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FEATURE ARTICLE

TEXAS SUPREME COURT DENIES PETITION FOR REVIEW OF WATER AUTHORITY TAKINGS CASE THEREBY REFUSING TO ADDRESS THE ISSUE OF THE LANDOWNERS' GROUNDWATER RIGHTS

The Texas Supreme Court's recent denial of a petition for review in *Edward Aquifer Authority v. Bragg* demonstrates that it is unready to address the Pandora's Box it opened in *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tx. 2012) where the Court recognized a property interest for landowners in the groundwater beneath their land. With the denial of the petition, landowners, water district authorities, and other interested groups will have to continue look to the intermediate court decision in *Bragg* and to *Day* itself for any guidance on groundwater regulatory takings cases. [*Edwards Aquifer Authority v. Bragg*, 421 S.W.3d 118 (Tex.App.-San Antonio 2013), *review denied* (Tex. 2015).]

Background

The Braggs grew pecans on their homestead orchard in Medina County since the 1970s. In the early 1980s, they added a second orchard near their main homestead. The Braggs made extensive investments into irrigation for the pecan trees at both orchards and profitably grew pecans there for many years. Then in 1993, the Texas Legislature passed the Edwards Aquifer Act (Act) to regulate the groundwater in the Edwards Aquifer basin, which the Braggs' pecan orchards fall within. The Braggs applied for permits under the Act from the Edwards Aquifer Authority (Authority), the water district in charge of implementing the Act and regulating the aquifer's water. In 2004, the Authority denied a water-use permit for the second orchard and in 2005 provided a permit for the first orchard with a much lower acre-foot amount of groundwater than the Braggs needed to raise a healthy crop of pecans.

The Lawsuit

Relying on the 2012 Texas Supreme Court decision in *Edwards Aquifer Authority v. Day*, the Braggs sued the Authority for having made a regulatory taking of their groundwater property rights. The Braggs won a large judgment at the trial court, and the Authority appealed to the Texas Fourth Circuit Court of Appeals in San Antonio. In a lengthy opinion, the Court of Appeals upheld the judgment in favor of the Braggs in all respects except the manner in which the trial court calculated damages.

The Court of Appeals' Decision

Proper Defendant under the Edwards Aquifer Act

In the first issue on appeal, the court made a novel holding based on the Authority's argument that the proper defendant in Edwards Aquifer Act cases is not the Authority but the State of Texas. While this issue was new, the court determined based on numerous other cases, including *Day*, that the Authority was an extension of the state for such suits and so is proper party to a takings lawsuit initiated under the Edwards Aquifer Act, not just the state.

Limitations Period for Regulatory Takings

The second issue in the case, with implications for future groundwater-takings cases, concerned when the regulatory takings would have occurred: at enactment of the Edwards Aquifer Act, or when the Authority decided on the Bragg's permit applications?

Based heavily on the reasoning in the Texas Supreme Court case *Hallco Texas Inc. v. McMullen*, the Court of Appeals determined that the Braggs were not challenging the validity of the Act but instead were making an "as applied" challenge as to how the Act affected their groundwater rights. Thus, the Braggs' claim accrued in 2004 and 2005 when their permit applications were decided upon, not in June 1996 as the Authority argued. The Court of Appeals also had to determine what limitations period applies in such cases, because no statutory provision specifies limitations period for regulatory takings and the Texas Supreme Court has not directly decided the issue. Based on adverse possession cases, the court decided a ten-year limitations period should apply in groundwater regulatory takings cases.

Had a Compensable Taking Occurred?

Next, in the core issue of the case, the Court of Appeals examined whether a taking occurred at all. The Authority argued no taking had based its argument that the Braggs had the added value of their permit rights, which they could lease to others and offset the increase in irrigation costs at both orchards. The court held the Authority's argument was rejected in *Day*, quoting the holding there that "a landowner has absolute title in severalty to the water in place beneath his land." The court rejected that the landowner's right is merely the ability to sell or lease water under a permit; rather, the landowner has the right to be able to make best and highest use of his groundwater. As the trial court found, for the Braggs that was the ability to operate and irrigate a pecan orchard. So after rejecting the Authority's argument as a red herring, the court turned to question of whether Act's impact on Braggs' use of water rose to the level of a compensable taking.As a threshold matter, the court held groundwater-permit regulatory takings are not *per se* takings. *Per se* regulatory takings occur when a regulation has a direct, physical effect on property or deprives the owner of *all* economic beneficial use of land. As neither had happened to the Braggs, the court looked to *Penn Central* factors from the U.S. Supreme Court, which had been used by the Texas Supreme Court in *Day,* to determine whether a taking occurred. (*See, Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).)

The *Penn Central* factors include:

(1) economic impact;

(2) interference with "distinct investment-backed expectations";

(3) whether the regulation resulted in physical invasion or merely affected property interests for the common good; and

(4) the surrounding circumstances of the taking.

The court determined that the factors overall demonstrated a taking had occurred.

Economic Impact

Under the economic impact factor, the court looked to the trial court's best and highest use finding and how the regulation had impacted that use. The trial court determined pecan orchards were the best use for the land. Braggs testified they had to cut back on their pecan crop, could not afford to water all of the trees adequately, and had to take emergency measures to keep the trees alive after they were given only 120 acre-feet of water by the Authority's permits for only one orchard. They also testified they would abandon their orchards, in which they had invested over $2 million, if they were not compensated for the taking. Based on this evidence, the court held the economic impact factor weighed in favor of a compensable taking. Relying on *Day*, the court emphasized that the regulations forced the Braggs:

> …to purchase or lease what they had prior to the regulation—an unrestricted right to the use of the water beneath their land.

This interpretation of *Day* shows how broad a right the Texas Supreme Court seemed to endorse: almost any new permit or water-use restriction by a water authority will show a compensable regulatory taking, unless the landowner did not own the land, and water rights, prior to the Act.

Investment Based Expectations

The court noted that the second factor, investment-based expectations, generally is difficult to

evaluate in Edwards Aquifer Act cases, quoting *Day*. But in *Bragg*, it seemed fairly easy to demonstrate such expectations based on the Braggs' historical use and their stated reasonable expectations of use. There was extensive evidence that the Braggs made significant investments in the orchards years before the act passed, with the expectation they would be able to use the groundwater underneath their land. Mr. Bragg, who had higher education degrees in appropriate fields, explained how he had made each investment in his orchards and irrigation systems based on calculations of how much of his groundwater he could use. The Braggs also demonstrated they had enough water for all their pecan trees before the Authority imposed restrictions on them.

Affecting Property Interests for the Common Good

The court quickly determined that the third factor weighed in favor of no taking, because the Edwards Aquifer Act so clearly was directed to protect the economic, social, and environmental interests in the Edwards Aquifer basin.

Surrounding Circumstances

Under the fourth factor, the court looked to the surrounding circumstances in Medina County, where the Braggs lived. In their county, there generally is not much rainfall and growers must rely on groundwater. So this factor weighed in favor of a taking. This also suggests this factor may not favor landowners in less arid areas who have other water sources.

Adequate Compensation Calculation

As to the next issue, the court determined whether the trial court's compensation calculation was correct. In line with other inverse condemnation cases, the court again held that the takings occurred when the Authority implemented the act by making permit decisions regarding the Braggs' property in 2004 and 2005, not when the act began in 1996. The court then determined that valuation of the water use was neither a valuation of the separate subsurface estate nor a valuation of the subsurface estate as part of a land taking. Instead, valuation of groundwater should be made "by reference to the highest and best use of the properties," because the Braggs did not sell or lease the water itself (like in the usual oil and gas case) but used it for their pecan business. By this measure, the court held the trial court should have calculated compensation based on the value of the pecan orchards before and after the Authority implemented new permits in 2004 and 2005. The court remanded this issue to the trial court for it to make this compensation calculation.

The Petition for Review

After the Court of Appeals issued the opinion in November 2013, the Authority petitioned for review to the Texas Supreme Court. The Authority argued that the *Bragg* court was too permissive in allowing the Braggs to file their claims years after the start of the Edwards Aquifer Act, when the cut-off for challenges should have been December 1996, and that there should be more guidance from the Supreme Court on what constitutes enough economic impact to constitute a taking under that *Penn Central* factor. For their part, the Braggs argued a *per se* taking had occurred and that the appeals court did not need to remand for further calculations as the trial court correctly calculated adequate compensation as the lost value of the property.

The petition drew attention from several *amici*, and many expected the Supreme Court to take up the case to provide more guidance to both landowners and water districts. The San Antonio Water System, the Authority's largest permittee, supported the Authority's position, while the Texas Farm Bureau and other farming and ranching associations supported the Braggs. The Texas Supreme Court denied the petition on May 1, 2015.

Conclusion and Implications

Because the decision of the Court of Appeals was more favorable to the Braggs, the denial of the petition represents a victory for broad landowners' rights. While *Day* and *Bragg* may have dealt only with the Edwards Aquifer Act, the principle that landowners have strong rights to the groundwater under the Texas and federal constitutions likely will apply in any fight with a water district authority or regulation scheme. Thus, landowners are in the stronger position in future battles with water district authorities across the state.

And despite the pleas of *amici* and the Edwards Aquifer Authority, the Supreme Court of Texas

continues to signal it is not ready to elaborate on landowner's groundwater rights. Beyond *Bragg*, the Texas Supreme Court also punted on the related issue of whether a landowner can sue for the migration of wastewater onto her land. In February, the Supreme Court issued a narrow decision in *Environmental Processing Systems LC v. FPL Farming Ltd.* that only looked at the parties' burden of proof rather than addressing whether landowners' have a cause of action. Reading the tea leaves, the Supreme Court may have decided these issues are too controversial or too much in flux for them to handle. For now then, landowners and water authorities will have to rely on appellate decisions like *Bragg* and the *Day* decision itself for guidance in regulatory takings actions.

Although Texas' high court does not appear ready to provide more guidance on these issues, their urgency will only increase in future years as limited groundwater resources are fought over between agricultural and industry interests, landowners, and water authorities dealing with burgeoning urban growth. Highlighting this increasing importance is the state's greater spending on water infrastructure. In July, the Texas Water Development Board, through a revolving loan fund known as the State Water Implementation Fund for Texas (SWIFT), provided $3.9 billion in financial assistance for projects from transmission pipelines, canal linings, capacity expansions, desalination, and leak detection systems. Many of these projects are being implemented and managed by regional water authorities similar to the Edward Aquifer Authority, so may give rise to new cases pitting landowners' water rights against authorities' attempts to regulate for the "common good."

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In her environmental practice, Denise investigates and defends groundwater contamination and other pollution matters brought by regulators as well as by third parties for personal injuries and economic losses. On an urgent and nonurgent basis, she also investigates incidents that give rise to potential liabilities. Most recently, she successfully tried Phase One of the Deepwater Horizon litigation on behalf of an oilfield services client, securing the party's dismissal at the close of the plaintiffs' case.

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EASTERN WATER NEWS

'WOTUS': A SUMMARY OF THE MULTIPLE LEGAL CHALLENGES OPPOSING THE FEDERAL SCOPE OF AUTHORITY UNDER THE CLEAN WATER ACT

At present, we have seen reports of at least ten separate complaints to the federal courts by some 72 plaintiffs concerning the validity of the June 29, 2015 promulgation of the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) of their new regulation of "waters of the United States" (WOTUS) under the federal Clean Water Act (WOTUS Rule). *See*, 80 FR 37054-01.

The complainants include 27 or more states, private and public companies and business associations, and environmental advocacy groups. In addition to these U.S. District Court actions, there are at least eight reported challenges to the adoption of the Rules filed in the U.S. Courts of Appeals. At this writing, more may yet be filed, since the statute allows 120 days for the filing of petitions for review.

The EPA and Corps seek to consolidate the District Court challenges in the District of Columbia, and they also asked the Multidistrict Litigation Panel of judges to pick a single Circuit Court of Appeals in which the appeals are to be consolidated. On July 28, 2015, petitions for review were consolidated in the United States Court of Appeals for the Sixth Circuit by order of the MDL Panel pursuant to 28 U.S.C. § 28 U.S.C. § 2112. The multidistrict litigation motion is undecided at the time this article was written.

States have filed for injunctive relief in at least five different U.S. District Courts, with mixed success:

North Dakota

Thirteen states, including North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, South Dakota, and Wyoming filed a complaint for injunctive relief against the WOTUS Rule in the District Court for North Dakota on the date of promulgation of the WOTUS Rule. After a hearing in August on preliminary injunctive relief, Ralph Erickson, Chief Judge of the District Court granted a stay of the WOTUS Rule. See *North Dakota v. U.S. E.P.A.*, 2015 WL 5060744, ___F.Supp.3d___ (Aug. 27, 2015). The EPA promptly announced that the ruling was in error and said that it would honor the stay only in the 13 states that brought the case.

The opinion of Judge Erickson deserves keen review despite the EPA's quick dismissal of its importance or correctness. The opinion examines the language of the Clean Water Act that vests jurisdiction of certain rulemaking actions in the U.S. Circuit Courts of Appeals. The court noted:

> Title 33, of the United States Code, § 1369(b)(1) 4 defines the circumstances under which the United States Courts of Appeals have exclusive jurisdiction over an action of the EPA Administrator. Implicated here are the provisions of subsections (b)(1)(E) and (b)(1)(F) of § 1369. Section 1369(b)(1)(E) posits jurisdiction in the Courts of Appeals where the Administrator has approved or promulgated 'any effluent limitation or other limitation under section 301, 302, 306, or 405, [33 USCS § 1311, 1312, 1316, or 1345]'. 'Effluent limitations' are defined by the act as 'any restriction established by a state or the [EPA] on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters.'

The District Court went on to examine the WOTUS Rule and decided that the exclusive review of limitations on discharge and permits or permit-like actions granted to the Courts of Appeals does not encompass the WOTUS Rule. The promulgation documents issued by EPA and the Corps themselves explain that there is no limitation imposed by the WOTUS Rule on either states, agriculture, business or industry. Thus, the court concluded, it is not within the exclusive review jurisdiction given by the Clean Water Act to the Courts of Appeals.

Judge Erickson then examined whether the waters identified by the federal agencies are reasonably in conformance with the discussion of nexus to navigable waters that was the foundation of Supreme Court

Justice Anthony Kennedy's opinion in the seminal case of *Rapanos v U.S.*, 547 U.S. 715, 126 S.Ct. 2208 (2006). Judge Erickson found that the agencies extended their jurisdiction beyond a reasonable understanding of the nexus requirements. For this and additional reasons, he granted a stay of the WOTUS Rule.

Georgia

On the same day that Judge Erickson ruled in the North Dakota action, another District Court reached a contrary conclusion on similar requests filed by states. Chief Judge Lisa Godbey Ood of the Southern District of Georgia determined that the District Courts do not have jurisdiction over the WOTUS Rule and that the pleas of 11 states for a preliminary injunction against its enforcement would be denied. In so doing, Judge Ood seemed to rely most heavily on the relatively broad interpretation of the Clean Water Act provisions for Court of Appeals review. In particular she indicates she sees the WOTUS Rule as determinative of what waters need permits and that it is thus a limitation the review of which the law vests in the Courts of Appeals:

> In the present case, the WOTUS rule does define waters of the United *States*. However, its undeniable and inescapable effect is to restrict pollutants and subject entities to the requirements of the Clean Water Act's permit program. Indeed, that is, in part, why the Plaintiffs are suing, and it is part of the harm of which they complain. The Rule operates as a limitation or restriction on permit issuers and people who would discharge into the bodies of water the Rule now includes as waters of the United States. The WOTUS rule accomplishes significant limiting and significant restricting even if accomplished by way of defining. Additionally, the EPA promulgated this Rule under section 1311 of the Clean Water Act, among several others. 80 Fed.Reg. at 37,055. Thus, the Plaintiffs in this case seek review of the Administrator's action in promulgating a limitation under section 1311. 33 U.S.C. § 1369(b)(1)(E). Accordingly, original subject matter jurisdiction is appropriate over this dispute in the Court of Appeals.

The states seeking the injunction in Georgia included Georgia, Alabama, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, West Virginia and Wisconsin. All are believed to have filed petitions in the Sixth Circuit since the Georgia District Court ruled.

Oklahoma

The State of Oklahoma filed a complaint in the US District Court for the Northern District of Oklahoma, *Oklahoma ex rel. Pruitt v. U.S. EPA.*, 2015 W.L 4607903 (Case Nos. 15–CV–0381–CVE–FHM, 15–CV–0386–CVE–PJC). The EPA moved for a stay of the proceeding, citing its Motion for Transfer that was imminent in the Multi-District Litigation Panel proceedings. On arguments submitted to the Court, the Court stayed the case pending the determinations of whether the Sixth Circuit has exclusive jurisdiction.

Ohio

The States of Ohio, Michigan and Tennessee joined in filing a complaint for injunctive relief in the US District Court in Columbus, Ohio. On September 1, 2015, Magistrate Judge Norah McCann King granted a Motion to Stay that proceeding pending the resolution of the EPA petition for consolidation of the multiple district filings. EPA represented to the court that there is a hearing on the multi-district consolidation motion on October 1, 2015. *Ohio et al v. U.S. EPA*, Case No. 2:15-cv-02467.

West Virginia

Murray Energy Corporation, a very large coal mining concern, filed a complaint in the District Court for West Virginia seeking injunctive relief against the WOTUS Rule. On August 26, 2015 Judge Irene Keeley determined that the WOTUS Rule should be considered a "limitation" on potential permitees, because it circumscribes their freedom to operate without a permit in waters defined by the WOTUS Rule. *Murray Energy Corp. v U.S. EPA*, ___F.Supp.3d___, Case No. 1:15CV110. Judge Keeley referenced holdings from several Circuit Courts of Appeals in reaching her judgment, which was to deny the injunctive relief for lack of jurisdiction and dismiss the complaint without prejudice. Murray Energy has also filed a petition for review in the Sixth Circuit Court of Appeals.

Other Cases

Other cases in the District Courts of which we are aware include the following: *State of Texas, et al. v. U.S. EPA, et al.*, Case No. 3:15-cv-162 (filed in S.D. Tex. on June 29, 2015; *American Farm Bureau Federation, et al. v. U.S. EPA, et al.*, Case No. 3:15-cv-165 (filed in S.D. Tex. on July 2, 2015); *Chamber of Commerce of the United States of America, et al. v. U.S. EPA, et al.*, Case No. 4:15-cv-386 (filed in N.D. Okla. on July 10, 2015); *Southeastern Legal Foundation, Inc., et al. v. U.S. EPA, et al.*, Case No. 1:15-cv-2488 (filed in N.D. Ga. on July 13, 2015); *Arizona Cattlemen's Assoc. et al v. U.S. EPA*, Case No. 2:15-cv-01752-BSB (D. Ariz.); and *Washington Cattlemen's Assn. et al v. U.S. EPA*, Case No:15-cv-03058 (D. Minn, filed 7-15-2015).

Conclusion and Implications

The number of District Court challenges seem to illustrate a broad feeling in numerous states and in the business and agricultural community nationally that the WOTUS Rule oversteps even the broad limits enunciated for "waters of the United States" in the *Rapanos* decision and deprives landowners, developers and the states themselves of local control over their economic development to a degree that breaks the federal system under the U.S. Constitution. While EPA will have support for the rule in some states and among environmental protection groups, this controversy about federal jurisdiction illustrates the opinions of many states that the reach of federal control has gone well beyond any traditional or historical understandings of the Constitutional regulation of navigable waters and interstate commerce by the Congress. While it can be surmised that review may ultimately be determined to rest with the Courts of Appeals, there is little question that the issue of whether the federal government has overreached is not going away anytime soon.
(Harvey M. Sheldon)

NEWS FROM THE WEST

This month's News from the West involves cases from both state and federal courts in California, Montana, and Washington. First, a U.S. District Court in California found that a scrap metal recycling facility discharged polluted storm water in violation of state and federal law. Next, the Supreme Court of Montana reversed and remanded a lower court decision regarding unreasonable interference with senior water rights. Finally, the Court of Appeals of Washington determined that wastewater discharge permits must comply with both state statutes and the federal regulatory scheme.

Organization Claims Scrap Metal in Industrial Storm Water Violates California Water Quality Standards and Clean Water Act

Cal. Sportfishing Prot. Alliance v. Chico Scrap Metal, Inc., ___F.Supp.3d___, Case No. 2:10-CV-01207-GEB-AC (E.D. Cal. Aug. 17, 2015).

The U.S. District Court for the Eastern District of California held that scrap metal recycled in California could have led to the discharge of polluted storm water in violation of state and federal law. The court found that sampling at the facility revealed at least 65 times where metals were released in violation of the federal Clean Water Act.

Chico Scrap Metal, Inc. owns and operates a scrap metal recycling facility with the primary purpose of receiving, separating and recycling scrap metal. Because most of the facility's industrial activities occur outside, when it rains, industrial storm water is discharged from the facility. California Sportfishing Protection Alliance filed a complaint alleging that Chico's discharges violated the terms of their California General Industrial Storm Water Permit (General Permit), that Chico failed to develop and implement an adequate storm water pollution and prevention plan, and that Chico violated state water laws by knowingly discharging into a designated drinking water source.

The District Court first identified that the Feather River was a navigable water of the United States and that storm water flowed down a ditch for 1.5 miles from the facility before discharging into Wyman Ravine which affected the physical, biological and chemical integrity of the river downstream. The court found that Chico violated the General Permit by

failing to report storm water sampling results to the Regional Water Quality Control Board that exceeded certain state water quality standards and the state-based criteria were applicable for Clean Water Act purposes. The court found 65 water samples exceeded the criteria, and thus the facility made multiple violations of the General Permit. The plaintiff argued that Chico did not have a storm water pollution and prevention as required by the General Permit, but the court found that the plan Chico had earlier created was sufficient and the claims of inadequacy would need to be based on continuous or reasonably likely future violations rather than wholly past violations.

The court also noted that state law violations also could have occurred from knowingly discharging lead concentrations into a drinking water source and that violations of the General Permit would negate the state law safe harbor for discharges conforming with a permit. However, the court concluded that there was no evidence that Chico's facility was the source of the lead.

The Supreme Court of Montana Requires Admission of Expert Testimony regarding Property Owner's Claim of Unreasonable Interference with Senior Water Rights

Sharbono v. Cole, 2015 MT 257 (Mt. Sept. 1, 2015).

The Supreme Court of Montana reversed a lower court's decision to exclude the testimony of experts used by one water user to argue that another water user had unreasonably interfered with his water rights, and thus further proceedings were needed on a Water Court's finding regarding senior water rights being impacted.

Two water users, the Sharbonos and the Coles, own adjoining parcels of land adjacent to Rock Creek. The Sharbonos have a pond on their property with the water source originating on the Coles' land. In 1994 the Coles obtained a water use permit for a pond on their property and began engaging in considerable development and construction. As a result of these activities, the Sharbonos claimed that by 2007 their land and pond had dried up and they were unable to use their senior water right. Consequently, the Sharbonos brought an action against the Coles arguing that the Coles had interfered with the Sharbonos' water rights by engaging in significant construction activities without taking adequate steps to protect the flow of water onto the Sharbonos' land.

The state court certified an issue for review by the Montana Water Court to determine the source of the Sharbonos' water rights in their pond. After conducting site visits, reviewing documents, and hearing arguments, the Water Court determined that the Sharbonos had superior irrigation water rights and the source of the rights was from water arising on and flowing through the Coles' property. The Water Court also found that when the state issued the Coles' water use permit in 1994, it had intended that the water would continue to flow through the Coles' land to the Sharbonos' property and pond. After the Water Court issued its decision, the case returned to the originating state court, but the state court then found in favor of the Coles in contravention to the Water Court's decision.

On appeal, the Supreme Court of Montana determined that the originating court had wrongfully excluded the testimony of experts that were needed to present the majority of the Sharbonos' evidence of their rights. Discussing the evidence that would have been presented showing the Coles' impact to water flowing to the Sharbonos' property, the Supreme Court reversed the decision and remanded the case back down for further proceedings allowing for the use of expert testimony.

Washington Court of Appeals Holds that Wastewater Discharge Permits Must Be Consistent with both State and Federal Statutes and Regulations

Puget Soundkeeper Alliance v. Pollution Control Hearings Bd., No. 45609-5-II (Wash.App. July 28, 2015).

A Court of Appeals in the state of Washington reversed an order from the state's Pollution Control Hearings Board (Board) that had allowed Washington's Department of Ecology (Department) to issue wastewater discharge permits in violation of certain water quality standards. After evaluating the relevant evidence, the court determined that the order conflicted with the Department's regulations, the governing statutes, and the federal regulatory scheme.

In 2012, the Department issued a National Pollutant Discharge Elimination System (NPDES) permit to BP West Coast Products LLC for one of its oil re-

fineries. This NPDES permit allowed BP to discharge treated wastewater from its oil refinery into navigable waters. As a condition of its permit, BP was required to comply with the specified acute toxicity effluent limit set by the Department and tested.

Under the permit issued, once BP learned of a failed whole effluent toxicity test result, and wanted to continue discharging wastewater without being subject to an adverse enforcement action, it had two options. It could conduct additional weekly whole effluent toxicity tests for four consecutive weeks, and if those tests passed it would not be required to submit a toxicity identification and reduction evaluation plan. Alternatively, if BP believed that the failed test result was anomalous, it could conduct one additional whole effluent toxicity test and notify the Department and similarly avoid preparing a plan if the second test passed and the Department agreed that the sample was anomalous. The Puget Soundkeeper Alliance challenged these options arguing that rather than providing for the failure of one test to constitute a permit violation, it allowed retesting and planning that need not reduce toxicity. Soundkeeper argued that in structuring BP's permit in such a way, the Department and the Board essentially allowed BP to discharge wastewater into navigable waters in a way otherwise prohibited by statute and the Department's own regulations.

The court found that the Department has the power to issue NPDES wastewater discharge permits so long as the permits comply with the Clean Water Act requirements, which includes imposing limits on wastewater discharge as necessary to implement water quality standards as set by state or federal law. In Washington, the relevant law makes clear that any discharge of any pollutant in excess of the amount authorized in the NPDES permit constitutes a violation of the terms and conditions of the permit.

Therefore, after reviewing the Board's decision to uphold BP's NPDES permit, the Washington Court of Appealss determined that the Board's order authorized the Department to issue permits that would allow BP to continue discharging even if it failed a sampling test. Both the Department's own regulations and the governing statutes and federal regulations, however, made it clear that NPDES permits may not authorize discharges that violate the applicable water quality standards. Thus, the court reversed the Board's order and remanded the matter to the Department with instructions to revise the NPDES permit conditions in a manner that complies with both state and federal laws and regulations.
(Steven Martin)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

Editor's Note: Complaints and indictments discussed below are merely allegations unless or until they are proven in a court of law of competent jurisdiction. All accused are presumed innocent until convicted or judged liable. Most settlements are subject to a public comment period.

Civil Enforcement Actions and Settlements—Water Quality

•On July 15, 2015, the EPA announced a settlement with Enid, Oklahoma-based Cottonwood Creek, Inc. in which the company has agreed to pay a $170,000 penalty to resolve violations of the federal Clean Water Act (CWA) related to oil pollution at the Bonanza Station in Big Horn County, Wyoming. The alleged violations included a March 8, 2010, pipeline discharge of approximately 162 barrels of crude oil into a tributary of the Nowood River. The agreement also resolves allegations that Cottonwood Creek, Inc. violated EPA regulations regarding the preparation and implementation of a Spill Prevention, Control, and Countermeasure (SPCC) Plan and a Facility Response Plan (FRP). The company cleaned up the oil release and ultimately submitted an acceptable FRP.

•On July 21, 2015, EPA announced a settlement with Pan Am Railways covering allegations that Pan Am violated the federal Clean Water Act at two of its railyards in Waterville, Maine, and East Deerfield, Massachusetts. The company agreed to pay a fine of $152,000 to resolve the violations. EPA alleged that Pan Am violated the conditions of the Maine "Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity," as well as federal Oil Pollution Prevention Regulations. According to EPA's complaint, Pan Am's stormwater pollution prevention plan (SWPPP) did not adequately describe control measures necessary to minimize the impact of stormwater running offsite. EPA alleged similar violations at the company's East Deerfield, Mass. facility.

•Arch Coal Inc., entered into a settlement with EPA and the DOJ under which it agreed to conduct comprehensive upgrades to their operations to ensure compliance with the Clean Water Act. The settlement resolves Clean Water Act violations at the companies' coal mines in Kentucky, Pennsylvania, Maryland, Virginia and West Virginia. Arch will pay a civil penalty of $2 million for the Clean Water Act violations; half of that amount will go to the United States, with the remainder divided among the states based roughly on the percentage of violations that occurred in each state: $895,000 to West Virginia, $20,000 to Virginia, and $85,000 to Pennsylvania.

•On August 17, 2015, EPA and the DOJ announced a settlement with the Delaware County Regional Water Quality Control Authority (DELCORA) resolving Clean Water Act violations involving combined sewer overflows (CSOs) to the Delaware River and its tributaries. DELCORA has agreed to develop and implement a plan to control and significantly reduce overflows from its sewer system. DELCORA will also pay a civil penalty of $1,375,000, which will be split between the United States and the Pennsylvania Department of Environmental Protection.

•EPA reached settlement with Coastal Energy Corporation of Willow Springs, Missouri, recently reached a proposed settlement valued at more than $200,000 to resolve violations of the Clean Water Act and the Emergency Planning and Community Right-to-Know Act (EPCRA). The settlement requires Coastal to pay $25,000 in cash penalties and complete more than $175,000 in supplemental environmental projects. Coastal Energy manufactures asphalt oil and stores approximately 2.8 million gallons of liquid asphalt, ethanol, and diesel fuel at this facility, which is directly adjacent to the Eleven Point River. EPA inspected the facility in early 2014. Coastal lacked a facility response plan and did not have an adequate spill prevention, control and

countermeasure plan. It also failed to provide required secondary containment for oil storage.

• Ardagh Glass Inc. agreed to pay a $103,440 penalty and to fund three environmental projects costing a total of about $121,700 to settle claims it was discharging wastewater in violation of its permits. In the settlement with EPA's New England office, Ardagh agreed to install equipment that will enhance the treatment of stormwater before it is discharged. In addition, the company will buy firefighting equipment and materials for the Town of Milford Fire Department. EPA alleged that Ardagh, which makes glass bottles, jars, and other containers, was in violation of its permits issued under the Clean Water Act to discharge stormwater and cooling water, which both flow into wetlands adjacent to the Charles River.

• The Iowa Fertilizer Company and Orascom E&C USA have agreed to pay a $80,689 civil penalty to settle alleged violations of the Clean Water Act associated with the construction of a new fertilizer plant in Wever, Iowa. Orascom is Iowa Fertilizer's construction contractor for the site and is jointly responsible for compliance under a National Pollutant Discharge Elimination System permit with the Iowa Department of Natural Resources. EPA Region 7 inspected the facility in June 2014 to evaluate the site's compliance with its stormwater permit. Of the 369-acre site, construction-related activity had occurred on nearly 323 acres. The EPA identified violations at the site, including the failure to install or implement adequate stormwater control measures, failure to update or amend the Stormwater Pollution Prevention Plan (SWPPP), and failure to perform adequate stormwater self-inspections. The violations resulted in sediment-laden stormwater leaving the site and entering a tributary of the Mississippi River.

• EPA and DOJ entered into a Consent Decree with the City of Bangor, Maine, that requires the City to take action to prevent sewer overflows and contaminated stormwater from entering the Penobscot River and Kenduskeag Stream. The city complied fully with the terms of an earlier consent decree with EPA but had not fully achieved the goals set forth in the Clean Water Act or in a federal discharge permit issued by the State of Maine. The Consent Decree imposes a schedule for the city to, among other things, institute operations and maintenance programs, conduct sewer system evaluations studies, construct capital improvement projects, and implement sewer system remedial measures and a more thorough program to eliminate stormwater contamination in the city's storm drains.

• EPA announced a settlement with the City of Jerome, Idaho requiring the city to upgrade its wastewater treatment plant to ensure the facility has the capacity to handle future discharges. The city will also make approximately $43 million in improvements to the wastewater treatment facility over the next six years. These upgrades will include adding two basins and increasing blower capacity in the membrane treatment area, adding a new sludge dewatering building, adding an additional aeration basin, pump station and blower building, new yard piping and increased biotower ventilation. In addition, the City of Jerome will pay an $86,000 civil penalty to settle claims it was discharging wastewater in violation of its permits.

• Under a settlement with the DOJ and EPA, the Puerto Rico Aqueduct and Sewer Authority (PRASA) has agreed to make major upgrades, improve inspections and cleaning of existing facilities within the Puerto Nuevo system and continue improvements to its systems island-wide. The Puerto Nuevo sewer system serves the municipalities of San Juan, Trujillo Alto, and portions of Bayamón, Guaynabo and Carolina. The settlement updates and expands upon legal settlement agreements reached with PRASA in 2004, 2006 and 2010. Under the agreement, PRASA will spend approximately $1.5 billion to make necessary improvements. PRASA has also agreed to invest $120 million to construct sanitary sewers that will serve communities surrounding the Martín Peña Canal, a project that will benefit approximately 20,000 people.

• The Town of Swampscott, Massachusetts entered into a Consent Decree with EPA agreeing to pay a $65,000 civil penalty and to take critical remedial measures to address pollution the Town discharged into the ocean near local beaches. The Consent Decree imposes a schedule for the Town to screen and monitor its storm water outfalls during dry and wet weather. Where pollutants are found, the Town

must eliminate the flows conveying the pollutants. In addition, the Town must take action to control runoff from land redevelopment projects. The Consent Decree also assesses a $65,000 civil penalty against the Town for its Clean Water Act violations. Swampscott is subject to vigorous reporting requirements to ensure compliance with the terms of the Consent Decree. If it fails to comply, it may be subject to additional penalties as high as $2,500 per each day of violation.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•In an agreement with the U.S. Environmental Protection Agency, PetEdge Inc. agreed to pay $75,900 to resolve EPA allegations that it violated federal pesticide regulations. EPA alleged that in 2012 and 2013, PetEdge Inc. was involved in numerous violations of the Federal Insecticide, Fungicide, and Rodenticide Act, including inaccurate labelling and distribution of unregistered products that contain pesticides. PetEdge did not admit to the allegations by EPA but agreed in the settlement to pay the fine and that PetEdge and products supplied by its vendors will come into compliance with the law within 30 days. The company also agreed not to distribute or sell any product that is in violation with federal regulations.

•Rego Realty Corp. and six associated property-owning companies, and one individual, will pay a penalty to settle EPA claims that they failed to follow federal lead-based paint disclosure requirements when renting nineteen housing units in Hartford, Connecticut. Under the settlement, Rego Realty Corp., along with Mancora LLC, Mochica LLC, Nazca LLC, Paracas LLC, Rosario LLC, and Stephanie LLC (all of which are affiliated corporate entities headquartered in Hartford), and an individual owner of a residential unit managed by Rego, will pay a $48,000 penalty and provide documentation of their compliance with the Residential Lead-Based Paint Hazard Reduction Act and the Lead-based Paint Disclosure Rule.

•Specialty Minerals Inc. and Minteq International Inc. will pay a civil penalty of $76,500, settling EPA claims that the facilities violated the federal Emergency Planning and Community Right-to-Know Act by failing to complete and submit timely toxic release inventory (TRI) reports for lead compounds, manganese, antimony and propylene. The Toxics Release Inventory is a public right-to-know requirement that tracks the management of certain toxic chemicals that may pose a threat to human health and the environment.

•Zippo Manufacturing Company will pay a $186,000 penalty to settle alleged violations of hazardous waste regulations at its manufacturing facility in Bradford, Pennsylvania. EPA cited Zippo for violating the Resource Conservation and Recovery Act (RCRA), the federal law governing the treatment, storage, and disposal of hazardous waste. RCRA is designed to protect public health and the environment, and avoid costly cleanups, by requiring the safe, environmentally sound storage and disposal of hazardous waste. The alleged RCRA violations included storage of hazardous waste without interim status or a permit, operation of an unpermitted thermal treatment unit, failure to properly manage hazardous waste containers, and failure to maintain job descriptions of personnel managing hazardous waste.

•Partner's Produce, Inc. in Payette, Idaho failed to immediately report the release of anhydrous ammonia to the National Response Center, State Emergency Response Commission, and the Local Emergency Planning Committee, as required by § 103 of CERCLA and § 304 of EPCRA. EPA alleges that Partner's Produce released approximately 378 pounds of anhydrous ammonia on February 14, 2014, from its Payette, Idaho facility. Partner's Produce agreed to pay a penalty of $67,392.

•EPA approved a proposed settlement with Dunbar Asphalt Products, Inc., to clean up a 29-acre portion of the Sharon Steel Corporation Superfund Site in Hermitage, Pennsylvania. Under the proposed settlement, Dunbar will pay the costs to cover exposed slag with asphalt or clean fill to prevent releases of heavy metals and polyaromatic hydrocarbons (PAHs), and ensure there is no exposed waste. Dunbar will also reimburse EPA for future costs related to the cleanup of this 29-acre portion of the site. EPA estimates that it would have cost the agency $1.7 million to clean up this portion of the site if a settlement had not been reached with Dunbar.

•EPA Region 7 announced a settlement with the current and former owners of the former Townsend Industries Facility, a chemical storage and handling site in Pleasant Hill, Iowa, to address hazardous waste contamination in groundwater resulting from business operations in the 1970s and 1980s. An administrative order on consent, proposed by EPA Region 7 in Lenexa, Kan., requires the operation and maintenance of on-site containment and remediation systems to reduce contamination in groundwater at, and coming from, the site. The site includes approximately 12 acres of land and a 45,000-square-foot industrial building at 4400 Vandalia Road in Pleasant Hill.

Indictments Convictions and Sentencing

•Mississippi Phosphates Corp. (MPC), a Mississippi corporation, which owned and operated a fertilizer manufacturing facility located on Bayou Casotte in Pascagoula, Mississippi, plead guilty to a felony information charging the company with a criminal violation of the Clean Water Act. As part of the guilty plea, MPC admitted discharging more than 38 million gallons of acidic wastewater in August 2013. The discharge contained pollutants in amounts greatly exceeding MPC's permit limits, resulting in the death of more than 47,000 fish and the closing of Bayou Casotte. MPC also admitted that, in February 2014, MPC discharged oily wastewater from an open gate on a storm water culvert into Bayou Casotte, creating an oily sheen that extended approximately one mile down the bayou from MPC. MPC entered its guilty plea before Chief Judge Louis Guirola Jr. of the U.S. District Court for the Southern District of Mississippi. Because MPC is in bankruptcy and is obligated to assist in funding the estimated $120 million cleanup of its site, the court accepted the parties' agreement for MPCto transfer 320 acres of property near to its Pascagoula plant to become a part of the Grand Bay National Estuarine Research Reserve, which is managed by the Mississippi Department of Marine Resources as part of the National Oceanic and Atmospheric Administration's National Estuarine Research Reserve System.

•Jason A. Halek, 41, of Southlake, Texas, was indicted in federal court in Bismarck, North Dakota, on 13 felony charges stemming from the operation of a saltwater disposal well near Dickinson, in Stark County, North Dakota. Halek was charged with one count of conspiracy to violate the Safe Drinking Water Act and defraud the United States. He was also charged with four counts of violating the Safe Drinking Water Act, four counts of making false statements and four counts of obstructing grand jury proceedings. The well, named the Halek 5-22, received "produced water" constituting "brine and other wastes" commonly and generically referred to as "saltwater." "Saltwater" in this context covers a wide array of drilling waste fluids, including hydraulic fracturing fluid, which is water combined with chemical additives such as biocides, polymers and "weak acids." The EPA has stressed that this water is often saltier than seawater and can "contain toxic metals and radioactive substances."

•Petr Babenko, 45, of Vineland, New Jersey, was found guilty of participating in a conspiracy to illegally buy and sell paddlefish and one count of illegally trafficking in paddlefish in violation of the Lacey Act. Babenko owned European International Foods, a specialty grocery business in Vineland. Codefendant Bogdan Nahapetyan, 37, an Armenian citizen residing in Lake Ozark, Missouri, pleaded guilty on Nov. 12, 2013, to illegally trafficking in paddlefish. The American paddlefish (Polydon spathula), also called the Mississippi paddlefish or the "spoonbill," is a freshwater fish that is primarily found in the Mississippi River drainage system. Paddlefish eggs are marketed as caviar. The retail value of the caviar is estimated to be between $30,000 and $50,000. Paddlefish were once common in waters throughout the Midwest. However, the global decline in other caviar sources, such as sturgeon, has led to an increased demand for paddlefish caviar. This increased demand has led to over-fishing of paddlefish and consequent decline of the paddlefish population.

•On August 27, 2015, Dean Daniels, 52, Richard Smith, 57, Brenda Daniels, 45 and William Bradley, 58, all of Florida, pleaded guilty and were sentenced in U.S. District Court for charges related to a scheme involving the false production of biodiesel. Dean Daniels was sentenced to 63 months incarceration, Bradley was sentenced to 51 months incarceration, Smith was sentenced to 41 months incarceration and Brenda Daniels was sentenced to 366 days incarceration. In addition, the court sentenced the defendants to pay $23 million in restitution.
(Andre Monette)

JUDICIAL DEVELOPMENTS

SECOND CIRCUIT AFFIRMS NARROW READING OF *FORCE MAJEURE* CLAUSE IN NEW YORK OIL AND GAS LEASES IN CONNECTION WITH FRACKING MORATORIUM

Beardslee v. Inflection Energy, LLC, ___F.3d___, Case No. 12-4897 (2nd Cir. Aug. 19, 2015).

The Second Circuit has dealt another blow to the oil and gas industry, affirming a 2012 New York District Court holding that a number of oil and gas leases had expired at the conclusion of the subject leases' primary terms because no oil and gas operations occurred on the properties during that time. The Second Circuit held that the *force majeure* clauses of the subject leases did not modify the primary term of those leases' *habendum* clauses. Taking its lead from the New York State Court of Appeals, the Second Circuit concluded that even if New York's moratorium on high volume hydraulic fracturing and horizontal drilling could be considered as unforeseeable and beyond the lessee energy companies' control as to trigger the leases' *force majeure* clauses, the leases' *force majeure* clauses did not apply to the expired five-year primary terms of the leases.

Background

Beginning in 2001, Walter and Elizabeth Beardslee, along with more than 30 other Tioga County landowners (collectively: landowners) entered into certain oil and gases leases with Victory Energy Corporation (Victory), each separately conferring rights to extract oil and gas resources underlying their respective properties. Megaenergy, Inc. (Mega) shared an interest in the leases with Victory and, as of July 2010, Inflection Energy, LLC (Inflection) (collectively: energy companies or lessees) assumed from Mega the operational rights and responsibilities under a majority of the leases.

The leases each contained an identical habendum clause, stating:

> …[i]t is agreed that the lease shall remain in force for a primary term of FIVE (5) years from the date hereof and as long thereafter as the said land is operated by Lessee in the production of oil or gas.

Thus, the primary terms of the leases were five years and, at the conclusion of which, the leases expired if the land had not been operated by the energy companies in the production of oil or gas.

The leases also all contained the same *force majeure* clauses, providing, in part:

> If and when drilling … [is] delayed or interrupted … as a result of some order, rule, regulation … or necessity of the government, or as the result of any other cause whatsoever beyond the control of Lessee, the time of such delay or interruption shall not be counted against Lessee, anything in this lease to the contrary notwithstanding.

In 2008, then-Governor of New York George Paterson directed the New York Department of Environmental Conservation to update its generic environmental impact statement on conventional drilling and to consider the potential impacts of newer extraction techniques such as hydraulic fracturing. After that directive, New York ceased issuing hydraulic fracturing permits. Inflection subsequently provided the landowners with notices claiming that New York's regulatory actions constituted a *force majeure* event under the leases, thus, extending the lease terms.

At the District Court

In 2012, the landowners filed a declaratory judgment action in the District in New York arguing that the leases essentially rendered their properties unmarketable and sought a declaration that the leases had expired. Landowners moved for summary judgment, contending that because the energy companies had not drilled any wells nor undertook any related actions on the properties, the leases expired after five years. The energy companies cross-moved, primarily arguing that the Governor's 2008 directive was a *de facto* moratorium on fracking which prevented

them from exercising the only "commercially viable" method of drilling. They argued that this qualified as a *force majeure* event, which modified the habendum clause and resulted in extending the leases' primary terms until the statewide moratorium was lifted.

The District Court disagreed and granted the landowners' motion for summary judgment and declared that the leases expired at the end of the five-year primary term. Notably the court did not rule on whether a *force majeure* event occurred. Instead, the court concluded that even though the energy companies could not use hydraulic fracturing techniques, the purpose of the leases had not been frustrated and that the energy companies could have drilled using conventional methods. Likewise, the court noted that the leases simply provided the energy companies with an option to drill, rather than obligation to do so. The District Court found the moratorium to be a "mere impracticality" that was not sufficient to trigger the *force majeure* clause.

The Second Circuit's Decision

Certification of Questions to the New York Court of Appeals

The energy companies timely appealed and, in review, the Second Circuit found the matter turned on significant and novel issues of New York law concerning the interpretation of oil and gas leases. The Second Circuit certified two questions to the New York Court of Appeals:

1. Under New York law, and in the context of oil and gas lease, did the State's Moratorium amount to a *force majeure* event?

2. If so, does the *force majeure* clause modify the habendum clause and extend the primary terms of the leases?

In review of the leases, New York's highest court answered the second question in the negative. The Court of Appeals opined that the habendum clauses of the leases did not incorporate the *force majeure* clauses either explicitly or by reference. The court was also not persuaded by the energy companies' contention that the habendum clauses were modified by the provision of the *force majeure* clauses that "anything in this lease to the contrary notwithstanding." The court concluded that, under New York law, such language only supersedes conflicting language. Therefore, because the *force majeure* clauses did not "conflict" with the primary term of the habendum clauses, it had no bearing on that term (*i.e.*, five years). As a result of having addressed the second question, the court found it unnecessary to confront the first question of whether the state's moratorium constituted a *force majeure* event, terming it as only "academic."

Second Circuit Affirms the State Court Decision Granting the Motion for Summary Judgment

Armed with this interpretation of the leases from the New York Court of Appeals, the Second Circuit affirmed the 2012 District Court decision granting the landowners' motion for summary judgment. In so doing, the Second Circuit recognized the New York Court of Appeals' decision that, under New York law, the specific *force majeure* clause did not modify the habendum clause and, noting no perceived disputed issues of fact, the Second Circuit concluded that the leases expired at the end of the five-year primary term. The Second Circuit noted that it will "not second-guess the [New York Court of Appeals'] interpretation and application of New York law" in this regard.

Conclusion and Implications

Taking guidance from the New York State Court of Appeals, the Second Circuit affirmed that the leases did not provide a *force majeure* clause that implicated the leases' primary terms, but instead only covered the leases' secondary terms and, therefore, even if New York's moratorium on fracking qualified as a *force majeure* event, this was of no matter. While this decision is an important development in New York law concerning the drafting and subsequent interpretation of oil and gas leases, *Beardslee* may be more significant for the question left unanswered—whether New York's fracking and horizontal drilling moratorium qualified as a *force majeure*. Nonetheless, drafters should take heed of New York's narrow interpretation of *force majeure* clauses in oil and gas leases.

The Second Circuit's decision is available online at: https://scholar.google.com/scholar_case?case=14927973240577151840&hl=en&as_sdt=6&as_vis=1&oi=scholarr

(John McGahren, Drew Cleary Jordan, Duke McCall III)

NINTH CIRCUIT ORDERS FINAL RESPONSE FROM EPA ON ADMINISTRATIVE PETITION TO BAN USE OF PESTICIDE

Pesticide Action Network North America; Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency, ___F.3d___, Case No. 14-72794 (9th Cir. Aug. 10, 2015).

A three-judge panel on the Ninth Circuit Court of Appeals has granted a petition for a writ of *mandamus* filed by the Pesticide Action Network and the Natural Resources Defense Council (collectively: Pesticide Action Network). The writ of *mandamus* petition sought a final response from the U.S. Environmental Protection Agency (EPA) on the Pesticide Action Network's administrative petition filed in 2007 challenging the EPA's determination that the use of a pesticide chlorpyrifos is safe in rural areas. In granting the petition, the Ninth Circuit ordered that the EPA issue either a proposed or final revocation rule or a full and final response to the 2007 administration petition by October 31, 2015 because nearly a decade had elapsed, in which the EPA repeatedly failed to issue a final response and the EPA's recent pronouncements that chlorpyrifos posed a significant threat to water supplies.

Background

The Food Quality Protection Act of 1996 required that the EPA complete an initial review of every pesticide then in use within ten years to ensure compliance with relevant safety standards in ten years and repeat the process using updated scientific data every 15 years. During this initial review, the EPA in 2000 announced an agreement with pesticide manufacturers to ban the application of the pesticide chlorpyrifos in residential areas, but issued both interim and final decisions permitting the continued use of chlorpyrifos in agricultural areas.

The Pesticide Action Network disagreed with the EPA's assessment that chlorpyrifos is safe and filed an administrative petition in September 2007 (2007 administrative petition) alleging that the EPA ignored evidence of chlorpryifos' toxicity. The EPA did not issue a formal response to the 2007 administrative petition other than publishing a notice of the petition in the *Federal Register*. The Pesticide Action Network subsequently filed suit in federal district court in New York in July 2010 demanding a final response to the 2007 administration petition. Five months later, the EPA and the Pesticide Action Network filed a stipulation staying the suit. The stipulation was based on EPA's promise that it would issue a human health risk assessment of chlorpyrifos by June 2011 and a final response to the 2007 administrative petition by November 2011. EPA failed to publish a final response by November 2011, or anytime thereafter.

In April 2010, the Pesticide Action Network filed for a writ of *mandamus* in the Ninth Circuit (2012 mandamus petition). The EPA responded by publishing a partial denial of the 2007 administrative petition and stated that it would either issue a complete denial of the 2007 administrative petition by February 2013 or issue a proposal rule/final rule without prior proposal to revoke or modify the existing chlorpyrifos tolerances by February 2014. The Ninth Circuit subsequently denied the 2012 mandamus petition, noting that the EPA had a "concrete timeline" in place to respond to the Pesticide Action Network's 2007 administrative petition.

The EPA failed to act in February of 2013 and 2014. The Pesticide Action Network filed a renewed petition for a writ of *mandamus* in September 2014, which is the subject of the instant opinion. The EPA issued a preliminary final denial of the 2007 administrative petition in January of 2015 but was unable to offer a firm date when the EPA could issue a final response. Dissatisfied with the uncertainty of the EPA's response, the Pesticide Action Network reiterated its request that the Ninth Circuit issue a writ of *mandamus* compelling the EPA to issue a final ruling on the 2007 administrative petition.

The Ninth Circuit's Order

The only question before the Ninth Circuit was whether the EPA's delay in responding to the Pesticide Action Network's 2007 administrative petition warranted the extraordinary remedy of *mandamus*. In concluding that it does, the Ninth Circuit used the *TRAC* factors to determine if an agency's delay is so "egregious" to warrant *mandamus* relief.

Time

The court first considered the length of time afforded to the EPA to issue a final decision on the 2007 administrative petition. In rejecting the Pesticide Action Network's 2012 mandamus petition, the court noted that the EPA had a "concrete timeline" for issuing a final ruling in a matter of months. Now, as the court recognized, the delay had stretched to eight years and the EPA was still unable to offer a timetable for concluding or even initiating proceedings to determine the risk posed by chlorpyrifos and issue a final response on the 2007 administrative petition.

The Threat Posed by Chlorpyrifos

The court then considered the threat posed by chlorpyrifos to human health. The EPA had initially determined that chlorpyrifos was safe in 2006, but had backtracked significantly from that pronouncement over the last several years. New labeling requirements on chlorpyrifos were recently imposed by the EPA and the EPA reported in a new status report that a nationwide ban on the pesticide may be justified due to its significant threat to water supplies. The court, therefore, had "little difficulty" concluding that the EPA should be compelled to act quickly in light of the EPA's own assessment of the dangers to human health posed by chlorpyrifos.

History of Missing Deadlines

The court finally acknowledged the EPA's "significant" history of missing deadlines previously set with regards to the 2007 administrative petition. Stating that the EPA's delay has already been the subject of three non-frivolous lawsuits, the court directed the EPA to issue either a proposed or final revocation rule or a full and final response to the 2007 administrative petition by October 31, 2015.

Conclusion and Implications

The Ninth Circuit granted the Pesticide Action Network's petition for a writ of *mandamus* directing the EPA to issue a final response to the Pesticide Action Network's 2007 administrative petition. In so doing, the Ninth Circuit found that the EPA's eight-year delay in responding to the Pesticide Action Network's administrative petition warranted the "extraordinary remedy" of a writ of *mandamus*. This case, although perhaps unique on its facts, suggests that a writ of *mandamus* directing a federal agency to act in response to an administrative petition may be appropriate in situations involving undue delay and risks to human health.
(Danielle Sakai, Benjamin Lee)

DISTRICT COURT ENJOINS IMPLEMENTATION OF EPA/CORPS RULE DEFINING WATERS OF THE UNITED STATES UNDER THE CLEAN WATER ACT

North Dakota v. U.S. Environmental Protection Agency,
___F.Supp.3d___, Case No. 3:15-cv-00059 (D. N.D. Aug. 27, 2015).

North Dakota and 12 other states (States) filed suit against the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (collectively: Agencies) challenging the Agencies' issuance of a rule redefining "Waters of the United States" under the federal Clean Water Act. The States alleged that the new rule unlawfully expanded the Agencies' jurisdiction under the Clean Water Act to cover state lands and water resources beyond the limits established by Congress. In a break from decisions issued by other federal District Courts, the U.S. District Court for the District of North Dakota enjoined implementation of the new rule, finding that it appeared likely the Agencies had violated their Congressional grant of authority in promulgating the new rule.

Background

The Clean Water Act seeks to protect the Nation's waters from pollution through the adoption of various programs designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." The provisions of these programs generally extend to and include "navigable waters," which are defined under the act as "the waters of the

United States, including the territorial seas." The determination of which intrastate waters are "waters of the United States" has proven controversial and has been the subject of much litigation, culminating in a spilt decision of the U.S. Supreme Court in *Rapanos v. U.S.*, 547 U.S. 715 (2006).

On April 21, 2014, the Agencies issued a proposed rule to change the regulatory definition of "waters of the United States." Following a public comment period, the Agencies issued a final rule defining waters of the United States on June 29, 2015. The effective date of the new rule was specified as August 28, 2015.

The same day the Agencies issued the final rule the States filed their complaint for declaratory and injunction relief, alleging that the new rule violated the Administrative Procedure Act, the Clean Water Act and the National Environmental Policy Act (NEPA). On August 10, 2015, the States moved for a preliminary injunction, seeking to enjoin the implementation of the rule before its August 28th effective date.

The District Court's Decision

After concluding that original jurisdiction to hear the States' claims resided in the District Court, rather than the Court of Appeals, the District Court proceeded to address the merits of the States' motion. The court noted that it was required to assess four factors in determining whether to issue a preliminary injunction:

(1) the threat of irreparable harm to the movant;

(2) the balance of harms to the parties;

(3) the movant's likelihood of success on the merits; and

(4) the public interest.

Likelihood of Success on the Merits

The court devoted most of its analysis to assessing whether the States' claims challenging the new rule had a likelihood of success on the merits. The court explained that the standard to be applied in this analysis varied, depending on whether the regulation at issue was promulgated in a "presumptively reasoned democratic process." If it was, a "substantial likelihood of success on the merits" standard applied. If the presumption was rebutted and the evidence established that the new rule was not the product of a reasoned democratic process, the States needed only to establish a "fair chance of success." The court concluded that the evidence before it revealed the new rule was issued in a manner that was "inexplicable, arbitrary, and devoid of a reasoned process" and thus the "fair chance" standard applied, but the court also volunteered that its conclusions would be the same under the higher "substantial likelihood of success" standard.

Analyzing the States' likelihood of success on the merits, the court concluded that the States were likely to prevail on the merits of both their claim that the Agencies violated their grant of authority under the Clean Water Act and failed to comply with the requirements of the Administrative Procedure Act.

Looking to a Significant Impact on the Integrity of other more Traditional Covered Waters

With respect to the States' claim that the Agencies violated their grant of authority under the Clean Water Act, the court focused on the whether the waters included within the new rule were likely to "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" The court concluded that the new rule allowed EPA to regulate waters that do not have any effect on the "'chemical, physical, and biological integrity' of any navigable-in-fact water," and thus there was a fair chance the States could establish that the new rule exceeded the congressional grant of authority under the Clean Water Act.

The APA Claims

In assessing the likelihood of success on the States' Administrative Procedure Act claim, the court found a lack of any scientific basis for certain bright-line standards included in the new rule and concluded that the final rule was not a "logical outgrowth" of the proposed rule because the final rule substituted geographic distances for ecologic and hydrologic concepts that formed the basis of the proposed rule. The court concluded it was not necessary to reach the merits of the States claim that the Agencies violated the National Environmental Policy Act because the States had met their burden of establishing a likelihood of success on their other claims.

Harms and the Public Interest

Turning the assessment of harms and public interest, the court found the States would suffer irreparable harm both as a result of their loss of sovereignty over intrastate waters and monetary losses the States would be unable to recoup because of the United States' sovereign immunity. In contrast, the court concluded that delaying implementation of the rule would cause the Agencies no appreciable harm. Moreover, the court found that delaying implementation of the rule to allow for a full and final resolution of the States' claims on the merits was in the public interest.

Conclusion and Implications

The court's decision does not finally determine the merits of the States' claims and does not hold that the Agencies' new rule defining the "waters of the United States" is unlawful. But the court's decision does prevent the implementation of the new rule pending a final determination on the merits and provides at least a preliminary view of the court's assessment of the merits of the States' claims. Because the lawfulness of the Agencies' new rule is the subject of litigation in a number of other courts and only a minority of states is before this court, a final determination of the nationwide validity of the new rule is unlikely to occur any time soon.
(Duke K. McCall, III)

DISTRICT COURT HOLDS THAT PLAINTIFF'S SIXTH AMENDED PETITION ASSERTING CLEAN WATER ACT CLAIM DID NOT SATISFY THE NOTICE REQUIREMENTS

Peter Payne, et al v. U.S., ___F.Supp.3d___, Case No. 4:15CV246-LG-CMC (E.D. Tx. Aug. 17, 2015).

Peter Payne, Mary Beth Payne, David Howard, and Oksana Howard (plaintiffs) filed state takings, nuisance, and negligence claims, as well as a federal Clean Water Act (CWA) claim against Highland Homes, LLC., GCS Trails of Frisco d/b/a Golf Club of Frisco, and Sun Den Frisco Investment d/b/a Golf Club of Frisco (collectively: Golf Club), seeking redress for damages to their homes arising from alleged residential construction defects and creek-bank erosion. In response, Golf Club filed motions to dismiss for lack of jurisdiction. The U.S. District Court denied Golf Club's motions seeking to dismiss the state law claims based on a lack of jurisdiction, but granted the motions dismissing the CWA claim without prejudice. The dismissal was based on plaintiffs' failure to provide statutory citizen suit notice of their claim to the Golf Club, or to the federal defendants. The court rejected plaintiffs' argument that a prior lawsuit alleged against the Golf Club complied with the CWA's citizen suit notice requirements.

Background

Plaintiffs' alleged that the area behind their homes frequently flooded, causing erosion that impacted the value of their properties.

CWA allows private citizens to sue any person "alleged to be in violation" of the conditions of an effluent standard or limitation under the CWA or of an order issued with respect to such a standard or limitation by the Administrator of the U.S. Environmental Protection Agency (EPA) or a state. (*See*, 33 U.S.C. § 1365(a)(1).) Citizens may not bring suit, however, unless and until they have given 60 days notice of their intent to sue to the alleged violator (as well as to the Administrator and the state). (33 U.S.C. § 1365(b)(1)(A).) The purpose of this notice requirement, the Supreme Court explained in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found. Inc.*, 484 U.S. 49, 60 "is to give [the alleged violator] an opportunity to bring itself into compliance with the Act and thus likewise render unnecessary a citizen suit." EPA regulations give further guidance on the contents of the notice, at 40 CFR § 135.3(a):

> Notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto, shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to constitute a violation, the person or persons responsible for the alleged violation, the date

> or dates of such violation, and the full name, address, and telephone number of the person giving notice.

In practical terms, the notice must be sufficiently specific to inform the alleged violator about what it is doing wrong, so that it will know what corrective actions will avert a lawsuit. Even if the notice is broad enough in scope and was timely, a second requirement for citizen suits is that the defendant must be "in violation" of a relevant standard, limitation, or order.

In *Gwaltney*, the Supreme Court held that:

> …[t]he most natural reading of 'to be in violation' is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation-that is, a reasonable likelihood that a past polluter will continue to violate in the future. (*See, Gwaltney,* 484 U.S. at 57.) The Court held that this language precluded the possibility of a citizen suit based on a wholly past violation; instead, the plaintiff must allege that the violations are ongoing at the time suit is brought. Justice Scalia would have gone further on the latter point and would have required the plaintiff to substantiate an allegation of an ongoing violation, if the point was contested. (*See, Gwaltney*, 484 U.S. at 69.)

He agreed, however, that:

> …[a] good or lucky day is not a state of compliance. Nor is the dubious state in which a past effluent problem is not recurring at the moment but the cause of that problem has not been completely and clearly eradicated.

If the violation is cured at some point while the suit is pending the case nevertheless does not become moot. It may be possible that the citizen plaintiffs would lose their right to an injunction, if, as the *Gwaltney* majority put it, "it is 'absolutely clear' that the allegedly wrongful behavior could not reasonably be expected to recur." (*Gwaltney,*quoting from *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203, 89 S.Ct. 361, 364, 21 L.Ed.2d 344 (1968).)

The District Court's Decision

Plaintiffs' did not dispute a failure to provide notice required by the CWA. Instead, plaintiffs' alleged that its Sixth Amended Petition filed in a previous lawsuit concerning the same flooding, and involving Golf Club, provided Golf Club with the requisite notice. Plaintiffs' alleged that the following language in their Petition provided Golf Club with notice:

> These actions/inactions, and others, of Defendants, individually and/or collectively have resulted in the mismanagement of flood waters, causing an increase of volume and velocity within Cottonwood Branch [tributary], increasing the frequency of flooding, and…altering the flow of water and increasing the rate of erosion fill material and soils providing lateral support to the soils beneath plaintiffs' homes, and discharging fill materials into Cottonwood Branch and Lake Lewisville in violation of the CWA.

The court held that this language did not meet the notice requirement of the CWA:

> It would be unreasonable to expect [Golf Club] to decipher notice that a CWA lawsuit would be filed against them from a thirty-six page Petition that asserts no claims against them for violation of the CWA and only vaguely references possible CWA violations while discussing the jurisdiction and liability of other defendants. Furthermore, it is questionable whether a previous lawsuit could ever fulfill the notice requirement under the CWA, because the very intent of the notice requirement is to *avoid* litigation where possible….Litigation could never reasonably be used as a means of preventing litigation.

Moreover, as plaintiffs' admitted to not providing the EPA Administrator and the State of Texas with notice, that failure, in and of itself, was a violation of the CWA notice requirement warranting dismissal of plaintiffs' claims against Golf Club.

Conclusion and Implications

Under the Code of Federal Regulations, at a minimum, notice "shall include sufficient information to

permit the recipient to identify the specific standard, limitation, or order alleged to have been violated…"

(40 C.F.R. §135.3(a).) Here the District Court found that plaintiffs' complaint did not meet this standard. (Thierry Montoya)

DISTRICT COURT HOLDS THAT THE CLEAN WATER ACT APPLIES TO POLLUTANTS EXPELLED FROM A VENTILATION FAN USED ON POULTRY CONFINEMENT HOUSES

Rose Acre Farms, Inc. v. North Carolina Department of Environment and Natural Resources, ___F.Supp.3d___, Case No. 5:14-CV-147-D (E.D. N.C. July 30, 2015).

This is a long-running dispute in which Rose Acre Farms, Inc. (Rose Acre) sought to avoid federal Clean Water Act (CWA) regulation and National Pollutant Discharge Elimination System (NPDES) permitting requirements by arguing that its poultry operation confinement houses, and the ventilation system which discharged dust, feathers, and manure ultimately into U.S. waters, were exempt from NPDES permitting under the CWA's "agricultural stormwater" exception. Rose Acre filed a declaratory relief complaint in District Court seeking an order exempting it from NPDES permitting requirements, and declaring that the North Carolina Department of Environmental and Natural Resources (DENR) lacked authority to require it to obtain an NPDES permit. Defendant intervenors and DENR (collectively: defendants) moved to dismiss Rose Acre's complaint. The court granted defendants' motion to dismiss refusing to:

> …upset the congressionally-approved balance of responsibilities between federal and state courts with respect to the CWA's NPDES permitting scheme…the court is confident that North Carolina appellate courts will faithfully consider non-binding, compelling precedent concerning whether DENR lacks the legal authority in this case to require Rose Acre to obtain a NPDES permit.

Background

Rose Acre operates an egg production facility in Hyde County, North Carolina. This facility includes 12 high-rise confinement houses holding 3.2 million egg-laying hens. These 12 confinement houses are ventilated by fans which blowout feathers, dust, litter, and excrement from the containment houses. The excrement contains ammonia.

Pursuant to state regulations, Rose Acre built a wet detention pond to accumulate precipitation that falls on the ground around the farm. A few times a year, this detention pond discharges into a nearby canal. This canal drains into the Pungo River, a tributary of the Pamlico River.

In 2004, the DENR issued Rose Acre its first five-year NPDES permit. On March 25, 2009, Rose Acre applied to DENR for a renewal of the permit. DENR issued a final permit on September 24, 2010, requiring no discharge by Rose Acre and imposed Best Management Practices (BMPs).

On October 15, 2010, Rose Acre filed an administrative challenge to the newly renewed NPDES permit, arguing that DENR had no authority to require Rose Acre to operate under a NPDES permit. On October 17, 2011, the Administrative Law Judge (ALJ) issued a recommended decision granting Rose Acre's motion for summary judgment. Pursuant to state law, the contested case went to the North Carolina Environmental Management Commission (EMC) for review, which rejected the ALJ's recommendation and ordered an evidentiary hearing to determine whether Rose Acre had discharged pollutants. On January 4, 2013, the Superior Court remanded the case for evidentiary hearing.

On March 12, 2014, Rose Acre filed this suit seeking declaratory judgments from the district court that the pollutants expelled from the ventilation fans in its confinement houses and washing down into other waters constitutes agricultural stormwater, which is exempt from NPDES permitting requirements, and further declaring that DENR lacks the authority to require Rose Acres to obtain an NPDES permit.

On May 14, 2014, environmental groups moved to intervene on defendants' behalf; status granted by the court on July 8, 2014. Various motions ensued

with this decision focusing on defendants' motion to dismiss for lack of subject-matter jurisdiction.

The District Court's Decision

Federal Jurisdiction

Rule 12(b)(1) and (h)(3) state that if the court determines at any time it lacks subject matter jurisdiction, the court must dismiss the action. Here, Rose Acres alleged subject matter jurisdiction under 28 U.S.C. §§1331, 1332, and 2201. Federal question jurisdiction under §1331 requires the interpretation of federal law or at least the implication of federal policy. In the case of state/federal law hybrids, state law must raise a federal issue, disputed and substantial, and exercising federal jurisdiction would not upset balance of federalism. (Citing to *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*,(*Grable*) 545 U.S. 308, 312.) Federal jurisdiction would be determined by cases falling within the *Grable* and *Gunn v. Minto*, (*Gunn*) 133 S.Ct. 1059 tests.

Rose Acre's declaratory relief claims merely expressed a remedy, not jurisdiction. Rose Acre would have to prove an independent basis for federal jurisdiction:

> Thus, for subject-matter jurisdiction to exist, it must be the case that defendants could bring a claim arising under federal law against Rose Acre concerning its NPDES permit obligations….Here any claim that defendants could bring against Rose Acre concerning its NPDES permit obligation would be under state law…'

Here, the relevant North Carolina statute, which determines whether persons must obtain an NPDES permit explicitly relies on federal regulations:

> Should the state bring an enforcement action based on a person's failure to obtain an NPDES permit, the state must prove (among other things) that federal law required the permit. Accordingly, such an action would raise a federal issue.

The second *Grable* factor requires the parties to actually dispute the federal issue in this case. That requirement is met as Rose Acre alleges federal law does not obligate it to obtain an NPDES permit "because any discharge that might occur falls under the CWA's agriculture stormwater exception."

The third *Grable* factor requires that the federal issue be substantial. There must be a "serious federal interest in claiming the advantages thought to be inherent in a federal forum." (*Grable*, *supra*, 545 U.S. at 313.) The sole issue in *Grable* was the interpretation of a federal tax statute (in-hand or mail service) with potentially wide-reaching administrative effects and it would not upset federalism. *Gunn* involved a legal malpractice claim that required extensive interpretation of the exclusively federal patent statute, but did not affect federal patent law at all:

> Specifically, the Court noted the 'backward-looking nature of a legal malpractice claims' and the lack of controlling or preclusive effect that a state-court decision would have on patent jurisprudence. (Quoting *Gunn, supra*, 1066-67.)

The court found that the case fell within the *Grable* category as this case presents a:

> …nearly pure issue of law as to whether the agricultural stormwater discharge exception in the CWA covers the possible precipitation-related discharge of litter and manure into Rose Acre's detention pond.

Unlike the backward-looking nature of the legal malpractice case in *Gunn* the resolution of the legal issue in this case "would affect the behavior of Rose Acre and DENR moving forward." (*Id.*)

The final *Grable* factor requires that the court's consideration of the federal issue not disturb "any congressionally approved balance of federal and state judicial responsibilities." (*Id.*, quoting from *Grable, supra*, 545 U.S. at 314.)

A State-Federal Partnership under the Clean Water Act

The court that the CWA is a partnership between the states and the federal government to meet a shared objective: to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." (*Arkansas v. Oklahoma*, 503 U.S. 91,101 (1992).) Congress provides federal funding to states contingent upon the creation of a regulatory scheme

that is at least as stringent as the federal minimum standards, allowing states the right to tailor water quality criteria to local needs, implement their own NPDES permitting systems, and enforce their own administrative rules.

Conclusion and Implications

This case began as a contested state court case commencing in the North Carolina Office of Administrative Hearings in October 2010, continuing to a final agency decision by the North Carolina Environmental Management Commission in January 2012. Rose Acre pursued the appeal of such to the North Carolina Superior Court in March of 2012. The North Carolina Superior Court issued its opinion in January of 2013 upholding the final agency decision. That decision held that Rose Acre's CWA "agricultural exemption" claim did not apply to pollutants expelled from the ventilation fans on Rose Acre's confinement houses, and that DENR has the authority to require Rose Acre to obtain an NPDES permit.

Almost a year following the remand, Rose Acre pursued this action apparently seeking to re-litigate the issued decided on the state level decided within the authority granted to the state agencies by the CWA. Rose Acre has appealed this District Court ruling.
(Thierry Montoya)

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