

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV

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| IN THE MATTER OF: |) | |
| |) | |
| TRI-COUNTY WATER |) | DOCKET NO. CWA-IV-93-529 |
| CONDITIONING, INC. |) | |
| |) | |
| and |) | |
| |) | |
| JAMES W. COLLINS |) | |
| |) | |
| Respondents |) | |
| |) | |

ORDER ON COMPLAINANT'S MOTION FOR SUMMARY DETERMINATION
AS TO LIABILITY

This is a proceeding for Class I administrative penalties brought by the Director of the Water Management Division of the United States Environmental Protection Agency, Region IV ("Complainant") against Tri-County Water Conditioning, Inc. ("Tri-County") and James W. Collins ("Respondents") for alleged discharge of a pollutant into navigable waters in violation of Section 301(a) of the Clean Water Act ("Act"), 33 U.S.C. § 1311(a). Such discharge is alleged to have occurred without authorization by a National Pollutant Discharge Elimination System ("NPDES") permit and in violation of certain terms and conditions of an NPDES permit issued by EPA pursuant to Section 402 of the Act, 33 U.S.C. § 1342.

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) ("Part 28").

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."

On February 2, 1996, Complainant filed a Motion for Summary Determination on the issue of liability pursuant to 40 C.F.R. proposed Part 28. Respondents were advised in the February 1, 1996, Report of Prehearing Conference and Order, of the requirement at § 28.25(b) of the Non-APA Rules, to respond to the motion no later than 20 days from receipt. Specifically, that section provides as follows:

"[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..., 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, the administrative record and any exchange of information present a genuine issue of material fact as to liability [emphasis added].

Respondents failed to respond and the twenty day time period for Respondents to file a response has expired. Complainant's Motion is now ripe for determination.

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. 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." Section 502(5) of the Act, 33 U.S.C. § 1362(5), defines the term "person" to include individuals and corporations. The elements of liability in this case, which must be proven in order for the Complainant to prevail on its Request for Summary Determination of liability, are that the Respondents are "persons" within the meaning of the Act, that the Respondents discharged pollutants into navigable waters from a point source, and that such discharges were unpermitted, or in violation of a permit, and therefore not in compliance with Section 301(a) of the Act.

Although Respondents did not file a response to the Motion for Summary Determination, Respondent Tri-County had previously filed a letter with the Regional hearing Clerk dated October 7, 1993, in response to the initial proposed Administrative Complaint.¹ James W. Collins, on behalf of Tri-County stated therein, that "It is true that I have been remiss in the timely filing of the EPA discharge reports. Because of the extreme demands on my time, something had to be neglected. Since I am discharging a minimal amount of effluent (500 to 600 gallons per day, five days per week), I really thought that my neglect was

¹By Order of the undersigned dated August 31, 1995, Complainant was granted leave to file the Amended Administrative Complaint to name James W. Collins as a Respondent in this action. In all other respects the Administrative Complaint remained the same.

insignificant. I have learned otherwise and have filed timely reports as of this date." Thereafter, in anticipation of Complainant's filing an Amended Administrative Complaint to include Mr. James W. Collins as a party, on August 8, 1995, a letter was filed with the Hearing Clerk from Collins and Tri-County. The only statement in connection with the allegations made in the Amended Administrative Complaint, were in essence that 1) Tri-County did not make a timely application for permit renewal in reliance upon information from an employee of the State of Florida Department of Environmental Regulation that it couldn't get a new permit and 2) corporate law protects individual proprietors and their personal concerns in the entity that is the corporation.

A number of conference calls were held with the parties to this action.² Repeatedly, during those telephone calls, James E. Collins, as representative of the corporate Respondent, admitted liability on the part of Tri-County Water Conditioning. Therefore, as to those allegations in the Amended Complaint which Respondent either admitted or failed to deny, there is no issue of material fact. 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

²Specifically, conference calls were held in this matter on June 6, 1995, July 13, 1995, January 23, 1996, and February 1, 1996. Reports of Prehearing Conference were issued by the Presiding Officer and made part of the administrative record. The reports reflect Respondents' positions regarding the allegations set forth in the Complaints filed in this action. Those reports are incorporated herein by reference.

Respondent, Tri-County's liability under the statute for the occurrences alleged in the Amended Administrative Complaint is an issue of law, not of fact. See In the Matter of Town of Miami, Arizona,

Docket No. CWAIX-FY93-42 (April 4, 1994). Since Respondent, Tri-County Water Conditioning, Inc., has not provided any support for denying liability, that corporate Respondent is liable under the Clean Water Act Section 301(a) for discharging without a permit, and for failure to submit the Discharge Monitoring Reports as required by the permit for the periods set forth by Complainant in the Amended Complaint. Therefore, Complainant's Motion for Summary Determination as to liability of Tri-County Water Conditioning is **GRANTED**.

Liability on the part of the individual Respondent, James W. Collins, must be addressed as a separate matter. Relying upon cases under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq.³, the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq.⁴, and the Safe Drinking Water Act, 42 U.S.C. §§ 300f et seq.⁵, Complainant contends that as sole shareholder and principal officer in the corporation, Mr.

³United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726, 745 (8th Cir. 1986).

⁴United States v. Production Plated Plastics ("PPP"), 742 F. Supp. 956, 963.

⁵United States v. Hydrocarbon Resources, Inc., Civil Action No. 92-115 (E.D. Ky, March 12, 1993).

Collins too is liable for violations of the Clean Water Act. Complainant also asserts that Mr. Collins did not contest liability for the violations in his answer to the Amended Administrative Complaint. Although that is technically correct, as noted above, Respondent James W. Collins contested that as a matter of law he was not liable for the violations admitted to by the Corporate Respondent, Tri-County Water Conditioning, Inc.

The cases relied upon by Complainant indeed hold individuals, usually individual officers and shareholders, personally liable. The courts generally focus on the question of control, and the extent to which the individuals in those cases controlled the management and operation of the violating corporations. Reflected in those decisions, however, is rather extensive fact-finding leading to the conclusions that the extent of control on the part of the individuals in the affairs of the corporations actually took place. For instance, in the PPP decision the Court relied upon various documents and depositions which were submitted by the defendants providing evidentiary support that the individual corporate officer was personally involved in or directly responsible for acts in violation of RCRA and the local hazardous waste management act.

This same issue was discussed at length in another CERCLA case, Kelly v. Thomas Solvent Co., 727 F. Supp 1532 (W.D. Mich. 1989). The decision examines the appropriate standard upon which to base what was couched as "the serious matter of liability" on the part of a corporate individual. The Court stated, "Although

liability under CERCLA is essentially a strict liability scheme, the case law indicates that where CERCLA seeks to impose liability beyond the corporate form, an individual's power to control the practice and policy of the corporation, and the responsibility undertaken by that individual in this area should be considered." Id., at 1543. Although the court established what it considered a more stringent standard than traditional corporate tort liability, focusing on whether the corporate individual could have prevented the violation at issue, it noted that more than mere status as a corporate officer or director is required. The Court stated that, "The test...allows the fact-finder to impose liability on a case-by-case basis, a result I favor in this area due to the seriousness of the potential liability. The test for liability of corporate individuals under CERCLA is thus heavily fact-specific, requiring an evaluation of the totality of the situation". Id. at 1544.

Assuming arguendo, that the cases under the various other environmental statutes apply to the Clean Water Act case at hand, Complainant has not established those facts sufficient to persuade the undersigned, that Respondent James W. Collins is liable for the violations alleged in the Amended Administrative Complaint. Complainant's conclusions as to Mr. Collins' liability rest solely upon his position in the corporation. Without a more extensive showing of his actual involvement in the violations that are the subject of the Amended Administrative Complaint, it would be premature, at best, to summarily determine

that there is no material issue of fact as to Mr. Collins' liability.

Complainant's motion for summary determination on the issue of liability on the part of James W. Collins is therefore **DENIED WITHOUT PREJUDICE**.

Section 28.25(e) of the proposed Non-APA Rules, 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, having determined that Complainant is entitled to judgment as to liability as to Respondent Tri-County Water Conditioning, Inc., I therefore make the following recommended findings of fact and conclusions of law:

(1) Tri-County is a corporation incorporated under the laws of the State of Florida with a business in East Palatka. Respondent James W. Collins, is President of Tri-County. Both are "persons" within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).

(2) Respondent Tri-County owns and operates a wastewater treatment facility in East Palatka, Florida, which is a "point source" within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14), which discharged pollutants to an unnamed creek and then to the St. Johns River, a water of the United States within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7).

(3) Pursuant to Section 402 of the Act, 33 U.S.C. § 1342, the Administrator of EPA, through the Director of the Water Management Division of EPA, Region IV, issued NPDES permit number FL0031755 ("NPDES permit"), to Respondent Tri-County, effective October 1, 1987, with an expiration date of September 30, 1992.

(4) The NPDES permit required Respondent Tri-County to periodically submit discharge monitoring reports ("DMRs").

(5) During the period from July 1990 through October 1, 1991, inclusive, and during the period from October 10, 1991 through September 1992, inclusive, Respondent Tri-County failed to timely submit DMRs.

(6) Respondent Tri-County's NPDES permit expired on September 30, 1992. Respondent Tri-County had never applied for or received an NPDES permit renewal or a new permit for the discharge of a pollutant from the facility as of the time of filing of the original Administrative Complaint.

(7) During the period from October 1992 through December 1992, inclusive, and on May 25, 1993, Respondent Tri-County discharged from the facility rinse and backwash water to an unnamed creek thence to the St. Johns River, a "navigable water" within the meaning of Section 502(7) of the Clean Water Act, 33 U.S.C. § 1362(7). Rinse and backwash water is a "pollutant" as defined in Section 502(6) of the Clean Water Act, 33 U.S.C. §1362(6).

(8) Respondent Tri-County's discharges and failures to submit DMRs in a timely manner as described above were in

IN THE MATTER OF TRI-COUNTY WATER CONDITIONING, INC. and
JAMES W. COLLINS, DOCKET NO. CWA-IV-93-529

CERTIFICATE OF SERVICE

I certify that the foregoing Order on Complainant's Motion for Summary Determination as to Liability, dated June 3, 1996, was sent this day in the following manner to the addressees:

Hand delivered:

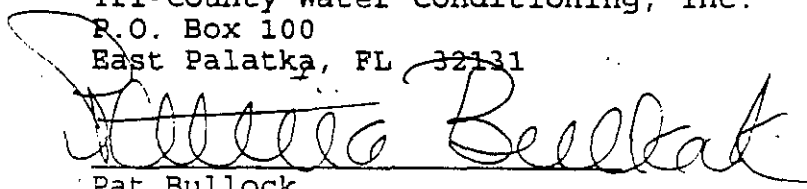
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6/15/96
Date


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