UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 9

IN THE MATTER OF:	)	Docket No. CWA-IX-FY93-42
	)	
	)	Proceeding to Assess
Town of Miami, Arizona	)	Class I Administrative
	)	Penalty Under Clean Water
RESPONDENT	)	Act Section 309(g),
	)	33 U.S.C. §1319(g)
	)	
	)	

ORDER ON COMPLAINANT'S REQUEST FOR SUMMARY DETERMINATION OF LIABILITY

This proceeding for Class I administrative penalties was brought by the Director of the Water Management Division of EPA Region 9 ("Complainant") against the Town of Miami, Arizona ("Respondent") with respect to alleged unpermitted discharges of pollutants during March, 1993 into Bloody Tanks Wash[1] from the Respondent's wastewater collection and treatment facility, in violation of Section 301(a) of the Clean Water Act, 33 U.S.C. §1311(a).

The procedural rules applicable to this proceeding are the proposed "Consolidated Rules of Practice Governing the Administrative Assessment of Class I Civil Penalties Under the Clean Water Act," 56 Fed. Reg. 29,996 (July 1, 1991) ("Part 28"), which are being used by EPA as guidance in Class I administrative penalty proceedings under Section 309(g) of the Clean Water Act prior to their final promulgation.

Section 28.25(a)(1) of the proposed "Consolidated Rules of Practice" provides that

> [a]ny party may request, by legal argument with or without supporting affidavits, that the Presiding Officer summarily determine any allegation as to liability being adjudicated on the basis that there is no genuine issue of material fact for determination presented by the administrative record and any exchange of information.

The Complainant has requested, in its Request for Summary Determination of Liability dated November 17, 1993, that I summarily determine that the Respondent "is liable for violations of the Clean Water Act as alleged in the complaint." In effect,

[1]A wash is defined in The American College Dictionary (1970) as the dry bed of an intermittent stream (Western U.S.).

the request is for a determination that there is no genuine issue of material fact as to the allegations of fact in the Administrative Complaint.

Section 301(a) of the Clean Water Act, 33 U.S.C. §1311(a), prohibits the discharge of a pollutant by any person except in compliance with the terms of Section 402 of the Act, 33 U.S.C. §1342, or other sections of the Act not relevant here.[2] Section 502(12) of the Act, 33 U.S.C. §1362(12), defines the term "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source." The elements of liability in this case, which must be proved in order for the Complainant to prevail on its Request for Summary Determination of Liability, are therefore that the Town of Miami is a person within the meaning of the Act, that the Town of Miami discharged pollutants into navigable waters from a point source, and that such discharges were unpermitted[3] and thus not in compliance with Section 301(a) of the Act.

The Respondent was served with the Complainant's Request for Summary Determination of Liability by regular mail on November 17, 1993. Section 28.25(b) of the proposed "Consolidated Rules of Practice" provides that

> [a]ny party against whom a request for summary determination . . . has been made shall serve a response to the request or a counter-request no later than twenty days following receipt of the opposing party's request, or thirty days following the service of the administrative complaint, whichever is later, unless the Presiding Officer establishes a different schedule . . . . A party opposing a request or counter-request for summary determination shall show, by affidavit or by other documentation, that the administrative record and any exchange of information present a genuine issue of material fact as to liability. [emphasis added]

The Respondent has not filed any response to the Complainant's request. The Respondent has not filed any documents since its Response to Administrative Complaint and Motion to Amend Answer

---

[2]Section 402 of the Act provides for the issuance of permits for the discharge of pollutants, upon condition that the discharge will meet certain requirements of the Act. The Town of Miami does not have such a permit. See paragraph I of the Town of Miami's Response, admitting allegation 7 of the Administrative Complaint.

[3]Or in violation of a permit, if the Town of Miami had had a permit.

dated October 18, 1993.[4]

In its Response to Administrative Complaint and Motion to Amend Answer, the Respondent admitted many of the allegations in the Administrative Complaint. There is no issue of material fact as to any of the allegations which have been admitted by the Respondent. In summary, these are that the Respondent, a municipality incorporated under the laws of Arizona, is a "person" within the meaning of the Clean Water Act; that the Respondent operates a wastewater collection and treatment facility in Miami, Arizona; that the facility includes a wastewater collection system, a pump station adjacent to Bloody Tanks Wash, and evaporation ponds on top of inactive tailings piles owned by Cyprus Miami Mining Corp.; that "a discharge from the main trunk line did occur" (Response at paragraph IV); and that the discharge was unpermitted.

The allegations that were not admitted by the Respondent are as follows:

> (1) The allegations in Paragraph 2 were admitted "except as to the allegation that discharge was made into 'Navigable waters' which is denied for lack of information and belief."
>
> (2) The allegations in Paragraph 5 were admitted "except as to the allegation that Bloody Tanks Wash is a 'Navigable water' which is denied for lack of information and belief."
>
> (3) Paragraph 6 was admitted "as to the fact that a discharge from the main trunk line did occur but is denied insofar as the allegation of particular dates and effluent content is concerned due to a lack of precise information and belief by counsel."
>
> (4) Paragraph 8 was admitted "as to the allegation that an unpermitted discharge occurred, and the balance of the paragraph is denied as to the Town of Miami's liability."

The first two issues raised by the Respondent by reason of its denials are whether the Respondent discharged into navigable waters and whether Bloody Tanks Wash is a navigable water. Since the Respondent is alleged to have discharged only into Bloody Tanks

---

[4]Although the Complainant stipulated to a thirty day extension of time for the Respondent to amend its response, the extension expired with no amended response having been filed.

Wash, the two issues are identical.[5] While under other circumstances there could be an open question of fact as to whether a particular body of water is a navigable water, in the present case Bloody Tanks Wash has been determined to be a navigable water by the State of Arizona.[6] "Navigable waters" are defined in Arizona Revised Statutes §49-201 as "the waters of the United States as defined by § 502(7) of the clean water act (33 United states Code § 1362(7)." The term "navigable waters" as used by the State of Arizona in making its determination is therefore identical to the term "navigable waters" as used under federal law in the Clean Water Act. The Respondent has provided no argument or evidence to suggest that the State of Arizona's determination is erroneous or subject to dispute.[7] Under Section 28.25(b) of the proposed "Consolidated Rules of Practice" quoted above, the Respondent is obligated to do more than just stand on its denial. The Respondent has therefore failed to present a genuine issue of material fact as to whether Bloody Tanks Wash is a "navigable" water.

The third issue raised by the Respondent has to do with the specific facts of the discharges alleged in the Administrative Complaint. Paragraph 6 of the Administrative Complaint alleges that "[o]n March 12, 16, 17, and 18, 1993, the Town of Miami discharged from one or more point sources in its wastewater collection system, to Bloody Tanks Wash, effluent containing suspended solids and other pollutants." The Respondent contests, "due to a lack of precise information and belief by counsel," the dates of the discharges and whether the discharges contained pollutants. (The Respondent did not dispute whether the discharges

---

[5]The "NPDES Permit Compliance Report" attached to Complainant's Request for Summary Determination of Liability refers at page 2 to the alleged discharge as "flowing down Bloody Tanks Wash and into Miami Wash," but the allegations in the Administrative Complaint refer to Bloody Tanks Wash only.

[6]As stated by the Complainant in its Request for Summary Determination of Liability, Arizona law requires that the Director of the Arizona Department of Environmental Quality adopt, by rule, water quality standards "for all navigable waters." A.R.S. §49-221. The Complainant states that the Director has done so, and has included Bloody Tanks Wash on a "List of Navigable Waters and Designated Uses," A.A.C. R18-11, Appendix B.

[7]On February 9, 1994 the Complainant filed a copy of a preliminary injunction obtained by the State of Arizona against the Town of Miami, which includes a finding that Miami Wash is a navigable water. State of Arizona v. Town of Miami, No. CV 93-26524 (Maricopa County Superior Ct. Jan. 31, 1994) (order granting preliminary injunction).

were from one or more point sources.) Under Section 28.25(b) of the proposed "Consolidated Rules of Practice" quoted above, such a disclaimer, absent more, is not sufficient to present a genuine issue of material fact where, as here, the Complainant has filed uncontroverted supporting evidence of the specific discharges. See, the NPDES Compliance Inspection Report dated March 25, 1993, (attached to the Complainant's Request for Summary Determination of Liability) and the preliminary state court injunction cited in footnote 7.

The inspection report, prepared by Susan D. Johnson, an environmental engineer with the EPA Region 9 Water Management Division, states that on March 17 and 18, 1993 she and another EPA inspector conducted a "Compliance Evaluation Inspection" of the Town of Miami's wastewater treatment and collection facilities as a follow-up on a report that the Town was discharging untreated sewage into Bloody Tanks Wash. The inspection report states that on March 17, 1993 they were accompanied on their inspection by Mr. Elias Garcia, Director of Public Works for the Town of Miami, and that Mr. Garcia described to them discharges that occurred on March 12 and 16, 1993.

According to the inspection report, Mr. Garcia stated (in summary) as follows: On March 12, 1993 two manholes located at Ragus Road overflowed as a result of a sewage backup in the collection system, causing sewage to flow over the ground, under the highway via a culvert, and into Bloody Tanks Wash. The back-up of sewage in the collection system was caused by the inability of the pump station to handle incoming flows due to heavy storms and excessive infiltration into the collection system. One of the three pumps in the pump station was out of service for repairs and the other two were operating at reduced capacity. The Town contacted the Gila County Health Department to request permission to begin the deliberate discharge of untreated sewage directly into the Wash from the collection system. On March 16, 1993 the Town opened a clean-out valve on a section of the sewer line running adjacent to the Wash and allowed sewage to discharge directly into the Wash from the collection system. On both days chlorine tablets were added to the sewage upstream from the point of overflow/discharge.

The inspection report states in addition that on March 17 and 18, 1993 the EPA inspectors observed the discharge of chlorinated, but otherwise untreated, sewage into Bloody Tanks Wash and observed that the sewage flowed down Bloody Tanks Wash into Miami Wash. Ronald H. Clawson, the other EPA inspector, took nine photographs that are included in the inspection report. Photographs one through three taken on March 17th show the flow of sewage from the clean-out valve into Bloody Tanks Wash. Photographs eight and nine taken on March 18th show the reduced flow of sewage being pumped to the evaporation pond.

In addition, the preliminary injunction obtained by the State of Arizona against the Town of Miami contains findings of fact by the court that the Town discharged partially chlorinated but otherwise untreated wastewater into Miami Wash from an open cleanout valve on the main sewer transmission line on March 12, 1993, that the discharge continued from March 16, 1993 until March 18, 1993 "in a steady flow of approximately 100 gallons per minute," and that the sewage released from the cleanout valve had not been treated. State of Arizona v. Town of Miami, No. CV 93-26524 (Maricopa County Superior Ct. Jan. 31, 1994) (order granting preliminary injunction at findings of fact 1, 2, and 4).

While the Town of Miami denies the allegation that it discharged "effluent containing suspended solids and other pollutants," the material discharged by Miami from its collection system -- "sewage" -- is by definition a "pollutant" under Section 502(6) of the Clean Water Act, 33 U.S.C. §1362(6).

When a motion for summary determination is made and supported, the opponent of the motion may not rest upon mere allegations and denials, but must show, by affidavit or by other materials subject to the consideration of the Presiding Officer, that there is a genuine issue of material fact for determination at hearing. Pecora Enterprises, No. III-89-042-DS (EPA Region 3, July 11, 1990) (interlocutory summary determination at p. 6). The Respondent has failed to meet this burden in the face of the evidence contained in the inspection report and has therefore failed to present a genuine issue of material fact as to the dates of the alleged discharges and as to whether the discharges contained (or constituted) pollutants. As to the latter issue, sewage, even if treated with chlorine, constitutes a pollutant by definition. 33 U.S.C. §1362(6).

In summary, there is no genuine issue of material fact as to those facts necessary to prove the elements of liability under Section 301(a) of the Clean Water Act for the Town of Miami's unpermitted discharges.

The final issue raised by the Town of Miami concerns the Town's liability for the unpermitted discharges. The portion of allegation number 8 that was not admitted by the Respondent reads as follows:

> . . . the Town of Miami violated section 301(a) of the [Clean Water] Act. Under section 309(g)(2)(A) of the Act, 33 U.S.C. 1319(g)(2)(A), the Town of Miami is liable for the administrative assessment of a civil penalty not to exceed $10,000 per violation, up to a maximum of $25,000.

Where, as in the present case, there is no genuine issue of material fact as to those facts necessary to prove the elements of

liability under the Clean Water Act, the Town of Miami's liability under the statute for the occurrences alleged in the Administrative Complaint is an issue of law, not of fact. The Respondent has not provided any legal argument in support of its denial of liability. In light of the findings of fact made below, the Town of Miami is, as a matter of law, liable under Section 301(a) of the Clean Water Act for the discharges alleged in the Administrative Complaint and is therefore in turn liable for an administrative penalty under Section 309(g) of the Act. The actual amount of the penalty will be determined in a later phase of this proceeding. See Section 28.26 of the proposed "Consolidated Rules of Practice."

Section 28.25(e) of the proposed "Consolidated Rules of Practice" provides that if the Presiding Officer determines that a party is entitled to judgment as to liability as a matter of law, the Presiding Officer shall prepare any written recommended finding of fact and any conclusion of law corresponding to such determination. Accordingly, I therefore make the following recommended findings of fact and conclusions of law:

(1) The Town of Miami is a municipality incorporated under the laws of Arizona, and is a "person" within the meaning of Section 502(5) of the Clean Water Act, 33 U.S.C. §1362(5).

(2) The Town of Miami operates a wastewater collection and treatment facility in Miami, Arizona. The facility includes a wastewater collection system and a pump station adjacent to Bloody Tanks Wash.

(3) At no relevant time did the Town of Miami have an NPDES permit authorizing discharges from the facility.

(4) On March 12, 1993, two manholes in the Town of Miami's collection system overflowed as a result of a sewage backup, and sewage from the collection system flowed into Bloody Tanks Wash.

(5) On March 16, 1993, the Town of Miami opened a clean-out valve in its collection system, and allowed sewage to discharge from the system directly into Bloody Tanks Wash.

(6) On March 17 and 18, 1993, EPA inspectors observed discharges from the collection system into Bloody Tanks Wash.

(7) The material, "sewage," discharged by the Town of Miami is a "pollutant" as defined in Section 502(6) of the Clean Water Act, 33 U.S.C. §1362(6).

(8) Bloody Tanks Wash is a "navigable water" within the meaning of Section 502(7) of the Clean Water Act, 33 U.S.C. §1362(7).

(9) Section 301(a) of the Clean Water Act, 33 U.S.C.

§1311(a), prohibits the discharge of a pollutant into navigable waters by any person except in compliance with the terms of a permit issued under Section 402 of the Act, 33 U.S.C. §1342, or in compliance with other sections of the Act not relevant here.

(10) On March 12, 16, 17, and 18, 1993 the Town of Miami discharged pollutants into navigable waters from one or more point sources in its collection system without a permit in violation of Section 301(a) of the Clean Water Act, 33 U.S.C. §1311(a).

(11) Under section 309(g)(2)(A) of the Clean Water Act, 33 U.S.C. 1319(g)(2)(A), the Town of Miami is liable for the administrative assessment of a civil penalty not to exceed $10,000 per violation, up to a maximum of $25,000.

/s/
Steven W. Anderson
Presiding Officer

Dated: April 4, 1994