

## ***Sixth Circuit Upholds Civil Penalty Against City***

The Sixth Circuit has upheld a district court's imposition of civil penalties against a city that allowed sewage and wastewater to discharge over a property owners' land and into a lake. The court also rejected the landowners' claim that the civil penalty amount was too small and that the district court should have ordered the city to pay the penalty to the landowners instead of the United States Treasury.

Jean and Joe Tamaska brought a citizen suit under the federal Clean Water Act (CWA), alleging that the City of Bluff City, Tennessee (City) violated the CWA by allowing untreated or partially treated sewage and wastewater to discharge over their land and into a lake. Prior to trial, the court entered a consent judgment, under which the City agreed to cease operating its wastewater treatment facility and to connect its wastewater collection system to another nearby city's sewage system. The consent judgment required these steps to be completed by April 15, 1998, or else the City would be required to show cause why civil penalties should not be imposed on it under the CWA.

The City continued to allow wastewater to flow over the Tamaskas' property after the deadline. The City filed a motion for an extension of time to perform under the consent judgment, and the Tamaskas filed a motion for a hearing requesting the City to show cause why civil penalties should not be imposed under the CWA. The district court granted a 14-day extension of time under the consent judgment, but the City did not fulfill its obligations until 49 days after the extension expired.

The district court entered a judgment assessing a penalty of \$100 per day against the City for each of the 49 days it failed to comply with the consent judgment, for a total penalty of

\$4,900, to be paid to the United States Treasury. Shortly thereafter, the Tamaskas filed a motion for an award of \$19,241 to reimburse their attorneys' fees. The court awarded them \$5,000.

The parties then filed cross appeals. The City appealed the district court's assessment of a civil penalty against it. The City argued, in part, that imposition of a civil penalty was improper because, although violations continued after the suit was filed, the City had permanently ceased the offensive discharges before the court imposed the penalty. The City cited case law that held that the CWA does not permit citizen's suits for violations that are wholly in the past. The Sixth Circuit, however, held that "a defendant's voluntary cessation of a challenged practice after the filing of suit, but before entry of judgment, should not deprive the court of the ability to impose civil penalties for violations of the [CWA]. [T]o hold otherwise would encourage polluters to delay litigation as long as possible, knowing that they could escape all liability for even post-complaint violations by simply coming into compliance with the [CWA] before the suit comes to trial."

The Tamaskas appealed (1) the amount of the civil penalty assessed; (2) the order that the civil penalty payment be made to the U.S. Treasury, arguing, instead, that the court should have ordered that the penalty be paid to them; and (3) the amount of the awarded attorneys' fees. The appeals court, however, disagreed, finding that (1) the district court did not abuse its discretion in assessing the penalty; (2) applicable precedent provides that civil penalties paid under the CWA must be paid to the U.S. Treasury; and (3) the district court also did not abuse its discretion in awarding only \$5,000 in attorneys' fees.

***Tamaska v. City of Bluff City***, 26 Fed. Appx. 482, 2002 WL 22003 (6<sup>th</sup> Cir. Tenn.)

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