56(c).

Discussion

The Complaint here charges Respondents with discharging fill without a permit, in connection with stream bank stabilization work, in Coal Creek, in the City of Lafayette, Boulder County, Colorado. The parties' motions turn on the resolution of the issue of the applicability of Nationwide Permit 26 to Respondents' activities at this site. The applicability of that Nationwide Permit depends, in turn, on resolution of the issue of the location of the headwaters of Coal Creek.

The Complainant has established that the U.S. Army Corps of Engineers (the "Corps") has determined the location of the headwaters of Coal Creek at a point some 10 miles upstream of the Lafayette site, where the stream crosses the county line from Jefferson to Boulder County. Complainant submitted the affidavit of Timothy T. Carey of the Corps office in Littleton, Colorado. The designation was made before 1982, and is found in a computer-generated list of Colorado streams, dated May 1, 1983.

The definition of "headwaters" is found in the Corps' regulations at 33 CFR §330.2(d):

"Headwaters means non-tidal rivers, streams, and their lakes and impoundments, including adjacent wetlands, that are part of a surface tributary system to an interstate or navigable water of the United States upstream of the point on the river or stream at which the average annual flow is less than five cubic feet per second. The DE [District Engineer] may estimate this point from available data by using the mean annual area precipitation, area drainage basin maps, and the average runoff coefficient, or by similar means."

The problem in this case arises from the inability of the Complainant, or the Corps, to provide any substantial evidence or data to support its determination of the headwaters of Coal Creek. Interrogatories served on Mr. Carey, as well as on two other Corps officials at its Omaha District Office, failed to reveal any data or information concerning precipitation, runoff, or any of the other factors cited in the regulation in relation to the Coal Creek headwaters determination.

The Respondent, meanwhile, has offered the expert testimony of a hydrologist and civil engineer, Kenneth R. Wright, P.E.. In his affidavit submitted with Respondent's motion to dismiss, Mr. Wright asserts that the average annual flow at the Lafayette site is "likely about 4.0 cfs." (Wright Affidavit, November 24, 1995, ¶8). Respondent has also submitted some data from a stream gauging station near Plainview, Colorado, some 13 miles upstream from the Lafayette site, indicating that average annual flow at that location is under 5 cfs.

In these circumstances, the Respondent has presented enough evidentiary material to raise a genuine issue of material fact as to the actual location of the headwaters of Coal Creek, and to challenge the validity of the Corps' designation. While ordinarily the Corps' determination would be entitled to some deference, none of the stream records submitted show a flow of 5 cfs at any point on Coal Creek.¹ Respondent also offers an expert witness who will

testify that the average annual flow remains below 5 cfs at the project site. The Complainant, meanwhile, has not countered Respondent's evidence with any evidence in support of the Corps determination. Although a headwaters determination is only required to be an estimate, it is still supposed to be made on the basis of empirical data such as precipitation records, drainage basin maps, and runoff coefficients.

The issue of the location of the headwaters of Coal Creek will be a mixed issue of fact and law. The facts concerning actual average annual flow in the Creek are amenable to resolution through the evidentiary hearing process. Then those facts will help determine what legal effect or deference the Corps' headwaters determination will be given. At this juncture I am not prepared to rule on what legal standard should be applied to the Corps determination.

As Complainant asserts, Respondent will bear the burden of proving the facts in support of its affirmative defense. In order to avoid liability, Respondent must show that the headwaters of Coal Creek is downstream from the Lafayette site, that the Corps determination should be given no credence, and that Nationwide Permit 26 was therefore applicable to Respondent's activities. Complainant may of course rebut Respondent's evidence, but Complainant is not required to affirmatively prove the location of the headwaters beyond offering the official Corps determination in order to make out a prima facie case.

The facts concerning the actual average annual flow in Coal Creek and location of its headwaters may also be relevant to the amount of any civil penalty, if Respondents are found liable. Several of the administrative civil penalty factors listed in 33 USC §1319 (g) (3) may be affected by the factual findings on flow in Coal Creek. The amount of the penalty of course remains at issue, and would require a hearing, with respect to other circumstances surrounding the Respondent's activities at the site as well.

Order Denying Motions for Accelerated Decision

Both Complainant's Motion for Partial Accelerated Decision and Respondents' Motion for Dismissal are denied.

Order Scheduling Hearing

The parties have already filed their initial prehearing exchanges. In view of the passage of time since then, and the narrowing of the issues for hearing based on this order, the parties may freely modify or supplement their

prehearing exchanges, without motion, until 20 days before the date scheduled for the beginning of the hearing.

The hearing in this matter will be held beginning at 9:30 A.M. on March 11, 1997 in Denver, Colorado, continuing if necessary through March 14, 1997. The parties will be notified of the exact location and of other hearing procedures after the arrangements have been made by the Regional Hearing Clerk.

Andrew S. Pearlstein
Administrative Law Judge

Dated: December 19, 1996
Washington, D.C.

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 on Motions for Accelerated Decision and Order Scheduling Hearing, dated December 19, 1996 was served by regular mail on the addressees listed below:

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Dated: December 19, 1996
Washington, D.C.

¹ It is recognized that the 1992 and 1993 stream gauge data submitted by Respondent with its Reply dated November 21, 1996, contains only partial year records. However if interpolated values for the missing winter months are added, the average annual flows would still be well under 5 cfs for those two years.