8/20/96

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
HAROLD G. RUETH	)	**Docket No. CWA-A-0-007-92**
RUETH DEVELOPMENT COMPANY	)	
	)	
Respondent	)	

MEMORANDUM OPINION AND ORDER

Under consideration are the following motions: (1) Respondents' motion for leave to file an amended answer and motion to dismiss filed February 6, 1996, by Harold G. Rueth and Rueth Development Company; (2) Complainant's motion for default order, filed February 15, 1996; and (3) Complainant's motion for leave to file supplemental authority, filed May 3, 1996.

Motion to Dismiss and Motion to Amend Answer

The complainant, Region 5, alleges that the respondents violated the Clean Water Act (CWA) , 33 U.S.C. §§ 1252 et seq., by discharging pollutants into navigable waters of the United States without having obtained a permit pursuant to § 404 of the CWA. Allegedly, respondents discharged pollutants into approximately 11 acres of wetlands located on property in Griffith, Indiana. Complainant alleges that the respondents have failed to remove the fill or acquire a permit authorizing the discharged materials to remain in the wetlands. In its motion for default, the complainant states as follows:

> Since at least August 7, 1987, and continuing to the present, Respondents periodically have discharged pollutants consisting of fill material, such as sand,

gravel road base, asphalt, and cement curbing, into wetlands at the Woodland Estates subdivision in Griffith, Indiana. The fill generally is located in the southeast corner of the subdivision near Rueth Drive, Holly Lane, Oak Street and Lillian Avenue. Respondents continued to fill the wetlands, despite warnings issued during on-site visits and formal written non-compliance notifications, the posting of stop work signs, the issuance of a "cease and desist" order by the U.S. Army Corps of Engineers. . . .

. . . [T]he [adjacent Hoosier Prairie State Nature Preserve (HPSNP)] and its wetlands have been and continue to be adversely impacted by the loss of hydrologic function caused by the filling and draining of the Woodland Estates wetlands. (Default Mot. at 7-8).

Respondents move to dismiss the complaint which was filed against it, on August 12, 1992, on the ground that it exceeds the five year limit on initiating actions for civil penalties imposed by 28 U.S.C. § 2462. Respondents urge that because the August 12, 1992 complaint fails to cite any "violations" after August 7, 1987, it was five days late and barred by § 2462. Respondents characterize the proper time for issuing a complaint as the "date the Government discovered or should have discovered the violation" or when the government "knew or reasonably should have known of the violation." Respondents find support for its view that the violation accrued on August 7, 1987, and no later, in United States v. Telluride, 884 F. Supp. 404 (D. Colo. 1995).

The complainant opposes the motion to dismiss on the grounds that the CWA provides that when discharged material remains in wetlands without a required permit, each additional day constitutes a violation of § 301 of that Act. It is complainant's view that because the material remains in wetlands without a permit, the violation continues daily and beyond the August date cited in the complaint. Complainant also represents in its prehearing exchange that unauthorized discharges continued at the Woodland Estates after August 7, 1987, on or about November 25,

1987, and December 9, 1987. These dates, complainant maintains, substantiate the representation made in the complaint that the discharges, in addition to their statutorily defined impact, continued after August 7, 1987. Complainant argues that these grounds act to toll § 2462, the statute of limitations, and render respondents' statute of limitations argument moot.

Respondents' reply does not address the complainant's factual and statutory arguments on which it rests the timeliness of its complaint. Those allegations and arguments sufficiently establish that the complaint is timely. The facts alleged by the complainant specifically state that harm from the discharge of pollutants continued after August 7, 1987, and that the discharge of the pollutants continued after August 7, 1987. Respondents have not alleged any facts that indicate that that is not the case. Whether the events that give rise to this action are viewed on the dates of the discharge of pollutants or the continuing after effects of their harm, they establish sufficiently that this case was timely pursuant 28 U.S.C. § 2462. Here, there are both factual allegations that pollutants continued to be discharged within five years of issuance of the complaint and statutory allegations that the impact continues to this day. Section 301 of the Clean Water Act states that each day that these matters are not rectified results in a violation of the Act. For these reasons, the court's opinion in Telluride Co., supra at 2, and the case on which it relies, 3M Company (Minnesota Min. and Mfg..) v. Browner, 17 F. 3d 1453 (D.C. Cir. 1994), provide no direct guidance in the disposition of respondent's motion to dismiss. The court in Telluride Co. did not consider § 301 of the CWA which provides that discharge of a polluting substance into wetlands continues to result in liability until it is removed or permitted. 3M Company provides even less guidance. The court reviewed the timeliness of a complaint issued under the Toxic Substances Control Act and the question about what would be a continuing

violation under that Act was not an issue before the court. The court in 3M Company made no mention whatsoever of the CWA, its statutory scheme, or the particular facts which led to issuing a complaint in this case. 1/ For these reasons, the motion to dismiss will be denied. 2/

Respondents request leave to amend their answer to include the statute of limitations as a defense to the complaint. Section 22.15(e) provides that respondents may amend their answer upon motion granted by the presiding officer. While the complainant opposes granting the request, it has not provided an adequate reason for denying the amendment at this stage of the proceeding. 3/ Granting the amendment will not complicate the proceeding nor delay its

---

1/ In their reply the respondents urge that the court's opinion in Friends of Santa Fe County v. Lac Minerals, Inc., 892 F. Supp. 1333 (D.N.M. 1995) provides a rationale for granting their motion to dismiss. There, the court followed the long held proposition that a citizens suit could not prevail unless they could establish that there was either a continuous or intermittent violation. The court noted that there was testimony that there may not have been a continuous violation but it pointed out that the "fact-finder will have to determine what evidentiary weight to give to these opinions." The court does not say that the plaintiffs could not proceed with their case. In this case, the complainant has alleged continuous adverse impact by the loss of hydrologic function in the filling of the Woodland Estates wetlands. Those facts remain to be established but the allegations alone give rise to a valid and timely complaint.

2/ The complainant requests leave to file a supplemental authority. The request will be granted.

3/ Counsel for respondents states in an affidavit that he is inexperienced and did not become familiar with the time limitation defense until after the answer had been prepared. In fact, as complainant points out, it took three years for him to become aware of respondents' key defense. Counsel's inability to represent his client for whatever reason is not an excuse for amending an answer. The grant of respondent's motion to amend its answer was in no respect premised on counsel's admitted inadequacies.

resolution, since the issue raised by the respondents has already been resolved. Respondents' motion for leave to amend its answer will be granted, and complainant's motion to strike respondent's motion will be denied.

Complainant's Motion to Hold Respondents in Default

Complainant moves to find the respondents in default pursuant to § 22.17 of the rules of practice because respondents have not complied with two prehearing orders of presiding officers regarding their witnesses and exhibits. While respondents did not timely comply with the prehearing orders, they have done so now and are no longer in default. Complainant's motion is moot and will be denied.

ACCORDINGLY, IT IS ORDERED that:

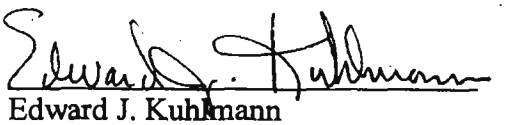
1. Respondents' Motion to Dismiss IS DENIED.

2. Respondents' Motion to Amend Answer IS GRANTED.

3. Complainant's Motion to Strike Amendment to Answer IS DENIED.

4. Complainant's Motion for Leave to File Supplemental Authority IS GRANTED.

5. Complainant's Motion for Default Order IS DENIED.



Edward J. Kuhlmann
Administrative Law Judge

Date: August 20, 1996
Washington, D.C.

IN THE MATTER OF HAROLD G. RUETH, ET AL
Respondents, Docket No. CWA A-0-007-92

CERTIFICATE OF SERVICE

I certify that the foregoing Memorandum Opinion and Order, dated August 20, 1996, was sent in the following manner to the addressees listed below:

Original by Pouch Mail to:

Jodi L. Swanson-Wilson
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region V
77 West Jackson Blvd.
Chicago, IL 60604-3507

Copy by Certified Mail to:

Counsel for Complainant:

Jane D. Woolums, Esq.
Rudolph C. Tanasijevich, Esq.
Associate Regional Counsel
U.S. Environmental Protection Agency, Region V
77 West Jackson Blvd.
Chicago, IL 60604-3507

Counsel for Respondent:

Michael Muenich, Esq.
Hand, Muenich & Wilk
3235 - 45th Street
Highland, Indiana 46322

Aurora Jennings
Legal Assistant
Office of Administrative Law Judges
Environmental Protection Agency
Washington, DC 20460

Dated: Aug. 20, 1996
Washington, DC