United States District Court, S.D. Ohio, Western Division.

Julianne C. BUCHHOLZ et al. Plaintiffs,
v.
DAYTON INTERNATIONAL AIRPORT, et al., Defendants.

No. C-3-94-435, 1995 WL 811897

Oct. 30, 1995

The citizen-plaintiffs in the *Buchholz* case were three families who live near the Dayton International Airport and who were impacted by the discharges into the Mill Creek of deicing chemicals used at the airport. The citizen-plaintiffs sought relief under the citizen suit provisions of the Clean Water Act ("CWA") and the Resource Conservation and Recovery Act ("RCRA"). The plaintiffs moved for a preliminary injunction. The Magistrate Judge found that the Court was empowered under both the CWA and RCRA to grant injunctive relief and made the following report and recommendations to the District Court.

With respect to the Clean Water Act, the Magistrate Judge's Report and Recommendations, adopted by the District Court, found:

> Under the Clean Water Act, the Plaintiffs have the right to enforce the CWA against a person who is in violation of an effluent standard or limitation. 33 U.S.C. § 1365(a)(1)(A). The conditions of Dayton's NPDES permit, including the General Effluent Limitations, constitute an "effluent standard or limitation" under the CWA. 33 U.S.C. § 1365(f)(6). Furthermore, the Ohio Water Quality Standards constitute an "effluent standard or limitation" under the CWA. 33 U.S.C. § 1365(f)(2); *PUD No. 1 v. Washington Dept. of Ecology*, 114 S.Ct. 1900, 1909 (1994); *Montgomery Environmental Coalition v. Fri*, 366 F. Supp. 261, 265 (D.D.C. 1973).
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> Under the Clean Water Act, it is unlawful for any person to discharge any pollutant from a point source to navigable waters in violation of its NPDES permit or without an effective NPDES permit. 33 U.S.C. § 1311(a); *Natl. Wildlife Fed. v. Consumers Power Co.*, 862 F.2d 580, 582 (6th Cir. 1988); *NRDC v. Vygen Corp.*, 803 F. Supp. 97, 103 (N.D. Ohio 1992); *SPIRG of New Jersey v. AT & T Bell Labs.*, 617 F. Supp. 1190, 1203 (D.N.J. 1985); *United States v. Plaza Health Labs., Inc.*, 3 F. 3d 643, 645 (2d Cir. 1993).
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> The City of Dayton is a "person" within the meaning of the Clean Water Act. *Dept. of Energy v. Ohio*, 503 U.S. 607, 616, 118 L.Ed.2d 255, 267 (1992). Dayton's discharges from the NW Basin constitute the discharge of "pollutants" under the CWA. 40 C.F.R. § 122.2; *United States v. Hamel*, 551 F.2d 107, 110 (6th Cir. 1977).
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> USEPA did not issue final stormwater application requirements until October 31,

1990. 55 Fed. Reg. 4802, November 16, 1990. The Water Quality Act of 1987, Pub. L. No. 100-4, added Section 402(p) to the Clean Water Act. Section 402(p) first required USEPA to issue regulations establishing stormwater permit application requirements for stormwater discharges "associated with industrial discharges" by no later than February 4, 1989.

USEPA defines the term "stormwater discharge associated with industrial activity" to include:

> Transportation facilities classified as Standard Industrial Classifications 40, 41, 42 (except 4221-25), 43, 44, 45, and 5171 which have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations. Only those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, airport deicing operations, or which are otherwise identified under paragraphs (b)(14)(i)-(vii) or (ix)-(xi) of this section are associated with industrial activity.

40 C.F.R. §122.26(b)(14)(viii) (emphasis added).

USEPA's permit application deadline was deferred on several occasions, but a final deadline of October 1, 1992, was established for submission of individual stormwater permit applications. 40 C.F.R. §122.26(e)(1), 56 Fed. Reg. 56548, November 5, 1991.

Dayton had no obligation to apply for an NPDES permit for discharges of stormwater runoff from the Detention Basin until October 1, 1992, absent the specific request from Ohio EPA, pursuant to its authority under Chapter 6111 of the Ohio Revised Code. In as much as the City applied for and received an NPDES permit from Ohio EPA pursuant to Ohio EPA's request, Dayton did not unlawfully discharge without a permit prior to the Permit's effective date of April 1, 1994.

The "General Effluent Limitations" set forth in Part III of the Permit are derived from the general water quality criteria contained in Ohio EPA's water quality standards. Ohio Administrative Code §3745-1-04. The general water quality criteria apply to every extent practical and possible as determined by the Director. *Id.*

The applicability of the Permit's General Effluent Limitations is, therefore, contingent on a finding of "practical and possible" compliance. Thus, stream conditions that do not meet the terms of the General Effluent Limitations (i.e. contain noticeable accumulations of foam or exhibit odors or unnatural colors) do not, *ipso facto,* indicate permit non-compliance.

The sluice gate and the spillway of the NW Basin each constitutes a "point source" under the Clean Water Act. *Natl. Wildlife Fed.*, 862 F.2d at 583; *Committee to Save the Mokelumne River v. East Bay Municipal Util. Dist.*, 37 E.R.C. 1159, 1174 n.35, 1177 (E.D. Cal. 1993), *aff'd*, 13 F. 3d 305 (9th Cir. 1993), *cert. denied sub nom.*, *Cal. Regional Water Quality Bd. v. Committee to Save Mokelumne River*, 115 S.Ct. 198 (1994); *Legal Environmental Assistance Found. v. Hodel*, 586 F. Supp. 1163, 1168 (E.D. Tenn. 1984). Dayton's NPDES permit does not authorize Dayton to discharge over the spillway.

It is undisputed that the Mill Creek and the Stillwater River constitute "navigable waters" under the CWA. 33 U.S.C. § 1362(7); *United States v. Ashland Oil & Trans. Co.*, 504 F.2d 1317, 1318 (6th Cir. 1974).

Dayton's post-April 1, 1994, discharges through the sluice gate and over the spillway which have caused foaming, odors, discoloration, harm to aquatic life, growth of sewage fungus, and some impairment of downstream uses constitute violations of its NPDES permit and therefore violations of the CWA. The Clean Water Act is a strict liability statute, so that Dayton's lack of negligence or willfulness in complying with it would not be a defense. *United States v. Winchester Municipal Utils.*, 944 F.2d 301, 304 (6th Cir. 1991). Therefore the Court is empowered by the Clean Water Act to enjoin further discharges or spills from the NW Basin to the Mill Creek.

With respect to the citizen-plaintiffs' RCRA imminent and substantial endangerment claim, the Magistrate Judge's Report and Recommendations, adopted by the District Court, found:

> RCRA's purpose is preventative and remedial. The Plaintiffs have standing to enforce RCRA against a person who is contributing to the handling, storage, or disposal of solid wastes that may present an imminent and substantial endangerment to health or the environment. 42 U.S.C. § 6972(a)(1)(B). The City of Dayton is a person within the meaning of RCRA. *Ohio*, 503 U.S. 607, 616, 118 L.Ed.2d at 267.
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> A "solid waste" within the meaning of RCRA is
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> > Any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semi solid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of Title 33.

United States v. Dean, 969 F. 2d 187, 194 (6th Cir. 1992)(emphasis supplied).

Dayton's handling and storage of stormwater runoff in the NW Basin since the closing of the sluice gate constitute the handling and storage of "solid waste" under RCRA, since the spillway is a point source and therefore does not come within the NPDES permitted exception to RCRA. 42 U.S.C. § 6903(27); *United States v. Dean*, 969 F.2d 187, 194 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1852 (1993); *Connecticut Coastal Fishermen's Assoc. v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1313-14 (2d Cir. 1993); *Murray v. Bath Iron Works Corp.*, 867 F. Supp. 33, 45 (D. Me. 1994).

Dayton's discharges from the spillway are not authorized by Dayton's NPDES permit; thus, these discharges to the Mill Creek constitute disposal of "solid waste" under RCRA. 42 U.S.C. § 6903(27); *Dean*, 969 F.2d at 194; *Inland Steel Co. v. USEPA*, 901 F.2d 1419, 1422 (7th Cir. 1990); *Lutz v. Chromatex, Inc.*, 725 F. Supp. 258, 263 (M.D. Pa. 1989); *United States v. Allegan Metal Finishing Co.*, 696 F. Supp. 275, 281 (W.D. Mich. 1988).

An "endangerment" means a threatened or potential harm and does not require proof of actual harm. *Petropoulos v. Columbia Gas of Ohio*, 840 F. Supp. 511, 516 (S.D. Ohio 1993) (Beckwith, J.). "Imminence" refers to the nature of the threat rather than the identification of the time when the endangerment initially arose. *Dague v. City of Burlington*, 935 F.2d 1343, 1356 (2d Cir. 1991); *rev'd on other grounds*, 112 S.Ct. 2638 (1992). The term "imminent" does not limit the provision to "emergency-type situations." *Id.* at 1355-56.An endangerment is "imminent" if conditions which give rise to it are present, even though the actual harm may not be realized for years, as for example, when present exposure to a toxic substance results in a latent harm which does not become evident for years. *Lincoln Properties Ltd. v. Higgins*, 36 E.R.C. 1228, 1240 (E.D. Cal. 1993). An endangerment is "substantial" if there is a reasonable cause for concern that someone or something may be exposed to a risk of harm by a release or a threatened release of a hazardous substance if remedial action is not taken. *Lincoln Properties*, 36 E.R.C. at 1240; *United States v. Valentine*, 856 F. Supp. 621, 626 (D. Wy. 1994).

A number of factors (e.g., the quantities of hazardous substances involved, the nature and degree of their hazards, or the potential for human or environmental exposure) must be considered in determining whether there is reasonable cause for concern, although in any given case, one or two factors may be so predominant as to be determinative on the issue. *B.F. Goodrich Co. v. Murtha*, 697 F. Supp. 89, 96 n.8 (D. Conn. 1988). The endangerment need not be precisely quantified in order to be "substantial." *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 194 (W.D. Mo. 1985).

A threat or risk of harm to wildlife or to groundwater constitutes an endangerment

to the "environment." *Lincoln Properties*, 36 E.R.C. at 1240-41; *Valentine*, 856 F. Supp. at 626-27. An imminent and substantial endangerment to the "environment" may exist even where there is no threat to humans. *Lincoln Properties*, 36 E.R.C. at 1241; *Conservation Chem. Co.*, 619 F. Supp. at 192.

Dayton's handling and storage of solid wastes in the NW Basin and the disposal of solid wastes in the Mill Creek have resulted in actual harm to the aquatic life of the Mill Creek, the possible contamination of local drinking water wells with ethylene glycol, and actual, albeit minor and transitory, acute health effects on persons who have been exposed to glycol-type fumes of the Mill Creek present an imminent and substantial endangerment to the environment and to health within the meaning of RCRA. *Lincoln Properties*, 36 E.R.C. at 1240-41 (E.D. Cal. 1993); *U.S. v. Northeastern Pharm. & Chem. Co., Inc.*, 579 F. Supp. 823, 832-33 (W.D. Mo. 1984), *aff'd in part, rev'd in part on other grounds*, 810 F.2d 726 (8th Cir. 1986); *Conservation Chem. Co.*, 619 F.2d at 197; *Dague*, 935 F.2d at 1356; *Valentine*, 856 F. Supp. at 627. The Court is therefore empowered by RCRA to grant preliminary injunctive relief as to the NW Basin.

Based on these findings, the Magistrate Judge made the following recommendations:

I accordingly recommend that the City of Dayton be enjoined during the pendency of this action from permitting any further discharge from the Northwest Basin by way of the spillway. To achieve that, Dayton will be required to discharge the Basin contents through the sluice gate where such discharges are regulated by the NPDES Permit. Not later than fourteen days from the entry of an order adopting this recommendation, the City shall submit a working plan to bring the sluice gate discharge within the terms of the Permit and keep it there. Such a plan shall include:

1. Continuation of aeration by use of at least the aerators presently in operation,

2. Initiation or continuation of the anti-foaming operation at the sluice gate,

3. Use by the airport of the most environmentally friendly alternatives for runway and ramp deicing, to wit, mechanical means and/or potassium acetate,

4. Use by the airport of its best efforts to encourage/require its airline tenants to use the most environmentally friendly alternatives for airplane and runway/ramp deicing, to wit, propylene glycol and potassium acetate,

5. Detailed plans for completion of the central deicing pad project, including identification of any obstacles potentially posed by possible objections by governmental authorities other than the City of Dayton.[FN16]

The plan should receive comment from Plaintiffs' retained experts and Ohio EPA, and should not be put into effect until approved by the Court, except to the extent it embodies practices already approved in this Report. After adoption, the plan

progress should be subject to monitoring by the Court. To that end, if deemed necessary by any party or District Judge Beckwith, the Magistrate Judge should be expressly designated special master under Fed. R. Civ. P. 53 to conduct that monitoring.

In addition, it is important to continue to monitor any impact from the NW Basin on the environment. To that end, Dayton shall requesting that the Montgomery County Combined General Health District and the Miami County General Health District initiate monthly sampling within their respective jurisdiction of the Plaintiffs' private wells and such other private wells in the vicinity of the Airport as the Health Districts may deem advisable for monitoring purposes. The samples shall be analyzed using approved USEPA test methodologies for such parameters reasonably deemed appropriate by the Health Districts and shall continue monthly during the pendency of this action. Furthermore, Dayton shall install groundwater monitoring wells sufficient to determine the general direction of groundwater flow within the Lockport Dolomite Bedrock from the Northwest Detention Basin and monitor groundwater quality. Such wells will be sampled monthly during the pendency of this action and shall be sited in accordance with a plan approved by Ohio EPA (Southwest District Office).

At all reasonable times Dayton shall make its Airport facilities, grounds and records available to representatives of Ohio EPA for inspection.

Finally, with respect to fees, the Magistrate Judge found:

As provided by the CWA and RCRA and as relief incidental to the injunctive relief, Dayton is liable for all reasonable attorneys' fees, expert fees, and litigation costs incurred by the Plaintiffs in securing relief for Dayton's violations of law. 33 U.S.C. § 1365(d); 42 U.S.C. § 6972(e); *City of Burlington v. Dague*, 112 S.Ct. 2638, 2641 (1992); *Continental Bank N.A. v. Everett*, 861 F. Supp. 642, 644 (N.D. Ill. 1994); *Wheeless v. Gelzer*, 765 F. Supp. 741, 745 (N.D. Ga. 1991). The Court believes it is appropriate to make an interim award of fees and costs, given the amount of time already consumed in preparation for the preliminary injunction hearing. Plaintiffs' counsel shall submit a separate motion for said fees and expenses.