

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of)
)
Overcash Gravel and Grading) Docket No. CWA-04-2004-4530
Company, Inc.,)
)
Respondent)

ORDER DENYING COMPLAINANT'S
MOTION FOR ACCELERATED DECISION

This enforcement matter arises under Section 309(g)(1) of the Clean Water Act (the "Act"). 33 U.S.C. § 1319(g)(1). The United States Environment Protection Agency ("EPA") charges that Overcash Gravel and Grading Company, Inc. ("Overcash"), violated the Act by failing to comply with the storm water discharge provisions of its National Pollutant Discharge Elimination System ("NPDES") permit at its Yates Mill Subdivision. This permit was issued to Overcash by the State of North Carolina, Department of Environment and Natural Resources. EPA charges that respondent's failure to comply with the provisions of its NPDES permit resulted in a violation of Sections 301 and 402(p) of the Clean Water Act. 33 U.S.C. §§ 1311 & 1342(p). Complainant seeks a civil penalty of \$157,500 for this alleged violation. 33 U.S.C. § 1319(g)(2)(B). Overcash disputes this charge.

EPA now seeks accelerated decision -- *i.e.*, summary judgment -- pursuant to 40 C.F.R. 22.20(a).¹ Complainant seeks accelerated decision on both the liability and penalty issues. Despite EPA's claim that respondent's admissions and certain of its proposed evidentiary exhibits (not yet in the record), like Inspector Pope's inspection report, support a finding of violation, the success or failure of complainant's motion in this instance rests upon the affidavit of EPA Inspector Susan Pope.²

¹ Despite the fact that respondent filed an answer denying the heart of the complaint's allegations (Ans. ¶¶ 25, 26, 27 & 29), it chose not to respond to EPA's motion for accelerated decision.

² When a party seeks summary judgment, the evidence is to be viewed in the light most favorable to the nonmoving party. Summary judgment is to be granted only when no reasonable decision-maker could find for the nonmoving party. *Consumer Scrap Recycling*, EAB CAA Appeal 02-06 (January 29, 2004), citing *Adeckes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). In addition, a party seeking summary judgment has the initial responsibility of identifying those portions of the pleadings, depositions, answers to interrogatories, admissions on file, and any affidavits that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1968).

With respect to liability, Inspector Pope declared that during her inspection of the Yates Mill Subdivision, she observed the following: sediments leaving the property and impacting the Rocky River; no silt fencing over a majority of the site; unprotected storm drain inlets; sedimentation basins and traps not constructed in accordance with the Erosion and Sediment Control Plan; failure to install required diversion ditches; no gravel or paving on entrances and exits to the facility and to individual lots where construction was taking place; no seeding, sod or groundcover; and the lack of adequate groundcover on the slopes of sedimentation basins and traps. Aff. ¶ 3.

While Inspector Pope's unopposed affidavit appears to be devastating to respondent on first reading, it actually lacks the specificity necessary to understand just where and how Overcash violated the terms of its NPDES permit. The Pope Affidavit is a solid introduction as to why EPA believes that the Clean Water Act was violated in this case, but in order to be awarded accelerated decision, a clearer and more detailed evidentiary picture must be drawn. Without more, EPA can not show that "no genuine issue of material fact exists" and that it is "entitled to judgment as a matter of law." 40 C.F.R. 22.20(a).

Carl C. Charneski
Administrative Law Judge

Issued: July 11, 2005
Washington, D.C.