

RCRA/Clean Water Act Citizen Suit Action: Federal Court Addresses Procedural Motion Filed by South Carolina Plastic-Pellet Packager



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A United States District Court (D. South Carolina) (“Court”) addressed in a September 21st Order a procedural motion (judgment on the pleadings) filed by a plastic-pellet packager related to alleged federal environmental statutory violations. See *Charleston Waterkeeper et al. v. Frontier Logistics, L.P.*, 2020 WL 5629717.

The federal environmental statutes allegedly violated included the Resource Conservation and Recovery Act (“RCRA”) and Clean Water Act (“CWA”).

The Southern Environmental Law Center (“SELC”) filed a March 19th Complaint for Declaratory Injunctive Relief (“Complaint”) against Frontier Logistics, L.P., (“Frontier”) alleging violations of the RCRA and the “CWA”. The Complaint was filed on behalf of Charleston Waterkeeper and South Carolina Coastal Conservation League.

The Complaint describes Frontier as providing supply chain management services to the plastics industry. As part of such services, SELC states that Frontier has operated the Union Pier Terminal Facility (“Facility”) in Charleston County, South Carolina, since at least April 2007. The Facility is stated to receive plastic pellets via rail and package them in bulk bags for shipment overseas.

The Complaint alleged that the Facility had released into the environment small pre-production plastic pellets described as “nurdles.” Charleston Waterkeeper was stated to have collected:

... over 14,000 plastic pellets from the Cooper River, Charleston Harbor, and other Charleston area waterways, beaches, and parks since the organization began sampling in July of 2019.

SELC claims that pellets remain in Charleston waters and that Frontier was the likely source of the pollution.

The alleged violations included:

1. that Frontier had contributed and was contributing to the past or present handling, storage, treatment, transportation, or disposal of solid waste which may present an imminent and substantial endangerment to health or the environment in violation of RCRA, and
2. that Frontier was discharging pollutants into waters of the United States without a National Pollutant Discharge Elimination System permit in violation of the CWA.

The RCRA and CWA Federal District Court actions were brought pursuant to the citizen suit provisions of those statutes.

The Complaint requested that Frontier be ordered to:

- Perform and pay for such work as may be required to eliminate any present and future endangerment to health or the environment, and restraining Frontier from further violating RCRA
- Cease and desist unpermitted discharges, and restrained from further violating the CWA

The Court addressed in the September 21st Order a number of motions. These included a motion for judgment on the pleadings (“Motion”).

The Court notes that in considering such a motion that Rule 12(c) requires it to accept plaintiff’s factual allegation as true and draw all reasonable inferences in the plaintiff’s favor. The defendant may not prevail on a motion for judgment on the pleadings if there are pleadings that, if proved, would permit recovery for the plaintiff.

Frontier put forth three theories in its motion requesting judgment on the pleadings. These included:

- SELC failed to demonstrate standing to bring the Complaint
- SELC failed to state a proper claim with respect to either RCRA or the CWA
- SELC is prohibited from bringing simultaneous claims under RCRA and the CWA based on the same injury

Frontier argued, first, that plaintiffs did not meet any of the requirements for standing either on their own or as representative of their members. The Court rejected this theory stating that SELC had sufficiently demonstrated standing by pleading “good-faith, plausible allegations.” It cited what it described as the overriding motion-to-dismiss standard applicable to the inquiry of standard, which means that:

... a suit will not be dismissed for lack of standing if there is sufficient allegations of fact – not proof – in the complaint or supporting affidavits.

The Court referenced alleged discharges from the facility cited by SELC along with use of the waters by the organization’s members.

As to the allegation that RCRA was not applicable, the Court undertook an analysis of its jurisdictional elements. It rejected Frontier’s arguments that the pellets were not discarded because:

... the pellets handled at Frontier’s facility have yet to serve their intended use and purpose.

The Court agrees with SELC stating that case law cited holding that a product becomes “discarded material” and thus “solid waste” when it is abandoned by defendant (and ceases to be useful) is applicable in this instance. It agrees with case law cited by SELC involving spilled petroleum and leaked cow manure. y were found to be solid waste and analogous to the released plastic pellets.

Similarly, the Court rejects Frontier argument that SELC failed to allege that the pellets present a RCRA “imminent threat of injury” or pose “substantial danger.” The Complaint is stated to contain sufficient allegations noting the number of plastic pellets released and significant concentrations in the Charleston area.

Frontier’s motion argues that SELC’s CWA claim must be dismissed because it fails to sufficiently allege a continuing and ongoing violation of the statute. SELC responds that the Complaint asserts good-faith allegations of continued violations.

The Court agrees with SELC, noting that the Complaint notes ongoing (as opposed to wholly past) allegations. They are stated to be alleged in good faith and grounded in fact. Cited is an allegation in the Complaint that:

. . . as of the filing of this Complaint, after six months of concerted sampling, the Waterkeeper continues to find plastic pellets in significant concentrations at sites across the Charleston area, particularly those closest to the Facility.

The Court notes the “modest burden” at this stage and rejects the claim.

Finally, the Court considers Frontier’s argument that SELC could not bring simultaneous claims alleging that pellets at the facility are both solid waste “for purposes of RCRA” and “discharges under the CWA.”

SELC responded that the argument is fatally flawed because it rests on the assumption that each pellet spilled must either be a “discharge” or “solid waste.” This is based on its argument that the pellets leave Frontier’s facility through various pathways which could include either point source discharges or the release of solid waste. Since a plaintiff can plead claims in the alternative, it is argued that they are not required to choose a theory at this stage of litigation.

The Court accepts this argument.

Frontier’s motion is denied.

A copy of the decision can be downloaded [here](#).