



UNITED STATES
 ENVIRONMENTAL PROTECTION AGENCY
 REGION 6
 DALLAS, TEXAS



IN THE MATTER OF:)
)
 SOLV-EX CORPORATION)
 A New Mexico corporation)
) CWA DOCKET NO. VI-97-1632
 RESPONDENT)
)
 NPDES Permit No. MNR05A160)
 NPDES Facility No. NMU000216)
)

ORDER DIRECTING ENTRY OF RESPONDENT'S DEFAULT AS TO LIABILITY

This is a proceeding for the assessment of a Class I administrative penalty under Section 309(g)(2)(A) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g)(2)(A).¹ This Order directs the entry of the Respondent's default as to liability under proposed 40 C.F.R. § 28.21(a), and orders the Complainant to submit written argument regarding the assessment of an appropriate civil penalty under proposed 40 C.F.R. § 28.21(b).

A. BACKGROUND AND PROCEDURAL HISTORY

On August 29, 1997, the Complainant filed an administrative complaint against the Respondent, alleging that the Respondent unlawfully discharged pollutants into waters of the United States, in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a). The administrative complaint seeks a \$27,500 civil

¹Class I CWA penalty actions are governed by procedures set forth in the proposed rules for Non-Administrative Procedures Act (Non-APA) cases. Proposed 40 C.F.R. Part 28 [56 Fed. Reg. 29996 (July 1, 1991)]. Future citations to the proposed rules will be to the proposed Code of Federal Regulation citations, rather than to the Federal Register.

penalty. On September 17, 1997, the Respondent filed a "Notice of Automatic Stay in Bankruptcy", claiming that this "filing operates as a stay of the continuation of all litigation and claims against and pertaining to this Debtor, pursuant to 11 U.S.C. § 362(a)." This document did not admit, deny, or otherwise respond to any of the allegations set forth in the administrative complaint.

As noted in a previous Order in this case, bankruptcy petitions do not operate as an automatic stay of EPA administrative enforcement proceedings. *In Re: Patrick J. Neman, d/b/a The Main Exchange*, 5 E.A.D. 450, 454, fn 1 (August 26, 1994). However, if the administrative enforcement proceeding results in a money judgment for EPA, then the automatic stay would preclude an action to collect the money judgement. *Id.* Therefore, this action was not stayed. *Notification of Assignment and Order Setting Deadline for Submission of Amended Response dated July 9, 1998.*

In that the Respondent failed to admit, deny or otherwise respond to any of the allegations in the administrative complaint, the Respondent was ordered to file an Amended Response in accordance with proposed 40 C.F.R. § 28.20, by July 31, 1998. *Notification of Assignment and Order Setting Deadline for Submission of Amended Response dated July 9, 1998.* The Respondent was also notified that:

Failure to file an Amended Response will result in an Order of Default as to Liability against the

Respondent, if the Presiding Officer determines that the Complainant has stated a cause of action in its Administrative Complaint.

Amended Order Setting Deadline for Submission of Amended Response dated July 14, 1998. The Orders were served by certified mail - return receipt requested. The return receipt green cards in the Regional Hearing Clerk's file shows that the Respondent's counsel received both Orders. Despite the two Orders, the Respondent failed to file an Amended Response.

Proposed 40 C.F.R. § 28.21(a) provides the following:

If the respondent fails timely to respond pursuant to § 28.20(a) or (b) of this part or the Presiding Officer determines that the respondent's conduct warrants imposition of the sanction of default as to liability, the Presiding Officer, on his own initiative, shall immediately determine whether the complainant has stated a cause of action.

Although the Respondent filed a "Notice of Automatic Stay in Bankruptcy", this document did not admit, deny, or otherwise respond to the allegations in the administrative complaint.

Under proposed 40 C.F.R. § 28.20(d),

Each uncontested allegation in the administrative complaint as to liability is deemed admitted by the respondent . . . by the respondent's failure in a timely response to deny such allegation included in the administrative complaint.

Despite the Respondent's initial failure to deny the allegations in the administrative complaint, this Court gave the Respondent an additional opportunity to deny the allegations by filing an Amended Response. The Respondent failed to do so.

Therefore, this Court concludes that the Respondent's conduct warrants the entry of default as to liability.

B. ELEMENTS OF THE CAUSE OF ACTION

The Complainant has alleged that the Respondent unlawfully discharged pollutants into waters of the United States, in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a). Section 301(a) of the CWA, 33 U.S.C. § 1311(a) prohibits, *inter alia*, the discharge of a pollutant by any person except in compliance with a National Pollutant Discharge Elimination System (NPDES) permit (Section 402 of the CWA, 33 U.S.C. § 1342). Therefore, the elements of liability which must be proven in order for this Court to enter a default order as to liability, are as follows:

1. The Respondent is a "person", as that term is defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5);

2. The Respondent discharged "pollutants" as that term is defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6);

3. The pollutants were added to "navigable waters", as that term is defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7);²

4. The pollutants were added to the navigable waters by a "point source", as that term is defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14); and

5. Such discharge(s) were unpermitted, or in violation of a

²Navigable waters means "waters of the United States".

permit, and therefore not in compliance with Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

C. ANALYSIS OF ADMINISTRATIVE COMPLAINT

Based on the foregoing, the Complainant has stated a cause of action. The Complainant alleged the following in the administrative complaint:

1. The Respondent is a corporation and a person as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

Administrative Complaint ¶¶ 1 - 2.

2. The Respondent discharged "hydrocarbons (oil), clays, titanium dioxide, and alumina", into its storm water, and that these substances were "pollutants" as that term is defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6). Administrative Complaint ¶¶ 5, 12, 13, 14, and 18.

3. The pollutants were added to the City of Albuquerque Municipal Separate Storm Sewer System, and then to the receiving waters of the Rio Grande, which are "navigable waters", as that term is defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7). Administrative Complaint ¶¶ 6 and 18.

4. The pollutants were added to the navigable waters by the Respondent's facility, a "point source", as that term is defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14). Administrative Complaint ¶¶ 3, 4, 5, 6, and 18.

5. An NPDES permit was required in order for the Respondent to discharge said pollutants. The Respondent did not have such a permit, and thus such discharges were unpermitted, and therefore

not in compliance with Section 301(a) of the CWA, 33 U.S.C. § 1311(a). Administrative Complaint ¶¶ 6 - 18.

Therefore, the Complainant has alleged a cause of action for a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), and an Order of Default as to Liability will be entered against the Respondent.

D. ENTRY OF DEFAULT AS TO LIABILITY

Having determined that the Complainant has stated a cause of action, this Court directs the Regional Hearing Clerk to enter the Respondent's default as to liability in the administrative record of this proceeding. Proposed 40 C.F.R. § 28.21(a)(1).

Upon entry of this Order, the aforementioned paragraphs of the administrative complaint (Section C, *supra*) shall be deemed recommended findings of fact and conclusions of law. Proposed 40 C.F.R. § 28.21(a)(1).

E. DETERMINATION OF REMEDY

In accordance with proposed 40 C.F.R. § 28.21(b), Complainant shall submit by **November 3, 1998**, written argument (with any supporting documentation), regarding the assessment of an appropriate civil penalty. The argument shall be limited to the nature, circumstances, extent and gravity of the violation or violations, and with respect to the respondent, ability to pay, any prior history of such violations, the degree of culpability, the economic benefit or savings (if any) respondent enjoyed resulting from the violation, and such other matters as justice may require. The Respondent may file a response to the

Complainant's submission by **November 20, 1998.**

Dated this 2nd day of October, 1998.

/S/

Evan L. Pearson
Presiding Officer

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of October, 1998, I served true and correct copies of the foregoing Order Directing Entry of Respondent's Default as to Liability on the following in the manner indicated below:

CERTIFIED MAIL - RETURN RECEIPT REQUESTED P 110 337 514

John D. Phillips
Ellen T. Louderbough
Hinkle, Cox, Eaton, Coffield &
Hensley, L.L.P.
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INTEROFFICE MAIL

Efren Ordonez
Water Team Leader (6EN-LW)
Legal Branch
Compliance Assurance and
Enforcement Division
U.S. EPA - Region 6
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Dallas, Texas 75202-2733

/S/

Lorena S. Vaughn
Regional Hearing Clerk