UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
TOWN OF LURAY,	)	**DKT. No. CWA-III-185**
	)	
Respondent	)	

ORDER GRANTING MOTION FOR ACCELERATED DECISION ON LIABILITY [(1)]

Under consideration is complainant's motion for a partial accelerated decision, received October 15, 1997. The complaint in this matter was filed April 7, 1997. It charges respondent Town of Luray ("respondent"), with violating Section 301(a)of the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a),[(2)] and seeks assessment of an administrative penalty pursuant to CWA § 309(g)(1)(A), 33 U.S.C. § 1319(g)(1)(A).[(3)] Respondent, a municipality, owns and operates a wastewater treatment plant in Luray, Page County, Virginia. In March of 1991 respondent was issued National Pollution Discharge Elimination System ("NPDES") Permit No. VA0062642, as required of all publicly owned treatment works under CWA § 402, 33 U.S.C. § 1342 by the Virginia Department of Environmental Quality ("DEQ"). DEQ reissued this permit, which establishes certain specific effluent limitations for the discharge of pollutants by the wastewater plant, on March 29, 1996. Complainant alleges that respondent violated the terms of this permit on numerous occasions during April 1992 through December 1996 by discharging pollutants from Outlet 001 into Hawksbill Creek, a navigable water as defined at CWA § 507(7), 33 U.S.C. § 1362(7).

Complainant's Motion for Accelerated Decision on Liability

Summary determination is only appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. 40 C.F.R. 22.20(a). The moving party bears the burden of showing that no dispute exists as to any material fact. The moving party may carry this burden either by producing evidence showing that no genuine factual dispute

exists or by showing that there is no evidence that supports the nonmoving party's case. Celotex v. Catrett, 477 U.S. 317, 323 (1986). Where the "evidence is so one-sided" that a reasonable mind could reach only one conclusion, there is no genuine issue of material fact and summary determination is appropriate. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986).

Complainant maintains that here no material facts are in dispute and that the record establishes that complainant is entitled to judgment as a matter of law pursuant to Consolidated Rule 22.20(a). Respondent's liability is conclusively established, complainant asserts, by respondent's discharge monitoring reports ("DMRs"). See Complainant's Prehearing Exchange ("PHE") Ex. 3. The DMRs, which respondent is required to maintain and submit to EPA as a condition of its permit, are records of respondent's discharges.

Complainant avers that on numerous occasions from April 1992 through December 1996 respondent exceeded the limits established by its permits for discharge of Total Suspended Solids ("TSS") and Carbonaceous Biochemical Oxygen Demand ("CBOD5").[(4)] In addition, complainant asserts that no evidence in the record supports respondent's claim that certain of its discharges were pursuant to interim limits established under a Consent Special Order issued by the Virginia DEQ. Moreover, relying on the recent case United States v. Smithfield Foods, Inc., 965 F.Supp. 769 (E.D.Va. 1997), complainant urges that such Orders do not alter respondent's obligation to abide by the limits established by its NPDES permits. The Smithfield court held, inter alia, that Special Orders issued by the Virginia Water Control Board either before or after the issuance of defendant's NPDES permit did not modify the terms of that permit.

In opposition to complainant's motion, respondent offers little that is relevant to a determination of liability under the CWA. First, respondent has submitted no evidence in support of its Answer where it denies that Hawksbill Creek is a navigable water and that Luray discharged pollutants into it. Respondent's Answer at II-2, II-3. Second, respondent has submitted no documentation of the Consent Special Orders it claims to have received from the Virginia DEQ. Third, respondent has made no effort to raise questions of fact, merely asserting, without elaborating, "that questions of fact are in issue, and a summary decision would therefore be inappropriate." Id. at 1-2.

Respondent's sole defense appears to be the mere assertion that "it has done all humanly possible to comply with all regulations

governing operation of its sewage disposal facility." Respondent's Response at 1. As complainant observes, however, the CWA is a strict liability statute. Stoddard v. Western Carolina Regional Sewer Authority, 784 F.2d 1200, 1208 (4th Cir. 1986). Consequently, respondent's protestations that it has done all that could be humanly expected have no relevance in determining its liability.

It is well settled that conclusory statements and denials unsupported by evidence are insufficient to resist a well-supported motion for summary determination. In the Matter of Clarksburg Casket Co., Dkt. No. EPCRA-III-165 at 7 (June 6, 1997); Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir., 1990) (holding that neither wishful thinking, mere promises to produce admissible evidence at trial nor conclusory responses unsupported by evidence will defeat a properly pleaded motion for summary judgment). An examination of the uncontroverted DMRs shows that respondent's discharges of TSS and CBOD5 exceeded its permit limits on numerous occasions in the period specified by the Complaint. Because complainant has submitted evidence showing that respondent committed the violations alleged in the Complaint, and because respondent has offered nothing that raises a genuine issue as to any material fact, complainant's motion for accelerated decision on liability will be granted.

FINDINGS

1. Respondent Town of Luray, is a person within the meaning of CWA § 502(5), 33 U.S.C. § 1362(5), and owns and operates a wastewater treatment plant in Luray, Page County, Virginia, which discharged pollutants from a point source into Hawksbill Creek.

2. Hawksbill Creek is a navigable water as defined at CWA § 502(7). Therefore respondent is subject to the provisions of the CWA.

3. On March 31, 1991 the Commonwealth of Virginia, DEQ issued to respondent, pursuant to CWA § 402 and the Virginia State Water Control Law, NPDES Permit No. VA0062642 for the discharge of pollutants from its facility. This permit became effective on March 31, 1991 and expired on March 31, 1996. On March 29, 1996 pursuant to the same statutory authority, the Virginia DEQ reissued NPDES Permit No. VA0062642 to respondent. This permit expires on March 31, 2001. These permits contain the monitoring requirements and effluent limitations for TSS, CBOD5 and other pollutants at Outlet 001 of respondent's facility.

4. Respondent's DMRs show that it violated the effluent limitations contained in the two NPDES permits on numerous occasions from April 1992 through December 1996 by discharging wastewater from Outlet 001 with levels of TSS and CBOD5 that exceeded its permit limitations and conditions.

5. Respondent's discharges in excess of its permit limitations and conditions violated the Permit, the CWA, and its implementing regulations.

Based on the foregoing findings of violation, the complainant seeks a final order assessing an administrative penalty of $48,000. The hearing to determine the penalty will begin in Washington, D.C. on November 20, 1997. It is not expected that the hearing will take more than one day.

ACCORDINGLY IT IS ORDERED that complainant's motion for accelerated decision on the issue of liability IS GRANTED and the foregoing findings of fact ARE ADOPTED.

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Edward J. Kuhlmann

Administrative Law Judge

November 4, 1997

Washington, D.C.

1. The complainant is represented by Janet E. Sharke, Esq. and the respondent is represented by John R. Bushey Jr., Esq.

2. CWA § 301(a) provides in pertinent part that: "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful."

3. CWA § 309(g)(1)(A) provides that whenever "the Administrator finds that any person has violated section 1311 . . . or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State" a civil penalty may be assessed.

4. Respondent's 1991 permit provides the following effluent limitations: for pH, minimum of 6.5 standard units and maximum of 9.5; for CBOD5 and suspended solids, monthly average of 30

milligrams per liter ("m/l") of concentration or quality, monthly average of 18.7 kilograms per day ("kg/d") of mass or loading and weekly average of 45 mg/l and 272.5 kg/d; for fecal coliform, monthly average of 200 and 400; for dissolved oxygen, minimum of 6.5 mg/l; for ammonia, 10.6 mg/l concentration and 64.2 kg/d loading during January through May and 1.81 mg/l concentration and 11.0 kg/d loading during June through December. Complainant's PHE, Exhibit 1 at 1. Complainant states that the 1996 permit did not change any of the relevant effluent parameters. Complainant's Motion for Partial Accelerated Decision at 8 (citing Complainant's PHE Exs. 1 and 2).