Consent Decree Interpretation/Clean Water Act: Federal Appellate Court Addresses Dispute Between Fort Smith and U.S. Environmental Protection Agency

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The United States Court of Appeals for the Eighth Circuit ("Eighth Circuit") in a September 14th Opinion addressed a dispute between the City of Fort Smith ("Fort Smith") and the United States Environmental Protection Agency ("EPA") regarding a Clean Water Act Consent Decree . *See United States of America; State of Arkansas v. City of Fort Smith, Arkansas,* No. 21-2127.

The issue involved the applicable timeframe for repairing certain manhole and pipe defects associated with the Fort Smith sewer system.

Fort Smith and EPA entered in a Consent Decree in 2015 to resolve alleged Clean Water Act violations by the city. Fort Smith owns and operates a separate sanitary sewer system which includes wastewater treatment plants and a wastewater collection and transmission system. The system consists of 500 miles of sewer lines and 23 pump stations.

EPA had alleged that Fort Smith violated Section 301 of the Clean Water Act and terms of conditions of its National Pollutant Discharge Elimination System permits. The alleged violations included:

- Discharges of raw sewage to the Arkansas River
- Failure to prevent sanitary sewer overflows through proper operation and maintenance of the system

The Consent Decree includes specific requirements to address separate sanitary sewer overflows ("SSOs") and occasional unintentional discharges of raw sewage from the municipal sanitary sewers. It requires that Fort Smith undertake:

- A comprehensive assessment of its sanitary sewer system to identify defects and sources of inflow and infiltration
- Fix or replace all sewer pipe segments and manholes identified as likely to fail within the next 10 years
- Evaluate and develop projects to address sewer capacity and deficiencies
- Develop and implement a capacity, management, operation, and maintenance program including comprehensive system cleaning and a grease control program

The cost of implementing these measures was estimated by EPA to exceed $255 million plus the cost of routine operation and maintenance.

The State of Arkansas was a co-plaintiff in the enforcement action.

The Consent Decree included a dispute resolution provision to address instances in which the parties' interpretations of its terms and conditions were at odds.

The Eighth Circuit's Opinion initially undertakes a review of the tasks imposed upon Fort Smith by the Consent Decree. Of particular relevance is a "decision tree" which sets forth a process for evaluating the relationship between system defects and SSOs and determining how to address them.

The decision tree divides sewer line and manhole defects into two groups:

1. Defects connected to known or predicted SSOs
2. Defects connected with verified SSOs

In regard to 1), if a defect is likely to cause or contribute to a future SSO, then the decision tree routes it into a box titled Remedial Measure Alternative Analysis ("RMAA"). However, if an SSO is deemed unlikely, then the defect is assigned to the Capacity, Management, Operations, and Maintenance ("CMOM") program. The CMOM program involves open-ended monitoring and maintenance and is an alternative to full rehabilitation by replacement or repair.

Fort Smith and EPA disagreed on whether grades 4 and 5 defects can be addressed under the CMOM program.

Fort Smith argued that such defects could be addressed with CMOM. If so, they would be subject to open-ended monitoring and maintenance.

In contrast, EPA argued that the relevant provisions of the Consent Decree should be interpreted as requiring that they must be repaired by a date certain which foreclosed the possibility of addressing them with CMOM. This interpretation would require they be remedied within four years of the calendar year in which they were discovered.

The United States District Court addressed the issue when the parties could not reach a resolution. It rejected Fort Smith's arguments that the Consent Decree allowed the city to monitor grade 4 and 5 defects under its CMOM plan.

Fort Smith appealed to the Eighth Circuit.

The Eighth Circuit initially notes that, because the lower court's interpretation of the Consent Decree is based solely on the written document, that its review of the interpretation is de novo. Further, it utilizes the rules of contract interpretation which require when possible that it discern the parties' intent from the unambiguous terms of the written Consent Decree (read as a whole). Nevertheless, the Eighth Circuit further states that it cannot ignore:

- The context in which the parties were operating
- The circumstances surrounding the Consent Decree

The Eighth Circuit concludes that neither the Consent Decree or its Appendix D explicitly indicates that the decision tree only applies to defects with grades 1, 2, 3 as opposed to grades 4 and 5. It further determines that there is a conflict between the requirements of Paragraph 18 of the Consent Decree, which requires all Remedial Measures to be completed by a date certain, and Appendix D which provides that some remedial measures may continue past a date certain. As a result, it notes that the Consent Decree provides that any conflict between the language in the body of the document and the language in an Appendix should be resolved in favor of the language in the body of the Consent Decree.

Paragraph's 18 requirements that all defects must be remedied within four years of the calendar year in which they were discovered is deemed to supersede language cited by the city in Appendix D.

The Eighth Circuit therefore affirms the conclusion of the United States District Court that:

. . . the Consent Decree requires the City to resolve the defects in grade 4 and 5 manholes and sewer lines, and this cannot be accomplished solely by monitoring and maintenance analysis.

A copy of the Opinion can be downloaded here.