



UNITED STATES
 ENVIRONMENTAL PROTECTION AGENCY
 REGION 4
 Atlanta, Georgia



IN THE MATTER OF:)
)
 JAMES E. YONGE/NOH, INC.)
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 RESPONDENTS) DOCKET NO. CWA-IV 94-522
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DECISION AND ORDER ON RESPONDENT JAMES E. YONGE'S MOTION FOR SUMMARY DETERMINATION OR IN THE ALTERNATIVE MOTION TO DISMISS

This is a proceeding for Class I administrative penalties brought by the Director of the Water Management Division of the United State Environmental Protection Agency (EPA), Region IV ("Complainant") against James E. Yonge and NOH, Inc. ("Respondents") for alleged unlawful discharge of a pollutant into the St. Johns River, in violation of Section 301(a) of the Clean Water Act (the "Act"), 33 U.S.C. § 1311(a).

The 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) ("Non-APA Rules").

Section 28.25(a)(1) of the Non-APA Rules 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."

On June 13, 1995, Respondent James E. Yonge filed a motion to dismiss the Administrative Complaint against him or enter summary judgment in his favor. Mr. Yonge also requested a hearing on the motion. There has not been any information exchange ordered or conducted in this matter. Primarily, for that reason, on June 30, 1995, the Complainant filed a motion requesting that the

Presiding Officer postpone ruling on Respondent's motion until the parties have conducted a prehearing exchange. On the same day, EPA submitted a separate motion to amend its complaint to name Mr. Yonge as an operator, in addition to its initial claim that Mr. Yonge is liable as an owner. On July 27, 1995, Respondents filed motions in opposition to both of Complainant's motions. On September 2, 1995, Complainant replied to the aforementioned responses. These matters are now ripe for determination. A decision on Complainant's Motion to Amend the Complaint is addressed in a separate order.

MOTION FOR SUMMARY DETERMINATION OF LIABILITY OR IN THE
ALTERNATIVE MOTION TO DISMISS:

In support of the motion to dismiss the Complaint against him, Mr. Yonge submitted an affidavit in which he emphatically stated that "... [A]t no time at issue in this action, have I in my individual capacity been the owner operator of the water treatment system which is the subject of the action...".

Attached to the affidavit is EPA Form 3510-1, dated December 13 1989, which is the general information application for the Consolidated Permits Program. On page 2 of that form, Mr. Yonge identified himself as the facility contact while identifying the other Respondent in this action, NOH, Inc., a Florida corporation of which he is President, as the operator. In addition to signing the form, the application further provided the following:

"[T]he owner of this treatment facility is a real estate holding company. This corporation is not in the utility business and is attempting to transfer the treatment facility to another company, organized, staffed and in the business of wastewater treatment and disposal."

However, as the third defense to the Administrative Complaint, Respondent claims that on March 1, 1993, PDY, Inc., a Florida corporation, and JAMES E. YONGE, conveyed all interest in the subject facility to the Point Property Owners Association, a Florida corporation. A transfer implies some prior ownership interest. On its face, this is inconsistent with the denial of ever having owned the subject facility.

Other genuine issues of material facts in dispute are raised by Complainant. In the Motion to Postpone Ruling, Complainant sites portions of a 1989 personal property purchase and sale agreement that lists NOH, Inc. and Mr. Yonge as the sellers. As indicated in Complainant's Motion, Article 11 of that Agreement sets forth that "the seller warrants and represents that they have title to the assets to be conveyed." However, nowhere in its responsive pleadings does Respondent address this issue. Furthermore, Respondent makes reference to a title search in

