

4/24/96

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of)
)
Urban Drainage and Flood) Docket No. CWA-VIII-94-20-PII
Control District, and)
Kemp & Hoffman, Inc.)
)
Respondents)

ORDER GRANTING MOTION FOR INTERROGATORIES
and
GRANTING AN EXTENSION OF TIME

On November 13, 1995, Respondents filed a "Motion for Reconsideration of Order on Motion for Oral Deposition, or, in the Alternative, Motion for an Additional Order of Discovery." On the same date, Respondents filed a motion seeking an extension of time to respond to Complainant's motion for partial accelerated decision in this proceeding.

These motions follow Respondents' motion of June 19, 1995 requesting leave to take oral depositions of four employees of the United States Army Corps of Engineers (the "Corps"). That earlier motion was granted in part by the former presiding officer in this proceeding, Administrative Law Judge Frank W. Vanderheyden.¹ Judge Vanderheyden's Order of August 31, 1995 denied Respondents' motion for oral depositions but did allow Respondents to serve interrogatories on one of the Corps employees, Timothy T. Carey. Not satisfied with the information received in response to those interrogatories to Mr. Carey, in the instant motion Respondents renew their request for further discovery by means of serving interrogatories on two of the remaining Corps employees. The Complainant filed in opposition to Respondents' earlier motion for oral depositions, but has not responded to the current motion seeking further discovery. Respondents do state, in their motion for an extension of time to respond to Complainant's motion for partial accelerated decision, that counsel for Complainant was contacted and stated she opposed the motion for an extension of time.

Motions for discovery beyond the prehearing exchanges (which have been made in this proceeding) are governed by 40 C.F.R. §22.19(f). The presiding officer may grant such discovery upon

¹ Judge Vanderheyden retired on December 31, 1995. This proceeding was then suspended until the redesignation of the undersigned Administrative Law Judge on April 3, 1996.

determination that: (i) it will not unreasonably delay the proceeding; (ii) the information sought is not otherwise obtainable; and (iii) the information has significant probative value.

The Complainant charges Respondents in this proceeding with discharging fill into the waters of the United States without a permit issued pursuant to Section 404 of the Clean Water Act ("CWA"), in violation of Section 301(a) of the CWA, 33 U.S.C. §1311(a). In their defense, Respondents contend their filling activities were authorized by Nationwide Permit 26, which is applicable only above the "headwaters" of a regulated stream. Respondents seek this further discovery in order to shed light on the key issue of the location of the "headwaters" of Coal Creek, the stream that is the subject of this proceeding.

Complainant's witness on this issue is Timothy T. Carey, Project Manager for the Corps' Tri-Lakes Project Office in Littleton, Colorado. Mr. Carey submitted an affidavit in support of Complainant's Motion for Partial Accelerated Decision of June 5, 1995. In that affidavit, Mr. Carey states that, before 1982, the Corps determined the location of the headwaters of Coal Creek at a point over ten miles upstream from the site of the alleged violations, where the stream crosses the county line into Boulder County, and that the location has not changed since that time (¶¶7,8). Mr. Carey also cites the definition of "headwaters" in the Corps' regulations at 33 C.F.R. §330.2(d):

Headwaters means non-tidal rivers, streams, and their lakes and impoundments, including adjacent wetlands, that are part of a surface tributary system to an interstate or navigable water of the United States upstream of the point on the river or stream at which the average annual flow is less than five cubic feet per second. The DE [District Engineer] may estimate this point from available data by using the mean annual area precipitation, area drainage basin maps, and the average runoff coefficient, or by similar means.

Recognizing the crucial nature of the issue of the location of the headwaters of Coal Creek, Judge Vanderheyden granted Respondents' motion to obtain further discovery from Mr. Carey on the underlying basis and documentary support for the Corps' determination.

However, in his response to Respondents' interrogatories, Mr. Carey was unable to shed any new light on this issue. Respondents' earlier Freedom of Information Act request to the Corps had also proved fruitless, as no documents were found to support the Coal Creek headwaters determination. The only evidence of that determination is a computer-generated list of Colorado streams, from the Omaha District Office, dated May 1, 1983, that lists the streams alphabetically with certain data, including the headwaters

location. In his response to the interrogatories, Mr. Carey stated he had no other knowledge or support for the headwaters determination other than that single list of streams.

In the instant motion, Respondent seeks leave to serve further written interrogatories on two other Corps officers in the Omaha District Office: Jerry Folkers, Civil Engineering Tech; and Douglas Clemetson, Chief of Hydrology and Meteorology Section. The interrogatories would be limited to inquiring as to the underlying basis supporting the headwaters determination for Coal Creek, as in the interrogatories ordered in regard to Mr. Carey. Respondents also point out that Messrs. Folkers and Clemetson are listed as proposed witnesses in their prehearing exchanges, but that counsel for the Corps, in cooperation with counsel for the Complainant, has not allowed these officers to give depositions or sign affidavits at the request of Respondents.

In these circumstances, I find that the requested further discovery should be granted. Service of these interrogatories would not unreasonably delay this proceeding. Respondents have sought this information steadfastly by several means without success, indicating it is not otherwise obtainable. The information on the headwaters determination is potentially highly probative of a key issue in this proceeding. In light of the regulation that requires headwaters determinations to be made on the basis of empirical data, it is reasonable to believe that the information on Coal Creek should exist within the control of the Corps. The persons sought to be sent interrogatories are those most likely to have knowledge or information on this issue at this juncture.

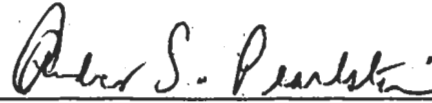
Respondents' motion for an extension of time to respond to Complainant's motion for partial accelerated decision should also be granted. Respondents' response to that motion will depend largely on the ultimate result of the additional discovery sought on the key issue of the location of the headwaters of Coal Creek. Thus, Respondents' response will not be due until after that discovery is completed, in accord with the Order below.

Order

Respondents will have 30 days from the date of service of this Order to serve written interrogatories on Jerry Folkers, Civil Engineering Tech, and Douglas Clemetson, Chief of Hydrology and Meteorology Section, United States Army Corps of Engineers, Omaha, Nebraska. Those persons will have 30 days from service of the interrogatories to file their responses. The interrogatories will be limited to the underlying basis for the determination of the headwaters of Coal Creek, similar to those previously served on Timothy T. Carey.

Respondents will then have 30 days after they receive the

responses to those interrogatories to file their response to Complainant's motion for partial accelerated decision.



Andrew S. Pearlstein
Administrative Law Judge

Dated: April 24, 1996
Washington, D.C.

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Kemp & Hoffman, Inc., Respondents
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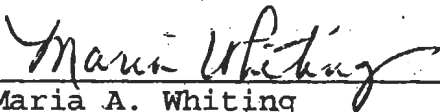
CERTIFICATE OF SERVICE

I certify that the foregoing Order Granting Further
Discovery and Extension of Time, dated April 24, 1996 was served
by regular mail on the addressees listed below:

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Dated: April 24, 1996
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