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EASTERN WATER LAW™

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EWL

EASTERN WATER NEWS

CAN THE U.S. FISH AND WILDLIFE SERVICE DESIGNATE UNINHABITABLE AREAS AS 'CRITICAL HABITAT' OF A LISTED SPECIES—MUST COURTS DEFER TO ITS INTERPRETATION OF THE ESA?

Can areas unoccupied and uninhabitable by a species listed under the federal Endangered Species Act (ESA) nonetheless be designated by the U.S. Fish and Wildlife Service (FWS) as "critical habitat" of that species? The U.S. Supreme Court has agreed to review a case—*Weyerhaeuser Company v. U.S. Fish and Wildlife Service*—posing that question. As the lower courts upheld the FWS decision by applying a fundamental, yet controversial doctrine of administrative law known as *Chevron* deference and deferring to FWS' reading of the ESA to authorize it to do so, the case affords the Supreme Court an opportunity to revisit and rework that doctrine if it chooses. The case also presents a second ESA issue: whether the FWS' decision not to exclude an area from critical habitat because of the economic impact of that designation is subject to judicial review.

Background

The ESA authorizes the FWS to list species it finds to be threatened or endangered and generally protects listed species and their habitat in two ways: first, prohibiting any person from "taking" listed species without authorization and, second, calling on federal agencies to ensure that any actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of the "critical habitat" of any listed species.

The ESA generally directs the FWS when listing species also to designate "any habitat of such species which is then considered to be critical habitat . . ." and defines "critical habitat" as:

> [1] the specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical and biological features . . . essential to the conservation of the species and . . . which may require special management considerations or protection; and
>
> [2] specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the [FWS] that such areas are essential for the conservation of the species.

The ESA also requires the FWS to "take into consideration the economic impact . . . of specifying any particular area as critical habitat" and provides that FWS:

> . . .may exclude any area from critical habitat if it determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat."

The *Weyerhaeuser Company* Decision

In 2010, the FWS designated critical habitat for the endangered dusky gopher frog, which included a 1,544-acre site not occupied by the frog. That site, moreover, contained only one of the three physical and biological features the FWS determined necessary for dusky gopher frog habitat, several ephemeral ponds that could support the frog's reproduction. Those ponds, however, were surrounded by upland forest that (absent prescribed burning and other voluntary measures by the landowners to create habitat and introduce frogs) the FWS admitted was "unsuitable as habitat" for the frog.

In making this decision, the FWS also declined to exclude the site from critical habitat based on its weighing of the economic impacts and benefits of the designation.

Weyerhaeuser and other owners of the site sued the FWS seeking to invalidate the critical habitat designation. The trial court ruled in favor of the FWS, and the Court of Appeal, 2-1, affirmed that ruling (then entitled *Markle Interests, L.L.C. v. U.S.*

Fish and Wildlife Service). The panel majority of the Fifth Circuit Court of Appeals deferred to the FWS' interpretation of the ESA that areas "essential for the conservation of the species" may include areas not currently habitable by the frog. *Chevron* deference, named for the U.S. Supreme Court's decision in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), generally calls for courts to defer to an agency's interpretation of a statute Congress has charged it with enforcing as long as the agency's interpretation is not contrary to the statute's plain meaning and, if the statute is ambiguous, the agency's interpretation is reasonable, even if the court would have read the statute differently. Observing that "[t]here is no habitability requirement in the text of the ESA" and the ESA calls on the FWS to designate "essential" areas without further specifying "essential" to mean "habitable," the court concluded that FWS' interpretation was not unreasonable.

Rejecting Weyerhaeuser's challenge to the FWS' refusal to exclude the site based on the economic impacts of its designation as critical habitat, the panel majority ruled that since the ESA committed the decision not to exclude an area to the discretion of the FWS and did not provide any "judicially manageable standards" for judging how the agency should exercise its discretion, the FWS' decision not to exclude the area is "not reviewable" by the court.

Weyerhaeuser petitioned for a rehearing *en banc*, which the court rejected on a vote of 8 to 6 over a strenuous dissent. Weyerhaeuser petitioned the U.S. Supreme Court to review the case, and on January 22, 2018, the Supreme Court agreed to do so.

Conclusion and Implications

Because designation of land as critical habitat may substantially constrain its use, development, and value, landowners naturally have much at stake and thus good reason to care whether the FWS may extend critical habitat designations over areas that listed species cannot inhabit. The Ninth Circuit recently confronted much the same issue in *Bear Valley Mutual Water Co. v. Jewell*, 790 F.3d 977 (9th Cir. 2015)) and reached generally the same result as the Fifth Circuit. Much thus rides on how the U.S. Supreme Court resolves that issue.

While the ESA requires the FWS to consider the economic impacts of designating critical habitat before deciding to do so, the FWS generally has analyzed such impacts in ways that render the exercise largely meaningless. The Fifth Circuit's ruling that courts cannot even review FWS decisions not to exclude areas for economic reasons serves to further diminish the role of economic considerations in critical habitat designations. A Supreme Court ruling may leave this status quo largely undisturbed or perhaps lead to more meaningful consideration of economic impacts.

Chevron deference has been central to judicial review of administrative decisions since 1984. It has, as well, remained controversial throughout that time. While criticism of the doctrine has mounted, the Supreme Court has slightly narrowed the circumstances for applying it. Justice Gorsuch, when serving in the Tenth Circuit, denounced it as "a judge-made doctrine for the abdication of judicial duty" to decide what the law means. If the High Court is inclined to repudiate or revise the *Chevron* doctrine, this case provides an opportunity.

Markle Interests, L.L.C. v. U.S. Fish and Wildlife Service, Case No. 14-31008 (5th Cir. Feb. 13, 2017) http://www.ca5.uscourts.gov/opinions/pub/14/14-31008-CV1.pdf, and *see, Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452 (5th Cir. 2016)
(David Ivester)

TEXAS V. COLORADO AND NEW MEXICO UPDATE—ORAL ARGUMENTS ON THE UNITED STATES' COMPLAINT OF INTERVENTION

After five years of litigation, the U.S. Supreme Court heard oral arguments in *Texas v. Colorado and New Mexico* on January 8. January's oral argument only focused on the United States' involvement in the case, however, leaving the core questions still to be litigated.

History of Water Agreements in New Mexico

Elephant Butte Reservoir was created in 1915 with the completion of a dam on the Rio Grande River near Truth or Consequences, New Mexico. The reservoir is part of the Rio Grande Project, authorized by Congress in 1905 to support irrigation in south-central New Mexico and western Texas. The issue was further complicated when Texas, Colorado, and New Mexico negotiated the Rio Grande Compact (Compact), which was ratified by Congress in 1939. The Compact provides for the allocation of Rio Grande water between the three states, as well as guaranteeing certain deliveries to Mexico.

In 2008, in response to several years of drought and plummeting levels in Elephant Butte Reservoir, the Bureau of Reclamation (who operates the Rio Grande Project), the Elephant Butte Irrigation District, and the El Paso County Water Improvement District No. 1 signed a new operating agreement to better share water in dry years. Importantly, neither Texas nor New Mexico was parties to that agreement.

In 2011 New Mexico sued the U.S. Bureau of Reclamation (Bureau) in U.S. District Court alleging that too much water was being given to Texas under the 2008 Elephant Butte Reservoir operating agreement.

Litigation Background

Texas retaliated to New Mexico's 2011 lawsuit by suing both New Mexico and Colorado, alleging the two states have been taking more than their share of water under the 1938 Rio Grande Compact. Texas invoked the Supreme Court's original jurisdiction in controversies between states, beginning the current case.

Texas' complaint alleged that New Mexico and Colorado had been allowing farmers to pump groundwater for several decades—water that should have flowed all the way to Texas. That farmers have been pumping groundwater, especially in drier years, is not debated. Chile, pecan, and cotton farmers are scattered throughout the region, and all of those crops need high volumes of water, which farmers have taken to pumping to supplement their surface diversions.

Texas' argument is that all of that groundwater is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir, so that by allowing farmers to pump it, New Mexico is depleting the amount of water that should flow to Texas. New Mexico has countered saying that it is currently meeting its delivery obligations to Texas, and therefore should not be required to pay any of the up to $1 billion Texas is requesting in damages.

The issue is further complicated by the fact that the Rio Grande Compact requires New Mexico to make its deliveries to Texas at Elephant Butte Reservoir—100 miles from the Texas border. There are approximately 60,000 acres of irrigation lands on the Rio Grande between Elephant Butte Reservoir and the Texas border, which Texas claims New Mexico has a duty to control to ensure that Texas receives its full allotment.

Federal Government Intervention

Special Master A. Gregory Grimsal was appointed to the case in 2014, and shortly thereafter the United States filed a motion to intervene. In its complaint, the United States argued that by allowing farmers to pump groundwater tributary to the Rio Grande, New Mexico is taking more than its share of allotted water and thereby impairing with the federal government's ability to deliver water under the Rio Grande Compact, as well as interfering with required treaty deliveries to Mexico.

In February 2017, Grimsal released the Special Master's first interim report which recommended, among other things, that the Supreme Court dismiss the United States' complaint under the Rio Grande Compact, but allow intervention on claims made under federal reclamation law principles to protect the government's interstate and international inter-

ests (this would be jurisdiction pursuant to 28 USC § 1251(b)(2) and Article III, § 2, Clause 2 of the U.S. Constitution).

The Special Master's reasoning behind that recommendation was that the United States usually appears as an amicus, not an intervening party, in water allocation disputes between the states. The first interim report noted that:

> . . .[t]he United States is not a signatory to the 1938 Compact—indeed, it received no apportionment of Rio Grande water through the compact.

January Oral Argument

The oral argument of January 8 was only on that single issue—does the United States have jurisdiction to intervene as an interested party?

The Court first heard from Ann O'Connell, assistant to the Solicitor General and appearing on behalf of the United States. She began her argument by asserting that the United States' claims did not distinguish between those brought under the Rio Grande Compact and those under the other relevant laws. Because the Rio Grande Compact requires New Mexico to deliver water to Elephant Butte Reservoir, and the United States is obligated to deliver water from the reservoir to water users and Mexico, O'Connell argued, the United States is thoroughly entangled such that it has party status under the compact itself.

Texas, represented by Solicitor General Scott Keller, then argued in support of the United States complaint of intervention. Expanding on the federal government's position, Keller argued that the Rio Grande Compact created a statutory duty to the United States. To support this, Keller claimed that the Rio Grande Project was a necessary predecessor to the Rio Grande Compact, and the Project is the only way to deliver the required water, so the United States must be able to bring claims against New Mexico under the Compact. He did emphasize, however, that the central focus of Texas' lawsuit was about the Rio Grande Compact and the interstate equitable apportionment—not intrastate allotment.

Keller acknowledged, in response to questions from Justice Sonia Sotomayor, that the United States could sue New Mexico as a state, not individual water users, through its jurisdiction under state law reclamation principles.

The Supreme Court then heard from the two defendants, beginning with Colorado, which was represented by Solicitor General Frederick Yarger. Yarger began by noting that Colorado, home to the headwaters of several major rivers, is party to nine interstate compacts, and the United States has never asserted an independent right of action under any of them. He cited *Kansas v. Nebraska and Colorado* (the Republican River) as an example of the United States asserting federal interests as *amicus*—a position Colorado believes the federal government should take here.

In a position shared by New Mexico, Yarger argued that, if the United States wishes to have jurisdiction as an interested party, it must bring a claim under the 1906 Convention (between the U.S. and Mexico) not the Rio Grande Compact. This proposition was in response to question from Justice Kennedy who said the case highlights:

> . . .is an international law obligation on the United States that the United States would be remiss if it ignored.

In fact, Yarger asserted several times, in response to Kennedy as well as Justice Gorsuch—that the United States does have important rights at stake, but that claims under the Rio Grande Compact are not the proper place to bring them.

Finally, Marcus Rael argued on behalf of New Mexico, emphasizing Colorado's position that any claims by the United States must be based on the 1906 Convention, not the Rio Grande Compact. He highlighted New Mexico's claim that the United States is a necessary party, but only for claims arising under the 1906 Convention and the Reclamation Act that helped create the Rio Grande Project.

On rebuttal, O'Connell argued that the United States can't be expected to rely on Texas to assert its interests—especially in deliveries to Mexico—and therefore must be allowed to intervene. She further claimed that reclamation law claims (which the Special Master recommended be allowed) might not be enough on their own for the United States to challenge New Mexico. Therefore, the United States argues, the Rio Grande Compact claims are necessary for the United States to protect its interests.

Conclusion and Implications

In analysis on *SCOTUSBlog*, Ryke Longest noted that several justices expressed concern over allowing the United States to proceed on its claims under the Rio Grande Compact. Especially considering that both Colorado and New Mexico conceded that United States has jurisdiction under the 1906 Convention—New Mexico even going as far as claiming the United States as a necessary party—it will be interesting to see how the Supreme Court decides the scope of the federal government's jurisdiction.

After this issue is decided, the real work on the case will begin. In addition to the standard, answers, counterclaims, and other motions, several hydrologic studies will need to be performed. This is an area where Texas and potential intervener the United States disagree. The United States is in favor of using regression analysis of return flows to calculate usable water, while Texas would prefer other methodologies. (John Sittler, Paul Noto)

NEWS FROM THE WEST

In this month's News from the West we report on ongoing efforts of the California State Water Resources Control Board—the state regulatory authority in water rights issues—to move forward with Governor Jerry Brown's vision for a tunnel project transferring water from the wetter north part of the state, under the San Francisco Bay/San Joaquin River Delta to parts south. We also report on efforts by the Nevada State Engineer—the office tasked with water rights permitting and change applications—to curb groundwater pumping in the fast growing but parched state.

California WaterFix: State Water Resources Control Board Delays Start of Part 2

In 2015, the California Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (collectively: Petitioners) filed a petition with the State Water Resources Control Board (SWRCB) to add three points of diversion to the agencies' existing water right permits for the proposed water infrastructure project known as California WaterFix. Under WaterFix, three new intakes, each with a capacity of 3,000 cubic feet per second, would be constructed in the north Delta to pump Sacramento River water that would then be transported via two 40-foot wide underground tunnels to the agencies' south of Delta export facilities. Before it may approve the petition, the Water Code requires the SWRCB to find—among other things—that the proposed changes will not injure any other legal user of water or unreasonably impact the environment.

In 2016 and 2017, the SWRCB held Part 1 of the change petition hearing, during which parties presented evidence and cross-examined witnesses on WaterFix's potential impacts to water rights and legal users of water. Part 2 of the hearing was scheduled to commence on January 18, 2018, to consider impacts of the change petition on the environment, public trust, and the public interest.

On January 17, 2018, the day before the commencement of Part 2, the first two weeks of scheduled hearing dates were cancelled to allow the Hearing Officers time to meet in closed session and consider recently filed motions that raise questions regarding communications between Petitioner DWR and SWRCB Hearing Team staff, and the witness panels proposed by DWR for Part 2. Absent further notice, the hearing is scheduled to resume in February.

The SWRCB held a Pre-Hearing Conference on October 19, 2017, to address a number of procedural issues regarding motion practice, past rulings, and the permissible scope of issues on which the parties could present evidence.

First, while the SWRCB's evaluation on environmental impacts could rely on materials in the Final Environmental Impact Report (EIR) certified by DWR in 2017, the Hearing Officers stressed that adequacy of the EIR under the technical requirements of the California Environmental Quality Act (CEQA) is *not* an issue to be argued before the SWRCB. As a responsible agency, the SWRCB complies with CEQA by considering the EIR and reaching independent conclusions on whether and how to conditionally approve the portion of the Project

within its discretionary control—in this case, the water right changes. That being said, the Hearing Officers acknowledged that the specific conclusions and data in the EIR and other documents submitted for the SWRCB's consideration may pertain specifically to the SWRCB's findings for purposes of the change petition. Accordingly, parties are entitled to test the sufficiency and validity of those conclusions and supporting data.

Furthermore, although Part 2 parties are foreclosed from presenting evidence on Part 1 issues in their cases-in-chief, the Hearing Officers clarified that cross-examination questions and rebuttal evidence that arise directly from another party's Part 2 evidence may extend beyond the limited scope of Part 2 issues. The Hearing Officers cautioned, however, that parties wishing to ask questions or present evidence pertaining to Part 1 issues will need to demonstrate that they were unable to do so during the cross-examination, rebuttal, and surrebutal phases of Part 1.

The SWRCB subsequently issued a Pre-Hearing Conference Ruling on November 8, 2017, addressing how the hearing record for the change petition will inform the SWRCB's related determination of appropriate Delta flow criteria to apply to WaterFix. Specifically, in the event the SWRCB imposes flow criteria that are outside the range of alternatives evaluated in the EIR, additional analysis will be conducted to satisfy CEQA.

On January 11, 2018, an affiliation of protesting parties known as the Sacramento Valley Water Users (SVWU) filed a motion to reorganize the order of Petitioners' proposed witness panels to reduce the risk of inefficiency and other prejudices. As currently proposed, Petitioners wish to present three panels to present evidence on: 1) project description, operations, and public interest; 2) protection of fish and wildlife and the public trust; and 3) protection of recreational uses. Panel 1 includes "operations" and "modeling and operations" witnesses, while Panel 2 offers witnesses to present on "CALSIM II modeling" and "modeling." Citing inefficiencies and cross-panel deferrals during Part 1 questioning, the SVWU motion requests that the Hearing Officers direct the Petitioners to present their modeling and operations witnesses together, rather than in separate panels. East Bay Municipal Utility District (EBMUD) joined in SVWU's motion and sought additional time to cross-examine Petitioners' witnesses. DWR objected on January 17, 2018, arguing the reorganization would complicate scheduling and confuse the issues, to the prejudice of Petitioners.

On January 12 and 15, Save the California Delta Alliance (SCDA) and the County of Sacramento et al., respectively, submitted motions to continue or stay the WaterFix hearing in response to newly uncovered communications alleged to violate the SWRCB's prohibition against private, *ex parte* communications about substantive or controversial hearing matters. The communications, which largely took place in 2015 and 2016 leading up to and throughout Part 1, were produced in response to a California Public Records Act request on the SWRCB for any *ex parte* communications between SWRCB staff and DWR regarding WaterFix. SCDA and County of Sacramento et al. contend in their motions that the disclosed records show staff on the Hearing Team and DWR staff used *ex parte* meetings to revise and shape the evidence ultimately presented by Petitioners to demonstrate that WaterFix would not injure legal users of water or cause unreasonable environmental impacts, shielded from the public and other hearing parties.

SWRCB counsel initially responded to a supplemental records request that the Administrative Procedures Act only forbids SWRCB *members* from engaging in *ex parte* talks and that the communications were concerning the SWRCB's role as responsible agency under CEQA. Numerous parties have joined in the stay motions. At the time of this writing, neither the SWRCB nor DWR have made any other formal responses to the motions.

On January 17, 2018, the Hearing Team issued notice that Part 2 of the hearing would be delayed until February 2, 2018 to allow the Hearing Officers time to consider the motions filed regarding the disputed communications and the Petitioners' proposed witness panels.

Conclusion and Implications

As stakeholders continue to consider costs, funding, and the size of the Project, Part 2 of the hearing will involve a new cadre of experts, environmental groups, and other individuals and organizations offering testimony and statements on how WaterFix might affect their interests. The SWRCB is expected to issue a ruling on pending motions regarding alleged *ex parte* communications between DWR and Hearing

Team staff and the ordering of witnesses before the commencement of Part 2 on February 2, 2018.

An overview of the California WaterFix Hearing process and related documents are available at https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/water_right_petition.shtml
(Austin Cho, Meredith Nikkel)

Nevada State Engineer Issues Order to Curb New Domestic Wells in Pahrump Basin

As the most arid state in the nation, Nevada has always faced challenges when managing its valuable water resources, and the Pahrump Artesian Basin is no exception. On December 19, 2017, Nevada State Engineer issued an unprecedented order (Order No. 1293 or the Order), prohibiting the drilling of new domestic wells in the Pahrump Artesian Basin in hopes of slowing the decline of the overtaxed groundwater supply. Pursuant to Chapter 534 of the Nevada Revised Statues, when the State Engineer determines that a groundwater basin is being depleted:

> . . .the State Engineer in his or her administrative capacity may make such rules, regulations and orders as are deemed essential for the welfare of the area involved. Nev. Rev. Stat. § 534.120.

It is estimated that the perennial yield of the Pahrump Artesian Basin, or the maximum amount that can be withdrawn to still allow the basin to recharge, is 20,000 acre-feet annually. However, the State Engineer estimates that the amount of water from committed rights (amounts of water provided under Permits and Certificates issued by Nevada Division of Water Resources) accounts for approximately 59,175 acre-feet of annual withdrawals from the basin. This figure does not account for water withdrawn from "domestic wells" because domestic wells are not subject to permit requirements. Per Nevada Revised Statues §§ 534.013 and 534.180, a "domestic well" is a well used for culinary and household purposes directly related to a single-family dwelling, including without limitation, the watering of a family garden and lawn and the watering of livestock and any other domestic animals or household pets, so long as the amount of water drawn does not exceed 2 acre-feet per year. An acre-foot is the amount of water it takes to cover one acre with a foot of water and is enough water to supply two average Las Vegas Valley homes for a little more than a year.

In Pahrump Valley, there are approximately 11,280 domestic wells, the highest density in the state. Accordingly, in the Pahrump Artesian Basin, the existing domestic wells could withdraw 22,560 acre-feet of water alone, exceeding the perennial yield of the basin. The Order states that in some areas of the basin, there are as many as 469 wells per square mile. Despite the proliferation in wells, the State Engineer estimates that an additional 8,000 new domestic wells could be drilled in the basin.

Historical water level data maintained by the State Engineer and other agencies show a steady decline in the water levels on the valley floor since the 1950s.

The Order prohibits the drilling of any new domestic well, unless a user can obtain and relinquish to the State an existing permitted right to cover the 2.0 acre-feet per year to serve the new domestic well. The order does not apply to the rehabilitation or redrilling of existing domestic wells. By limiting new domestic wells and requiring the relinquishment of existing permitted rights, Nevada hopes to protect the continued supply of groundwater within the basin, including for existing domestic wells.

The Nye County water district requested the move to help bring Pahrump's water disparity under control until broader conservation measures and other management strategies can be implemented.

Conclusion and Implications

Since most surface waters in Nevada are allocated by a federal, state, or civil decree, or water rights permits, determining the availability and sustainability of groundwater supplies has become an important issue. With this new Order, property owners wanting to drill new domestic wells will now be required to obtain water rights on the property. This Order will likely result in a higher premium in the sale of water rights between owners.

None of Nevada's more than 230 hydrographic groundwater basins has ever been placed on curtailment that would affect domestic wells. Water management in Nevada is no easy task and the host of challenges facing the Pahrump Artesian Basin are not easy to solve. However, the Nevada State Engineer appears to be facing these challenges head on by issuing this new Order.
(Wesley A. Miliband, Eric R. Skanchy)

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

•February 12, 2018—EPA, DOJ reach agreement with City of Middletown to prevent sewage discharge to Great Miami River. The U.S. Department of Justice, U.S. Environmental Protection Agency and Ohio Environmental Protection Agency announced an agreement with the city of Middletown, Ohio, on a consent decree under the federal Clean Water Act to address discharges of untreated sewage into the Great Miami River and Hydraulic Canal. The settlement was lodged in the U.S. District Court for the Southern District of Ohio. The city currently discharges millions of gallons of untreated sewage each year from its sewer system during and after rain events through its eight "combined sewer overflow" outfalls. Untreated sewage can contain disease-causing bacteria, viruses and parasites, as well as pollutants that can harm aquatic life. Under the agreement, the city will construct storage basins and other improvements to its sewer system and sewage treatment plant over the next 25 years that will substantially reduce the frequency and volume of its untreated sewer overflows. The city estimates this work will cost about $269 million. Additionally, the city will pay a penalty of $55,000 and spend $200,000 on a project in the canal to protect aquatic life from contaminated sediments. The proposed consent decree is available for public review and comment for 30 days.

•January 24, 2018—The U.S. Environmental Protection Agency's enforcement actions this year in Hawaii resulted in closures of 19 large capacity cesspools (LCC) and over $500,000 in fines. EPA regulations under the Safe Drinking Water Act required closure of all existing LCCs by April 5, 2005. The ban does not apply to individual cesspools connected to single-family homes. Cesspools collect and discharge untreated raw sewage into the ground, where disease-causing pathogens and harmful chemicals can contaminate groundwater, streams and the ocean. Groundwater provides 99 percent of all domestic water in Hawaii, where cesspools are used more widely than in any other state. Since EPA banned LCCs in 2005, over 3,400 large-capacity cesspools have been closed state-wide, many through voluntary compliance. EPA actions to close prohibited LCCs this past year include:

•Matheson Tri-Gas facility, a commercial gas supply company in Campbell Industrial Park, Kapolei, Oahu closed two LCCs and converted to a septic system. The company agreed to pay a civil penalty of $88,374 and to spend an estimated $50,000 on a supplemental environmental project to close an on-site small-capacity cesspool. Matheson completed its work and converted to a septic system at the end of 2017.

•Maui Varieties Investments, Inc., which owns two Big Island hardware stores and a commercial property, is closing four LCCs at its properties in Naalehu, Kamuela and Hilo and paid a $134,000 penalty.

•Fileminders of Hawaii, LLC, which operated a prohibited cesspool in Kapolei, and Hawaii MMGD, the company's owner, were assessed a civil penalty of $122,000. In June, the cesspool was closed and the company installed an individual wastewater system.

•The U.S. Navy paid a civil penalty of $94,200 and closed nine LCCs at Joint Base Pearl Harbor-Hickam. The Navy had closed six cesspools in 2012, but had failed to close the remaining three

in a timely manner. The three remaining cesspools served an estimated 160 people at three separate facilities. The Navy has since closed the non-compliant cesspools.

•The County of Hawaii agreed to close seven large capacity cesspools that serve the Pahala and Naalehu communities. The agreement requires the closure of two LCCs serving the Pahala community, three LCCs serving the Naalehu community, and two LCCs serving the Pahala Elderly Apartments. Combined, the seven cesspools serve about 280 households. The County will replace the cesspools with wastewater treatment systems approved by the Hawaii Department of Health.

•Aloha Petroleum, Ltd. paid a penalty of $57,500 for operation of an LCC at its Aloha Island Mart convenience store and gas station in Captain Cook on the Big Island. EPA found that Aloha Island Mart had operated the illegal LCC until 2014. Aloha Petroleum has since closed the non-compliant cesspool and replaced it with an approved wastewater system.

•Uilani Associates owns and operates the Uilani Plaza, a multi-unit commercial building in Kamuela. The company paid a $6,000 fine and replaced the cesspool with a Hawaii Department of Health approved wastewater system.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•February 15, 2018—EPA Settled with Amazon for Distributions of Illegal Pesticides. The agreement settles allegations that Amazon committed nearly four thousand violations of the "Federal Insecticide, Fungicide and Rodenticide Act"—dating back to 2013—for selling and distributing imported pesticide products that were not licensed for sale in the United States. Under the terms of the agreement, Amazon will develop an online training course on pesticide regulations and policies that EPA believes will significantly reduce the number of illegal pesticides available through the online marketplace. The training will be available to the public and online marketers in English, Spanish and Chinese. Successful completion of the training will be mandatory for all entities planning to sell pesticides on Amazon.com. Amazon will also pay an administrative penalty of $1,215,700 as part of the consent agreement and final order entered into by Amazon and EPA's Region 10 office in Seattle, Washington. In late 2014, EPA began investigating online pesticide product distributions and sales through several internet retail sites including Amazon and third-party sellers that used Amazon's online marketing platform. In March 2015, EPA inspected an Amazon facility in Lexington, Kentucky, and inspectors in EPA's Region ten office successfully ordered illegal pesticides from Amazon.com. In August 2015, EPA issued a FIFRA Stop Sale, Use, or Removal Order against Amazon to prohibit the sale of the illegal pesticide products that can easily be mistaken for black-board or side-walk chalk, especially by children. EPA issued another Stop Sale Order against Amazon in January 2016 after discovering that certain unregistered or misbranded insecticide bait products were being offered for sale on Amazon.com. After receiving the stop sale orders, Amazon immediately removed the products from the marketplace, prohibited foreign sellers from selling pesticides, and cooperated with EPA during its subsequent investigation. The orders, as well as EPA's subsequent engagement with the company, prompted Amazon to more aggressively monitor its website for illegal pesticides. As a result, Amazon has created a robust compliance program comprised of a sophisticated computer-based screening system backed-up by numerous, trained staff. In October 2016, Amazon notified all customers who purchased the illegal pesticides between 2013 and 2016 to communicate safety concerns with these products and urge disposal. Amazon also refunded those customers the cost of the products, approximately $130,000. Non-English speaking members of the public are at increased risk from these pesticides that are illegal in the U.S. but have long been used throughout Asia. These populations' familiarity with these products make it more likely they will order them from online sources such as Amazon. By removing such products from Amazon's online platform and by educating third party sellers on the hazards of these unregistered and misbranded pesticide products, this agreement will decrease the availability of these unsafe products and protect these vulnerable groups.

•February 12, 2018—EPA reaches agreement with Syngenta for farmworker safety violations on Kauai. Under the settlement, Syngenta Seeds, a subsidiary

of Syngenta AG, will spend $400,000 on eleven worker protection training sessions for growers in Hawaii, Guam, and the Northern Mariana Islands. Syngenta will develop a curriculum and training materials tailored to local growers who face pesticide compliance challenges related to language, literacy, geographic and cultural factors. Syngenta will also develop compliance kits for use at these trainings and for wider distribution in the agricultural community in English and four other languages commonly spoken by growers and farmworkers in the training locations—Mandarin, Korean, Tagalog, and Ilocano. Syngenta will make the kits available to the public by posting the materials online for three years after the trainings are complete. Syngenta will pay a civil penalty of $150,000 as part of the settlement. In matters referred to EPA by the Hawaii Department of Agriculture, EPA found that in two separate incidents at its Kekaha farm, Syngenta failed to notify workers verbally and with signage to avoid fields recently treated with pesticides, resulting in exposure and hospitalization of workers. In addition, EPA found Syngenta failed to provide both adequate decontamination supplies on-site and prompt transportation to a medical facility for exposed workers. Restricted-use pesticides are not available for use by the general public because of high toxicity and potential to injure applicators and bystanders and to adversely affect the environment.

Indictments, Convictions, and Sentencing

•February 14, 2018—The United States and the State of Missouri have filed a motion asking a federal court to hold in contempt HPI Products Inc., its owner William Garvey, and St. Joseph Properties, LLC, for failing to comply with a 2011 environmental settlement by illegally storing thousands of pounds of hazardous chemicals in unsafe and dilapidated facilities in western Missouri. The Department of Justice, on behalf of the Environmental Protection Agency, and the Missouri Attorney General, on behalf of the Missouri Department of Natural Resources, filed the motion today in U.S. District Court for the Western District of Missouri. The contempt motion also requests that the court appoint a receiver to oversee the operation of the defendants' business in compliance with the 2011 consent decree and applicable law. The defendants own and operate a pesticide formulating business with six facilities in St. Joseph, Missouri. The 2011 consent decree was intended to resolve numerous violations of federal and state environmental laws and requires the defendants to characterize and properly manage large quantities of hazardous wastes generated or stored at its St. Joseph facilities. Despite a May 2017 court order requiring the defendants to comply with the 2011 consent decree, HPI and Garvey continue to store thousands of pounds of uncharacterized, often unidentified, chemicals, some with labels indicating that they have been stored for a dozen years or more. In addition, many of HPI's facilities lack functional fire suppression equipment, two facilities previously suffered partial collapse, one burning down, and many of them are in extreme disrepair and in danger of collapse. Chemical wastes at these facilities are exposed to the elements and are readily accessible to members of the public, posing a significant danger to public health and safety and the environment.

•February 9, 2018—Today, the U.S. Department of Justice, on behalf of the U.S. Army Corps of Engineers (Corps) for the Jacksonville District, submitted to the United States District Court for the Middle District of Florida a proposed consent decree that would resolve alleged violations of the Clean Water Act by condominium developers Lodge/Abbott Investments Associates LLC and Lodge/Abbott Associates LLC. The Clean Water Act requires any person who plans to fill federally protected wetlands to receive a permit from the Corps. The defendants in this case did not obtain a permit from the Corps before they filled over an acre of high quality wetlands that abut and function in close proximity to the tidal waters of Wiggins Pass and the Cocohatchee River in Naples, Florida. The purpose of the fill was to create "Tower 200," one of five towers comprising a high-end condominium development known as "Kalea Bay" in North Naples. Under the proposed consent decree, the defendants are required to pay a $350,000 civil penalty. In addition, to offset the environmental impact of the alleged violations, the defendants have purchased approximately $54,000 in mitigation credits from a Corps-approved wetlands mitigation bank. The proposed decree also enjoins the defendants from filling any additional wetlands without first obtaining a permit or other clearance from the Corps. Compliance and enforcement are important components of the Corps' regulatory program, as it assures that the

public interest and environmental resources are protected. The Corps' Jacksonville District has a routine compliance inspection program throughout Florida, Puerto Rico, and the U.S. Virgin Islands. The Corps' Jacksonville District Enforcement Section is often aided by state and federal agencies as well as groups and individuals who report suspected violations. To address violations, the Corps is authorized to prescribe corrective action, impose fines, and/or prescribe removal of the offending fill, work, or structure. The proposed consent decree, lodged in the U.S. District Court in Fort Myers, is subject to a 30-day comment period and final court approval.

• January 25, 2018—New Jersey Man Indicted for Illegal Storage and Disposal of Hazardous Waste. The former owner and president of a Glassboro, New Jersey, drum reconditioning company was indicted today for allegedly illegally storing and disposing of hazardous waste, U.S Attorney Craig Carpenito and Acting Assistant Attorney General Jeffrey H. Wood of the Environment and Natural Resources Division of the U.S. Department of Justice, announced. Thomas Toy, 73, of Elmer, New Jersey, was charged with one count of illegal storage and disposal of hazardous waste at the site of Superior Barrel and Drum Company Inc. (Superior) in Glassboro, New Jersey, in violation of the Resource Conservation and Recovery Act (RCRA). According to the Indictment, Superior received drums from various industrial customers, cleaned and processed those drums, and then resold them. Toy directed and supervised the operations of Superior, including the storage and disposal of large amounts of waste—including hazardous waste—at the company's site. Superior did not have a permit to store or dispose of hazardous waste there. From Sept. 27, 2013, to Sept. 25, 2014, the U.S. Environmental Protection Agency (EPA) conducted a removal action of waste stored at Superior's site. Approximately 1,800 containers of waste were removed, and much of the waste was found to be hazardous. The EPA's removal cost was $4.2 million. Toy was charged under RCRA, which was enacted in 1976 to address a growing nationwide problem with industrial and municipal waste. The law is designed to protect human health and the environment and provided controls on the management and disposal of hazardous waste. It prohibits the treatment, storage or disposal of any hazardous waste without a permit. The charge on which Toy was indicted carries a maximum penalty of five years in prison and a maximum fine of $250,000 or twice the gain or loss caused by the offense. The charge and allegations against Toy are merely accusations, and the defendant is presumed innocent unless and until proven guilty.
(Andre Monette)

JUDICIAL DEVELOPMENTS

U.S. SUPREME COURT CLARIFIES PROCEDURE FOR CHALLENGING REGULATIONS DEFINING THE SCOPE OF THE CLEAN WATER ACT, LEAVING SUBSTANCE UNRESOLVED

National Association of Manufacturers v. Department of Defense,
___U.S.___, S. Ct. Case No. 16-299 (U.S. Jan. 22, 2018).

Reversing the Sixth Circuit Court of Appeals, the U.S. Supreme Court held that challenges to U.S. Environmental Protection Agency (EPA) regulations defining "Waters of the United States" (WOTUS), and thereby describing the scope of federal jurisdiction under the Clean Water Act (CWA), must be brought first in the U.S. District Court. The Court's decision, combined with significant regulatory uncertainty stemming from the Trump administration's stated intention to promulgate a new definition of WOTUS, signals that uncertainty regarding the CWA's reach will likely persist for years to come. During that time, significant regional differences in implementation of the CWA are likely.

Background

The Clean Water Act, 33 U.S.C. § 1251 *et seq.*, prohibits the unpermitted discharge of "any pollutant by any person," defines "discharge of pollutant" to include "any addition of any pollutant to navigable waters from any point source," and defines navigable water as "the waters of the United States," or WOTUS. 33 U.S.C. §§ 1311(a), 1362(12) and (7). Thus, the scope of the National Pollutant Discharge Elimination System (NPDES) programs, administered by the EPA pursuant to 33 U.S.C. § 1342 and by the U.S. Army Corps of Engineers (Corps) pursuant to 33 U.S.C. § 1344, are defined by those agencies' definition of WOTUS. In 2015 the agencies proposed a "WOTUS Rule" to define the term:

> The WOTUS Rule 'imposes no enforceable duty on any state, local, or tribal governments, or the private sector.' .... As stated in its preamble, the Rule 'does not establish any regulatory requirements' and is instead 'a definitional rule that clarifies the scope of' the statutory term WOTUS. 80 *Fed. Reg.* 37102 and 37054.

The CWA provides two avenues for obtaining judicial review of EPA implementing actions: 1) pursuant to the Administrative Procedure Act, by challenging final agency actions in federal District Court; and 2) in seven statutorily-enumerated circumstances, jurisdiction over challenges lies exclusively in the federal Circuit Courts of Appeals, including, as relevant here, EPA actions "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345," pursuant to § 1369(b)(1)(E), and "issuing or denying any permit under section 1342," pursuant to § 1369(b)(1)(F). *Decker v. Northwest Envt'l Def. Ctr.*, 568 U.S. 597, 608 (2015).

The National Association of Manufacturers, among others, challenged the WOTUS Rule in multiple U.S. District Courts; various other parties filed protective actions in various Circuit Courts. The appeals were consolidated in the Sixth Circuit and the National Association of Manufacturers intervened and then moved to dismiss for lack of jurisdiction. The government opposed dismissal, arguing the Sixth Circuit had jurisdiction in the first instance under § 1369(b)(1)(E) and (F). The Sixth Circuit denied dismissal "in a fractured decision that resulted in three separate opinions." *In re U.S. Dept. of Def.*, 817 F.3d 261 (6th Cir. 2016).

Meanwhile, litigation in the District Courts continued apace, with some District Courts dismissing the matters for lack of jurisdiction, and at least one holding it had jurisdiction to review the WOTUS Rule. *See, North Dakota v. U.S. EPA*, 127 F.Supp.3d 1047, 1052-1053 (D. N.D. Aug. 27, 2015).

The U.S. Supreme Court's Opinion

Section 1369(b)(1) Subparagraph E and 'Other Limitations'

Addressing first the government's argument that review in the first instance by the Circuit Courts is required under § 1369(b)(1)'s Subparagraph (E), for review of EPA actions "in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345," the Court disagreed that the WOTUS Rule qualifies as an action approving an "other limitation" under § 1311.

To recap, Subparagraph (E) provides for exclusive appellate jurisdiction over review of EPA actions "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345." The Court, interpreting "other limitation" in context, reasoned:

> Congress' use of the phrase 'effluent limitation or other limitation' in subparagraph (E) suggests that an 'other limitation' must be similar in kind to an 'effluent limitation': that is, a limitation related to the discharge of pollutants.

The Court went on to state that subparagraph (E) cross-references §§ 1311, 1312, 1316, and 1345 reinforces this natural reading. The Court pointed out that the unifying feature among those cross-referenced sections is that they impose restrictions on the discharge of certain pollutants. See, *e.g.*, 33 U.S.C. § 1311 (imposing general prohibition on "the discharge of any pollutant by any person"); § 1312 (governing "water quality related effluent limitations"); § 1316 (governing national performance standards for new sources of discharges); § 1345 (restricting discharges and use of sewage sludge).

Further, even where the Court to accept the government's expansive reading of "other limitation," the WOTUS Rule was not promulgated "under § 1311," which "generally bans the discharge of pollutants into navigable water absent a permit."

> Rather, the WOTUS Rule was promulgated or approved under § 1361(a), which grants the EPA general rulemaking authority 'to prescribe such regulations as are necessary to carry out [its] functions under' the Act.

Section 1369(b)(1) Subparagraph (F)

The government also failed to carry the day under § 1369(b)(1)'s Subparagraph (F), which:

> . . .grants courts of appeals exclusive and original jurisdiction to review any EPA action "in issuing or denying any permit under section 1342.

NPDES permits issued under § 1342 "authoriz[e] the discharge of pollutants" into certain waters "in accordance with specified conditions." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 52 (1987). The WOTUS Rule neither issues nor denies a permit under the NPDES permitting program. Because the plain language of subparagraph (F) is "unambiguous,. . .our inquiry begins with the statutory text, and ends there as well." *BedRoc Limited, LLC v. U.S.*, 541 U.S. 176, 183 (2004) (plurality opinion). (Parallel citations omitted.)

'Functional Interpretative Approach' and the *Crown Simpson* Decision

The Court rejected the government's urging to apply what it called the "functional interpretative approach" purportedly employed in *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980), and which allegedly directs courts to inquire "whether agency actions are 'functionally similar' to permit issuances or denials." The Court first explained that the government misconstrued *Crown Simpson*, in which the Court held that EPA rejection of effluent limitation set forth in a state-issued permit had "the precise effect" of "den[ying] a permit within the meaning of [subparagraph F]." *Id.* at 196. In contrast:

> . . .[a]lthough the WOTUS Rule may define a jurisdictional prerequisite of the EPA's authority to issue or deny a permit, the Rule itself makes no decision whatsoever on individual permit applications. *Crown Simpson* is therefore inapposite.

Subparagraph (F) and Clean Water Act Surplusage

Finally, the government's "interpretation of subparagraph (F) would" render other provisions in the CWA surplusage.

Subparagraph (D) is one example. That provision gives federal appellate courts original jurisdiction to review EPA actions "making any determination as to a State permit program submitted under section 1342(b)." Put differently, subparagraph (D) establishes the boundaries of EPA's permitting authority vis-à-vis the states. Under the government's functional interpretive approach, however, subparagraph (F) would already reach actions delineating the boundaries of EPA's permitting authority, thus rendering subparagraph (D) unnecessary:

> Absent clear evidence that Congress intended this surplusage, the Court rejects an interpretation of the statute that would render an entire subparagraph meaningless. As this Court has noted time and time again, the Court is 'obliged to give effect, if possible, to every word Congress used.' *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). (Parallel citation omitted.)

Conclusion and Implications

National Association of Manufacturers' clarification that all challenges to the 2015 WOTUS Rule and any subsequent iterations of the Rule must first be brought in District Courts means that final certainty regarding CWA scope is years away. The Sixth Circuit had enjoined implementation of the WOTUS Rule, but that stay will now be lifted—except in 13 states, where it remains enjoined by North Dakota's U.S. District Court. Even outside those states, the Trump administration has proposed to delay the Rule's effective date. And the Trump administration has directed EPA to promulgate a new rule defining WOTUS, so it is unclear whether the government will continue to defend the 2015 WOTUS Rule in the District Courts. Lastly, once a new WOTUS definition has been formally adopted by the agencies, the effect of *National Association of Manufacturers* will be to ensure that a multiplicity of District Court rulings will flourish across the land (none with precedential force), certainly resulting in a split among the Circuit Courts that will take the Supreme Court years to resolve. The Court's decision is available online at: https://www.supremecourt.gov/opinions/17pdf/16-299_8nk0.pdf
(Deborah Quick)

FIRST CIRCUIT HOLDS EPA HAS DISCRETION ON WHETHER TO SERVE INDIVIDUAL CLEAN WATER ACT NOTICES ON STORMWATER DISCHARGERS

Conservation Law Foundation, et al. v. Scott Pruitt, Administrator of the U.S. Environmental Protection Agency et al., 881 F.3d 24 (1st Cir. 2018).

The U.S. Court of Appeals for the First Circuit upheld the dismissal of two claims against the U.S. Environmental Protection Agency (EPA) for lack of jurisdiction where the plaintiffs could not show their claims fell within the citizen suit provision of the Clean Water Act (CWA). The court found the EPA's challenged conduct—declining to send individual written notices to stormwater dischargers—did not constitute a "failure…to perform an act or duty… which is not discretionary" and therefore petitioners' claims could not survive a jurisdictional challenge.

Factual and Procedural Background

The objective of the federal CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." To accomplish this goal, the CWA and its implementing regulations create various tools aimed at bringing waters of the United States into compliance with regulatory standards. Three of these tools are relevant in this case: 1) the CWA's permitting storm water permitting scheme, 2) the development and approval of Total Maximum Daily Loads (TMDLs), and 3) the CWA's citizen suit provision.

The basic requirement of the CWA's permitting system is that all discharges from a "point source," defined as "any discernible, confined and discrete conveyance," must obtain a permit. States are re-

quired to establish water quality standards and to identify waters that fail to meet those standards. As a way to further bring impaired waters into compliance, states are further directed to develop TMDLs, which represent the maximum amount of a particular pollutant that can be released into a waterway while still maintaining water quality standards. EPA regulations state that for discharges composed entirely of stormwater, the EPA Director shall have the authority to require permits where that stormwater discharge might contribute to the TMDLs of a certain pollutant. To increase the likelihood these CWA's regulations are enforced, the law provides a citizen-suit provision where a citizen can bring an action against the EPA Administrator for failing to perform a non-discretionary duty under the CWA:

> Plaintiffs' two suits focus on 40 C.F.R. § 124.52(b), a regulation promulgated under the Clean Water Act. This regulation calls for the EPA to send a written notice to a discharger of storm water whenever the EPA "decides that an individual permit is required" for the discharge. The notice informs the discharger of the EPA's decision and the reasons for it, and includes a permit application.

From 2005 to 2011, the Rhode Island Department of Environmental Management developed a number of the TMDLs at issue in this case, including for Mashapaug Pond and portions of the Sakonnet River. The Massachusetts Department of Environmental Protection developed TMDLs for the Charles River over the same period of time. The EPA approved these TMDLs, finding that they met the requirements of the CWA.

In April 2015, plaintiffs sued the EPA in the District of Rhode Island, seeking a court order requiring the EPA to notify all commercial and industrial dischargers of stormwater within the watersheds covered by the TMDLs that they must obtain discharge permits. A few months later, plaintiffs brought a nearly identical action in the District of Massachusetts. The two district courts determined the EPA's decision to not send out written notices to stormwater dischargers did not constitute a "failure" to perform a non-discretionary act and therefore did not fall under the purview of the CWA citizen suit provision. Accordingly, the claims were dismissed for want of jurisdiction. Plaintiffs appealed and their suits were consolidated for review in the 1st Circuit.

The First Circuit's Decision

The court's reasoning in denying the plaintiffs' appeal and upholding the dismissal hinged on the determination the EPA did not fail to perform a non-discretionary duty in declining to serve written notices on stormwater dischargers. Plaintiffs argument was distilled by the court to three steps: 1) in helping to develop and in approving the TMDLs in Rhode Island and Massachusetts, the EPA came to the conclusion that stormwater controls are needed for discharges identified in the TMDLs; 2) this conclusion triggered a duty by the EPA to "notify the discharger in writing" of its decision that the discharger is required to obtain a permit and to "send an application form with the notice;" 3) this duty was non-discretionary and therefore was the proper subject of a CWA citizen suit.

Discretionary and Non-Discretionary Duties

The EPA responded with a variety of arguments but the one used by the court was that the EPA's approval of the TMDLs was not a decision requiring an individual permit pursuant to CWA regulations. The court notes the EPA's involvement with TMDLs is simply to review for compliance with the CWA. There is no equivalency between the certification of a TMDL's conformity with the CWA and the determination that a stormwater discharger requires a permit. Plaintiffs argued the EPA must send notice and application forms to specific, "identified" dischargers, even though the TMDLs themselves do not identify who those dischargers are and the data in the TMDLs does not contain the level of specificity necessary to make those decisions. The court found that despite plaintiffs' contentions, the EPA only has a duty to notify when it decides that an individual permit is necessary, not merely when TMDLs are certified.

The court also went to great lengths to note the plaintiffs' arguments, practically speaking, would require the EPA to notify all property owners in the 70,000 TMDLs already approved and active in watersheds across the country. Ultimately, the court found the EPA's approval of the TMDLs was not a decision such that an individual permit was required nor was it a decision that triggered the notice requirement,

and therefore the EPA did not fail to perform a non-discretionary duty:

> Importantly, though, the TMDLs do not identify by name or address any individual dischargers, nor do they attempt to designate which specific properties within the studied areas actually discharge storm water. In practical terms, they do not differentiate, for example, an organic farm with a cistern from a large house with a long, impervious driveway. Plaintiffs nevertheless ask us to rule that the EPA must send a written notice under section 124.52(b) to every landowner and business in the area covered by each TMDL. . . . Simply put, there is nothing in the TMDLs themselves—and hence nothing in the EPA's approval of the TMDLs—that even suggests an undertaking to make individualized determinations. Rather, the TMDLs address discharges at the abstract level of source type. . . . We therefore conclude that the EPA's approval of the TMDLs was not a decision that an individual permit was required, that it therefore did not trigger the notice requirement, and that, consequently, the complaints allege no failure by the EPA to perform a nondiscretionary duty.

Conclusion and Implications

This case serves to further outline the requirements for citizen suits under the CWA and the nature of the EPA's actions regarding TMDLs. Environmental groups and other interested plaintiffs should take care to properly allege jurisdiction when looking to sue under the CWA's citizen suit provision. The court's decision is available online at: http://media.ca1.uscourts.gov/pdf.opinions/17-1166P-01A.pdf
(Danielle Sakai, Holland Stewart)

NINTH CIRCUIT FINDS POLLUTION FROM WELLS TO THE PACIFIC OCEAN CONSTITUTED POINT SOURCES UNDER THE CLEAN WATER ACT—THE STAGE MAY BE SET FOR U.S. SUPREME COURT DETERMINATION

Hawai'i Wildlife Fund v. County of Maui, ___F.3d___, Case No. 15-17447 (9th Cir. Feb. 1,2018).

The Ninth Circuit Court of Appeals recently affirmed a U.S. District Court ruling that discharges of treated sewage to wells requires an Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permit where it was shown that the discharged sewage contamination was making its way through groundwater and showing up in the Pacific Ocean. nearby. This ruling is somewhat at odds with analysis in some other cases in other Circuits.

> The panel concluded that the County's four discrete wells were "point sources" from which the County discharged "pollutants" in the form of treated effluent into groundwater, through which the pollutants then entered a "navigable water," the Pacific Ocean. The wells therefore were subject to National Pollutant Discharge Elimination System regulation.

Background

The Clean Water Act in its modern form was enacted in 1972. Since the mid-1970s the County treatment works on Maui had discharged treated wastewater from Maui sewers into two wells known to carry it eventually to the ocean:

> The County owns and operates four wells at the Lahaina Wastewater Reclamation Facility ("LWRF"), the principal municipal wastewater treatment plant for West Maui. Wells 1 and 2 were installed in 1979 as part of the original 1975 plant design, and Wells 3 and 4 were added in 1985 as part of an expansion project. Although constructed initially to serve as a backup disposal method for water reclamation, the wells have since become the County's primary means of effluent disposal into groundwater and the Pacific Ocean.

The Ninth Circuit's Decision

Standard of Review

The Ninth Circuit stated that since the appeal was on review of motions for summary judgment, the standard of review was *de novo*.

Groundwater Carrying Pollutants as a Point Source under the CWA

It was not felt at the time of the construction and later additions of two more wells that these disposal wells came under NPDES system regulations. In the course of its ruling, written by Sr. Judge Dorothy W. Nelson, the Ninth Circuit analyzed other situations where Circuit Courts have found there is not an NPDES permit requirement where groundwater carries pollutants.

First the court pondered the opposite, *i.e.* examples on nonpoint sources of pollution to aid in reaching the opposite conclusion:

> That the County's activities constitute "point source" discharges becomes clearer once we consider our jurisprudence on "nonpoint source pollution": "[Such] pollution . . . arises from many dispersed activities over large areas," "is not traceable to any single discrete source," and due to its "diffuse" nature, "is very difficult to regulate through individual permits." *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 508 (9th Cir. 2013) (citations omitted).

The court distinguished its holding from cases where there is not clearly a point source through which contaminated water flows before it goes into the ground and groundwater, and its main contention and justification for the holding is that it does not matter if there is an interval between the point of exit from the "point source" that is made up of land surface or groundwater, since the resulting flow to "navigable waters" is gravity controlled, *i.e.* expected. The court cited to cases from the Second and Fifth circuits to make its point. *Concerned Area Residents v Southview Farm*, 34 F.3d 114, 119 (2nd Cir. 1994); *Sierra Club v Abston Construction*, 620 F.2d, 41, 45 (5th Cir. 1980).

The court was quick to come to the conclusion that indeed, the wells were discrete, identifiable point sources of pollution:

> Ours is a different case entirely. Unlike the "millions of cars" discussed in *Ecological Rights*, here we have four "discrete" wells that have been identified and can be "regulate[d] through individual permits." Id. at 508 (citations omitted). Furthermore, the automobiles and the utility poles discussed in Ecological Rights did nothing themselves to "discretely collect[] and convey[]" the pollutants to a navigable water, and hence could not constitute "point source[s]" under § 1362(14). Id. at 508–10 (citations omitted). The Lahaina Wells, by contrast, collect and inject pollutants in four discrete wells into groundwater connected to the Pacific Ocean, thereby "discretely collect[ing] and convey[ing]" pollutants to a navigable water.

Strictly speaking the Ninth Circuit ruling is not that groundwater is always regarded as a natural conveyance giving rise to NPDES liability. Their expression of a holding was narrower:

> We hold the County liable under the CWA because (1) the County discharged pollutants from a point source, (2) the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water, and (3) the pollutant levels reaching navigable water are more than de minimis.

The Ninth Circuit goes on to state that the "functional equivalent" of a direct discharge is the standard it sees itself imposing. Since there was no definitional issue in finding a "well" could be a point source, and there was a proven element of the case that the ocean is the intended ultimate receiving water for the Maui wastewater, that functional emphasis would have to be an element proven in future Ninth Circuit cases.

Kentucky Waterways

By contrast, although it is a U.S. District Court opinion, in late December 2017, Judge Danny Reeves in the Eastern District of Kentucky wrote a thoughtful and analytical opinion about the basis by which groundwater should be considered in the context of alleged NPDES violations. *See, Kentucky Waterways Alliance v. Kentucky Utilities Co.*, ___F.Supp.3d___, Case No. 5: 17-292-DCR 2017 (E.D. Ky. Dec. 28, 2017):

There are three distinct reasons that hydrologically connected groundwater might be subject to regulation under the CWA. First, hydrologically connected groundwater could itself constitute a "navigable water" under the CWA such that an adding a pollutant to hydrologically connected groundwater would constitute the discharge of a pollutant "to navigable waters." Second, hydrologically connected groundwater could constitute a "point source" under the CWA such that discharging a pollutant to a "navigable water" from hydrologically connected groundwater would constitute a discharge "from any point source." Third, hydrologically connected groundwater could constitute a non-point source conveyance that falls within the CWA even though it is itself neither a point source nor a navigable water.

The facts in the Kentucky case help illustrate the jurisprudential issue. The Kentucky situation originated with a dispute over how to deal with a longstanding ash pond, some 140 acres in area. The original issues between plaintiff and defendant dealt with the Resource Conservation and Recovery Act (RCRA) and landfill regulation. Perhaps importantly, too, the ash pond was in fact permitted to make controlled discharges through on outfall pipe. However, when studies were done it became clear that the ash pond, even under improved design, would leach some contamination to groundwater. In turn, some of the leached contaminants in groundwater entered a jurisdictional creek.

The District Court cited to Congressional history and case law concluding that groundwater is clearly not properly regarded as "navigable waters" under the CWA, and that provisions of the law and its history show Congress intended the regulation of groundwater to rest with the States. The court noted that a few courts have said that ash ponds may be deemed point sources and that the natural connection to jurisdictional waters through groundwater is actionable and requires an NPDES permit. However, the court refused to consider the natural connection as sufficient to create liability to possess NPDES permits, since almost any discharge through a discreet conveyance, even one that is miles from a water body, might be said to require such a permit. The Kentucky court indicated that would stretch the CWA beyond the plain limitations of federal jurisdiction Congress provided for.

Conclusion and Implications

There are cases in other Circuits that deal with the same issue in somewhat different factual contexts, including ash ponds. It remains to be seen if the Ninth Circuit's "functional equivalent" holding will be the subject of a petition for *certiorari* to the Supreme Court. The Ninth Circuit's decision is available online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2018/02/01/15-17447.pdf
(Harvey M. Sheldon)

FIFTH CIRCUIT PERMITS CASE REMOVAL OF 'MASS ACTIONS' UNDER THE CLASS ACTION FAIRNESS ACT FOR CLAIMS OF 100 OR MORE IMPACTED PLAINTIFFS IN RADIOACTIVE MATERIAL OPERATIONS

Warren Lester, et al v. Exxon Mobile Corporation, ___F.3d___, Case No. 14-31383 (5th Cir. Jan. 9, 2018).

Plaintiffs filed multiple actions in Louisiana State court alleging personal injury and property damage claims arising from their alleged exposure to a naturally occurring radioactive material (NORM) as part of oil and gas operations at various pipe yards and other facilities in the several states. Thereafter, three plaintiffs sought to transfer and consolidate their actions with the *Lester* action for the purpose of trial. Defendant, Exxon Mobile Corporation (Exxon Mobile), which was named as a defendant in each of the actions, timely moved to remove these actions pursuant to the Class Action Fairness Act's (CAFA)

"mass action" provision. Plaintiffs then moved to remand which the U.S. District Court denied. On appeal, the Court of Appeals for the Fifth Circuit held that Exxon Mobile was permitted to remove all of the actions—*Bottley* and *Lester*—to federal court as a "Mass Action" under CAFA.

Background

In 2002, over 600 plaintiffs filed a petition in *Warren Lester v. Exxon Mobil Corporation, et al.*, a personal injury and property damage case arising from NORM, as part of oil and gas operations at in several states. The *Lester* plaintiffs are individuals residing in several states that either worked at these facilities or lived near these facilities where NORM was located. At the time of removal, some 528 *Lester* plaintiffs remained in that suit.

Cornelius Bottley was a *Lester* plaintiff who alleged damages arising from his alleged exposure to NORM while working at various pipe yards in Louisiana and other states; he died on July 17, 2012 from a form of cancer. On July 16, 2013, his representatives filed a petition for wrongful death and survival action in Louisiana, alleging that Cornelius Bottley's death was caused by his alleged exposure to NORM. The *Bottley* plaintiffs were then residents of Louisiana and Texas seeking monetary recovery for wrongful death, survival action, and punitive damages. The *Bottley* petition named Mobil as a defendant. Mobil was not a defendant in the *Lester* matter.

On July 31, 2014, the *Bottley* plaintiffs' served Exxon Mobile with a motion to consolidate seeking to have the *Lester* court consolidate the *Bottley* matter with the *Lester* matter for the purpose of trial.

The Fifth Circuit's Decision

The Class Action Fairness Act

CAFA was intended to expand federal court jurisdiction over class actions and "mass actions." *In re Katrina Canal Litig. Breaches*, 524 F.3d 700, 711 n. 47 (5th Cir. 2008); *Preston v. Tenet Healthsys. Mem'l Med. Ctr., Inc. (Preston II)*, 485 F.3d 804, 810 (5th Cir. 2007); *Frazier v. Pioneer Americas LLC*, 455 F.3d 542, 546 (5th Cir. 2006). A case qualifies as a "mass action" under CAFA if it is one:

> . . .in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact. 28 U.S.C § 1332(d)(11).

A "mass action" must also satisfy the three threshold jurisdictional requirements for class actions under CAFA. Specifically: 1) at least one class member must be a citizen of a state different from any defendant; 2) the plaintiffs must seek $5,000,000 in damages in the aggregate; and 3) the aggregate number of the members of all proposed plaintiff classes must be 100 or more. 28 U.S.C. §§ 1332(d)(l)(B), 1332(d)(2), 1332(d)(5). Additionally, "jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy" the $75,000 jurisdictional requirement of § 1332(a). 28 U.S.C. § 1332(d)(11)(B)(i). As explained in Mobil's Notice of Removal, each of these three threshold requirements is met here, and Plaintiffs do not put any of them at issue in their motion to remand.

CAFA does not change the traditional rule that the party seeking to remove the case to federal court bears the burden of establishing federal jurisdiction. *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1164 n. 3 (11th Cir.2006). However, once jurisdiction has been established preliminarily under CAFA, the objecting party bears the burden of proving by a preponderance of the evidence the applicability of any claimed jurisdictional exceptions. *Preston II*, 485 F.3d at 797; *Frazier, 455 F.3d at 546; Caruso v. Allstate Ins. Co.*, 469 F.Supp.2d 364, 367 (E.D. La. 2007). This result is supported by the reality that plaintiffs are better positioned than defendants to carry this burden. *Frazier*, 455. F.3d at 546. Moreover:

> . . .longstanding § 1441(a) doctrine placing the burden on plaintiffs to show exceptions to jurisdiction buttresses the clear congressional intent to do the same with CAFA. *Frazier*, 455 F.3d at 546.

Quoting from the *Frazier* decision the Fifth Circuit stated that:

> As a factual matter, the record is unclear regarding whether the state court signed a consolidation order. That ambiguity is immaterial to the mass action inquiry, however, because the plain

> language of CAFA indicates that a mass action arises upon a *proposal* for joint trial. 'The language selected by Congress must be given effect.' *Id*.

Motion to Consolidate

In the case before the Circuit Court of Appeals, the *Bottley* plaintiffs moved to consolidate their case with the *Lester* case for the purpose of consolidating its matter with *Lester* for the purpose of trial, alleging that:

> . . .overlapping liabilities, damages, and questions of law and fact…[and the] determination of any of these issues in either case will have great bearing on the other and vice versa. *Id*.

The focus of CAFA is the consolidation that is proposed—what the *Bottley* plaintiffs' motion to consolidate proposed constituted a "mass action" within the ambit of CAFA, a:

> . . .mass action. . .in which monetary relief claims of 100 or more persons are *proposed to be tried jointly* on the ground that the plaintiffs' claims involve common questions of law or fact. 28 U.S.C. section 1332(d)(11), emphasis added.

Conclusion and Implications

Rather than seeking leave to amend the *Lester* petition to add the wrongful death claim of the *Bottley* heirs, the *Bottley* plaintiffs took the unusual step of filing a separate lawsuit to assert the wrongful death claims and have now moved to consolidate those claims with *Lester*. As a result, they joined with over 100 *Lester* plaintiffs in a single action further proposing a single trial. The Fifth Circuit's ruling is available online at: http://www.ca5.uscourts.gov/opinions/pub/14/14-31383-CV0.pdf

DISTRICT COURT EXTENDS ELEVENTH CIRCUIT PRECEDENT TO APPLY CERCLA PREEMPTION OF STATE LAW TORT CLAIM STATUTE OF LIMITATIONS

Abner v. U.S. Pipe & Foundry Co., LLC, ___F.Supp.3d___, Case No. 2:15-cv-02040 (N.D. Al. Jan. 23, 2018).

Relying on "indications" in a prior Eleventh Circuit opinion, the U.S. District Court for the Northern District of Alabama allowed plaintiffs pursuing state law tort claims to rely on the "federal commencement date," rather than Alabama's statute of limitations, in asserting claims based on personal injury and property damage stemming from contamination emanating from a Superfund site. The District Court held plaintiffs may rely on the federal commencement date in bringing otherwise-untimely claims, even if they failed to allege facts sufficient to allow them to bring a citizen's suit under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Rather, the court reasoned it was sufficient for the plaintiffs to allege the government had a CERCLA claim. The court, however, noted a brewing split among the Circuit Courts on this issue.

Background

From the early 20th century until 2010 the industrial defendants and their predecessors in interest operated a "ductile iron foundry" in Birmingham, Alabama, that allegedly "emitted, via the air and groundwater, a number of toxic substances" into surrounding properties. The U.S. Environmental Protection Agency (EPA) created the "35th Avenue Superfund Site" and collected soil samples documenting toxic contamination at an "unspecified number" of 1,100 residential properties within the Superfund Site. "In December 2012, the EPA issued to U.S. Pipe an 'Information Request' about the 35th Avenue Superfund Site," and following a response from another defendant:

> . . .[i]n September 2013 the EPA identified,

among other companies, U.S. Pipe as a 'potentially responsible part[y]' for the contamination of the Site.

The 14 individual plaintiffs filed state law personal injury and, in some instances, property damage tort claims. It is not disputed that these claims are untimely under the Alabama applicable statutes of limitations. The plaintiffs relied on the CERCLA "commencement date."

Federal Preemption

In an unusual manner, CERCLA uses preemption to modify state statutes of limitations with respect to state causes of action by imposing a federal discovery rule in some circumstances. *Blankenship v. Consol. Coal Co.*, 850 F.3d 630, 635 (11th Cir. 2017) (emphasis omitted).

42 U.S.C. § 9658(a) preempts state law limitations periods for tort claims alleging personal or property damage "caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility" by replacing the date on which the state law claims accrue with the "federally required commencement date" if the federal commencement date is later than the state law accrual date.

> The 'federally required commencement date' is 'the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages. . .were caused or contributed to by the hazardous substance or pollutant or contaminant concerned.' 42 U.S.C. § 9658(b)(4)(A).

The defendants sought partial summary judgment on the basis that the plaintiffs had not presented facts sufficient to create a genuine issue of material fact as to whether they could prove a private citizen CERCLA claim, and specifically that the plaintiffs had not alleged—let alone presented any evidenced supporting that—they had incurred cleanup costs.

The District Court's Decision

The District Court noted that in *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1000–02 (11th Cir. 2004), the Eleventh Circuit relied on the CERCLA commencement date to "bypass Georgia's statute of limitation" on claims of property damage:

> . . .arising from leakage of hazardous waste from the defendants' property onto the plaintiffs' property. . . .even though the plaintiffs did *not* raise any type of CERCLA claim and did not allege or prove that they had incurred response costs. *Id.* at 1000–02, 1016–17.

The court relied as well on a Fifth Circuit decision holding § 9568's pre-emption of state statute of limitations:

> . . .operates only where the conditions for CERCLA cleanup are satisfied. . . .[The plaintiff] must prove that her claims arose from a 'release' of 'hazardous substances' into the 'environment,' as well as other case-specific preconditions establishing that the defendant's 'facility' falls within CERCLA. *Barnes ex rel. Estate of Barnes v. Koppers, Inc.*, 534 F.3d 357, 365 (5th Cir. 2008).

The Fifth Circuit required only that *a* CERCLA claim could be made, not that a private-citizen's CERCLA claim could be proved:

> The Fifth Circuit's *Barnes* decision lines up with the implication contained in the Eleventh Circuit's *Parker* decision: that CERCLA's commencement date preempts the state statute of limitations when the plaintiff can prove facts showing that a defendant is liable to the government *or* a private party under CERCLA for cleanup costs.

As the District Court acknowledged, the Circuit Courts are split on this issue, with the Fourth Circuit holding that:

> . . .plaintiffs seeking the benefit of the CERCLA commencement date must prove *all* the facts that could support a private-citizen suit under CERCLA. Citing *Blankenship*, 850 F.3d at 637.

Conclusion and Implications

The District Court's extension of *Parker* to allow preemption of state law statute of limitations under CERCLA's § 9568 sets up this case for review by the

Eleventh Circuit that will, whatever the outcome, deepen an existing split among the Circuits. However, the Fourth Circuit's opinion in *Blakenship* concluded § 9568 may not be relied unless the plaintiff's complaint could give rise claims the *plaintiff* could bring under CERCLA, without analyzing whether § 9568 is available on the basis that the *government* may bring claims under CERCLA. Thus, even if the Eleventh Circuit on review in this case issues an opinion fully analyzing the issue it may be judged ripe for resolution by the U.S. Supreme Court until the issue has "percolated" more thoroughly amongst the Circuits. The court's decision is available online at: https://scholar.google.com/scholar_case?case=4219225295395888236&q=Abner+v.+U.S.+Pipe+%26+Foundry+Co.,+LLC&hl=en&as_sdt=2006&as_vis=1 (Deborah Quick)

DISTRICT COURT DENIES SUMMARY JUDGMENT MOTION BROUGHT AGAINST HONEYWELL INTERNATIONAL SEEKING TO LIMIT SOIL AND GROUNDWATER ENVIRONMENTAL INDEMNITY

Hammond, Kennedy, Whitney & Co., Inc. v. Honeywell International, Inc., ___F.Supp.3d___, Case No. 1:16-cv-09808 (N.D. Ill. Jan. 29, 2018).

In a case concerning environmental cleanup costs at a facility sold over ten years ago, the U.S. District Court for the Northern District of Illinois denied a motion for summary judgment brought by plaintiff Hammond, Kennedy, Whitney & Co., Inc. (plaintiff) against defendant Honeywell International, Inc. (Honeywell), where plaintiff asked the court to declare that plaintiff had no duty to indemnify defendant for cleanup costs.

Factual and Procedural Background

In November 2007, Honeywell purchased the Maxon Corporation through a Stock Purchase Agreement (SPA) and plaintiff was appointed Maxon's "representative, agent, and attorney-in-fact" in case of dispute under the SPA. Concurrently with the sale closing, plaintiff placed $16.725 million into escrow to secure any post-closing disputes.

One asset in the sale was a facility located in Muncie, Indiana that pre-1965 served as a trucking terminal with a fueling station and underground tanks. After the sale, Honeywell discovered previously undisclosed soil and groundwater contamination, including levels of benzene and vinyl chloride that exceeded guideline levels set by the Indiana Department of Environmental Management (IDEM) and notified both plaintiff and IDEM on the same day in March 2011. IDEM required a written spill report in accordance with the Indiana Spill Rule, directed Honeywell to investigate the nature and extent of the contamination per Indiana statutes on hazardous substances, and notified Honeywell of potential civil penalties for failing to comply.

In April 2011, Honeywell sent plaintiff a claim notice based on indemnification provisions in the SPA and provided a preliminary cost estimate, leading to both parties agreeing to freeze the remaining $3.26 million in escrow. Later in 2011, Honeywell agreed to enter into a Voluntary Remediation Program with the IDEM, leading to the approval of a final remediation plan in July 2017. Honeywell incurred over $1.5 million in investigation and remediation costs.

Plaintiff sued Honeywell in October 2016 seeking a declaratory judgment that plaintiff did not have to indemnify Honeywell for environmental cleanup costs, and Honeywell filed a counter claim in December 2016 seeking indemnification. After written discovery began, plaintiff sought a discovery stay to focus on settlement talks. The parties attended one settlement conference and scheduled a second, but in August 2017, plaintiff abruptly filed a summary judgment motion, arguing that it had no duty to indemnify Honeywell.

The District Court's Decision

In order to prevail on its summary judgment motion, plaintiff would have to show that no genuine dispute existed as to any material fact and the evi-

dence weighed so heavily in its favor that plaintiff "must prevail as a matter of law." As a non-contested initial matter, the court found that New York law controlled because of a choice of law provision in the SPA.

Contract Terms

The court first outlined the relevant provisions and environmental warranties that Maxon's seller made to Honeywell in the SPA. Specific to the Muncie facility, Section 3 represents that "[t]here are no Hazardous Materials currently present . . . except in material compliance with Environmental Laws" and that "[t]here is no past or current condition" for which Maxon has "or would have in the future, any Liability under Environmental Laws" or "any obligation to undertake any investigation, cleanup or remedial action pursuant to Environmental Laws." The SPA defines "Law" to mean "all laws, statutes, rules, and regulations of federal, state and local governments." Section 6 provides that defendant is entitled to indemnification for losses from any inaccuracy of a representation or warranty made in Section 3. However, Section 6 does limit indemnity by requiring Honeywell to make a claim within 42 months of the sale and assert an indemnity claim by notice that specifically identifies the particular breach underlying the claim while describing the claim in reasonable detail.

IDEM Guidelines and Other Environmental Laws

Plaintiff first argued that IDEM guideline levels are not laws, that Honeywell based its indemnification claim only on these levels, and therefore, Honeywell could not show that the contamination violated any of the SPA's warranties regarding material compliance with environmental laws. The court quickly shot down this theory, pointing out that a "simple review of the record" showed that Honeywell clearly identified other environmental laws underlying the indemnification claim, including the Indiana Spill Rule.

The court went on. Honeywell was under no obligation to list every statute that might require them to incur costs and, correctly under the SPA, Honeywell reasonably and specifically identified the previously undisclosed chemicals it found, where it found them, and which Indiana rules and regulations obligated it to begin working towards cleanup. Importantly, the first letter to plaintiff was sent within 42 months of the sale closing. Accordingly, Honeywell properly identified the "particular breach" and gave proper notice, creating in the court's mind a genuine issue of material fact as to whether the contamination violated environmental laws.

Remediation

Plaintiff next argued that Honeywell spent the $1.5 million on remediation voluntarily, pointing to the fact that IDEM asked Honeywell to investigate and report, but never exercised its statutory authority to compel Honeywell. Honeywell directed the court to the official letters it received from IDEM that specifically notified Honeywell of potential civil penalties for failing to comply. Calling the "voluntary" arguments borderline "frivolous", the court denoted that the New York rule that one who voluntarily makes payments cannot seek indemnification contains a clear exception when payments are made to protect ones' own legal or economic interests, as Honeywell did.

Indiana Spill Rule

Finally, plaintiff argued that the Indiana Spill Rule did not apply because Honeywell never demonstrated that the chemicals at the facility exceeded the quantities specified in the Spill Rule to trigger an obligation to report the chemicals. The court blasted plaintiff on two accounts. First, at the summary judgement stage, Honeywell does not have the burden to prove its case and given the involvement of IDEM, there was a genuine issue of material fact. Second, plaintiff chose to proceed with this motion without the benefit of discovery and as a direct result, failed to offer any evidence on the chemical levels at the facility.

The court denied plaintiff's summary judgment motion for all of the above reasons and barred plaintiff from filing any further summary judgment motions, absent approval of the court.

Conclusion and Implications

By denying summary judgment, this case will proceed to the merits of whether the plaintiff must indemnify Honeywell for the failure to disclose the environmental conditions on the property. However, this case stands for the proposition that a party will not be able to defeat a claim for indemnity by arguing

that every potential legal basis for indemnity must be identified in a demand for indemnity. Likewise, arguing that a regulator's directive, with potential penalties for non-compliance, is voluntary and therefore does not provide a right to indemnity will not be successful. The court's ruling is available online at: https://scholar.google.com/scholar_case?case=18160256571619582697&q=Hammond,+Kennedy,+Whitney+%26+Co.,+Inc.+v.+Honeywell+International,+Inc.&hl=en&as_sdt=2006&as_vis=1
(Danielle Sakai, Craig Hayes)

DISTRICT COURT FINDS THAT LANDOWNER WHICH DID NOT POLLUTE SITE STILL LIABLE UNDER CERCLA CONTRIBUTION CLAIM FOR SOIL AND GROUNDWATER CONTAMINATION

Valbruna Slater Steel Corporation, et al., v. Joslyn Manufacturing Company, et al., ___F.Supp.3d___, Case No. 1:10-CV-044 JD (N.D. Ind. Jan. 16, 2018).

Plaintiffs Valbruna Slater Steel Corporation and Fort Wayne Steel Corporation (collectively: Valbruna) sought recovery of cleanup costs associated with a steel-processing site formerly owned by Joslyn Manufacturing Company (Joslyn). After more than seven years of litigation, the court adjudicated Valbruna's federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) § 107(a) cost recovery claim against Joslyn, finding it strictly liable to Valbruna for $2,029,871.09 in costs. That did not resolve this matter, however, given that Josyln had filed a CERCLA § 113(f) counterclaim for contribution. As the parties stipulated to the facts that satisfied the *prima facie* case under § 107(a), the court was left with the task of equitably allocating costs under § 113(f). As it was established that Josyln's status was the sole polluting party to this action and its "blatant avoidance of liability and refusal to assist with some cleanup despite knowing it was responsible for contaminating the site for an extensive period," the court allocated 75 percent of the bulk of the costs to Joslyn but nevertheless awarded 25 percent liability to Valbruna.

Background

From 1928 to 1981, Joslyn Manufacturing Co. operated a steel manufacturing facility in Fort Wayne. On Feb. 2, 1981, Joslyn sold the site to Slater Steels Corp. In June 2003, Slater filed a Chapter 11 bankruptcy petition in the U.S. Bankruptcy Court for the District of Delaware. The soil and groundwater at and around the site are contaminated with numerous hazardous substances, including tricholorethylene, polychlorinated biphenyls, chlorinated organic chemicals, semi-volatile organic chemicals, heavy metals and radioactive elements related to historical operations at the site. Valbruna acquired the site in April 2004 following an auction conducted as part of the Slater bankruptcy. FWSC also acquired a portion of the site through the bankruptcy auction.

In April 2004, Valbruna and the Indiana Department of Environmental Management entered into a prospective purchaser's agreement (PPA), which required Valbruna to spend approximately $1 million on site investigation and remediation work in response to pre-existing contamination at and from the site. Valbruna contributed $500,000 of the $1 million.

From 2005 to 2006, Valbruna conducted electrical resistance heating, using the PPA funds to address volatile organic compound impacts at a portion of the site where degreasing operations had historically occurred. In June 2006, the U.S. Environmental Protection Agency inspected the site in relation to its historical contamination issues.

Valbruna and FWSC sued Joslyn under CERCLA § 107, 42 U.S.C. §9601 *et seq.*, seeking to recover the costs they incurred in remediating the site. Joslyn counterclaimed for contribution.

The U.S. District Court for the Northern District of Indiana held the first phase of a bifurcated trial in February 2017 to determine what costs Valbruna could seek under their cost recovery claim. Joslyn

argued that Valbruna could not obtain the entire $2.2 million in claimed damages because not all actions were consistent with the National Contingency Plan. The court found that Valbruna could not recover the costs associated with addressing contamination at a melt shop on the site, the installation of a vapor barrier, two radiation surveys and the removal of oil tanks, and a PCB transformer.

From the $2,029,871.09 in costs recoverable under § 107(a), the court deducted the $500,000 associated with Valbruna's escrow contribution. While that sum advanced the remediation, it was a known expense and part of the purchase price of the site. That left a total of $1,529,871.09 for the court to allocate pursuant to Joslyn's contribution action.

The District Court's Decision

To reach this point, the court previously ruled that, pursuant to *U.S. v. Atlantic Research Corp.*, 551 U.S. 128, 140 (2007), Joslyn could pursue a contribution claim. A defendant in a § 107(a) suit could:

> . . .blunt any inequitable distribution of costs by filing a section 113(f0 counterclaim, [which requires] the equitable apportionment of costs among the liable parties, including the PRP that filed the § 107(a) action.

The Contribution Claim and the *Gore* Factors

Joslyn was, thereby, faced with the burden of proof to demonstrate an entitlement to contribution. *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682, 690 (7th Cir. 2014).

In allocating costs under § 113(f), the court has "broad and loose" authority in both deciding which equitable factors will inform its decision and in the ultimate cost allocation determination. *Id.* citing to *NCR*, *supra*, 768 F.3d at 695. In making an allocation decision, courts often consider the *Gore* factors, but are not restricted to such. *Envtl. Transp. Sys. Inc. v. ENSCO, Inc.*, 969 F2d 503, 508 (7th Cir. 1992). Courts are also free to consider traditional equitable defenses in contribution, even though they do not bar liability in CERCLA. *Town of Munster, Ind. v. Sherwin-Williams Co.*, 27 F. 3d 1268, 1270 (7th Cir. 1994).

Valbruna argued for the application of the *Gore* factors, namely:

- The ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished;
- The amount of the hazardous waste involved;
- The degree of toxicity of the hazardous waste involved;
- The degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
- The degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and,
- The degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment. *ENSCO, Inc., supra,* 969 F.2d at 508.

These factors highlight the central issue for consideration: while Joslyn contaminated the site extensively over a prolonged period, Valbruna did not pollute at all. In such instances, courts have permitted non-polluting landowners to recover all of their cleanup costs from polluting prior owners. *See, NutraSweet Co. v. X-L Eng'g Co.*, 227 F.3d 776 (7th Cir. 2000), as but one cited example. But these cases are not entirely controlling given a blend of equitable factors, plus the fact that Valbruna purchased the site with actual knowledge of the contamination, representing a major distinguishing fact from all of its cases cited for the proposition that a non-polluting party should be afforded full cleanup cost recovery rights. Moreover, Valbruna purchased the site at a bankruptcy sale without any guarantees from Joslyn.

Of the *Gore* factors, the sixth factor supports Valbruna given Joslyn's refusal to cooperate with either the government's or Valbruna's requests for cleanup assistance. Beyond this, the Gore factors are of little assistance—and the court then turned to the remaining equitable considerations.

Of keen interest, were Joslyn's windfall and *caveat emptor* arguments, more prominently referred to as Valbruna's "assumption of risk." *Id.*

> It is generally true that 'when a buyer knows of a cleanup liability prior to purchase, proper allocation under the equitable factors of § 113(f) requires that the PRP buyer not be relieved of the entire expense of cleanup. *Id.*, citing to *W. Properties Serv. Corp. v. Shell Oil Co.*, 358 F.3d 678, 691 (9th Cir. 2004), *abrogated on other grounds*.

The court went on to find that:

> Accordingly, Joslyn [said] that permitting Valbruna to recover its cleanup costs would amount to a double recovery, since Valbruna already received a price break [the property's price was reduced to allow for future environmental cleanup claims] when it knowingly bought contaminated property and essentially assumed the risks involved with the possibility of future cleanup requirements and costs.

The court gave consideration to the fact that the site was almost certainly sold at a lower price than it would have been had it presented no environmental problems, however, that consideration was partially discounted due to the fact that there was a lack of evidence as to the abandoned site's value independent of environmental issues, contamination that was unknown at the time of the sale.

Joslyn's *caveat emptor* argument similarly alleged that Valbruna assumed the risk that its liability would be greater than anticipated when it knowingly purchased a contaminated site. However, Valbruna did not blindly accept all of the risk associated with the site as it conducted substantial diligence to map out the extent of contamination and then contracted in a manner designed to protect it against cleanup costs in excess of the escrow contribution:

> Under such circumstances, while Valbruna may deserve to incur some costs that exceeded its expectations, it should not have to bear all of them. *Id.*

Conclusion and Implications

The court having considered all of the factors deducted $500,000 associated with Valbruna's escrow contribution from the $2,029,871.09 in costs recoverable under § 107(a), leaving $1,529,871.09, to which Joslyn was liable to Valbruna for 75 percent of all such costs, allocating the remaining 25 percent to Valbruna, and holding Joslyn liable to Valbruna for 75 percent of all future costs incurred to clean up the site. The court's decision is available online at: https://www.courtlistener.com/recap/gov.uscourts.innd.60820/gov.uscourts.innd.60820.182.0.pdf
(Thierry Montoya)

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