UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
URBAN DRAINAGE AND FLOOD CONTROL DISTRICT; KEMP & HOFFMAN, INC.; AND CITY OF LAFAYETTE,	)	Docket No. CWA-VIII-94-20-PII
	)	
Respondents	)	

ORDER GRANTING RESPONDENT'S ACCELERATED DECISION MOTION AND DENYING COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION

These proceedings were initiated pursuant to Section 309(g) of the Clean Water Act (CWA), 33 U.S.C. 1319(g), which provides for the assessment of civil penalties for violations of Section 301(a) of the CWA, 33 U.S.C. 1311(a). An administrative complaint was filed on May 4, 1994 /1/, against the three respondents named above by the United States Environmental Protection Agency, Region 8 (complainant), for the alleged unauthorized discharge of dredged and fill material in violation of Section 301(a) of the CWA.

/1/ Unless otherwise indicated, all dates are for the year 1994.

Respondent, City of Lafayette (City or respondent), filed a motion on September 21, for an accelerated decision to be dismissed as a respondent from this proceeding based upon the failure of complainant to establish a prima facie case. On October 17, complainant served its

response in opposition to respondent's motion, as well as filing its own partial accelerated decision motion. On December 1, the Administrative Law Judge (ALJ) issued an order to show cause for complainant to explain why new allegations in its response should be considered, when they were

not in the complaint. Complainant served its answer to this order on December 20. Further, both parties offered sur-responses to the respective motions.

Before addressing the motions, some threshold thoughts are appropriate. Common garden intelligence dictates that evidentiary hearings are designed for the resolution of material facts. The concept of an accelerated decision is similar to that of summary judgment, and not every factual issue is a bar. The existence of minor factual disputes would not preclude an accelerated decision. Disputed issues must involve "material facts" or those which have legal probative force regarding the controlling issue. Stated otherwise, a "material fact" is one that makes a difference in the litigation. /2/ Additionally, under 40 C.F.R. 22.20(a), the ALJ, upon motion of the respondent, may dismiss an action on the basis of failure to establish a prima facie case on the

part of complainant.

/2/ Words and Phrases, "Material Fact."

With this backdrop, the ALJ now turns to the parties' motions. The question at issue is whether the City should remain liable as a respondent for the alleged unauthorized discharge of dredged and fill material into Coal Creek. The City owns the property on which Coal Creek is located. Due to flood control and erosion problems in the Creek, the City requested Urban Drainage and Flood Control District (District) to implement a repair project. Notwithstanding the City's ownership of Coal Creek, the City contends no liability should attach because it neither discharged any material into the

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Creek, nor did it have control over the project which resulted in the alleged discharge.

Although complainant does not claim that the City discharged dredged and fill material, it alleges this discharge was done with the knowledge, consent and participation of the City. (Compl. 10, 17.) Further, contrary to respondent's assertion, complainant argues that the City had substantial control and responsibility over the project, and

thus, liability should attach to the City.

Under Section 301(a) of the CWA, it is unlawful for any person to discharge any dredged or fill material into the navigable waters of the U.S. unless a permit was obtained pursuant to Section 404 of the CWA, 33 U.S.C. 1344. The CWA's provisions are written without regard to intentional violations, thereby, making the person responsible for discharging any pollutant strictly liable. U.S. v. Earth Sciences, Inc., 599 F.2d 368, 374 (10th Cir. 1979). However, to be liable for a discharge, it is not necessary to actually discharge a pollutant. Liability will attach if the respondent is the legal cause of the discharge. The causation requirement can be fulfilled if the respondent had responsibility, control or authority over the discharges. Love v. New York State Dep't of Envtl. Conservation, 529 F. Supp. 832, 842 (S.D.N.Y. 1981)(citing Montgomery Envtl. Coalition v. Fri, 366 F. Supp. 261, 267 (D.D.C. 1973)); U.S. v. Bd. of Trustees of Florida Keys Community College, 531 F. Supp. 267, 274 (S.D. Fla. 1981); Friends of Sakonnet v. Dutra, 738 F. Supp. 623, 629 (D.R.I. 1990); Comm. to

Save the Mokelumne River v. E. Bay Mun. Util. Dist., 37 ERC 1159, 1170 (E.D. Cal. 1993).

Under the circumstances of this case, complainant has failed to establish that the City exercised the requisite authority for liability regarding the alleged discharges. Most significant are the admissions /3/ of L. Scott Tucker (Tucker), the executive director of the District. Tucker stated the following: (1) the Coal Creek project was under the sole direction, control and supervision of the District; (2) the District had the sole responsibility of obtaining any permits required by the CWA; (3) the City's involvement was limited to requesting that the District undertake the project, and supplying 900 cubic yards of clean fill; and (4) the City did not discharge any pollutant, clean fill or other material during the project. (Resp't Mot., Tucker Aff., 3-4, 6- 7.)

/3/ These statements are inherently reliable and persuasive because they constitute admissions against the interest of the District in this proceeding. See, e.g., Federal Rules of Evidence 801(d)(2)(A).

The veracity of Tucker's affirmations are further buttressed by Colorado state law. The District has a statutory mandate to implement maintenance programs for the protection of waterways. If the District elects to undertake a program, it has statutory control over the project, and the right of entry upon the land to carry out the project. (Resp't Mot. at 6-8.)

The City's reference to Love, supra, at 3, is also persuasive. Love involved an analogous situation where the

plaintiff alleged that a town was liable under Sections 301 and 404 of the CWA, for a land developer's discharge. This claim was based upon the town's failure to require a permit in conjunction with knowing acquiescence to pollution. The court rejected the claim against the town, and held that neither Section 301, nor Section 404 imposes liability on local government officials for a third party's failure to obtain a permit, unless the former exercised authority directly or indirectly over the discharge of pollutants. 529 F. Supp. at 841-43; See also Dutra, 738 F. Supp. at 631 (town not liable for another party's discharges, without a permit, where town had no control over the discharges). Simply, the allegations were either too remote or failed to establish that the town exercised any authority over the discharges. Love, 529 F. Supp. at 842.

Complainant's allegations against the City, likewise, do not rise to the level of authority over the alleged discharge of pollutants. Complainant contends that the City exercised authority by the following actions: (1) provided trucking for and supplied 900 cubic yards of fill

material; (2) installed access gates to the project area; and (3) surveyed the completed project with a representative from the District. (Complainant's Mot. at 11-12.) These actions do not establish control over the project, but rather demonstrate normal interaction for logistical purposes. While the supply of fill material might suggest more involvement, the District eliminates such a notion by declaring that City did not

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exercise any control over the project or the use of fill material. (Resp't Mot., Tucker Aff., 7.)

Besides these specific allegations, complainant attempts to construe the City's contacts with the District as involving significant participation and coordination. This allegation is without merit. First, as discussed above, the City's initial contacts with the District, seeking assistance, were in accordance with standard procedure under Colorado state law. Once the District elected to tackle the project, it alone had full authority over the planning, design and construction. The other contacts amount to inconsequential communications. /4/ Complainant, however, has not presented any

concrete allegations to demonstrate a joint undertaking and control over discharges. See, e.g., E. Bay Mun. Util. Dist., 37 ERC at 1170-71 (municipal utility district and regional water control board both liable for discharge of pollutants from joint construction of facility designed to capture, contain and evaporate contaminated mine runoff).

/4/ These allegations consisted of: (1) visits to the project site by City representatives; and (2) a memorandum of understanding from the District to local governments indicating that the former will not isolate local governments from a project, and will seek input as the same develops the scope of the project.

Complainant next argues that, under a totality of circumstances, the City is liable for the discharges. It specifically focuses on the City's ownership, involvement and knowledge of the permit requirement. The issues of involvement and the permit requirement have already been addressed. As for ownership, it is true that ownership is not a prerequisite for

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liability under the CWA. Id. at 1170 (citations omitted). Nevertheless, complainant still must establish that the City was a legal cause of the discharge. In this regard, complainant has not produced sufficient allegations that the City had control over the alleged discharges. On the whole, the City's alleged authority over the project is too far

beyond the pale of a requisite connection with the alleged discharges to warrant the attachment of liability. /5/ Love, 529 F. Supp. at 842 (quoting Montgomery Environmental Coalition v. Fri, 366 F. Supp. 261, 267 (D.D.C. 1973)). Accordingly, it is concluded that the City should be dismissed as a respondent in this proceeding.

/5/ Complainant's sur-response has been considered but it fails to change the result reached.

IT IS ORDERED /6/ that:

/6/ This decision in favor of the City of Lafayette has the effect of initiating the appeals process as far as the City's involvement in this matter. Thus, under 40 C.F.R 22.30, the parties may file a notice of appeal of the accelerated decision, dismissing the City as a respondent, with the Environmental Appeals Board (EAB). Pursuant to 40 C.F.R. 22.27(c), this accelerated decision shall become the final order of the EAB, unless an appeal is taken by the parties or the EAB elects to review the same, sua sponte, under 40 C.F.R. 22.30(b).

1. The motion by City of Lafayette to be dismissed as a respondent in this proceeding be GRANTED.

2. Complainant's motion for partial accelerated decision be DENIED.

Frank W. Vanderheyden
Administrative Law Judge

DATED: February 14, 1995

Certificate of Service

I certify that the foregoing Order, dated 2/14/95 , was sent this day in the following manner to the below addressees:

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Dated: Feb. 14, 1995

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