UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
GERALD STRUBINGER	)	**DOCKET NO. CWA-3-2001-001**
GREGORY STRUBINGER,	)	
	)	
	)	
RESPONDENTS	)	

ORDER DENYING COMPLAINANT'S MOTION FOR ACCELERATED DECISION

Background

This civil administrative penalty 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). The United States Environmental Protection Agency (the "EPA" or "Complainant"), on October 25, 2000, filed a Complaint against Gerald Strubinger and Gregory Strubinger ("Respondents"), charging Respondents with violating Section 301(a) of the CWA, 33 U.S.C. § 1311(a), by discharging pollutants from a point source into waters of the United States without a permit issued under the CWA.[1/]

Specifically, the Complaint alleges that commencing on or about August 4, 2000, and continuing periodically through the present, Respondents, or persons acting on behalf of Respondents, operated equipment that discharged fill material into a stream channel and wetlands on property adjacent to Robertson Run in Carbon County, Pennsylvania which are waters of the United States without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344. In the Complaint, Complainant seeks a civil administrative penalty in the amount of $27,500.

On July 31, 2002, Complainant filed a Motion for An Accelerated Decision in this matter. Complainant moves for accelerated decision as to liability and seeks a penalty in the amount of $1. In response, Respondents filed an Answer to Complainant's Motion for Accelerated Decision dated August 15, 2002.

[1/] Respondents are appearing pro se.

Standard for Accelerated Decision

Complainant filed its motion for accelerated decision pursuant to Section 22.20 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), 40 C.F.R. § 22.20. Section 22.20(a) of the Rules of Practice states as follows:

> The Presiding Officer[2/] may at any time 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 (emphasis added). The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

40 C.F.R. § 22.20(a).

Motions for accelerated decision and dismissal under 40 C.F.R. § 22.20(a) are akin to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP").[3/] 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" (emphasis added). Thus, by analogy, Rule 56 provides guidance for adjudicating motions for accelerated decision. *See CWM Chemical Service*, TSCA Appeal 93-1, 6 E.A.D. 1 (EAB, May 15, 1995).

Therefore, I look to federal court decisions construing Rule 56 of the FRCP for guidance in applying 40 C.F.R. § 22.20(a) to the adjudication of motions for accelerated decisions. In interpreting

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[2/] The term "Presiding Officer" means the Administrative Law Judge designated by the Chief Administrative Law Judge to serve as Presiding Officer. 40 C.F.R. §§ 22.3(a), 22.21(a).

[3/] The FRCP are not binding on administrative agencies but many times these rules provide useful and instructive guidance in applying the Rules of Practice. *See Oak Tree Farm Dairy, Inc. v. Block*, 544 F. Supp. 1351, 1356 n. 3 (E.D.N.Y. 1982); *Wego Chemical & Mineral Corporation*, TSCA Appeal No. 92-4, 4 E.A.D. 513 at 13 n. 10 (EAB, Feb. 24, 1993).

Rule 56(c), the United States Supreme Court has held that the party moving for summary judgment has the burden of showing the absence of a genuine issue as to any material fact and that the evidentiary material proffered by the moving party in support of its motion must be viewed in the light most favorable to the opposing party. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1985); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). Further, the judge must draw all reasonable inferences from the evidentiary material in favor of the party opposing the motion for summary judgment. *See Anderson, supra*, at 255; *Adickes, supra*, at 158-159; *see also Cone v. Longmont United Hospital Assoc.,* 14 F.3d 526, 528 (10th Cir. 1994). Summary judgment is inappropriate when contradictory inferences may be drawn from the evidence. *Rogers Corp. V. EPA,* 275 F.3d 1096 (D.C. Cir. 2002); *Londrigan v. FBI*, 670 F.2d 1164,1171 n.37 (D.C. Cir. 1981).

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

The 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 nonmoving party. *Id*. Further, in *Anderson*, the Court ruled that in determining whether a genuine issue of fact exists, the judge must decide whether a finder of fact could reasonably find for the nonmoving party under the evidentiary standards in a particular proceeding. There must be an incorporation of the evidentiary standard in the summary judgment determination. *Anderson, supra*, at 252. In other words, when determining whether or not there is a genuine factual dispute, the judge must make such inquiry within the context of the applicable evidentiary standard of proof for that proceeding.

Once the party moving for summary judgment meets its burden of showing the absence of genuine issues of material fact, Rule 56(e) then requires the opposing party to offer any countering evidentiary material or to file a Rule 56(f) affidavit.[4/] Rule 56(e) states: "When a motion for summary judgment is made and

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[4/] Rule 56(f) states:

> (f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

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." However, 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, supra*, at 156.

The type of evidentiary material that a moving party must present to properly support a motion for summary judgment or that an opposing party must proffer to defeat a properly supported motion for summary judgment has been examined by the Court. *See Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *see also Anderson, supra; Adickes, supra.* The Court points out that Rule 56(c) itself provides that the decision on a motion for summary judgment must be based on the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, submitted in support or opposition to the motion. With regard to the sufficiency of the evidentiary material needed to defeat a properly supported motion for summary judgment, the Court has found that the nonmoving party must present "affirmative evidence" and that it cannot defeat the motion without offering "any significant probative evidence tending to support" its pleadings. *Anderson, supra,* at 256 (quoting *First National Bank of Arizona v. Cities Service Company,* 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, supra* at 322; *Adickes, supra*. The 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, supra*, 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.

The regulation governing motions for accelerated decision under 40 C.F.R. § 22.20(a) does not define or elaborate on the phrase "genuine issue of material fact," nor does it provide significant guidance as to the type of evidence needed to support or defeat a motion for accelerated decision. Section 22.20(a) states, in pertinent part, that the Presiding Officer may render an accelerated decision "without further hearing or upon any 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 an adjunct to this regulation, I note that under another governing regulation, a party’s response to a written motion, which would include a motion for accelerated decision, "shall be accompanied by any affidavit, certificate,

other evidence, or legal memorandum relied upon." 40 C.F.R. § 22.16(b).

Inasmuch as the inquiry of whether there is a genuine issue of material fact in the context of an administrative accelerated decision is quite similar to that in the context of a judicial summary judgment and in the absence of significant instruction from the regulation governing accelerated decisions, the standard for that inquiry as enunciated by the Court in *Celotex, Anderson*, and *Adickes* is found to be applicable in the administrative accelerated decision context.[5/]

Moreover, review by the Environmental Appeals Board ("EAB") in determining whether there is a genuine issue of material fact requiring an oral evidentiary hearing is governed by an "administrative summary judgment" standard which was articulated recently by the EAB in *Green Thumb Nursery, Inc.*, FIFRA Appeal No. 95-4a, 6 E.A.D. 782, 793 (EAB, Mar. 6, 1997). Under this standard, there must be timely presentation of a genuine and material factual dispute, similar to judicial summary judgment under FRCP 56, in order to obtain an evidentiary hearing. Otherwise, an accelerated decision based on the documentary record is sufficient. *Id*. *Compare Mayaguez Regional Sewage Treatment Plant*, NPDES Appeal No. 92-23, 4 E.A.D. 772, 781 (EAB, Aug. 23, 1993) (wherein the EAB adopted the standard for summary judgment articulated by the Court in *Anderson* to determine whether there is a genuine issue of material fact warranting an evidentiary hearing under 40 C.F.R. § 124.74 for the issuance of a permit under Section 301(h) of the Clean Water Act).

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." 40 C.F.R. § 22.24. Thus, by analogy, 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 nonmoving party under the "preponderance of the evidence" standard.[6/] In addressing the threshold question of the propriety of a motion for accelerated decision, my function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for an evidentiary hearing. *See Anderson, supra*, at 249.

[5/] An accelerated decision, as a summary judgment, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Rule 56(c) FRCP; 40 C.F.R. § 22.20(a).

[6/] Under the governing Rules of Practice, an Administrative Law Judge serves as the decisionmaker as well as the fact finder. *See* 40 C.F.R. §§ 22.4(c), 22.20, 22.26.

Accordingly, by analogy, 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. In this regard, the moving party must demonstrate, by a preponderance of the evidence, that no reasonable presiding officer could not find for the nonmoving party. 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.

Discussion

Complainant filed the Complaint in this matter against Respondents under the authority of Section 309(g) of the CWA. The Complaint alleges that Respondents violated Section 301(a) of the CWA by discharging pollutants from a point source into waters of the United States without a permit issued under the CWA. Specifically, Complainant alleges that commencing on or about August 4, 2000, and continuing periodically through the present, Respondents operated equipment which discharged fill material into a stream channel and wetlands on property adjacent to Robertson Run in Carbon County, Pennsylvania which are waters of the United States without a permit issued pursuant to Section 404 of the CWA. The property identified by Complainant is located on the northeast corner of the intersection of West 8th and Spring Streets, adjacent to Robertson Run in Carbon County, Pennsylvania.

Complainant maintains that it has met its burden of establishing that there is no genuine issue as to any material fact and that it is entitled to judgment as to liability as a matter of law. Complainant submits that it has provided a host of inspection reports, letters, and affidavits that support the allegations in the Complaint and that demonstrate that on August 4, 2000 and thereafter, Respondent Gerald Strubinger was the operator of earth moving equipment which he used to relocate a stream channel and further used to fill the original stream channel. Complainant further submits that the evidence demonstrates that Respondent Gregory Strubinger owns the property where the filled stream channel is located, and that neither Respondent procured a permit from the U.S. Army Corps of Engineers prior to filling the stream channel, a water of the United States.

In its Answers to the Complaint and its Answer to Complainant's Motion for Accelerated Decision, Respondents deny virtually every factual allegation and charge lodged against them by Complainant. For example, Respondents contend that the site at

issue is not adjacent to Robertson Run in Carbon County, Pennsylvania and that at no time did they, or any person acting in their behalf, operate equipment to fill in an existing stream on the site and relocate that stream to another area of the site. Respondents assert that their earth moving activities on the site did not result in the addition of fill material into wetlands and an unnamed tributary of Robertson Run. Respondents maintain that the property referenced by Complainant is not property owned by Gregory Strubinger, and that Respondents did not dredge or place fill material in waters of the United States, including wetlands, on property owned by Gregory Strubinger.

Additionally, Respondents claim that they had no knowledge of a spring-fed stream channel existing on Gregory Strubinger's property, and Respondents challenge the accuracy of the survey conducted by Mr. Marzen. Respondents question the expertise of Complainant's witness Wade Chandler for interpreting aerial photography and challenge Complainant's position that the aerial photography presented supports the allegations against Respondents. Respondents submit that the only water that runs through the property originates from storm water discharges and that since the introduction of storm water in this area there has been major erosion causing severe pollution and safety concerns.[7/] Respondents contend that the Pennsylvania Department of Environmental Protection ("PADEP") has changed its position as to whether the property in question is subject to regulation, and that at the August 2002 meeting of the Council of the Borough of Jim Thorpe it was announced that a $50,000 grant was awarded from PADEP to study the storm water problem in this area.

Finally, Respondents argue that Complainant continues to confuse and commingle Respondent Gerald Strubinger's plans to develop his property with Respondent Gregory Strubinger's site in question. Respondents maintain that there have been thousands of tons of soil erosion and surface water pollution all along this drainage ditch area and that, contrary to Complainant's assertions, such issues are relevant to its alleged liability in this matter. According to Respondents, independent sampling of the storm water flowing through the ditch on Respondent Gregory Strubinger's property confirm his findings that there are high levels of e-coli/human waste. Respondents assert that the legal survey and map of Respondent Gregory Strubinger's property produced by Carbon Engineering is accurate and that professional engineer Ronald Tirpak will testify to the accuracy of the survey. Respondents further assert that this survey demonstrates the entrance of the storm water drainage ditch onto the property which the parties

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[7/] Respondents do not explicitly raise the issue of the whether its earth moving activities fall within the purview of one of the exemptions from the permit requirements under Section 404(f) of the CWA.

agree has not been changed but that such point of entry does not match Mr. Marzen's mapping of the ditch according to Complainant's representatives.

At this juncture, I find that Respondents have raised genuine issues of material fact that only can be properly adjudicated following a full evidentiary hearing. 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 the opposing party and all reasonable inferences from the evidentiary material must be drawn in favor of the nonmoving party. *See Rogers Corp. v. EPA*, *supra*. 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 Respondents have adequately raised genuine issues of material fact for evidentiary hearing and that Complainant has not established that it is entitled to judgment as a matter of law.

In view of the foregoing determination that Respondents have raised genuine issues of material fact and that Complainant has not established that it is entitled to judgment as a matter of law, Complainant's Motion for Accelerated Decision must be denied. *See* 40 C.F.R. § 22.20(a).

ORDER

Complainant's Motion for Accelerated Decision is Denied.

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Barbara A. Gunning
Administrative Law Judge

Dated: August 22, 2002
Washington, DC

In the Matter of Gerald Strubinger & Gregory Strubinger, Respondent
Docket No. CWA-3-2001-001

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Denying Complainant's Motion for Accelerated Decision** dated August 22, 2002, was sent this day in the following manner to the addressees listed below.

_____
Mary Keemer
Legal Staff Assistant

Dated: July 22, 2002

Original and Copy by Pouch Mail to:

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