9/10/91

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
City of Yankton, SD,	)	Docket No.NPDES-VIII-SD-0023396
	)	
Permittee	)	

ORDER DENYING MOTION FOR SUMMARY DETERMINATION

Permit No. SD-0023396, dated July 19, 1989, required the City to develop and implement a pretreatment program. By letters, dated August 24 and October 18, 1989, the City, pursuant to 40 CFR § 124.74, requested an evidentiary hearing on this requirement and a determination that the requirement be deleted. By letter, dated October 30, 1989, the City's request for an evidentiary hearing was granted, constituting in effect an acknowledgment that the City had raised material issues of fact relevant to the mentioned permit requirement.

EPA's basis for the pretreatment program requirement is 40 CFR § 403.8(a) providing:

> (a) POTWs required to develop a pretreatment program. Any POTW (or combination of POTWs operated by the same authority) with a total design flow greater than 5 million gallons per day (mgd) and receiving from Industrial Users pollutants which Pass Through or Interfere with the operation of the POTW or are otherwise subject to Pretreatment Standards will be required to establish a POTW Pretreatment Program unless the NPDES State exercises its option to assume local responsibilities as provided for in § 403.10(e). The Regional Administrator or Director may require that a POTW with a design flow of 5 mgd or less develop a POTW Pretreatment Program if he or she finds that the nature or volume of the industrial influent, treatment process

> upsets, violations of POTW effluent limitations, contamination of municipal sludge, or other circumstances warrant in order to prevent Interference with the POTW or Pass Through.

There is no dispute but that the design and actual flow of the City's POTW is less than five mgd. The Agency reiterated its position that factual issues were involved and that an evidentiary hearing was appropriate in a statement, dated December 12, 1990, submitted in compliance with an order of the ALJ and in "statements of factual testimony" submitted under date of May 29, 1991.*

On August 19, 1991, Agency counsel submitted a motion for summary determination, contending that the essential facts supporting the Agency's determination that the City was required to implement a pretreatment program were undisputed. The motion cites an exhibit of categorical users of the City's POTW, attached to the referenced statement of December 12, 1990, and relies on 40 CFR Parts 433 and 469, specifying effluent guidelines and pretreatment standards, respectively, for the "Metal Finishing Point Source Category" and the "Electrical and Electronic Components Point Source Category." In particular, the motion relies upon 40 CFR §§ 433.15 and 469.26, which, insofar as pertinent here, are identical and provide in pertinent part:

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* The Agency's submission is more properly characterized as a summary of expected testimony rather than the written testimony contemplated by 40 CFR § 124.84(c). Written testimony is intended to expedite the hearing and direct examination is normally limited to identification and authentication of the written testimony, which is marked as an exhibit, the correction of any errors and an explanation or clarification of confusing or complex matters. The major portion of the hearing can thus be devoted to cross-examination.

> (a) Except as provided in 40 CFR 403.7 and 403.13, any existing source subject to this subpart that introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and achieve the following pretreatment standards for existing sources (PSES): * * * *.

The stated reason for filing the motion at this late date--the hearing is scheduled for September 20, 1991--is that the City's written testimony was only recently received.

Responding to the motion, the City asserts that its evidence clearly shows the design flow of the Yankton POTW is less than five mgd and that there is no substantive evidence that the nature or volume of the industrial influent [causes or contributes to] upsets, interference with the operation of the POTW or pass through, violations of effluent limitations, contamination of municipal sludge or other circumstances warranting imposition of a pretreatment program (Response To Motion Of EPA, Region VIII, dated September 3, 1991). Moreover, the City states that its testimony categorically denies that there were repeated failures of whole effluent toxicity (WET) tests and that there are a number of substantive legal and factual issues to be determined, which makes the motion for summary determination baseless and without merit.

D I S C U S S I O N

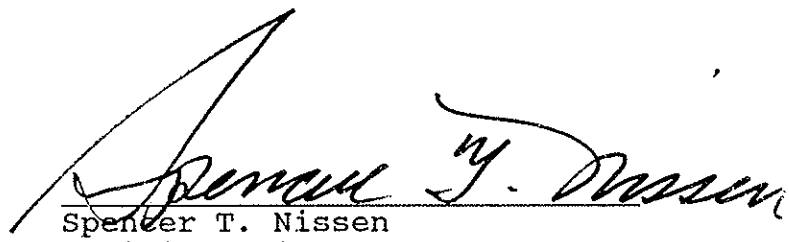
The City's testimony tends to demonstrate that any failures of WET tests are due primarily to ammonia which largely originates from domestic sources and a slaughtering operation. The City therefore argues that a pretreatment program directed to categorical users would have no affect on reported WET failures and that the Agency has failed to justify the imposition of a

pretreatment program under 40 CFR § 403.8(a). The provisions of 40 CFR §§ 433.15 and 469.26, cited by the Agency, apply to categorical users and not POTWs. Accordingly, it is concluded, contrary to the Agency's contention, that there are factual issues remaining for resolution and that the motion for summary determination is without merit.

O R D E R

The motion for summary determination is denied. The hearing will proceed as scheduled.

Dated this 10th day of September 1991.



Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER DENYING MOTION FOR SUMMARY DETERMINATION**, dated September 10, 1991, in re: City of Yankton, SD, Dkt. No. NPDES-VIII-SD-0023396, was mailed to the Regional Hearing Clerk, Reg. VIII, and a copy was mailed to Permittee and Complainant (see list of addressees).

Helen F. Handon
Secretary

DATE: September 10, 1991

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