

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION VII  
11201 RENNER BOULEVARD  
LENEXA, KANSAS 66219

BEFORE THE ADMINISTRATOR

IN THE MATTER OF )  
)  
)  
DR. DANIEL J. McGOWAN, ) DOCKET NO. CWA-07-2014-0060  
)  
) **COMPLAINANT'S MOTION FOR**  
Respondent ) **ACCELERATED DECISION AS TO**  
) **LIABILITY AND MOTION TO STRIKE**  
) **RESPONDENT'S DEFENSES**  
)

The United States Environmental Protection Agency, Region 7 ("EPA" or "Complainant") respectfully submits the following Complainant's Motion for Accelerated Decision as to Liability and Motion to Strike Respondent's Defenses. Accompanying this Motion is a Memorandum and Points of Authority in Support of these Motions.

Pursuant to Rule 22.20(a) of the Consolidated Rules of Practice, the Presiding Officer may render an accelerated decision as to all or any part of the proceeding at any time "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." As in federal practice, the purpose of such a motion is to pierce the pleadings and assess the proof in order to see whether there is a genuine issue for trial. A party may not rest upon mere denials of the adverse party's pleadings when opposing such a motion. *In re Labarge, Inc.*, Docket No. CWA-VII-91-W-0078 (1997).

If the non-moving party fails to address the moving party's assertions of fact – or establish that there is a genuine factual dispute - by citing to specific materials in the record, the court may grant an accelerated decision. *In Re: Polo Development, Inc., et al.*, Docket No. CWA-05-2013-0003 (2015), *citing* FCRP 56(c)(1). Likewise, with respect to affirmative defenses raised by the Respondent, the non-moving party must overcome the moving party's claims that the defenses lack factual support by citing to specific evidence in the record. *Id.* If unable to demonstrate a genuine factual dispute concerning affirmative defenses, the court may strike the defenses. *Id.*

In the present case, there is no genuine issue of material fact with respect to Respondent's liability for violations of the Clean Water Act. Thus, EPA is entitled to an accelerated decision pursuant to 40 C.F.R. § 22.20 concerning the following issues:

1. Respondent discharged pollutants.
2. Respondent discharged dredged and/or fill material.
3. Plum Creek is a water of the United States.
4. Respondent's dam is a point source.
5. Respondent did have a CWA Section 404 permit from the Corps.

Further, Respondent has failed to demonstrate through evidence that he is entitled to any of the defenses raised in his Answer and/or Prehearing Exchange. Thus, EPA seeks to have the Court strike Respondent's defenses for the following:

6. Respondent's application of EPA's "Water Transfers Rule" is inapplicable as a defense in this Case and, therefore, this defense fails.
7. Respondent's affirmative defense that his discharges were necessary to avoid loss of his dam fails.
8. Respondent's affirmative defense that the Corps authorized his discharges fails.

9. Respondent's affirmative defense that his discharges were exempt from the CWA because they were necessary to maintain the dam fails.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 17<sup>th</sup> day of April, 2015, I sent via the OALJ E-filing system the original and one copy of this Motion, to Sybil Anderson, the Office of Administrative Law Judges Hearing Clerk, and sent one true and correct copy via email to Mr. Stephen D. Mossman, Esq. at [SDM@MattsonRicketts.com](mailto:SDM@MattsonRicketts.com).

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Signature of Sender