2/2/94

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
FORMOSA PLASTICS CORPORATION,	)	NPDES Permit No. TX0085570
	)	
Permittee,	)	

Order Authorizing Immediate Discharge

This matter is before me on the application of Formosa Plastic's Corporation ("Formosa") under 40 C.F.R. 124.60, for authorization to begin discharging under the terms of NPDES Permit No. TX0085570, pending final agency action on the permit.[1] The matter is currently before the Environmental Appeals Board on appeal from the denial by the Acting Regional Administrator of Region 6 of an evidentiary hearing on the permit. The application is opposed by Ms. Diane Wilson, acting individually and as a member of the Calhoun County Resource Watch. Ms. Wilson is also the party who has sought an evidentiary hearing on the permit and has appealed the Region's denial of an evidentiary hearing. My authority to preside over this application has been determined by the Environmental Appeals Board.[2]

Background

On September 2, 1990, Formosa applied for an amended national

[1] NPDES permits are issued pursuant to the Clean Water Act, section 402, 33 U.S.C. 1342.

[2] Order on Interlocutory Appeal, NPDES Appeal No. 93-11 (December 17, 1993).

pollutant discharge elimination system ("NPDES") "new source" permit to discharge from a newly constructed expansion to an existing plant at Point Comfort, Texas, into Lacava Bay. The expansion was estimated to cost $1.3 billion, and was 80% completed at the time the agency began its environmental study.[3] After going through the notice and comment proceedings provided under the EPA's procedures, including the preparation of an Environmental Impact Statement, Region 6 on August 16, 1993, issued the permit.[4] Ms. Wilson had appeared in the predecisional proceedings and had opposed the permit.[5]

Under the rules of practice, a permit becomes effective 30 days after issuance unless review is requested or an evidentiary hearing is requested. If an evidentiary hearing is granted or if a petition to have the permit reviewed by the Administrator is filed, a permit does not become effective until there has been final agency action with respect to those proceedings. In the case of a new source, this means that the applicant is without permit until there has been final agency action on the permit.[6]

In an attempt to forestall any delay that might be caused by

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[3] DEIS at 2, 5; CIA, Exhibit G at 2. The documents from the administrative record considered on this motion, with their short citation forms, where applicable, are listed in the Appendix to this order.

[4] CIA, Exhibit F at 1. For the EPA's decisionmaking procedures applicable to NPDES permits, see 40 C.F.R. Part 124.

[5] See ROD (references to and comments by Calhoun County Resource Watch). Ms. Wilson is a commercial fisherman and states that the majority of the members of her group are commercial fishermen. Tr. 46.

[6] 40 C.F.R. 124.60(a)(1).

an appeal or request for an evidentiary hearing, Formosa, pursuant to 40 C.F.R. 124.60(a)(2), submitted to Region 6 a motion for authorization to begin immediate discharge. Region 6 initially deferred ruling on the motion since at that time no evidentiary hearing had been requested or petition for review filed.[7]

On September 22, 1993, Region 6 received an evidentiary hearing request from Ms. Diane Wilson. The request was timely filed.[8] The effect, accordingly, was to stay the effective date of the permit until there had been final agency action on Ms. Wilson's request.

Formosa, however, relying on the advice obtained from telephone inquiries to individuals in Region 6 that no request for an evidentiary hearing had been received by the EPA, commenced discharging into Lacava Bay under the new permit at 9:30 a.m. on September 22, 1993.[9] Those discharges have been continuing to date.

Upon receipt of Ms. Wilson's hearing request, and even though it was still to be ruled upon, Region 6 forwarded the matter to Chief Administrative Law Judge Frazier for assignment of an administrative law judge to render a decision on Formosa's motion for immediate discharge. The administrative law judge assigned to the matter questioned his authority under the rules to preside over an NPDES matter where no evidentiary hearing had been granted. Accordingly, on October 29, 1993, he certified the question to the

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[7] CIA, Exhibits A, B and G.

[8] CIA, Exhibit F at 1-2.

[9] Formosa's Position Paper at 2.

Environmental Appeals Board. On that same date, Region 6 also issued its decision denying Ms. Wilson's request for an evidentiary hearing.[10]

On December 17, 1993, the Environmental Appeals Board issued its decision ruling that the administrative law judge did have authority to preside over the proceeding and remanding the matter to the judge for further proceedings on the motion. In that same decision, the Environmental Appeals Board also declined to summarily affirm the Region's denial of an evidentiary hearing, which summary affirmance had been suggested by Formosa, and directed the filing of further briefs on certain issues raised by Ms. Wilson.[11]

Oral argument was held on Formosa's motion for immediate discharge on January 5, 1994, at Dallas, Texas. Decision on the motion was reserved, and the parties were directed to file briefs on the following two questions:

The first question is whether the environmental study required under National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. 4321 et seq., was impaired by fact that the plant had been 80% completed before the study was undertaken.[12]

The second question is whether an evidentiary hearing was required to determine if allowing the discharge would cause

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[10] CIA, Exhibit F.

[11] Order on Interlocutory Appeal, NPDES Appeal No. 93-11.

[12] The EPA's regulations relating to NEPA are set out at 40 C.F.R. Parts 6 and 1502. Specific procedures pertaining to new source NPDES permits are found at 6 C.F.R. 6.600 - 6.607.

irreparable environmental damage.

Discussion

Under 40 C.F.R. 124.60(a)(2), Formosa is entitled to immediately commence discharge, pending a final decision on the permit, if it can show the following:

1. Formosa is likely to receive the permit to discharge at the site in question.

2. The environment will not be irreparably harmed if Formosa is allowed to begin discharging.

3. The discharge is in the public interest.

In the normal course, the burden to show each of these factors would be upon Formosa as the moving party. The Region's grant of the permit after extensive comment on it and denial of an evidentiary hearing, however, has the effect of shifting to Ms. Wilson, as the party appealing those actions, the burden of showing that she is likely to prevail on appeal on her right to an evidentiary hearing or on reversing the Region's grant of a permit.

The Region's decision to grant the permit was made only after it had allowed comment by all interested parties and had made an extensive environmental study of the consequences of the permit. It concluded that there would be no predicted significant effects or impacts from the discharge and that principle adverse impacts were subject to control through regulation or substantial mitigation, and it gave reasoned answers for its conclusions to those who opposed the permit.[13]

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[13] See DEIS, Fact Sheet, FEIS, ROD and permit itself.

Neither in her oral argument at the hearing on January 5th nor in the papers she has filed, has Ms. Wilson shown that Lacava Bay will not be adequately protected against significant environmental harm, if the conditions of the permit are fully complied with.

The one undisputed effect is that the State has stopped shellfish harvesting in Lacava Bay until the Texas Department of Health ("TDH") can satisfy itself that the discharges of effluent from Formosa's outlet will not adversely affect TDH's model for determining whether stormwater runoff may contaminate the Bay's oyster beds with fecal coliform. The effluent itself will not contain sanitary waste, a source of fecal coliform. TDH's present model, however, correlates coliform levels with the Bay's ambient salinity, raising the question of how the effluent will affect the ambient salinity of the Bay.[14] It is evident, accordingly, that the ban on shellfish is only temporary, dependent on TDH's decision as to how it will now determine the level of fecal coliform contamination in the Bay.[15]

One of the arguments made by Ms. Wilson is that Formosa's past history of noncompliance with environmental requirements should be grounds for denying the permit. Even the Region concedes that Formosa's history of compliance in environmental matters has been poor.[16] The Region considered Formosa's poor compliance record but

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[14] CIA, Exhibit F at 9-10.

[15] In its Record on Decision, Region 6 noted that Formosa offered to provide up to $250,000 to the State to help fund the study for a new model, if one becomes necessary. ROD at 25.

[16] CIA, Exhibit F at 6. See also, DEIS, Appendix C; ROD at 15.

found sufficient evidence to persuade it that Formosa's record of compliance will improve because of changes in its management and by its demonstrated desire to work with federal and State regulatory agencies and public interest groups.[17] It could be argued that the credibility of Formosa's professed desire to work with federal regulatory agencies has been undermined by the fact that Formosa ignored the EPA's request to defer construction of its new addition pending completion of the NEPA review process.[18] It does appear, however, that Formosa has cooperated with the EPA in drafting the permit and in taking steps to mitigate any adverse environmental effects.[19] Consequently, on balance, I find that Formosa's poor compliance history is not an issue which is likely to result in a reversal of the permit.[20]

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[17] CIA, Exhibit F at 6. See also FEIS at II-5 to II-7.

[18] FEIS at II-3.

[19] See e.g., the memoranda of agreements between Formosa and the EPA on the opinions rendered by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service. Formosa has also offered to provide up to $250,00 to the State to help fund the study for a new model for determining the level of fecal contamination in the Bay, if one becomes necessary. ROD at 25. The Region also mentions as evidence assuring Formosa's future compliance, Formosa's agreement with a Mr. Jim Blackburn to perform environmental audits which will be reviewed by a "Technical Review Commission." FEIS at II-6, ROD at 20. The impartiality of that Commission, however, has been questioned. See comment of Texas Parks and Wildlife Dept. attached to ROD, and Ms. Wilson's request for evidentiary hearing, CIA, Exhibit C at 11. The Region, itself, is somewhat ambivalent on how significant the Blackburn agreement is as a protection against adverse environmental impacts. Tr. 131-135.

[20] It is, of course, recognized that Formosa at this point is discharging into Lacava Bay without a permit and the Region appears to have taken no action as yet against such illegal discharges. This does not indicate that the permit will not be complied with or

Another issue raised by Ms. Wilson is whether the Region's decision to issue the permit conformed to the requirements of NEPA and the EPA's regulations thereunder. In studying the environmental consequences of issuing the permit, the Region is directed under its regulations to rigorously explore and objectively evaluate all reasonable alternatives to the discharge into Lacava Bay.[21] The record seems clear that Formosa's reasons for picking the Point Comfort site and the discharge outlet into Lacava Bay were predominantly because of the economic advantages to Formosa.[22] The record is not so clear that Lacava Bay itself was the site among the alternatives in the area where the discharge would have the least environmental impact.

It must first be noted that the EPA's authority under the Clean Water Act is limited to either issuing or denying a permit to discharge effluent into the receiving waters. Although selection of the site for the plant may well directly bear upon the site of the discharge outlet, the EPA has no authority, at least under the Clean Water Act, to dictate where Formosa should build its plant.[23]

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that these facts will operate against Formosa prevailing on appeal. Formosa argues that it acted in good faith in commencing the discharge. The Region, for its part, indicated at oral argument that the Region was still weighing how it should proceed against the illegal discharge. Tr. 160 - 162. The positions of the parties are sufficient to explain why the merits of the facts relating to the discharge should not be decided in this proceeding but properly left to the Region with respect to how it will proceed against the violation, and to an enforcement proceeding, if one is brought.

[21] 40 C.F.R. 1502.14; see also, 40 C.F.R. 6.203.

[22] DEIS at 24, FEIS at II-8.

[23] NRDC v. U.S. EPA, 822 F. 2d. 104, 126-131 (D.C. Cir. 1987).

The EPA could request Formosa to wait until the environmental study was completed before commencing construction, and it did so.[24] The risk that Formosa faced in going ahead with construction was that the EPA would deny the permit because it found the effluent environmentally unacceptable, a risk Formosa was willing to undertake.

The Region, accordingly, limited its environmental analysis to the question of whether the discharge complied with water quality standards and presented any risk to the environment. It found that the effluent limitations (and monitoring requirements to insure compliance) prevented or mitigated all significant adverse impacts identified in the environmental study.[25] Alternative discharge sites were considered not in order to justify Lacava Bay as the site least likely to suffer any adverse environmental effects but to determine whether or not another site was "clearly superior" to Lacava Bay.[26] Thus, there were comments that Matagorda Bay and the Gulf of Mexico would be less affected by the effluent than Lacava Bay.[27] The EPA in evaluating these alternative discharge sites took into account not only the possible direct effects of the discharge but also the environmental effects of transporting the effluent to these more distant sites.[28]

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[24] FEIS at 3.

[25] ROD at 2-7.

[26] ROD at 8.

[27] See various comments to DEIS in FEIS, Appendix C.

[28] ROD at 8.

The environmental effects of transporting the effluent to a more distant site, presumably, would not have been a consideration, if the plant had been located on Matagorda Bay or the Gulf of Mexico. It could be argued, therefore, that they should not justify subjecting Lacava Bay to risks of environmental harm that would not be suffered if the plant were located closer to one of those discharge sites. The EPA concluded that there were no clear environmental benefits to be gained by having the effluent discharged into Matagorda Bay or the Gulf of Mexico. Even if it had concluded otherwise, the only option that was probably opened to it was to deny the permit.[29] That decision, however, would not have been mandated by NEPA, but a policy decision left to the agency after it has made its environmental study. All that NEPA requires is that the agency make a comprehensive environmental analysis.[30]

A third objection to the permit raised by Ms. Wilson, also relating to EPA's NEPA compliance, is that the EPA in its environmental study did not adequately consider the future development of Lacava Bay. Ms. Wilson argues that the Region should have taken into account the cumulative effects on the Bay of the

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[29] It is doubtful whether the EPA could have conditioned the permit on construction of a discharge outlet to one of those waters. See Natural Resources Defense Council v. U.S. EPA, 859 F. 2d. 156, 169-170 (D.C. Cir. 1988) (EPA cannot impose permit conditions not related to the effluent itself.)

[30] See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) ("NEPA itself does not mandate particular results, but simply prescribes the necessary process....If the adverse environmental effects of the proposed agency action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding what other values outweigh the environmental costs.")

enlargement of the Matagorda Channel, the dredging of the Red Bluff channel and the Palmino Bend II dam project.[31] The Region did discuss these projects and found that they were not reasonably foreseeable, and that it was unnecessary to include them in its environmental study.[32]

Ms. Wilson in her evidentiary hearing request did not show how the Region's treatment of these three projects raised a factual issue which needed an evidentiary hearing for its resolution.[33] Accordingly, I find that the Region's evaluation of these three projects is likely to be upheld on appeal.

I find, accordingly, that the Region did make the comprehensive environmental analysis required by NEPA and that the adverse environmental effects of granting the permit were adequately identified and evaluated by the Region. This is all that NEPA requires.[34]

For purposes of this motion, I have to decide whether the Region's decision to issue the permit is likely to be upheld on appeal. Subsumed within that question is whether Ms. Wilson is entitled to an evidentiary hearing on that decision.

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[31] See CIA, Exhibit C at 10-11; Tr. 66.

[32] DEIS at 207-210; see also FEIS at Appendix C 63 (EPA's comment 18-3 to Ms. Wilson's letter).

[33] Circumstances under which an evidentiary hearing would be useful are where the credibility of a witness whose testimony is relied on by the agency is involved or where the cross-examination of such a witness is necessary for a complete factual record.

[34] Robertson v. Methow Valley Citizens Council, 490 U.S. at 350-351.

I find from my examination of the papers considered here and the briefs and arguments of the parties addressed to this motion, that there has been no showing that there are factual issues requiring an evidentiary hearing for their resolution.[35] Ms. Wilson has produced an extensive list of witnesses and documents to support her claim that the effluent will cause irreparable injury to Lacava Bay. They seem to cover a wide range of environmental concerns over the discharge. I am persuaded, however, that the environmental study was complete and produced a sufficient record on which an informed decision could be made by the Region. Ms. Wilson's quarrel is really with the Region's conclusion that no adverse environmental effects had been identified which would justify denying the permit. As I have already stated, this is a policy decision, on which it may well be that reasonable persons could differ. I find that the Region's preferred decision to issue the permit, given the limited authority the agency has with respect to the action it can take, more persuasive than the alternative of denying the permit. Accordingly, I find that the decision to issue the permit is likely to be upheld on appeal.

I also find that the discharge will not cause irreparable environmental harm. It is true that there will be an effect on the oystering as well as a threat to commercial fishing, in general, in Lacava Bay.[36] The present ban on oystering, however, is not because

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[35] For the kind of showing needed to establish one's right to an evidentiary hearing, see supra, n. 33.

[36] See FEIS at II-11 to II-12; ROD at 18-19.

the oysters in the bay will be permanently destroyed or rendered uneatable but a regulatory decision based on the need to study the effect that the effluent may have on the model used to regulate oystering in the bay. The harm, thus, cannot be said to be irreparable. The threatened harm to fishing, in general, is really from the risk of an accidental spill. This is a factor to be considered in determining whether to issue the permit but the risk of an accidental spill has not been shown to be so great as to rise to the level of irreparable harm.

On the last issue of whether it is in the public interest to allow the discharge, I find that the equities as to whether it is or is not in the public interest to allow the discharge are more or less evenly balanced. Formosa strenuously argues that the plant will have to close down, putting hundreds of people out of work and adversely affecting the economic well-being of the area, if it is forced to stop discharging. This may be so, but it is a situation brought about by Formosa's own action in commencing operations before a final permit has been issued. To be balanced against this injury, is the ban on oystering that the discharge has caused as well as the threat to commercial fishing in general. Since closing the plant, however, will undoubtedly affect jobs in the area, and since I have found that Formosa is likely to prevail on the appeal with respect to the issuance of the permit and that there is no irreparable injury in allowing the discharge, I conclude that it would be in the public interest to allow the discharge.

ORDER

On consideration of Formosa Plastic Corporation's motion pursuant to 40 CFR section 124.60(a)(2) for authorization to begin discharges under NPDES Permit No. TX0085570, I am of the opinion, for the reasons stated herein that the motion should be and is hereby, GRANTED, subject, however, to the condition that any party may apply for reconsideration of this authorization, if, during the period this authorization is in effect, there is any instance of noncompliance by Formosa with the terms and conditions of the permit.

Gerald Harwood
Gerald Harwood
Senior Administrative Law Judge

Dated: February 2, 1994

NPDES Permit No. TX0085570

Appendix To Order on Application for Immediate Discharge

In addition to the briefs of the parties filed with respect to the motion, the following documents have been considered in ruling on the application:

1. Draft Environmental Impact Study dated July 1992. "DEIS."

2. Fact sheet prepared October 30, 1992, for DEIS. "Fact Sheet."

3. Final Environmental Impact Statement dated January 1993. "FEIS."

4. Record of Decision on issuance of Permit No. TX0085570 dated August 13, 1993. "ROD."

5. Permit No. TX0085570 issued August 16, 1993.

6. Certified Interlocutory Appeal ("CIA") filed October 28, 1993, containing the following documents:

Exhibit A - Letter from Akin, Gump, Strauss, Hauer & Feld to Acting Regional Administrator Joe D. Winkle, dated September 9, 1993.

Exhibit B - Acting Regional Administrator's reply to Letter from Akin, Gump dated September 15, 1993.

Exhibit C - Ms. Diane Wilson's Request for an Evidentiary hearing, filed September 22, 1993.

Exhibit D - Letter from Acting Regional Administrator to Chief Administrative Law Judge Frazier requesting expedited assignment of an administrative law judge, dated October 4, 1993.

Exhibit E - Certification of Interlocutory Appeal by Administrative Law Judge Harwood, dated October 19, 1993.

Exhibit F - Decision on Evidentiary Hearing Request, dated October 19, 1993.

Exhibit G - Formosa's Motion for Authorization to Begin Discharges, September 9, 1993.

7. Memorandum of Agreement between EPA and Formosa Plastics Corporation on National Marine Fisheries Service Opinion. "MOA-NMFS."

9. Memorandum of Agreement between EPA and Formosa Plastics Corporation on U.S. Fish and Wildlife Opinion. "MOA-FWS."

9. Order of Environmental Appeals Board on Interlocutory Appeal, NPDES Appeal No. 93-11, dated December 17, 1993.

10. Transcript of the hearing on January 5, 1994. "Tr."

In the Matter of Formosa Plastics Corporation, Respondent
NPDES Permit No. TX-0085570

Certificate of Service

I certify that the foregoing **Order Authorizing Immediate Discharge**, dated February 2, 1994, was sent this day in the following manner to the addressees listed below.

Original by Regular Mail to:

Lorena Vaughn
Regional Hearing Clerk
U.S. EPA
1445 Ross Avenue
Dallas, TX 75202-2733

Copy by Regular Mail to:

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Maria Whiting

Maria Whiting
Legal Staff Assistant

Dated: February 2, 1994