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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION VIII
999 18TH STREET, SUITE 500
DENVER, COLORADO 80202

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HEARING CLERK

IN THE MATTER OF Patrick Belcastro d.b.a. A-1 Auto Sales 1025 South Fifth St. Grand Junction, CO 81501 C.M. & H. Tire Co., Inc. 747 North Avenue Grand Junction, CO 81501 Respondents	Docket No. CWA-VIII-94-01-PI

RULING AND ORDER

On November 16, 1993, the United States Environmental Protection Agency ("EPA" or "Complainant") issued a Complaint against Patrick Belcastro d.b.a. A-1 Auto Sales ("Belcastro" or respondent) and C.M.& H. Tire Co., Inc. ("Tire Company" or respondent) pursuant to Section 309(g) of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1319(g). The Complaint alleges that the respondents violated Section 301(a) of the Act, 33 U.S.C. § 1311(a), which prohibits the discharge of fill material into the navigable waters of the United States, except in compliance with a permit issued by the Corps of Engineers ("COE") under Section 404 of the Act. Specifically, each respondent is charged with violating the Act by discharging fill material, in the form of used tires, into Hunter Wash, a navigable water of the United States, without a permit. EPA proposed to assess a Class I penalty against the respondents in the amount of $25,000.

Procedural Background and Discussion

The procedural rules applicable to this proceeding are the proposed "40 C.F.R. Part 28, 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 Rules"), 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.

Each respondent, by their respective attorney, separately filed a timely response to the Complaint.

Section 28.25(a) of the Part 28 Rules provides that "[a]ny party may request ,...., 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." It also provides that "[a]ny party may request,...., that the Presiding Officer accelerate his recommended decision on the basis that there is no compelling need for further fact-finding concerning remedy." On March 3, 1994, the complainant filed a Motion for Summary Determination that requested an accelerated decision.

Pursuant to Section 28.25(b) of the Part 28 Rules, by their respective attorneys, the respondents separately filed timely responses to the Motion for Summary Determination.

In its Motion for Summary Determination EPA alleged that the

unauthorized discharge of tires into Hunter Wash originally involved the acts of five entities including: two adjacent landowners (Michael Hotz and Joe Lynn) upon whose land the unauthorized disposal occurred; the respondent Tire Co. which paid Mr. Hotz to dispose of tires; and the Bank of Grand Junction (the "Bank") which paid respondent Belcastro to dispose of some tires. Belcastro subsequently paid another party to dispose of some tires.

Three of the original respondents: the Bank and the two landowners signed an Administrative Order on Consent, under which Mr. Hotz committed to develop and implement a plan to stabilize or remove the tires. (Exh. 15, Motion for Summary Determination). The two respondents declined to sign the order and were subsequently included in the subject penalty action under Section 309(g) of the Act. Equitable relief is not available under Section 309(g) of the Act.

Joinder of Respondents.

The respondents in this action were joined in an administrative complaint, under Section 309(g) of the Act. There is no statutory provision in the Act for joint and/or several liability, nor is there any provision for joinder in the Part 28 Rules.

The Motion for Summary Determination alleges that the respondents are "persons" within the meaning of Section 502(5) of the Act. Section 502(5) of the Act states [the] term "person" means an individual, corporation, partnership, association,

State, municipality, commission, or political subdivision of a State, or any interstate body. The term "person" is in the singular, not the plural "persons" as used by the complainant in its Motion for Summary Determination. See p 3, para. 2, of complainant's Motion for Summary Determination.

Rule 20 of the Federal Rules of Civil Procedure, F.R.C.P. 20(a), provides that:

> All persons ... may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action (emphasis ours).

In the instant case, whether or not joinder of the respondents is proper under the Part 28 Rules, there is a question of fact as to whether the relief asserted against the respondents arises out of the same transaction, occurrence, or series of transactions or occurrences.

The respondent Belcastro was involved in transactions with the Bank of Grand Junction and Michael Hotz. The Bank of Grand Junction paid Belcastro $1,200 to dispose of tires. Belcastro paid Kenneth Wieberg $500 to dispose of some tires. The tires were disposed of on Michael Hotz's property. The Tire Company was clearly not involved in any of these transactions or series of transactions.

The respondent Tire Company was involved in transactions with Michael Hotz. The Tire Company paid Michael Hotz $1,500 to dispose of some tires. Belcastro was clearly not involved in any

of these transactions.

Joinder of parties as respondents would seem to be allowable where there is a sufficient nexus and the parties would not be prejudiced by such joinder. In the subject action both respondents admitted to being involved in the unauthorized disposal of tires; however, there no other factors of commonality. The number of tires involved were different. The times of disposal were different. There is no evidence in the administrative record that they coordinated their actions. The only common factor is the site of disposal. Thus, their respective liabilities presents a genuine issue of material fact for determination. I therefore find no nexus, and no nexus is alleged, between the transactions involving the respondent Belcastro and those involving the respondent Tire Company. I further find that joining them as respondents in one action implicitly results in prejudice.

Division of Penalty Amount.

In its Motion for Summary Determination the complainant requested the imposition of a civil penalty in the amount of $25,000 on the respondents. Although the Motion for Summary Determination included an excellent discussion of the factors for assessing a penalty involving each respondent, there was no recommendation as to how the assessment of a $25,000 penalty should be divided between the respondents. The absence of a discussion of the division of the aggregate $25,000 penalty between the respective respondents, impairs any decision

respecting a penalty.

Conclusion

Since there is no connection between the actions or transactions of the respondents, except the disposal site, joining them in one penalty action results in prejudice and excessive entanglement.

The Motion for Summary determination and accelerated recommended decision is denied and the complainant is granted permission pursuant to Section 28.18(b)(2) of the Part 28 Rules to amend the complaint, as appropriate.

SO ORDERED THIS 17th day of June, 1994.

Alfred C. Smith

Alfred C. Smith
Presiding Officer