10/21/91

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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| In the Matter of | ) | |
| | ) | |
| BERWICK MUNICIPAL AUTHORITY, | ) | Docket No. CWA-III-043 |
| | ) | |
| Respondent | ) | |

**ORDER WITHDRAWING ORDER TO SHOW CAUSE AND GRANTING COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION**

At the outset, **IT IS ORDERED** that the order to show cause of April 19, 1991 be **WITHDRAWN**. For the reasons stated in its renewed motion for an accelerated decision of June 10, 1991[1] (motion), complainant seeks, pursuant to the Consolidated Rules of Practice (Rules), 40 C.F.R. § 22.20(a), a partial accelerated decision on the issue of liability. Respondent opposed the motion in its response of June 24. The aforementioned Rules permit the Administrative Law Judge (ALJ) to grant a motion for an accelerated decision "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding." The respective arguments of the parties are well known to them and will not be repeated here except to the extent deemed necessary by this order.

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[1] Unless otherwise indicated, all dates hereinafter are for the year 1991.

Accelerated decisions require that the motioning party assume the burden of demonstrating there are no genuine issues of material fact. Material facts are those which establish or refute an essential defense asserted by a party.[2] Inferences derived from the evidence must be viewed in the light most favorable to the party opposing the motion.[3] Here, a partial accelerated decision shall be granted because there remain no genuine issues of material fact concerning liability which warrant an evidentiary hearing.

The complaint alleged that respondent violated its National Pollutant Discharge Elimination System permit by its exceeding effluent limitations for five day Carbonaceous Biochemical Oxygen Demand and Total Suspended Solids at outfall 001. Respondent's own monthly Discharge Monitoring Reports clearly support complainant's allegations. Also, in respondent's eighth affirmative defense and in paragraph six of the affidavit of Alessandra M. Cavallini it is admitted the illegal discharges occurred.

Respondent asserts that the occasional discharge of pollutants were the result of improper design process, approved equipment and machinery failure, and/or plant infiltration from sudden and unexpected storm water and Thompson's Run inflow, which were unintentional and unforeseen and resulted in temporary noncompliance. It is argued that these factors are beyond reasonable control and ability of respondent. Despite respondent's explanation of why pollutants have occasionally been discharged,

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[2] Words and Phrases, "Material Fact."

[3] United States v. Diebold, 369 U.S., 654, 655 (1962).

section 309(g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g), is a strict liability statute; hence, issues of intent and liability are pertinent only to the amount of penalty.[4] In this order, the ALJ is required only to analyze issues relevant to liability.

Respondent submitted a copy of the Memorandum Opinion and Order in United States v. Winchester Municipal Utilities[5] in support of its position. In that case, the government stated in a stipulation of fact and in a consent decree that respondent's effluent violations were not due to respondent's willful misconduct or negligence. The court decided that because the respondent was not negligent in violating CWA, the purposes of deterrence and punishment would not be served by allowing the government to impose substantial civil penalties.[6] Winchester also mentioned that the federal EPA and the Kentucky Department of Environmental Protection approved the defective design and construction of the respondent's treatment plant prior to its failure.[7] Respondent here claims that a hearing should be held to determine whether the complainant and the Pennsylvania Department of Environmental Resources knew at the time its permit was issued that the facility would not work. Assuming this was so found during an evidentiary hearing, it may

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[4] United States v. Earth Sciences, Inc., 599 F.2d 368, 374 (10th Cir. 1979).

[5] Civil Action No. 84-289 (E.D. Ky. 1989).

[6] Id. at 15-16.

[7] Id. at 4.

have some bearing only on the amount of penalty to be assessed. (Winchester was concerned only with the questions regarding appropriate remedies, since the court had issued previously an order granting partial summary judgment as to liability.[8])

Respondent's argument concerning the problems resulting from unexpected storm water and Thompson's Run inflow is not persuasive. CWA is a strict liability statute. In that respondent has not complied with the statutory notice requirements set forth in 40 C.F.R. § 122.41(1)(6)(ii)(B), it is precluded from any "upset" defense that may be available under 40 C.F.R. § 122.41(n)(1)(2).

**IT IS ORDERED** that:

1. Complainant's motion for an accelerated decision concerning the issue of liability be **GRANTED**.

2. The parties shall continue good faith negotiations to settle the penalty question in this matter.

3. Complainant shall submit a status report 30 days from the service date of this order and each month thereafter.

Frank W. Vanderheyden

Frank W. Vanderheyden
Administrative Law Judge

Dated October 21, 1991

[8] Id. at 3-4.

**IN THE MATTER OF BERWICK MUNICIPAL AUTHORITY**, Respondent,
Docket No. CWA-III-043

## Certificate of Service

I certify that the foregoing Order, dated Oct. 21, 1991 was sent this day in the following manner to the below addressees:

Original by Regular Mail to:

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Marion Walzel
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Secretary

Dated: Oct. 24, 1991