Plastic Pellets/Clean Water Act Consent Decree: Federal Appellate Court Interprets Payment/Reporting Provisions

Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

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The United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") in an April 30th Opinion addressed an issue regarding the terms of a Clean Water Act Consent Decree. See *San Antonio Bay Estuarine Waterkeeper, et al. v. Formosa Plastics Corporation Texas,* et al., No. 20-40575.

The question addressed involved payment and reporting obligations.

San Antonio Bay Estuarine Waterkeeper and Sylvia Diane Wilson (collectively, "San Antonio Bay") filed a Clean Water Act citizen suit enforcement action against Formosa Plastics Corporation Texas and Formosa Plastics Corporation USA (collectively "Formosa") alleging certain violations. Formosa was alleged to have illegally discharged plastic pellets and other materials through its stormwater and wastewater in violation of its Texas Pollutant Discharge Elimination System ("TPDES") permit.

The United States District Court ("Court") determined that the TPDES permit was violated because the plastics discharged exceeded "trace amounts." The permit prohibited:

. . . floating solids or visible foam other than trace amounts.

San Antonio Bay and Formosa entered into a Consent Decree regarding the Clean Water Act claims.

Paragraphs 36, 37, and 38 of the Consent Decree addressed documentation of discharges by a designated third party (i.e., the "Monitor"). They also provided for Formosa's payment and reporting obligations for its discharges. These paragraphs were designated:

"Monitoring, reporting, and future mitigation payments"

If violations were identified Formosa was required to pay into a Mitigation Trust.

A disagreement arose over whether the previously referenced paragraphs were triggered only by a "new discharge of plastics" (this was Formosa's contention) or whether they were triggered by a "visual detection" of plastics regardless of whether they had actually been discharged from a Formosa property (this was San Antonio Bay's contention).

The Court held that the presence of plastics outside of Formosa's Clean Water Act outfalls constituted violations of the zero-discharge mandate outlined in the Consent Decree and the TPDES permit. It was also stated to have determined that:

. . . in analyzing whether plastics were present, the Monitor was required "to simply document the presence of Plastics," not "to determine source or cause, or justify his findings based on a found discharge of water(s)."

In other words, the Court placed the burden on Formosa to dispute that the plastics were not the result of a new release.

The Fifth Circuit reversed the Court.

The rationale for the Fifth Circuit's holding included:

- The relevant provisions of the Consent Decree indicate that only new, post-Consent Decree discharges trigger Formosa's payment and reporting obligations
- The overall structure of the Consent Decree was held to suggest that the parties contemplated only post-Consent Decree discharges as triggers for Formosa's payment and reporting obligations
- Taken as a whole the Consent Decree is unambiguous and it would make no sense for Formosa to agree to pay $50 million to obtain a full and final settlement of the Clean Water Act claims if it was subject to continuing liability for past discharges of plastics

The Fifth Circuit remands to the Court, instructing it to reconsider the responsibilities of the Monitor in light of its Opinion.

A copy of the Opinion can be downloaded here.