UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
COLLEEN TILLION, RICK	)	**DOCKET NO. CWA-10-2004-0067**
RICHARDS, AND PATRICIA	)	
RICHARDS,	)	
	)	
RESPONDENTS	)	

ORDER DENYING COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY

This proceeding arises under the authority of Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act("CWA"), as amended, 33 U.S.C. § 1319(g), and is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-.32.

The United States Environmental Protection Agency, Region X ("Complainant" or "the EPA") on April 30, 2004, filed and served a Complaint on Colleen Tillion, Rick Richards, and Patricia Richards ("Respondents"). Respondents are *pro se* litigants in this matter. Pursuant to Section 309(g)(2)(B) of the Clean Water Act and the Rules of Practice, the EPA proposes the assessment of a civil administrative penalty of $37,500 against Respondents for the alleged unlawful discharge of dredged or fill material into waters of the United States without authorization by a U.S. Army Corps of Engineers ("Corps") permit, as required by Sections 402 or 404 of the Clean Water Act, 33 U.S.C. §§ 1342, 1344, in violation of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a). Complaint §§ 1.2, 3.6.

Following the parties' submission of their prehearing exchanges in this matter, an Order Rescheduling Hearing was entered on March 2, 2005. Pursuant to that Order, the parties were directed to file a joint set of stipulated facts, exhibits, and

testimony by September 28, 2005.[1/] The hearing is scheduled to begin on October 24, 2005 in Homer, Alaska.

Several orders have been entered by the undersigned in this matter concerning the various motions filed by the parties. Included therewith is the Order Denying Respondents' Motion to Dismiss, entered on May 26, 2005.

On September 1, 2005, the EPA filed Complainant's Motion for Accelerated Decision on Liability ("Motion for Accelerated Decision") pursuant to Sections 22.16(a) and 22.20 of the Rules of Practice, 40 C.F.R. §§ 22.16(a), 22.20. The EPA moves for accelerated decision as to Respondents' liability for the violations alleged in the Complaint, arguing that there are no genuine issues of material fact and that the EPA is entitled to a determination of Respondents' liability as a matter of law.

Respondents have filed Respondents' Rebuttal to Complainant's Motion for Accelerated Decision on Liability ("Respondents' Rebuttal"), opposing the Motion for Accelerated Decision.

Complainant's Reply to Respondents' Rebuttal to Motion for Accelerated Decision on Liability ("Reply") was filed on October 6, 2005.

For the reasons discussed below, Complainant's Motion for Accelerated Decision will be Denied.

Standard for Adjudicating a Motion for Accelerated Decision

Complainant filed its Motion for Accelerated Decision pursuant to Section 22.20 of the Rules of Practice, 40 C.F.R. § 22.20. Section 22.20(a) authorizes the Administrative Law Judge to "render an accelerated decision in favor of a party as to any or all parts 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." 40 C.F.R. § 22.20(a).

Motions for accelerated decision under Section 22.20(a) are akin to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP"). *See, e.g.*, *BWX Technologies,*

[1/] Joint Prehearing Stipulations were filed by the parties on September 28, 2005.

Inc., RCRA (3008) Appeal No. 97-5, 9 E.A.D. 61, 74-75 (EAB 2000); *In the Matter of Belmont Plating Works*, Docket No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65, at *8 (ALJ, Sept. 11, 2002). 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." Therefore, federal court decisions interpreting Rule 56 provide guidance for adjudicating motions for accelerated decision. *See CWM Chemical Service*, TSCA Appeal 93-1, 6 E.A.D. 1 (EAB 1995).

The United States Supreme Court has held that the burden of showing that no genuine issue of material fact exists is on the party moving for summary judgment. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). In considering such a motion, the tribunal must construe the evidentiary material and reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1985); *Adickes*, 398 U.S. at 158-59; *see also Cone v. Longmont United Hospital Assoc.*, 14 F.3d 526, 528 (10th Cir. 1994). Summary judgment on a matter is inappropriate when contradictory inferences may be drawn from the evidence. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002).

In assessing materiality for summary judgment purposes, the Supreme Court has determined that a factual dispute is material where, under the governing law, it might affect the outcome of the proceeding. *Anderson*, 477 U.S. at 248; *Adickes*, 398 U.S. at 158-159. The substantive law involved in the proceeding identifies which facts are material. *Id.*

The Supreme 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 non-moving party. *Id.* In determining whether a genuine issue of fact exists, the judge must decide whether a finder of fact could reasonably find for the non-moving party under the evidentiary standards in a particular proceeding. *Anderson*, 477 U.S. at 252.

Once the party moving for summary judgment meets its burden of showing the absence of genuine issues of material fact, Rule 56(e) requires the opposing party to offer countering evidentiary material or to file a Rule 56(f) affidavit. Under Rule 56(e), "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." The Supreme Court has found that the non-moving party must present "affirmative evidence" and that it cannot defeat the motion without offering "any significant probative evidence tending to support" its pleadings. *Anderson*, 477 U.S. at 256 (quoting *First Nat'l Bank of Arizona v. Cities Service Co.*, 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 Corp. v. Catrett*, 477 U.S. 317 at 322 (1986); *Adickes*, 398 U.S. at 160. Similarly, a simple denial of liability is inadequate to demonstrate that an issue of fact does indeed exist in a matter. *In the Matter of Strong Steel Products*, Docket Nos. RCRA-05-2001-0016, CAA-05-2001-0020, and MM-05-2001-0006, 2002 EPA ALJ LEXIS 57 at *22 (ALJ, September 9, 2002). A party responding to a motion for accelerated decision must produce some evidence which places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing. *Id.* at 22-23; *see In re Bickford, Inc.*, Docket No. TSCA-V-C-052-92, 1994 TSCA LEXIS 90 (ALJ, November 28, 1994).

The Supreme 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*, 477 U.S. 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. Of course, 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*, 398 U.S. at 156.

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." Section 22.24 of the Rules of Practice, 40 C.F.R. § 22.24. 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 non-moving party under the "preponderance of the evidence" standard.

Accordingly, 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. 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. Even if a judge believes that summary judgment is technically proper upon review of the evidence in a case, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. *See Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979).

DISCUSSION

The Complaint in this matter alleges that Respondents violated Section 301(a) of the Clean Water Act when they unlawfully discharged dredged or fill material into waters of the United States without authorization by a U.S. Army Corps of Engineers ("Corps") permit, as required by Sections 402 or 404 of the Clean Water Act, Complaint §§ 1.2, 3.6. Specifically, the Complaint alleges that Respondents own, possess, and/or control property containing wetlands adjacent to Stariski Creek in the Kenai Peninsula Borough, Alaska (the "Site") that are "waters of the United States" within the meaning of 33 C.F.R. § 328.3(a) and 40 C.F.R. § 232.2 and therefore are "navigable waters" within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7). The Complaint alleges that beginning in May 1999, "Respondents used or authorized the use of a backhoe or other heavy earthmoving equipment to place gravel, sand, soil, and other materials for the purpose of constructing a house pad and saw mill pad"[2/] and excavated a ditch approximately 4,200 feet long and sidecast the excavated materials into wetlands on the Site using a backhoe or other heavy earthmoving equipment. Complaint §§ 2.4, 2.6, 3.1, 3.2.

In the Motion for Accelerated Decision, the EPA argues that there can be no genuine dispute that Respondents either conducted or directed the ditching and filling activities that occurred on their properties. The EPA maintains that the presence of the driveways, parking areas, structures, and ditches has been

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[2/] The Complaint does not clearly state that Respondents placed dredged or fill material "into wetlands" when constructing a house pad. Complaint § 3.1.

documented by inspection reports and ground photographs taken by the EPA, several aerial photographs and satellite images, and photographs submitted by Respondents. According to the EPA, any disagreement over the precise timing of these construction activities or the exact nature of the fill material is not material to the determination of Respondents' liability, because there is no question that at least a portion of these construction activities involved the point source discharge of dredged or fill material pollutants into areas subject to CWA jurisdiction. The EPA argues that Respondents are liable under Section 301(a) of the CWA because they are persons who discharged pollutants from a point source into navigable waters without a permit issued under the CWA. As such, the EPA asserts that it has established all the jurisdictional elements to support a finding of liability in this matter.

Respondents have a contrasting view of the facts, and oppose the Motion for Accelerated Decision.[3/] *See* Respondents' Rebuttal. First, Respondents contend that much of the property in question does not contain wetlands.[4/] Second, Respondents maintain that there never has been any fill or dredged material under any structures on the properties in question and that there is no fill for a parking area. Third, Respondents declare that they did not place dirt or gravel from a stream bank into any stream.

In Complainant's Reply, the EPA contends that Respondents' Rebuttal fails to raise any genuine issues of material fact relevant to a determination that Respondents are liable for the CWA violations alleged in the Complaint. The EPA points out that Respondents do not deny that they are persons, that they discharged dredged or fill material from point sources in

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[3/] Respondents also raise several arguments concerning the Compliance Order issued against them by the EPA. These arguments were addressed in the Order Denying Respondents' Motion to Dismiss entered on May 26, 2005. Again, I emphasize to Respondents that the Compliance Order is not relevant to the question of liability in this matter.

[4/] Respondents state that since the submission of their prehearing exchange they have discovered a borough map showing that much of the properties at issue is not within the wetland borders. Respondents are advised that if this map has not been submitted as part of their prehearing exchange or is not provided to the EPA at least 15 days before the hearing date, the map will not be admitted into evidence at the hearing unless they have good cause for failing to exchange the map. *See* Section 22.22(a)(1) of the Rules of Practice, 40 C.F.R. § 22.22(a)(1).

constructing a driveway and ditches at the site, or that they did not obtain a CWA Section 404 permit. The EPA argues that although Respondents, in their Rebuttal, maintain that maps, which have not been provided to the EPA, raise doubt as to whether there are wetlands on Respondents' properties and contest whether dredged or fill material was placed under structures or for a parking area, these are not genuine issues of material fact. The EPA assert that Respondents do not deny that they "placed dredged and fill material to construct a driveway across the Tillion property, nor do they deny that they excavated a ditch and placed sidecast dredged material around the Richards property." The EPA maintains that the construction of the structures on the properties in question constitutes the discharge of "fill material" regulated under the CWA. Finally, the EPA argues that Respondents have not presented any evidence to contradict Complainant's ample evidence that Respondents' properties are wetlands. As attachments to its Rebuttal and in support of its claim that Respondents' properties are wetlands, the EPA proffers two maps and the Declaration of Phillip North of the EPA.

Based on the pleadings before me, I am compelled to find that Respondents, who are appearing *pro se*, have sufficiently raised a genuine issue of material fact that only can be properly adjudicated following a full evidentiary hearing.[5/] In its Motion for Accelerated Decision, the EPA contends that Respondents' "properties in the entirety consist of wetland waters of the United States." Motion for Accelerated Decision at 14. Respondents maintain that much of the properties in question does not contain wetlands and they refer to a borough map that reportedly supports their position. Respondents' homes are located on the properties. Respondents also claim that there never has been any fill or dredged material under any structures on the properties in question and that there is no fill for a parking area, and they declare that they did not place dirt or gravel from a stream bank into any stream.

Under the standard for adjudicating motions for accelerated decisions, discussed above, the evidentiary material proffered by the moving party must be viewed in the light most favorable to

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[5/] The EPA's argument that Respondents should be deemed to have waived objection to the granting of the Motion for Accelerated Decision because their Rebuttal is untimely is rejected. Respondents' Rebuttal, which is postmarked September 24, 2005, was due to be filed with the Regional Hearing Clerk on September 26, 2005, but was not received until September 27, 2005.

the opposing party and all reasonable inferences from the evidentiary material must be drawn in favor of the nonmoving party.[6/] *See Rogers Corp. v. EPA*, *supra*. As such, I must find that the question of whether dredged or fill material has been placed into wetlands subject to CWA jurisdiction has been sufficiently raised to defeat the Motion for Accelerated Decision. 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 genuine issues of material fact are present and that this case requires an evidentiary hearing. As previously noted, even if a judge believes that summary judgment is technically proper upon review of the evidence in a case, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. *See Roberts v. Browning*, *supra*.

In view of the foregoing determination that there exists a genuine issue of material fact, the EPA's Motion for Accelerated Decision must be denied. *See* Section 22.20(a) of the Rules of Practice, 40 C.F.R. § 22.20(a).

ORDER

Complainant's Motion for Accelerated Decision on Liability is Denied.

Barbara A. Gunning
Administrative Law Judge

Dated: October 11, 2005
Washington, DC

[6/] Although Respondents, who are appearing *pro se* in this matter, have not submitted affidavits or the borough map to support their claims, Respondents' declaration signed by Respondent Patrica Richards is deemed adequate to raise questions of fact for an adjudicatory hearing.