UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

IN THE MATTER OF	)	**Docket No. CWA-07-2014-0060**
	)	
DR. DANIEL J. McGOWAN,	)	
	)	**MOTION TO STRIKE AND**
Respondent	)	**MEMORANDUM BRIEF**
	)	
Proceedings under Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g)	)	

MOTION TO STRIKE

COMES NOW the Respondent Dr. Daniel J. McGowan ("McGowan"), by and through his attorney and moves to strike the Declarations of Barry Harthoorn, Bruce Dannatt, and Paul Boyd, Ph.D. P.E. attached to Complainant's Rebuttal to Respondent's Memorandum and Points of Authority in Opposition to Complainant's Motion for Accelerated Decision as to Liability ("Complainant's Rebuttal") on the grounds set forth in the Memorandum Brief below.

CONFERENCE WITH OPPOSING PARTY PURSUANT TO SECTION VI OF THE PREHEARING ORDER DATED DECEMBER 29, 2014

Counsel for McGowan, Stephen D. Mossman, contacted counsel for the Complainant Chris Muehlberger and Liz Huston by telephone on Tuesday, June 23, 2015 at 2:30 p.m. After being informed McGowan intended to file a Motion to Strike, counsel for the Complainant indicated that they would be objecting to the relief sought in the Motion.

MEMORANDUM BRIEF

This Memorandum Brief will set out the reasons why the Presiding Officer should grant the motion to strike the Declarations of Barry Harthoorn, Bruce Dannatt, and Paul Boyd, Ph.D. P.E. that are attached to the Complainant's Rebuttal. The arguments in favor of the motion to

strike the additional Declarations include: (1) When interpreting the plain language of 40 C.F.R. § 22.20 and 40 C.F.R. § 22.16, the Presiding Officer is not required to consider the newly attached Declarations; (2) When considering a motion for an accelerated decision as the administrative equivalent to a summary judgment proceeding, the additional declarations produce a 'sandbagging' effect that should not be accepted by the Presiding Officer; (3) Recognizing the additional declarations would be prejudicial to the Respondent (McGowan), especially if the nonmoving party is unable to respond to new factual allegations set forth in the Declarations; and (4) The attached Declarations contain new facts that are likely to be contested material facts in the litigation and if the Declarations are not stricken, McGowan should be given sufficient time and opportunity to respond appropriately.

A. Plain Language of 40 C.F.R. § 22.20 and 40 C.F.R. § 22.16

Since this issue is an administrative procedure for an accelerated decision for the Environmental Protection Agency ("EPA"), we look to the particular Rules of Practice that govern these types of proceedings which is 40 C.F.R. § 22.20. It states:

> (a) [T]he Presiding Officer 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).

40 C.F.R. § 22.20.

Further, 40 C.F.R. § 22.16 regarding Motions generally states:

> (a) [M]otions shall be served as provided by § 22.5(b)(2). Upon the filing of a motion, other parties may file responses to the motion and the movant may file a reply to the response. ***Any additional responsive documents shall be permitted only by order of the Presiding Officer or Environmental Appeals Board, as appropriate...*** (emphasis added).

Based on the plain language of these regulations the Presiding Officer may render the accelerated decision without a hearing or without looking at additional evidence such as affidavits, or in this case the attached Declarations. It is up to the discretion of the Presiding Officer if she wants to allow additional evidence or grant any hearing on the matter. The additional Declarations are unnecessary and based on this regulation, do not need to be considered in order for the Presiding Officer to make her decision. The language of 40 C.F.R. § 22.20 specifically gives the example of affidavits to show that the Presiding Officer does not need to rely on any extra documentation such as the Complainant's attached Declarations, when rendering her decision to either grant or deny an accelerated decision on this issue.

Furthermore, 40 C.F.R. § 22.16 explains that under general motion practice for an accelerated decision or the like, additional responsive documents, such as the Declarations provided by Complainant, are only permitted by the order of the Presiding Officer as she deems appropriate. Simply, the Rules of Practice set forth in the regulations do not allow the extraordinary step of additional Declarations being filed after Respondent was provided its last opportunity to respond to Complainant's Motion.

B. "Sandbagging" effect of attached Declarations

Motions for accelerated decision under 40 C.F.R. § 22.20(a) are similar to motions for summary judgment as set out under Rule 56 of the Federal Rules of Civil Procedure. *In RE: Pepperell Assoc.,* Docket No. CWA-2-I-97-1088 (1998). *Puerto Rico Aqueduct and Sewer Authority v. EPA*, 35 F.3d 600 (1st Cir. 1994), cert. denied, 513 U.S. 1148 (1995); *CWM Chemical Services, Inc.*, 6 E.A.D. 1 (EAB 1995). The moving party for summary judgment has the burden of showing that there is an absence of any genuine issues of material fact.

Once the moving party has established the motion for summary judgment opposing party must set forth the facts showing that there is a genuine issue of material fact. *Clarksburg Casket Co.,* EPCRA Appeal No. 98-8. McGowan made a showing in his response to the original motion for an accelerated decision that there is a genuine dispute of material fact. When McGowan made those arguments, he made them based on the materials and evidence that was included in the EPA's initial motion for an accelerated decision. Now, McGowan moves to strike the Declarations that are attached to Complainant's Rebuttal. The new Declarations add information for which McGowan in unable to refute, due to the Declarations being added after McGowan's response to the motion for the accelerated decision.

The addition of the Declarations attached to the Complainant's Rebuttal creates a 'sandbagging' effect. "In this context, 'sandbagging' is defined as a party intentionally withholding its best evidence and/or argument until the opposing party does not have an adequate opportunity to respond." *Pike v. Caldera*, 188 F.R.D. 519, 532 (S.D. Ind. 1999). This is not an acceptable method of motion practice with the courts. In *Viero v. Bufano*, 925 F.Supp. 1374, 1379-80 (N.D. Ill. 1996) the Court made it clear that the party moving for summary judgment must apprise the opposing party of all of the evidence that they plan to use before the opposing party's response to the motion is due. In *Viero*, the moving party was required to submit a reply affidavit in order to supplement the evidence that the moving party had failed to present at the outset with its initial motion, and the Court decided that this practice showed either a lack of preparation from the moving party, or intentional sandbagging. *Id.* at 1380. The Court held that neither of these excuses were a genuine basis for considering the untimely evidence. *Id.*

It seems apparent that the addition of the Declarations attached to the Complainant's Rebuttal in support of the accelerated decision has produced a 'sandbagging' effect. The

Declarations were added at time when it would be difficult for McGowan to properly respond and they have introduced new issues that McGowan believes should not be considered as they were improperly added and were used intentionally to obstruct and potentially delay the proceeding.

C. Allowing Declarations would be Prejudicial

When reading FED. R. CIV. P. 56 with FED. R. CIV. P. 6(c)(2), it makes clear that any affidavit supporting a motion must be served with the motion. *See Woods v. Allied Concord Fin. Corp.*, 373 F.2d 733, 734 (5th Cir. 1967) (indicating Rule 6(c)(2)'s predecessor, former Rule 6(d), "should be read in conjunction with Rule 56(c)"). Rule 6(c)(2) allows the opposing party reasonable time and opportunity to respond to the motion's facts and legal theories in its entirety. *Burns v. Gadsden Stat Cmty. Coll.* 908 F.2d 1512, 1517 (11th Cir. 1990). By using this type of motion practice it avoids "litigation by ambush" as described in *Tishcon Corp. v. Soundview Communications, Inc.*, No. 1:04-CV-524-JEC, 2005 WL 6038743 (N.D. Ga. Feb. 15, 2005).

In *Tishcon*, the Court considered the impact of Rule 6(c)(2)'s predecessor, Rule 6(d). *Id.* at 7-9. In this case, the plaintiff moved for partial summary judgment and submitted several supporting declarations with its motion. *Id.* at 2. The defendants objected to the declarations as they argued they contained factual information beyond the declarant's knowledge. *Id.* at 3. In response to the defendants' objections, the plaintiff submitted additional declarations with its replies in order to remedy the original deficiencies in the declarations attached with the motion. *Id.* at 2. The defendants then moved to strike the reply declarations, arguing they were untimely because any declarations that were submitted should have been submitted with the initial motion for summary judgment. *Id.* at 2, 7. The defendants further stated that because the reply declarations were submitted after they had responded to plaintiff's motion, they would be

unfairly prejudiced by the court's consideration of the declarations. *Id.* at 8. The Court agreed with the defendants and acknowledged that Rule 6(d) (what is now Rule 6(c)(2)) was intended "to insure that the party opposing a motion for summary judgment be given sufficient time to respond to the affidavits filed by the moving party, thereby avoiding any undue prejudice." *Id.* at 8. The Court further stated:

> Justice is not served by allowing a moving party to unfairly surprise and prejudice the non-movant by producing evidence of new, substantive facts at the last minute when there is no opportunity for the non-movant to respond. This is precisely the kind of *trial by ambush* that the federal rules summarily reject.

(emphasis added) *Tishcon Corp.* 2005 WL 6038743, at 8. The Court recognized that it could have minimized the prejudice to the defendants by providing them with an opportunity to "reply to plaintiff's reply." *Id.* at 8-9. However, the Court did not take this approach on the grounds that it would significantly increase the time and resources necessary to resolve summary judgment motions. *Id.* If this type of practice were to become the norm, parties could file reply after reply, introducing new information and allowing no limit to when the cycle of submitting new evidence and rebuttals should come to an end.

This seems to be an identical situation to McGowan. He timely responded to the motion for an accelerated decision based on the evidence the moving party initially provided. However, once the moving party filed their reply in support of the motion for an accelerated decision, they attached new information to arguably 'ambush' McGowan with information he had not already addressed in his first response in opposition to the motion for an accelerated decision. The prejudicial effect of allowing the newly attached declarations to which McGowan can no longer respond seems to go against how motion practice is supposed to work and leaves McGowan with no remedy on how to address these new Declarations and therefore, the Declarations should not be considered.

D. Declarations Contain Genuinely Disputed Material Facts

Even if the Presiding Officer does consider the newly attached declarations that the movant has supplied, they should be considered in the light most favorable to McGowan as the non-movant. Further, the attached Declarations bring up newly contested material facts that are absolutely at issue in this case. If anything, the addition of the new evidence might only suggest that the facts of the case are indeed disputed and that an accelerated decision should not be granted as a matter of regulation. Once an issue of material fact appears, that issue "may not be tried upon a summary judgment by means of an 'affidavit match.'" *Yonkers Contract Co. v. Me. Tpk. Auth.*, 24 F.R.D. 205, 228 (D. Me. 1958).

It is up to the Presiding Officer's discretion whether these Declarations will be used, but if we again compare 40 C.F.R. § 20.22 to Fed. R. Civ. P. 56, we can look to Rule 56(e)(1) that allows the court to give the opposing party "an opportunity to properly support or address the fact." This would be an alternative remedy for McGowan if the Declarations are allowed to be considered. McGowan should at least be given a chance to respond. However, this opens the door to reply after reply and rebuttal to newly submitted responses which is seen by the courts with disfavor, as discussed above.

CONCLUSION

For the foregoing reasons, McGowan asks the Presiding Officer to grant the motion to strike as to the Declarations attached to the Complainant's Rebuttal as these Declarations contain new facts that are likely material and prejudicial to Mr. McGowan's position, as he is unable to respond to the newly presented facts and argue if they are in dispute. If the motion to strike is not granted and an accelerated decision is rendered, it could be based in error as the newly added facts likely present a genuine issue of material fact.

Dated this 23rd day of June, 2015.

DR. DANIEL J. McGOWAN, Respondent

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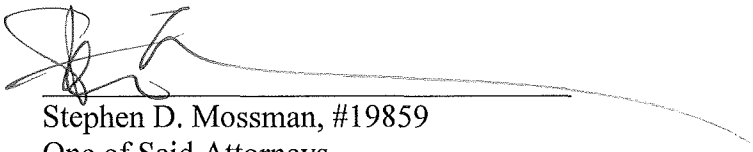
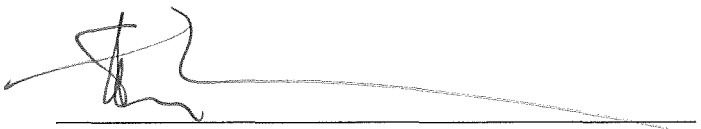
By: 
Stephen D. Mossman, #19859
One of Said Attorneys

CERTIFICATE OF FILING

The undersigned hereby certifies that a true and correct copy of the foregoing was served via the OALJ E-filing system, an original and one copy was sent to Sybil Anderson, the Office of Administrative Law Judges Hearing Clerk and a true and correct copy was served via email to Chris Muehlberger, Assistant Regional Counsel at muehlberger.christopher@epa.gov on the 23rd day of June, 2015.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