



UNITED STATES
 ENVIRONMENTAL PROTECTION AGENCY
 REGION VIII
 DENVER, COLORADO



IN THE MATTER OF:)
)
 Patrick Belcastro)
 d.b.a. A-1 Auto Sales)
)
) DOCKET NO. CWA-VIII-94-01-PI
 RESPONDENTS)
)
)

DECISION AND ORDER OF THE REGIONAL ADMINISTRATOR

This is a proceeding under Section 309(g) of the Clean Water Act ("CWA" or "the Act"), as amended, 33 U.S.C. §1319(g) and the United States Environmental Protection Agency's (EPA) 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. 29,990 (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.

I. BACKGROUND

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) pursuant to Section 309(g) of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1319(g). The complaint alleged that the respondent 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, respondent was 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 respondent in the amount of \$25,000.

On December 27, 1993, the respondent filed a timely response to EPA's administrative penalty action. On March 3, 1994, EPA filed a motion for summary determination under **§28.25(a) of the Part 28 Rules**. The motion joined Belcastro with a second respondent. On June 17, 1994, the Presiding Officer issued a Ruling and Order denying an accelerated decision because of improper joinder. The complainant was granted leave to amend its complaint, to separate the respondents. On July 25, 1994, the complainant filed an amended administrative complaint, with the Regional Hearing Clerk, naming Belcastro the sole respondent. On August 22, 1994, the complainant filed a request for an accelerated decision with the Regional Hearing Clerk. The respondent filed timely responses to the amended complaint and a motion for accelerated decision. For the reasons stated below, I am entering both a summary determination and an accelerated decision for the **complainant**.

II. DISCUSSION AND FINDINGS

A. Summary Determination as to Liability.

The Part 28 Rules provide that:

"[any] 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."
§28.25(a) (1) Part 28 Rules.

In order for complainant to prevail on summary determination, it must be established that there is no genuine issue of material fact for determination presented by the administrative record and any exchange of information, respecting the respondent's liability for violating the Act.

To prove a prima facie violation, it must be established that: respondent is a person; that respondent discharged pollutants into "water of the United States" from a point source; and that the discharge was not in compliance with , or without, a permit issued by the Corps of Engineers under Section 404 of the Act. Based on the administrative record and any exchange of information, I find as follows:

1. Respondent is a Person. The respondent has admitted that he is an individual conducting business under the name of A-1 Auto Sales, and that his place of business is 1025 South

Fifth Street, Grand Junction, Colorado, 81501.⁽¹⁾
Under Section 502(5) of the Act, 33 U.S.C. §1365(5), the term "person" includes both an individual and a corporation. I therefore find respondent is a "person" as that term is used in the Act.

2. Respondent Discharged Pollutants into Hunter Wash.

Paragraph 2 of the Amended Complaint alleges that respondent disposed (or arranged for the disposal) of the tires in Hunter Wash. Respondent admits contracting to dispose of tires from property owned by the Bank of Grand Junction. Respondent denies that he disposed of tires in Hunter Wash, but admits that he delivered the tires which he contracted to dispose of to Mr. Hotz's property through his agent, Kenneth Wieberg.⁽²⁾

Mr. Hotz's property is a wetland area adjacent to Hunter Wash. Pursuant to identical regulations issued by EPA and the Corps, intrastate wetlands are considered "Waters of the United States" if their "use", degradation, or destruction ... could affect interstate ...commerce.⁽³⁾ Respondent appears to argue that since the tires were not placed directly in Hunter Wash - the tires were not disposed of in a Water of the United States. Notwithstanding this allegation, I find that the tires were disposed of in an intrastate wetland by respondent's agent. The intrastate wetland is clearly a "Water of the United States", as noted above.

3. The Tires are Pollutants. The respondent admits that the tires are "pollutants" within the meaning of The meaning of Section 502(6) of the Act, 33 U.S.C. §1362(6).⁽⁴⁾

4. Hunter Wash is a Water of the United States. The respondent neither admits nor denies that Hunter Wash is a "Water of the United States." as defined in 33 CFR Part 328.3(a), as set forth in complainant's Request for Accelerated Decision.⁽⁵⁾ Upon review of Paragraph III.A.4. of complainant's Request for Accelerated Decision, I find that Hunter's Wash is a "Water of the United States."

5. The Truck is a Point Source. Respondent denies that his truck was a "point source." It has been found that trucks and bulldozers used to discharge fill are point sources covered by the Clean Water Act. U.S. v. Weisman, 489 F. Supp. 1331 (M.D. Fla. 1980). I therefore find that the respondent's truck is a "point source", within the meaning of Section 502(14) of the Act, 33 U.S.C., §1362(14). I therefore find that the respondent, acting through his agent, disposed of used tires in Hunter Wash (a "Water of the United States") without a permit, in violation of Section 301(a) of the Act, 33 U.S.C. Section 1311(a). Since there is no genuine issue of material fact remaining for determination, I hereby find summary determination against the respondent, with respect to liability.

B. Accelerated Decision Concerning Remedy.

Section 28.25(a), Part 28 Rules 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 August 22, 1994, the complainant filed a Request for Accelerated Decision with the Regional Hearing Clerk. In order to approve this request, I must find there is no compelling need for further fact-finding concerning remedy. The remedy, in this case is a civil penalty pursuant to Section 309(g) (3) of the CWA, as amended, 33 U.S.C., §1319(g) (3). In determining the appropriate administrative penalty [remedy], Section 309(g) (3) of the Act provides that the Administrator should take into account the following statutory factors:

. . . the nature, circumstances, extent and gravity of the violation, or violations, and with respect to the violator, the ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. (emphasis added).

Based on the above statutory factors, I make the following findings concerning remedy:

7. Nature, Circumstances, Extent and Gravity of the

Violation. The complainant alleges that respondent dumped approximately 2,200 used tires in Hunter Wash. In his affidavit, John M. Brink of EPA⁽⁶⁾ stated that the dumping of tires into Hunter Wash has caused substantial erosion, has destroyed wildlife habitat, and has created a public nuisance.⁽⁷⁾

The respondent's response pointed to an inconsistency in complainant's allegation concerning the number of tires dumped in Hunter Wash. In a supplemental brief EPA explained that the total number of tires dumped in Hunter Wash by the respondent was approximately 2,200, with 40 - 50 from property owned by the Bank of Grand Junction.⁽⁸⁾

Based on the administrative record, I find that approximately 2200 tires were dumped in Hunter Wash by the respondent. The environmental impact of this dumping is significant.

8. Ability to Pay I disagree, with the complainant, that the respondent did not respond to EPA's request concerning his financial capability, with either an affirmative or a negative answer as to his financial ability to remedy the violation.⁽⁹⁾ In a letter dated May 1, 1994, to John Brink the respondent made a credible attempt to respond to seven questions, pertaining to financial status.⁽¹⁰⁾ On the

basis of the information provided, I find that the respondent may not be able to pay a substantial penalty.

9. Prior History of Such Violations. Complainant is unaware of any prior enforcement actions against the respondent for violation of the Clean Water Act.

10. Degree of Culpability. I find that the respondent had complete control over the violative conduct; however, I also find no aggravating factors that increase the degree of culpability.

11. Economic Benefit or Savings. The complainant presented evidence that disposing of the tires in a county landfill would have cost \$2 per tire. Alternatively, it would cost \$14 per cubic yard, according to the Mesa County Waste Management Coordinator. By disposing of approximately 2,200 tires in Hunter Wash rather than in a landfill, the respondent avoided an expenditure of approximately \$4,400, assuming \$2 per tire. Alternatively, the EPA calculates that, assuming 6 equipment tires or 8 automobile tires per cubic yard - 200 equipment tires and 2,000 automobile tires would have taken up 283.3 cubic yards. At \$14 per cubic yard it would cost approximately \$3,966.20 to dispose of the tires in a landfill. The respondent was paid \$1,200 to haul tires from property belonging to the Bank. He has admitted paying Kenneth Wieberg \$500 to haul tires to Hunter Wash, thus earning a profit of \$700 on the job. The respondent should not profit from the improper disposal of the tires, nor benefit from the lower alternative cost of disposal. I find that the economic benefit to the respondent is \$4,400 (cost of properly disposing of tires in landfill) plus \$700 (profit) for a total economic benefit of \$5,100.

III. CONCLUSIONS OF LAW

In addition to the above, I find the following specific conclusions of law:

1. Hunter Wash, a wetland, is a Water of the United States within the meaning of Section 502(7) of the Act, 33 U.S.C., §1362(7).
2. Kenneth Wieberg, respondent's agent, disposed of approximately 2,200 tires in Hunter Wash.
3. The tires are a "pollutant" within the meaning of Section 502(6) of the Act, 33 U.S.C., §1362(7).
4. The disposal of tires in Hunter Wash is a violation of Section 301 of the Act, 33 U.S.C. §1311, for which the respondent is liable for penalties under Section 309(g) of the Act, 33 U.S.C., §1319(g).

IV. DISPOSITION

1. Summary determination is entered against the respondent, as there is no genuine issue of material fact for determination as to liability, presented by the administrative record or any exchange of information.
2. After reviewing the administrative record, I find no compelling need for further fact-finding concerning remedy. The complainant's Request for Accelerated Decision is granted.
3. Based on the administrative record and the statutory factors set forth in 33 U.S.C., §1319(g)(3), a penalty of \$5,100 is assessed against respondent.

ORDER

On the basis of the administrative record and applicable law, including **§28.28(a)(2)(ii) of the Part 28 Rules**, respondent is hereby **ORDERED** to comply with all of the terms of this **ORDER**:

A. Respondent is hereby assessed a civil penalty in the amount of \$5,100 and **ORDERED** to pay the civil penalty as directed in this **ORDER**.

B. Pursuant to **§28.28(f) of the Part 28 Rules**, this **ORDER** shall become effective 30 days following its date of issuance unless the Administrator suspends implementation of the **ORDER** pursuant to **§28.29 of the Part 28 Rules** (relating to Sua Sponte review).

C. Respondent shall, within 30 days after this **ORDER** becomes effective, mail a cashier's check or certified check (return receipt requested), payable to "Treasurer, United States of America," in the amount of \$5,100 to:

EPA - Region VIII
Regional Hearing Clerk
P.O. Box 360859M
Pittsburgh, Pa 15251

In addition, Respondent shall mail a copy of the check, by first class mail, to:

Regional Hearing Clerk (8RC)
U.S.E.P.A., Region 8
999 18th Street, Suite 500
Denver, CO 80202

D. In the event of failure by Respondent to make payment within 30 days of the date this **ORDER** becomes effective, the matter may be referred to the United States Attorney for collection by appropriate action in the United States District Court, pursuant to subsection 309 (g)(9) of the Clean Water Act, 33 U.S.C. §1319(g)(9).

E. Pursuant to 31 U.S.C. §3717, EPA is entitled to assess

interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin to accrue on the civil penalty if it is not paid as directed. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 4 C.F.R. § 102.13(c). In addition, a penalty charge of 6 percent per year will be assessed on any portion of the debt which remains delinquent more than 90 days after payment is due. However, should assessment of the penalty charge on the debt be required, it will be assessed as of the first day payment is due under 4 C.F.R. §102.13(e).

JUDICIAL REVIEW

Respondent has the right to judicial review of this **ORDER**. Under subsection 309(g)(8) of the Clean Water Act, 33 U.S.C. §1319(g)(8), respondent may obtain judicial review of this civil penalty assessment in the United States District Court for the District of Columbia or in the United States District Court for the District of Colorado by filing a notice of appeal in such court within the 30-day period beginning on the date this

ORDER is issued (5 days following the date of mailing under **§28.28(e) of the Part 28 Rules**) and simultaneously sending a copy of such notice by certified mail to the Administrator and to the Attorney General.

IT IS SO ORDERED:

Date: _____

WILLIAM P. YELLOWTAIL
Regional Administrator

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1. . Response of Patrick Belcastro to First Amended Administrative Complaint, par. 4.
 2. . Response to Request for Accelerated Decision, Par.III.A.2.
 3. . 40 U.S.C., 230.3.3(s)(3) and 33 U.S.C., 328.3(a)(3). See also Tull v United States, 481 [3] U.S. 412 (1987)
 4. . Response to Request for Accelerated Decision, Para. III.A.3.
 5. . Request for Accelerated Decision, Para. III.A.4.
 6. . Mr. Brink is the Section 404 Enforcement Program Manager for the Wetlands Protection Section, Water Quality Branch, Water Management Division, U.S. EPA, Region VIII.
 7. . Affidavit of John M. Brink - attached to EPA,s Request for Accelerated Decision.
 8. . EPA's Supplemental Brief in Support of its Request for Accelerated Decision.
 9. . Complainant's Request for Accelerated Decision, III, B.2, p 7.
 10. . Response to Request for Accelerated Decision, Exhibit C

Last Updated: October 18, 1999