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EASTERN WATER LAW™

& POLICY REPORTER

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EWL

EASTERN WATER NEWS

U.S. STATE DEPARTMENT RELEASES THE FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR THE PROPOSED KEYSTONE XL PIPELINE

On January 31, 2014, the U.S. State Department released the Final Supplemental Environmental Impact Statement (SEIS) for the proposed Keystone XL Pipeline. The Final SEIS concluded that the proposed pipeline would not substantially worsen carbon pollution. Beginning on February 5, 2014, the State Department opened a 30-day comment period for the public to weigh in on whether construction of the controversial Keystone XL pipeline would be in the national interest of the United States. A determination of national interest is required before construction of the proposed 875-mile pipeline can begin. Even so, some view the findings in the Final SEIS as paving the way for the President to approve the proposed pipeline.

Previous Project Application

On September 19, 2008, TransCanada Keystone Pipeline, LP (TransCanada) submitted a Presidential Permit application to the State Department to build the Keystone XL pipeline. The State Department considers applications for Presidential Permits for projects such as proposed petroleum pipelines that cross international borders of the United States. Under Executive Order 13337, the President had delegated his constitutional authority to receive and consider such applications to the State Department. Before a Presidential Permit can be issued, the President is required to find that the proposed project serves the national interest pursuant to Executive Order 13337.

The proposed pipeline would allow for the delivery of up to 830,000 barrels per day of crude oil from Canada through the United States to Texas oil refineries. The State Department issued a Final Environmental Impact Statement (EIS) on August 26, 2011, which found that construction and operation of the pipeline generally would have no significant environmental impacts along the project corridor. In December 2011, couched in a provision in the Temporary Payroll Tax Cut Continuation Act, Congress imposed a 60-day deadline to make the Presidential Permit Determination.

On January 18, 2012, the State Department determined that the proposed project did not serve the national interest. The determination was based solely on the rationale that the shortened timeline Congress had imposed did not allow enough time to complete a national interest review of the project. The State Department specifically pointed to the need to assess alternative routes in the Sand Hills region of Nebraska. The denial did not preclude subsequent permit applications for similar projects.

The Current Project Application

TransCanada submitted a second Presidential Permit application on May 4, 2012. The application proposed a more limited route for the pipeline whereby new pipes would be constructed from Morgan, Montana to Steel City, Nebraska, at which point the new proposed pipeline would connect to an existing Keystone pipeline. The revised route would avoid the environmentally sensitive ranchlands of San Hills and would eliminate the segment from Cushing, Oklahoma to the Gulf Coast that had been originally proposed. The company determined the Oklahoma to Texas leg of the pipeline had independent utility, and decided to proceed with that portion as a separate project. That leg would not require a Presidential Permit because it would not cross international borders.

In its second application, TransCanada incorporated by reference the previous Final EIS. The Department of State is once again tasked with determining whether granting a permit for the proposed pipeline would serve the national interest.

National Interest Determination

Factors pertinent to the national interest determination include environmental, foreign policy, energy security, economic, and regulatory issues. TransCanada stated in its 2012 application that the project would serve the national interest:

> …by providing a secure and reliable source of Canadian crude oil to meet the demand from refineries and markets in the United States, by providing critically important market access to developing domestic oil supplies in the Bakken formation in Montana and North Dakota, and by reducing U.S. reliance on crude oil supplies from Venezuela, Mexico, the Middle East, and Africa.

As part of this determination, on January 31, 2014, the State Department released the Final SEIS for the 2012 Presidential Permit application.

The Final Supplemental EIS

The Final SEIS revises, expands, and updates the original analysis to include a comprehensive review of the new route through Nebraska. The revision also incorporates any changed circumstances and new information since release of the last version.

The Final SEIS takes into consideration the more than 400,000 comments received during the scoping period and 1.5 million comments received on the Draft SEIS released in March 2013. The State Department notes that major changes from the draft SEIS include expanded analysis of potential oil releases, water resources, wetlands, threatened and endangered species, cultural resources, geological resources, air quality, noise, land use, recreation, and visual resources; expanded climate change analysis; updated oil market analysis incorporating new economic modeling; and expanded analysis of rail transport as part of the No Action Alternative scenarios.

Regarding carbon emissions in particular, the SEIS states that the total direct and indirect emissions associated with construction and operation of the pipeline project would contribute to cumulative global greenhouse gas emissions. The SEIS states, however, that any approval or denial of any one crude oil transit project, including the proposed pipeline, is unlikely to significantly impact the rate of crude oil extraction or the continued demand in the United States. The Final SEIS notes that transportation of Canadian crude oil by rail is already occurring in substantial volumes. Thus, even without the proposed pipeline, the Final SEIS appears to state that oil would still be extracted at the same rate and would be transported via rail instead.

Conclusion and Implications

The Final SEIS potentially brings approval of the proposed pipeline closer to fruition. The Final SEIS can be accessed at: http://keystonepipeline-xl.state.gov/finalseis/index.htm. Secretary of State John Kerry must make a recommendation as to the proposed project's approval or denial to the President, but there has been no obvious indication from the Secretary of State of how he may lean. During the Presidential Permit evaluation process, the State Department is expected to consult with the agencies identified in Executive Order 13337: the Departments of Defense, Justice, Interior, Commerce, Transportation, Energy, Homeland Security and the Environmental Protection Agency.

The Keystone XL pipeline recently experienced a setback when the U.S. District Court for Nebraska ruled on February 19, 2014, that the state's governor lacked authority to grant TransCanada the power of eminent domain. President Obama and the Secretary are expected to wait until Nebraska has legally approved the pipeline route before making a decision on the permit. If the President grants the permit, TransCanada will have authority to construct, connect, operate, and maintain the facilities at the border between the United States and Canada. (Gwynne B. Hunter, Jeannie Lee)

ENDANGERED SPECIES ACT CONGRESSIONAL WORKING GROUP ISSUES REPORT, RECOMMENDS CHANGES

The Endangered Species Act Congressional Working Group has issued a report with findings and recommendations regarding the federal Endangered Species Act. The report, which is the product of written and oral testimony received during a hearing in 2013, identifies greater transparency, less emphasis on litigation-oriented outcomes, and greater engagement with affected governments and landowners as desirable areas for reform.

Background

The Endangered Species Act (ESA) was passed in 1973 "to preserve, protect and recover" threatened or endangered domestic species. Since that time, over 1,500 species and sub-species have been listed for protection under the ESA. Section 4 of the ESA provides authority for the U.S. Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS) to list species as either threatened or endangered, and § 7 requires federal agencies to use their respective authorities to conserve listed species and avoid actions that may affect listed species or their federally-designated habitat. § 9 also establishes prohibitions on the taking of listed species, which applies to all persons without the requirement of a federal nexus.

The ESA charges FWS and NMFS to field petitions to list species as threatened or endangered and to designate critical habitat, using the "best scientific and commercial data available." Section 6 requires that these two agencies "cooperate to the maximum extent practicable with the States" in implementing the ESA, including:

> …consultation with the States concerned before acquiring any land or water, or interest therein, for the purpose of conserving any endangered species or threatened species.

The ESA has been amended several times, but has not been reauthorized since 1988.

Formation of ESA Working Group

On May 9, 2013, several Republican members of the House of Representatives announced the creation of the Endangered Species Act Working Group. The group, which is led by House Natural Resources Committee Chairman Doc Hastings (R-Washington) and Western Caucus Co-Chair Cynthia Lummis (R-Wyoming), includes congressmen from a variety of geographic regions. The stated purpose of the ESA Working Group is to examine the following questions related to ESA implementation:

(1) How is ESA success defined?
(2) How do we measure ESA progress?
(3) Is the ESA working to achieve its goals?
(4) Is species recovery effectively prioritized and efficient?
(5) Does the ESA ensure the compatibility of property and water rights and species protection?
(6) Is the ESA transparent, and are decisions open to public engagement and input?
(7) Is litigation driving the ESA?
(8) Is litigation helpful in meeting ESA goals?
(9) What is the role of state and local government and landowners in recovering species?
(10) Are changes to the ESA necessary?

On October 10, 2013, the Working Group convened a forum titled, "Reviewing 40 Years of the Endangered Species Act and Seeking Improvement for People and Species." The forum included oral and written testimony by seventeen witnesses representing private landowners, agriculture, sportsmen, electric utilities, timber, labor unions, state and local government, chambers of commerce, research and policy organizations, energy producers, and environmental and conservation groups. The Working Group also reviewed written testimony from over 50 witnesses submitted as part of full and subcommittee hearings of the House Natural Resources Committee over the past three years.

Findings and Recommendations in the Working Group's Report

The report acknowledges testimony that the ESA has been "99.9 percent effective" at preventing species extinction, but notes that less than 2 percent of listed species have achieved recovery in the act's 40-year history. The report also concludes that "cur-

rent implementation of ESA is focused too much on responding to listing petitions and unattainable statutory deadlines, litigation threats and ESA regulatory mandates," which arguably takes away from what Congresswoman Lummis referred to as "boots on the ground conservation" efforts. When it comes to de-listing species, the report found that the "process is uncertain and rare," leading to "open-ended, expensive and questionable measures." Additional concerns identified in the report include the "lack of data transparency and science guiding ESA-related decisions"; the "proliferation" of "lawsuits and threats of litigation"; and finally, that the "ESA shuts out states, tribes, local governments, and private landowners" from ESA decisions and conservation activities. The report illustrates these concerns with case studies from the ESA's history.

In light of these concerns, the report contains general recommendations for changes to the law in the following categories:

(1) Ensuring Greater Transparency and Prioritization of ESA with a Focus on Species Recovery and De-Listing
(2) Reducing ESA Litigation and Encouraging Settlement Reform
(3) Empowering States, Tribes, Local Governments and Private Landowners on ESA Decisions Affecting Them and Their Property
(4) Requiring More Transparency and Accountability of ESA Data and Science

Conclusion and Implications

In recent years, stakeholders across the political spectrum—from conservationists to property owners and businesses—have agreed that the ESA is in desperate need of reform. However, broad agreement on which of the Act's failings to prioritize has been elusive. As a general matter, conservationists have favored broadening and giving more nuance to the federal commitment to species protection activities, but they have opposed curtailing the role of litigation in enforcing mandatory deadlines. In contrast, private landowners and the regulated community generally view the uncertainty that ESA litigation risk creates as one of the highest priorities for ESA reform.

Several categories of ESA decisions have the potential to significantly restrict land use, yet by law they do not permit consideration of economic impacts. The ESA Working Group and its recently released report together represent an effort to give voice and coherence to the regulated community's various concerns about the ESA's effects on land use and economic development. Though calls for ESA reform have seen an uptick in recent years, the debate over the proper balance between species protection and human activity is likely to continue for many more years before substantive changes to the law are made. (Andrew Deeringer, Meredith Nikkel)

NEWS FROM THE WEST

This month's News from the West covers legislation and newly filed cases from California, Nevada and Washington. First, California's Governor signed emergency drought relief bills providing $687 million to help communities struggling with water shortages and expedite funding for water supply projects. Next, various groups filed a federal lawsuit in the U.S. District Court for Nevada claiming environmental violations by the Bureau of Land Management for approving a $15 billion pipeline that would pump groundwater across vast areas of Nevada and Utah to Las Vegas. Finally, the U.S. District Court for Washington ruled that petroleum companies lacked the right to intervene in a case alleging that coastal waters affected by ocean acidification should be listed as "impaired waters" under the Clean Water Act.

California Governor Signs Urgent Drought Relief Legislation

[S. Amend. to A.B. No. 80, approved by Governor, Mar. 1, 2014, S. Final Hist. 2013-2014 Reg. Sess., at 97 (Cal. Feb. 24, 2014)]

On the heels of a recent declaration of drought emergency, California Governor Jerry Brown has now signed an urgency relief package that expedites state actions and accelerates funding, especially to communities most affected by dry conditions, to increase

local water supplies. The package included various assembly and senate bills, with budget committees in both houses adopting the bills with amendments after a hearing. The legislation provides $687 million from the general fund, existing bond funds, and other programs for drought relief. More than $500 million would fund conservation projects to better capture, manage, and recycle water.

The bills expedited funding in eight main areas: (1) $77 million to the Department of Water Resources for flood protection projects in California's Central Valley that improve water supply and quality; (2) clean drinking water in disadvantaged communities; (3) $30 million from cap-and-trade auction revenue to Department of Water Resources programs that deliver state and local water use efficiency, including $20 million for energy upgrades and installation of water saving devices; (4) better groundwater monitoring and management; (5) infrastructure investments, with $200 million in Integrated Regional Water Management funds going toward drought preparedness and response projects; (6) $1 million for the Department of Water Resources' "Save Our Water" program to educate the public on conservation; (7) housing assistance in the form of rental vouchers for those suffering economic hardship due to the drought; and (8) enhanced State Water Resources Control Board rulemaking authority to respond to the drought.

In addition, the California Department of Health must adopt new groundwater replenishment regulations by July 1, 2014 and work with the State Board on additional measures to use recycled water and capture storm water to increase available water supply. The bills also change existing law, streamlining water right enforcement and increasing penalties for illegally diverting water during drought conditions. The State Water Resources Control Board may issue cease-and-desist orders in an emergency drought, fining violators up to $10,000 per day.

Groups Sue Federal Officials for Environmental Impacts of Las Vegas Water Supply Pipeline

White Pine County v. U.S. Bureau of Land Mgmt., Case No. 2:14-CV-00228-LDG-VCF (D. Nev. *filed* Feb. 12, 2014).

Several Indian Tribes and various groups from Nevada and Utah filed suit in the U.S. District Court in Nevada challenging the United States Bureau of Land Management's (BLM) approval of a $15 billion project to build over 250 miles of water pipelines across public land to Las Vegas. The groups allege violations of tribal trust obligations and the National Environmental Policy Act (NEPA), among others. In 2012, the Bureau granted a right-of-way for the Clark, Lincoln, and White Pine Counties Groundwater Development Project. The project authorized the Southern Nevada Water Authority to convey rural groundwater from central and eastern Nevada to southern Nevada. The project would reach as far north as Great Basin National Park to provide back-up water supplies and supply future demand in the Las Vegas region, which currently relies on the overdrawn Colorado River for 90 percent of its water. The plaintiff groups claimed, in part, that the BLM failed to take a hard look at the proposed pipeline's environmental impacts as required under NEPA, and sought to block its construction.

The groups claimed that the environmental impact statement improperly relied on a limited groundwater model that evaluated a hydrologic study area of 35 basins over 200 years and failed to analyze impacts that would continue to worsen beyond 200 years, the time required to mine the needed groundwater. They further alleged that the regional nature of the groundwater model made the results inherently uncertain, and a nonspecific evaluation of possible pumping impacts was no substitute for site-specific effects that were actually certain or highly likely to occur. Instead, the BLM allegedly required the Southern Nevada Water Authority to comply with a construction, operation, and mitigation plan without quantified targets that would trigger enforcement. As such, the groups considered the plan an inadequate safeguard against unreasonable impacts.

Although the Environmental Impact Statement predicted impacts to water levels in the White River basin, the groups claimed that Southern Nevada Water Authority planned to siphon water regardless of existing water rights and claims and that pumping would lower the water table by hundreds of feet over a vast and expanding area, causing devastating environmental and socioeconomic consequences on future development in eastern Nevada and western Utah. The groups also claimed the project would cause springs, wetlands, and riparian areas to dry out, destroying wildlife habitat for numerous species pro-

tected under the Endangered Species Act. Based on these widespread and unavoidable impacts, the groups alleged that the Bureau failed to consider reasonable alternatives to the proposed action. Accordingly, the groups claimed that the analyses were inadequate and violated the National Environmental Policy Act.

Petroleum Interests Prevented from Intervening in Case Alleging that Ocean Acidification Is Impaired Water

Center for Biological Diversity v. U.S. Environmental Protection Agency, Case No. C13-1866-JLR (W.D. Wash. Feb. 18, 2014).

A U.S. District Court for the Western District of Washington rejected the request of certain petroleum companies to intervene in an action claiming that the federal Clean Water Act required Washington and Oregon to add the ocean's acidification to their impaired waters list. The Center for Biological Diversity (CBD) had challenged the U.S. Environmental Protection Agency's (EPA) approval of both states' lists in spite of the water quality problems posed by acidity. The ocean's absorption of carbon dioxide lowers its pH, thus raising its acidity. CBD alleged that the acids strip seawater of the calcium carbonate required for sea life to build shells, thus causing declines in shellfish. CBD claimed that Washington and Oregon waters were particularly vulnerable to acidification, exposing marine life to corrosive surface waters along their coasts.

The Clean Water Act requires that states create a list of impaired waters that do not meet the states' water quality standards. CBD alleged that EPA has long acknowledged that human-made carbon dioxide emissions negatively impact marine ecosystems and species, including coral reefs, shellfish, and fisheries and that the Clean Water Act's impaired waters list must be used to address ocean acidification. Despite evidence linking ocean acidification to oyster production problems in Oregon and Washington, neither state included the allegedly affected segments of impaired waters in the list approved by EPA. Thus, CBD sought a declaration requiring EPA to partially vacate the approval and add waters impaired by ocean acidification.

Washington's water quality standards required a pH range of 7.0 and 8.5, with less than 0.2 units of human-caused variation. But coastal waters have exceeded this limit, preventing their designation as excellent habitat for plankton and shellfish. The failure to protect beneficial uses of water in segments including Puget Sound violated Washington's antidegradation policy, CBD argued, so they should have been listed as impaired waters under the Clean Water Act. Oregon's water quality standards likewise require waters free of dissolved gasses in quantities deleterious to aquatic life. Carbon dioxide in the ocean was allegedly destroying mussels, oysters, and scallops. Therefore, CBD asserted that the coastal waters and estuaries that fell below Oregon's water quality standards should have made the list of impaired waters submitted to EPA.

Western States Petroleum Association and the American Petroleum Institute sought to intervene in CBD's case. They represented petroleum interests in various states that, they alleged, would incur significant increased capital and operating costs to comply with potentially stricter permit limitations. However, the court found these interests too remote, with no direct, immediate harm to the petroleum companies if CBD prevailed. As such, the court denied the petroleum companies' request to intervene. (Melissa Cushman)

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

•EPA personnel conducted a series of inspections in March and May 2013 at the Double V Dairy, LLC, near Rock Valley, Iowa. As a result of the inspections, Double V Dairy, the former owner of the dairy, has agreed to pay a $75,000 civil penalty to settle alleged violations of the federal Clean Water Act (CWA). EPA inspections and sampling documented that Double V Dairy discharged manure into Rogg Creek and its tributaries while it owned the dairy between 2010 and 2013. Manure and other wastewater discharges from concentrated animal feeding operations and their land application areas can violate water quality standards, pose risks to human health, threaten aquatic life and its habitat, and impair the use and enjoyment of waterways. The manure discharges from Double V Dairy originated from stockpiles of used bedding sands that were stored outside in an uncontrolled area. Under Double V Dairy, LLC, the dairy had the capacity for approximately 1,200 dairy cattle. The dairy was sold in November 2013 and is still in operation today. EPA Region 7 is working with the new owners to assure compliance with the CWA.

•Alpha Natural Resources, Inc. (Alpha), one of the nation's largest coal companies, Alpha Appalachian Holdings (formerly Massey Energy), and 66 subsidiaries have agreed to spend an estimated $200 million to install and operate wastewater treatment systems and to implement comprehensive, system-wide upgrades to reduce discharges of pollution from coal mines in Kentucky, Pennsylvania, Tennessee, Virginia, and West Virginia. Overall, the settlement covers approximately 79 active mines and 25 processing plants in these five states. EPA estimates that the upgrades and advanced treatment required by the settlement will reduce discharges of total dissolved solids by over 36 million pounds each year, and will cut metals and other pollutants by approximately nine million pounds per year. The companies will also pay a civil penalty of $27.5 million for thousands of permit violations, which is the largest penalty in history under § 402 of the CWA. In addition to paying the penalty, the companies must build and operate treatment systems to eliminate violations of selenium and salinity limits, and also implement comprehensive, system-wide improvements to ensure future compliance with the CWA. These improvements include developing and implementing an environmental management system and periodic internal and third-party environmental compliance audits. The companies must also maintain a database to track violations and compliance efforts at each outfall, significantly improve the timeliness of responding to violations, and consult with third party experts to solve problem discharges. In the event of future violations, the companies will be required to pay stipulated penalties, which may be increased and, in some cases, doubled for continuing violations. The government complaint alleged that between 2006 and 2013 Alpha and its subsidiaries routinely violated limits in 336 of its state-issued CWA permits, resulting in the discharge of excess amounts of pollutants into hundreds of rivers and streams in Kentucky, Pennsylvania, Tennessee, Virginia, and West Virginia. The violations also included discharge of pollutants without a permit. In total, EPA documented at least 6,289 violations of permit limits for pollutants that include iron, pH, total suspended solids, aluminum, manganese, selenium, and salinity. These violations occurred at 794 different outfalls. Monitoring records also showed that on many occasions multiple pollutants were discharged in amounts of more than twice the permitted limit. Most violations stemmed from the company's failure to properly operate existing treat-

ment systems, install adequate treatment systems, and implement appropriate water handling and management plans. The settlement also resolves violations of a prior 2008 settlement with Massey Energy and applies to the facilities and sites formerly owned by the company. Under the 2008 settlement, Massey paid a $20 million penalty to the federal government for similar CWA violations, in addition to over a million dollars in stipulated penalties over the course of the next two years. Alpha purchased Massey in June 2011 and since that time has been working cooperatively with the government in developing the terms of this settlement. Alpha, headquartered in Bristol, Virginia, is one of the largest coal companies in the nation, operating more than 79 active coal mines and 25 coal preparation plants located throughout Kentucky, Pennsylvania, Tennessee, Virginia, West Virginia, and Wyoming. The Wyoming operations are not included in the settlement. The United States will receive half of the civil penalty and the other half will be divided between West Virginia, Pennsylvania, and Kentucky based on the number of violations in each state, as follows: West Virginia ($8,937,500), Pennsylvania ($4,125,000), and Kentucky ($687,500).

• EPA has issued a Notice of Violation to Utilities Inc., notifying them of violations observed at the Tega Cay Water Services' Wastewater Collection and Transmission System (Tega Cay) during a joint inspection with the South Carolina Department of Health and Environmental Control (DHEC) in December 2013. Tega Cay allowed at least 27 sanitary sewer overflows (SSOs) to occur from January 1, 2013 through January 2, 2014, resulting in 446,350 gallons of untreated sewage being discharged. At least 18 of the SSOs discharged untreated sewage to navigable waters of the United States. The Notice of Violation requires Tega Cay to follow the compliance dates noted in a related DHEC Consent Order executed on Feb. 3, 2014. EPA will monitor Tega Cay's progress in developing and implementing written Management, Operations and Maintenance programs, as well as continued rehabilitation and repair of its wastewater treatment plant and associated infrastructure, to address the violations over the next two years. Until consistent compliance is achieved, Tega Cay is considered to be in violation of the CWA and may be subject to additional enforcement action.

• The City of Great Falls, Montana and Malteurop North America, Inc. (Malteurop) have agreed to control wastewater discharges that generate high levels of toxic gas in the city's sewer system. The city has also agreed to make improvements to its wastewater treatment system to reduce raw sewage overflows in the city and the Missouri River. Under the terms of a consent decree with EPA, Malteurop will pay a civil penalty of $525,000 for discharges from its malting plant on State Highway 87 that EPA alleges caused high levels of hydrogen sulfide to form in the City of Great Falls' sewer system and will reimburse the city $21,396 for corrosion caused by the toxic gas. In addition, the city will pay a civil penalty of $120,000 and complete a supplemental project valued at $125,000 to remove pollutants from stormwater runoff during precipitation events. The settlement resolves alleged violations of CWA pretreatment regulations related to generation of hydrogen sulfide in the city's sewer system. EPA attempted to address these violations through administrative orders and referred the case to the U.S. Department of Justice when the violations remained unresolved. Malteurop's malting plant discharges wastewater that contains high levels of organic matter as a result of barley processing. This organic matter, combined with a lack of oxygen in the sewer, causes the formation of hydrogen sulfide, a toxic gas that poses dangers to workers and the public. The company has agreed to meet worker protection standards for hydrogen sulfide levels in the sewer system and plans to install a new service line that minimizes conditions that create the dangerous gas as a way to meet these standards. The proposed consent decree also addresses alleged violations of the CWA associated with persistent sewage overflows in the City of Great Falls wastewater system. These include several dozen incidents of raw sewage backing up into residences and buildings and flowing in city streets, as well as discharges of raw or partially treated sewage to the Missouri River.
The city has agreed to remedy these harmful overflows and discharges by increasing capacity at its treatment plant, improving the enforcement of pretreatment requirements at facilities that cause blockages, evaluating the capacity and condition of the sewer system, and improving the operation and maintenance of collection systems.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•EPA has filed a complaint against Zep, Inc., located in Atlanta, Georgia, alleging the sale and distribution of an unregistered and misbranded pesticide between April 21, 2010 and January 6, 2012, in violation of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Zep, Inc. allegedly manufactured and distributed "Formula 165" as a supplemental distributor without permission from the registrant. In the case of a registered pesticide sold under another company's name, the pesticide registrant must grant permission for the other company to manufacture and distribute its registered pesticide as a "supplemental distributor." When a supplemental distributor fails to obtain this permission, the pesticide is unregistered. In addition, EPA alleges that Zep gave false certifications of compliance with FIFRA Good Laboratory Practices (GLP) on documents associated with the registration of three pesticides in its line of Enforcer brand insecticides - Enforcer RoachMax Bait, Enforcer AntMax Bait and Enforcer Fire Ant Bait. Pesticide registrants are required to certify their compliance with the GLP on any testing or studies submitted to the EPA in support of a registration. Previously, Zep, Inc. complied with a Stop Sale Use or Removal Order (SSURO) issued by the EPA on April 20, 2012 to stop the sale of "ZEP Formula 165," a disinfectant intended for use in hospitals. Under EPA's antimicrobial testing program, ZEP Formula 165 was evaluated, and EPA's testing showed that contrary to labeling claims, the product was ineffective against Mycobacterium Tuberculosis. False or misleading label claims are misbrandings under FIFRA. The EPA is focusing national enforcement efforts on supplemental distributor activities because the agency has found that in many cases labels on pesticides produced and sold by supplemental distributors often lack critical information required by law, which increases the risk of harm from potential misuse of the product.

Indictments, Convictions, and Sentencing

•Patrick Henry Procino, age 66, of Laurel, Delaware, was sentenced to one-year probation, a $50,000 fine, and a $100 special assessment for one count of illegal storage of hazardous waste without a permit. On October 15, 2013, as the owner/operator of Procino Plating, Inc., Procino entered a guilty plea on behalf of that corporation to one count of violating the CWA. Procino was also sentenced on the Clean Water Act violation to five years of probation and a $400 special assessment. According to statements made at the plea hearing and documents filed in court, Procino owned and operated Procino Plating, Inc. in Blades, Delaware. Until the fall of 2007, the facility was utilized for plating and electroplating-related operations. From December 2007 through May 2010, Patrick Procino stored a tank containing approximately 450 gallons of liquid hazardous waste that originally had been used at the facility on its decorative chrome plating line. This chemical waste had a ph. of 0.8 and, therefore, was a corrosive waste under Resource Conservation and Recovery Act (RCRA). As to Procino Plating, in the course of its operations it produced wastewater, and pursuant to a pretreatment industrial wastewater permit issued by Sussex County, Procino Plating was permitted to discharge its industrial wastewater to the Seaford, Delaware treatment plant which, in turn, discharges into the Nanticoke River. On or about June 1, 2009, Sussex County modified Procino Plating's industrial user permit to specifically prohibit the discharge of wastewater generated as a result of electroplating operations, and any waste or bi-products of the electroplating processes then in storage at the facility. This modification was made based upon statements and representations by Procino Plating to Sussex County officials that the business has ceased electroplating-related operations at the facility. However, from June 2009 through March 2010, Procino Plating processed, through its wastewater treatment plant, stored drums of chemicals which were leftover from its former electroplating operations and, in violation of its CWA mandated permit, discharged resulting wastewater to the Seaford treatment plant. (Melissa Foster)

LAWSUITS FILED OR PENDING

U.S. SUPREME COURT DENIES PETITION FOR *CERTIORARI* ON NINTH CIRCUIT RULING AGAINST WATER DISTRICTS' CLAIMS THAT THE U.S. FAILED TO PROVIDE ADEQUATE DRAINAGE IN THE FEDERAL CENTRAL VALLEY PROJECT

The U.S. Supreme Court has denied a petition for cert. appealing from the Ninth Circuit's 2013 decision ruling against various water districts relating to allegations of a failure to provide adequate water drainage in the Central Valley Project (CVP). (*Firebaugh Canal Water Dist. v. U.S.*, (U.S. Feb. 24,2014); *Firebaugh Canal Water Dist. v. U.S.*, 712 F.3d 1296; (9th Cir. 2013).)

Background

The U.S. Congress passed the San Luis Act in 1960, authorizing the construction and maintenance of the San Luis Unit (Unit) of the Central Valley Project (CVP) by the Department of the Interior (DOI). The principal purpose of the federal portion of the San Luis Unit facilities was to furnish approximately 1.25 million acre-feet of water as a supplemental irrigation supply to approximately 600,000 acres of land located in the western portions of Fresno, Kings, and Merced counties. (*See*, http://www.usbr.gov/projects/Project.jsp?proj_Name=San+Luis+Unit+Project)

Congress conditioned construction of the Unit on one of two requirements: either (1) California's assurance that it would provide a master drainage outlet and disposal channel for the San Joaquin Valley or, (2) if California did not provide master drainage, the construction by DOI of a San Luis interceptor drain that would satisfy the drainage requirements of the Unit. DOI was also authorized to participate in the construction and operation of drainage facilities to serve the general area of the lands served by the Unit to the extent that the Unit facilities contribute to the drainage requirements of that area.

The State of California declined to build the drainage facilities for the San Joaquin Valley so DOI agreed to build the San Luis interceptor drain. Construction began in April 1968. Of the planned 188 miles of drain, 87 miles were completed, but construction was halted in 1975 because of mounting costs and concerns about the quality of the agricultural drainage that would go into the Sacramento-San Joaquin Delta. (http://www.usbr.gov/projects/Project.jsp?proj_Name=San+Luis+Unit+Project)

Part of the drain system was a concrete lined canal that ran from the town of Five Points to Kesterson Reservoir, near Gustine, Merced County, where water was ponded, regulated, and allowed to evaporate pending approval and construction of an outlet for the San Luis Drain. The reservoir also helped to conserve wildlife and was designated as a national wildlife refuge. Due to elevated levels of selenium in the drain water, which was damaging to wildlife, DOI closed Kesterson Reservoir in 1986 and plugged the drains that lead to it. (http://www.usbr.gov/projects/Project.jsp?proj_Name=San+Luis+Unit+Project) Despite the closure of Kesterson, the Bureau continued to provide irrigation water to the land within the Unit. Over the years, DOI has attempted to address the drainage situation within the Unit but, due to budgetary constraints, has completed few of the projects required to solve the problem.

Procedural History

Several parties affected by the poor drainage caused by the closure of Kesterson Reservoir have filed suit over the years, including Firebaugh Canal Water District. In *Firebaugh Canal Water District v. United States*, No. 88-CV-634 (E.D. Cal.), Firebaugh alleged that Interior was statutorily obligated to drain lands irrigated by the Unit. The District Court held that Section 1(a) of the San Luis Act required DOI to drain lands within the Unit and rejected DOI's claim that Congress's failure to provide funding and direction to DOI that it could not complete the interceptor drain, excused DOI's obligation to drain the lands irrigated by the Unit. The District Court ordered DOI to apply for a discharge permit to complete the interceptor drain. DOI appealed. The Ninth Circuit confirmed that the San Luis Act required the DOI to provide the interceptor drain, but also held

that subsequent Congressional actions gave the DOI discretionary authority to pursue alternatives in lieu of the interceptor drain. *Firebaugh Canal Co. v. U.S.*, 203 F.3d 568, at 574, 577, 578 (9th Cir. 2000) (*Firebaugh I*). On remand, the District Court modified its judgment to require DOI to provide drainage to the San Luis Unit without delay and to submit a detailed plan and schedule to accomplish the requirement. *Firebaugh Canal Water Dist. et al v. U.S. et al*, 712 F.3d 1296; 1299-1300 (9th Cir. 2013) (*Firebaugh II)*.

DOI's Response to the Court's Directive

DOI prepared an Action Plan (Plan), re-evaluated the Unit's drainage and environmental impact issues and sought public input. DOI's 2002 report concluded that approximately 379,000 acres would require drainage by 2050, 24,000 acres of which are outside the Unit but within Firebaugh's service area. In 2007, DOI issued a record of decision stating that it would pursue an "in-valley" alternative that would treat and reuse drainwater to reduce the total amount used, dispose of the wastewater in evaporation ponds and landfills, plus retire some lands from irrigated farming (the Plan). The cost estimate for the Plan was $2.69 billion, but existing legislation limits the amount to be spent on construction of the drainage project to $429M. DOI concluded that water districts that would benefit from the Plan could not afford to pay the difference in cost as is required by current Reclamation laws. DOI submitted a study to Congress outlining legislative changes that would enable DOI to implement the Plan, but Congress has not acted to change the monetary limit on construction. (*Firebaugh II* at 1300.) DOI requested and secured appropriations for some of the projects within the Drainage Plan, including a demonstration treatment plant in one water district and a drainage system for another district. (*Id.*)

Further Litigation

DOI settled with landowners within the Unit in 2002. Firebaugh's service area is outside the Unit so it filed amended complaints attempting to require DOI to either stop the flow of contaminated drainage water to its lands or to pay damages. One claim sought damages under the Federal Tort Claims Act (FTCA), alleging that failure to provide drainage was a trespass and nuisance. The second claim was based upon the Administrative Procedure Act (APA), alleging that DOI's failure to provide drainage constituted a final agency action that was arbitrary, capricious and an abuse of discretion, or constituted agency action unlawfully withheld or unreasonably delayed. (*Id.* at 1301.) The District Court held that DOI's only duty required by law was to provide drainage within the Unit, not outside. The District Court acknowledged that DOI's actions within the Unit had been "frustratingly slow" but did not constitute unreasonable delay as a matter of law. Firebaugh appealed.

The Ninth Circuit's Opinion

The Court of Appeals relied on the U. S. Supreme Court opinion in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) to determine how to interpret the court's authority:

> Thus, when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act but has no power to specify what the action must be. (*Id.* at 65.)

Firebaugh alleged that DOI had a duty to provide drainage to lands outside the Unit (*i.e.*, Firebaugh's service area) because drainage water was seeping into groundwater outside the Unit, thereby damaging property outside the Unit. The opinion points out that the act requires that DOI *shall* provide necessary drains within the Unit, but only authorizes DOI to build and operate drainage facilities outside the Unit for lands that may be affected by the Unit's irrigation drainage, and concludes that DOI has no duty to provide drainage facilities outside the Unit.

The opinion agrees that DOI is required to provide drainage within the Unit and notes that DOI has tried to get appropriations from Congress but Congress has not acted. Under the circumstances, the court concludes that DOI has not "unreasonably delayed." (*Id.* at 1303.)

The court's analysis of the claims under the FTCA comprised two issues. Under the FTCA, the United State is liable for tort damages "in the same manner and to the same extent as a private individual under like circumstances." (28 U.S.C, § 2674.) The court sidesteps this issue because it could find no California case re: the tort liability of private water suppliers for

downslope effects of their water supply. It relied on the second issue: the FTCA excludes claims:

> …based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. (28 U.S.C. § 2688(a).)

The Ninth Circuit found that the act gives DOI the discretion as to how to deal with drainage within the Unit, which is covered by the exclusion for discretionary functions.

Conclusion and Implications

The Ninth Circuit's opinion concedes that there may be a point at which the DOI's actions to deal with drainage in the San Luis Unit could become so "sluggish" that a court could find that DOI has abandoned its legal duty to provide drainage in the Unit, but finds the record before the court did not support such a conclusion. The Supreme Court's denial of the petition for *certiorari* affirms that landowners both within and outside the San Luis Unit are not likely to hold DOI accountable for the continuing damage caused by lack of drainage any time soon. (Jan S. Driscoll)

LANDOWNERS FILE FEDERAL TAKINGS SUIT AGAINST THE ARMY CORPS, SEEKING COMPENSATION FOR DAMAGES CAUSED BY FLOODING

Landowners in five states filed suit against the U.S. Army Corps of Engineers (Corps) on March 5, arguing that the Corps' management of Missouri River flooding has caused a taking of private property without compensation, in violation of the Fifth Amendment. The suit, *Ideker Farms Inc., et al v. U.S.*, Case No. 1:14-cv-00183-LJB (Court of Federal Claims,) claims that the landowners should be compensated for damages inflicted during periodic flooding along the Missouri River from 2007 through 2011.

Competing Management Priorities along the Missouri River

The Missouri River stretches across a 2,341-mile watercourse from the Rocky Mountains to a point just south of St. Louis, Missouri, where it meets the Mississippi River. Historically, the Missouri River had been prone to seasonal flooding, which was reduced during the 20th century due in part to the implementation of self-scouring channeling within the river bed, levees along the banks, and upstream dams and reservoirs used for flood control. In 1960, the Corps adopted the Missouri River Master Water Control Manual (Master Manual), which set out the agency's policies, procedures, and operations in managing the Missouri River and the surrounding basin. These policies were directed at reducing flood risk, increasing navigability, and allowing planning certainty for the agricultural and residential communities along the course of the river.

The Missouri River is also home to a number of endangered species. Under § 7 of the federal Endangered Species Act, a federal agency such as the Corps must consult with an appropriate expert agency (either the NOAA-Fisheries, or the U.S. Fish and Wildlife Service) when it authorizes, funds, or carries out discretionary actions that may affect endangered or threatened species. (*Id.* § 1536(a)(2); 50 C.F.R. § 402.02; *id.* § 402.03). These expert agencies, in turn, will issue a Biological Opinion (Bi-Op) assessing the potential risk to the endangered or threatened species, as well as recommended procedures to be taken to minimize the risk to the species.

The competing priorities of flood control and environmental management on the Missouri River came to a head in the early 2000s. In 2000, the U.S. Fish and Wildlife Service (FWS) issued a Bi-Op recommending that the Corps amends some of its policies and practices along the river in favor of protecting and restoring wildlife habitat three endangered species: the least tern, the piping plover, and the pallid sturgeon. Among other changes, the BiOp recommended flow enhancements, habitat restoration programs, and monitoring connected with preserving these species and their habitat along the river. The

BiOp further observed that flood control had historically been the highest priority along the river, and that the environmental directives of the BiOp might sometimes conflict with flood control objectives. The same BiOp was amended in 2003, to further recommend seasonal releases to benefit pallid sturgeon.

Landowners Allege a Federal Taking

In 2004, the Corps updated its Master Manual. The 2004 Master Manual provided for seasonal releases, and was followed by an additional update to the Master Manual in 2006. The *Ideker Farms Inc.* suit focuses on four years of flooding along the Missouri River after these updates to the Master Manual were implemented: 2007, 2008, 2010 and an historic 100-day long flood in 2011. The flooding was spread across land in five states: Missouri, Iowa, Nebraska, Kansas and South Dakota, and occurred mostly across farmland.

The landowners allege that the flooding in each of these contested years was the "direct, natural, probable, and foreseeable result" of a change in position by the Corps on its flood control policies and procedures. The suit is grounded in the claim that when the Corps adopted the updated Master Manual in 2004, it:

> …departed from its longstanding policy and practice of prioritizing flood control, and drastically changed its Master Manual and its policies…gutting its longstanding flood-control practices in the process. (Complaint at 45).

The suit does not allege that the Corps has mismanaged the river. Rather, the plaintiffs argue that the Corps' prioritization of flood control operations, in light of environmental demands, resulted in the damages for the landowners. In particular, the suit takes issue with changes in the amount of water stored behind upstream dams, and the schedule for water releases from those dams; notching of dikes along the river, which resulted in scouring of the river banks; and construction of secondary channels that increase the frequency and duration of floods, while enhancing habitat areas around the river.

The Fifth Amendment's Takings Clause provides that private property shall not be "taken for public use, without just compensation." Where a government action results in the taking of private property, private property owners may be able to recover compensation through the filing of a takings suit. Here, plaintiffs have alleges that their property was "taken" when, as a result of the Corps actions their farms became entirely unusable, or dramatically limited, following the flooding. Individual plaintiffs' particular injuries vary, but include temporary flooding, large and permanent sand deposits, and gouging that rendered the area no longer productive for farming.

Conclusion and Implications

Though the Corps declined to comment on the case, the success or failure of the landowners' claims will depend on their ability to demonstrate that the Corps' management decisions (rather than an unusual flood event) were the cause of the damages suffered by the landowners. Still, this line of argument is not without precedent. In December 2012, the U.S. Supreme Court held that even short-term flooding could give rise to a takings claim. *Arkansas Game & Fish Commission v. U.S.*, 133 S.Ct. 511, 518 (2012). The *Arkansas Game & Fish Commission* Court identified five key considerations that indicate whether a government action has violated the Takings Clause: (1) the duration and frequency of the government interference; (2) the extent to which the invasion was intentional, or was the foreseeable result of authorized government action; (3) the character of the land at issue; (4) the owner's "reasonable investment-backed expectations" regarding the land's use; and (5) the severity of the intrusion (*Arkansas Game & Fish Commission*, 133 S.Ct. at 518).

Although nearly 200 plaintiffs have joined the lawsuit, the case is not a class action lawsuit. Rather, the plaintiffs seeks to have the core Fifth Amendment Takings challenge recognized by the courts, then address each plaintiff's claim on its own. As a result, the primary action in the Court of Federal Claims may be followed by subsequent proceedings to determine whether each plaintiff has, individually, suffered a compensable taking. Additional information on the proceedings may be found at http://www.missouririverflooding.com/SitePages/Home.aspx. (R. Anderson Smith, Andrea Clark)

JUDICIAL DEVELOPMENTS

FIFTH CIRCUIT FINDS THAT LOCAL JURISDICTIONS' POLICE POWERS ARE PREEMPTED BY FEDERAL CLEAN WATER ACT IN *DEEPWATER HORIZON* LITIGATION

In Re: Deepwater Horizon, ___F.3d___, Case No. 12-30012 (5th Cir. Feb. 24, 2014).

The U.S. Court of Appeals for the Fifth Circuit refused to overrule the federal District Court for the Eastern District of Louisiana's refusal to remand back to state court and decision to dismiss the state law claims brought by local governmental entities against British Petroleum and others over pollution-related wildlife damage linked to the Deepwater Horizon explosion and oil spill, ruling that the federal courts had exclusive jurisdiction and that federal law preempted state law claims.

Factual and Procedural Background

On April 20, 2010, the Macondo well, which was being drilled by the mobile offshore drilling rig Deepwater Horizon, experienced a catastrophic blowout and explosion that caused hydrocarbon, mineral, and other contaminant pollution all along the shores and estuaries of the Gulf Coast states, inflicting billions of dollars in property and environmental damage and resulted in the filing of thousands of lawsuits.

Eleven Louisiana coastal parishes (counties) filed suits in state court against the British Petroleum family of companies and other defendants involved in the Deepwater Horizon oil spill to recover penalties under The Louisiana Wildlife Protection Statute (Wildlife Statute) for the pollution-related loss of aquatic life and wildlife. The cases sought only penalties accruing under state law for pollution damages that occurred in state waters or along the coastline.

The defendants removed the case to federal court and thereafter sought to dismiss the parishes' claims. In ruling on those motions, the District Court held that admiralty jurisdiction was present because the alleged tort occurred upon navigable waters and disrupted maritime commerce and that the operation of the Deepwater Horizon bore a substantial relationship to maritime activities and thus was properly maintained in federal District Court. The District Court ultimately held that state law was preempted by maritime law and dismissed the parishes' cases. The instant appeal followed.

The Fifth Circuit's Decision

The Fifth Circuit first considered whether the District Court properly denied the parishes' request that the cases be remanded back to state court.

Removal

The court started its analysis of the removal issue by looking to the language of the Outer Continental Shelf Land Acts (OCSLA) which stated that:

> …the District Court of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with… any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals….

It then noted that under its own established authority, a plaintiff does not need to expressly invoke OCSLA in order for it to apply and that it could apply even to claims brought exclusively under state law. The court considered and applied the following two-part test to determine whether the federal court should have jurisdiction. To make such a determination a could must consider whether: (1) the activities that caused the injury constitutes an "operation" conducted on the outer Continental Shelf that involved the exploration and production of minerals and (2) the cases arose out of, on in connection with the operation.

The parishes disputed that the second element was met and contended that their wildlife claims did not arise out of the operations and that a mere connection to the operations was insufficient under the statute. The Fifth Circuit affirmed the District Court's determination that the damages occurred because the

oil spill, which was a result of the "operations" and found that all that was needed was a "but-for" connection to the exploration for the federal court to maintain jurisdiction. Therefore, the court found that both preconditions for removal jurisdiction existed.

State Wildlife Statutes

The Fifth Circuit then turned to the question of the whether the state wildlife statutes could even be applied to the defendants. The parishes argued that because the harm to wildlife for which they sought redress occurred exclusively in the Louisiana state waters, that Louisiana law applied and the parishes had the right to exercise their traditional police powers under state law. However, in making that argument, they referenced the applicability of the federal Clean Water Act and the Oil Pollution Act and the "savings clauses" in each which they claimed preserved some state remedies.

The court felt that by referencing federal statutes while at the same time contending that the remedy they sought was exclusively a creation of state law was inconsistent and revealed a logical flaw in the parishes' argument. Because the parishes could not prove the defendants responsibilities for the injuries to wildlife without alluding to Deepwater Horizon's operations and the catastrophic blowout and explosion, which were controlled by federal law, federal environmental law and remedies were directly implicated and thus applicable to the cases.

The Fifth Circuit found that:

> …federal law, the law of the point source, exclusively applies to the claims generated by the oil spill in any affected state or locality.

In reaching this conclusion, the court cited the U.S. Supreme Court's decision in *International Paper Co., v.* Ouellette, 476 US 481, 107 S. Ct. 805 (1987), which found that the Clean Water Act prevents states from imposing separate discharge standards on a single point source. As the Deepwater Horizon rig was a single point source and could only be subject to one standard, that single standard had to be federal law.

The Clean Water Act Provided the Exclusive Remedy

The parishes' attempted to argue that the Clean Water Act was not an exclusive remedy because it expressly preserved some state law claims. The Fifth Circuit rejected this argument and stated that state law only applies to an interstate discharge when the source is situated within the state rather than in federal waters. Because the Deepwater Horizon rig was located in federal waters outside the jurisdiction of any state that savings clause was in applicable.

'Generous Remedies'

The court ultimately concluded that that the *Ouellette* decision applied to tragic cases like this where there was a devastating oil spill that the affected parties in numerous states. Under that precedent, the parties are left suing for the "generous remedies, including for loss of wildlife, under federal statute." The court reasoned that chaos would ensue if each individual state, and its local jurisdictions, were permitted to sue under their separate state laws for remedies that were clearly provided for under applicable federal law.

Conclusion and Implications

The Fifth Circuit decision to affirm the dismissal of the parishes' claims is consistent with rulings on similar claims asserted by local jurisdictions in nearby states. This decision limits the abilities of state and local municipalities to control activities in nearby waters, which are technically outside of their territorial jurisdiction, despite the fact that those activities could have devastating impacts on their land and people. This case sets precedent that in times of a catastrophic incident which impacts multiple states, the courts are going to rely exclusively on federal law and remedies. (Danielle Sakai)

DISTRICT COURT BARS RELIANCE ON ENVIRONMENTAL LAW THEORY OF LIABILITY NOT DISCLOSED IN RESPONSE TO CONTENTION INTERROGATORIES

In re: Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation, ___F.Supp.2d___, Case No. 1:00-cv-01898-SAS-DCF (S.D. N.Y. Feb. 6, 2014).

The U.S. District Court for the Southern District of New York recently granted summary judgment in favor of a defendant supplier of gasoline in an action by New Jersey environmental agencies seeking to hold the defendant liable for groundwater contamination at a service station site. The plaintiff agencies opposed summary judgment based on a theory of liability against the defendant that had never been disclosed in responses to contention interrogatories or during fact or expert discovery. The District Court found that the plaintiff agencies failed to comply with the requirement of Rule 26(e) of the Federal Rules of Civil Procedure, which requires amending discovery responses when they are materially incomplete and/or incorrect, and that Rule 37(c)(1) required the undisclosed theory of liability to be precluded because the plaintiffs did not meet their burden of showing that the defendant had not be prejudiced by the omission.

Background

The New Jersey Department of Environmental Protection, the Commissioner of the New Jersey Department of Environmental Protection, and the Administrator of the New Jersey Spill Compensation Fund (collectively: plaintiffs) filed suit seeking recovery for actual and/or threatened contamination of groundwater from the defendants' supply and/or use of gasoline containing methyl tertiary butyl ether (MTBE) and/or TBA (a product formed by the breakdown of MTBE in water). Originally filed in the District of New Jersey, the lawsuit was transferred on January 14, 2008 to the Southern District of New York, as part of the consolidated multi-district litigation related to MTBE contamination.

In September of 2012, the plaintiffs responded to contention interrogatories, which asked them to identify the defendants alleged to be liable for damages at each delineated "trial site" (*i.e.*, specific location of MTBE contamination) and all facts and documents that proved each defendant's liability at each site. With regard to the Skyline Service Center (Skyline) trial site, the plaintiffs identified defendants including Texaco but did not name either defendant Chevron Corporation or defendant Chevron U.S.A., Inc. (CUSA). The plaintiffs further responded that Texaco supplied MTBE gasoline to Skyline pursuant to a branding agreement. Although the plaintiffs believed that defendant Chevron Corporation was the successor-in-interest to Texaco, they did not describe, in their interrogatory responses, any factual basis for a theory of liability linking CUSA to the Skyline site.

On December 27, 2012, the District Court issued Case Management Order (CMO) 107, which limited the defendants against which the plaintiffs could proceed for the Skyline site to Sunoco, Texaco, CITGO, and "Chevron." On the basis of CMO 107 and the plaintiffs' responses to the contention interrogatories, CUSA's expert opined in his expert report that there was no allegation that CUSA supplied gasoline to Skyline. The plaintiffs did not refute this statement at any time prior to the close of expert discovery.

However, once the plaintiffs learned that CUSA was going to move for summary judgment regarding its liability at the Skyline site, they alleged, in a September 4, 2013 pre-motion letter, that CUSA was liable for MTBE contamination at Skyline because CUSA sold MTBE-containing gasoline to Star Enterprise and that Star Enterprise supplied gasoline to Skyline when MTBE releases occurred (Star Theory). The Star Theory was never disclosed in the plaintiffs' responses to the September 2012 contention interrogatories, at any time during fact or expert discovery, or at any time prior to the September 2013 pre-motion letter.

The District Court's Decision

CUSA ultimately moved for summary judgment with regard to its liability for contamination at Skyline, and the issue before the court was whether to preclude plaintiffs from arguing the Star Theory against CUSA. The plaintiffs argued that (1) because "Chevron" was listed beside Skyline in CMO 107,

CUSA has notice of the plaintiffs' claims against it related to Skyline, and (2) CUSA did not suffer any prejudice due to the plaintiffs' failure to include the Star Theory in its responses to the contention interrogatories.

'Chevron' Ambiguity Issue

With regard to the plaintiffs' first argument, the court agreed that the term "Chevron" had been used in the litigation to refer sometimes to Chevron Corporation and sometimes to CUSA and accepted that the plaintiffs had believed that the use of the term "Chevron" in CMO 107 with regard to the Skyline site included CUSA. However, given the ambiguity of the term, the court also declined to find that CUSA's receipt of CMO 107 meant that CUSA knew of the plaintiffs' claims against it related to Skyline. Moreover, the court reasoned that CMO 107 did not relieve the plaintiffs from their obligation under Rule 26(e) of the Federal Rules of Civil Procedure to amend their interrogatory responses in a timely manner if they learned that in some material respect their responses were incomplete or incorrect. The court noted that the plaintiffs' contention interrogatory responses never even hinted at the Star Theory and that the plaintiffs should have been aware of the omission, especially given CUSA's expert report referencing the lack of allegations that CUSA supplied gasoline to Skyline.

Theory of Liability Disclosure

With regard to the plaintiffs' second argument, the court noted that unless the failure to disclose a theory of liability was substantially justified or harmless, Rule 37(c)(1) of the Federal Rules of Civil Procedure mandates the theory's preclusion. The court reasoned that the burden was on the plaintiffs to show that their omission would not prejudice CUSA, and that not only did the plaintiffs fail to carry this burden, but CUSA affirmatively submitted evidence that it had in fact been prejudiced by this omission because its expert report did not analyze a theory of liability against CUSA at Skyline. The court further reasoned that this was not a mere procedural technicality because the case was so site-specific. Ultimately, the court found the likelihood of prejudice to CUSA too great, barring the plaintiffs from asserting the Star Theory and granting CUSA's motion for summary judgment.

Conclusion and Implications

In declining to allow the plaintiffs to use a previously undisclosed theory of liability against the defendant, the court applied, in a straight forward way, settled principles of federal civil procedure and discovery in a complex environmental matter. The court's opinion is a good reminder of the importance of complete and correct discovery responses, particularly in the context of complicated multi-party litigation where it is easy to lose track of such details. All counsel would do well to take note of the possible dispositive result that can occur from failure to amend one's discovery responses in accordance with Rule 26(e) of the Federal Rules of Civil Procedure. (Jamie O. Kendall, Duke K. McCall, III)

DISTRICT COURT AFFIRMS PRP GROUPS' ABILITY TO PROSECUTE BOTH CERCLA SECTION 107 AND SECTION 113 CLAIMS SIMULTANEOUSLY

LWD PRP Group v. ACF Industries, et al., ___F.Supp.2d___,
Case No. 5:12-cv 00127 JHM (W.D. KE. Feb. 7, 2014).

The U.S. District Court for the Western District of Kentucky denied the defendants' motion to dismiss the plaintiff potentially responsible party (PRP) group's lawsuit filed under the federal Comprehensive Environmental Response Compensation and Liability Act (CERCLA) for cost recovery and contribution. Defendants contended that the CERCLA §§ 107(a) and 113 could not both be maintained. The District Court rejected that and all of the defendants' other arguments.

Factual and Procedural Background

Plaintiff, the LWD PRP Group, is a group of companies that generated and/or transported hazardous waste to a former hazardous waste incinerator at the LWD Incinerator Site in Calvert City, Kentucky from the 1970s to 2004. The LWD PRP Group consisted of over fifty potentially responsible parties, in their own right, along with other PRPs who settled with the LWD PRP Group and assigned their rights to the LWD PRP Group. The LWD PRP Group cooperated with the U.S. Environmental Protection Agency (EPA) and the State of Kentucky to address environmental concerns related to the LWD Incinerator Site, which was listed as a Superfund site.

The EPA entered into an Administrative Settlement Agreement and Order on Consent for Removal Action (Removal Action AOC) with 58 former LWD customers, including the members of the LWD PRP Group. In the Removal Action AOC, the LWD customers agreed to perform specified remaining time-critical removal action activities at the LWD Incinerator Site and pay for the EPA's future response costs associated with the LWD Incinerator Site. In addition to entering into the Removal Action AOC, LWD PRP Group was also negotiating a CERCLA § 122(h) settlement with the EPA for the EPA's past response costs at the site and negotiating with the Kentucky Department of Environmental Protection ("KDEP") for "certain remediation, monitoring and maintenance activities . . . ." The LWD PRP Group allegedly paid over $9.5 million in response costs relating to the LWD Incinerator Site and filed suit against the non-settling defendants, seeking to recover some of these costs.

The LRD PRP Group's action seeks cost-recovery under CERCLA § 107(a) and contribution under § 113, as well as related state laws. The complaint also sought a declaratory judgment against the defendants holding them liable for their respective equitable shares of future response costs.

The defendants collectively filed a motion to dismiss setting forth six arguments: (1) the § 107(a) cost-recovery claim cannot be maintained because plaintiffs' exclusive remedy against is contribution under § 113(f); (2) the contribution claim under § 113(f) is time-barred; (3) the state law claims have the same failings as the federal cost recovery and contribution claims; (4) the declaratory judgment under CERCLA fails because there was no current substantive cause of action under CERCLA; (5) the declaratory relief claim was speculative and unripe; and (6) the LWD PRP Group cannot sue in the name of the "LWD PRP Group" since the LWD PRP Group was not the real party in interest.

The District Court's Analysis

The District Court first considered defendants argument that the § 107(a) cost-recovery claim was barred because the LWD PRP Group's exclusive remedy against the defendants was contribution under § 113(f).

Analysis under *Atlantic Research*

The court looked to *United States v. Atlantic Research Corp.*, 551 U.S. 128, 129, 127 S. Ct. 2331, 168 L. Ed. 2d 28 (2007), and noted that the Supreme Court held that CERCLA provided two distinct remedies by which PRPs may recover some or all of their hazardous waste clean-up costs from other PRPs: (1) cost-recovery claims under § 107(a); and (2) contribution claims under § 113(f). The first

option, § 107(a), provides that PRPs are liable for any necessary costs of response incurred by any other person and that it creates an implied private right of action to recover "necessary costs of response." Under the second option, § 113(f), and person may seek contribution from any other person who is liable or potentially liable under § 107(a), during or following any civil action under §§ 106 or 107(a). In addition, under § 113(f)(3)(B), responsible parties who resolve their liability to the United States or to a state through an administratively- or judicially-approved settlement may seek contribution from other responsible parties.

Defendants argued that because they had entered into the Removal Action AOC, all of the plaintiffs' costs were compelled and therefore not recoverable under § 107. In contrast, the plaintiffs contend that until such time that settlements had been reached with all of the regulatory agencies, some of the costs were voluntarily incurred.

The court ultimately found that it would be premature to dismiss the LWD PRP Group's § 107(a) cost-recovery claim as it had sufficiently plead a § 107(a) cost-recovery claim to the extent that some of its alleged $9.5 million in clean-up costs were voluntarily incurred as a result of the LWD PRP Group's negotiations with the KDEP. The court did note, that if plaintiffs finalize their settlement with the KDEP, it will be required to dismiss the § 107 claim and proceed sole under § 113.

Was the Section 113 Claim Time Barred?

The court then turned to the claim that the § 113(f) contribution claim was time barred with respect to the costs incurred under the Removal Action AOC. Defendants argued that there was a three-year statute of limitation in § 113(g)(3) running from the date of the administration order. Plaintiffs argued that the statute of limitation was controlled by § 113(g)(2) and not § 113(g)(3) and thus it was three years from the completion of the work.

To answer this question, the court considered whether the Removal Action AOC constituted a "cost recovery settlement" under CERCLA § 122(h). Because the Removal Action AOC was entered into to perform specified time-critical removal action activities at the site and to cover the EPA's future costs associated with the site, but did not reimburse EPA's past costs, it was not a cost recovery settlement and the statute of limitations from § 113(g)(2) would apply.

Because the court found that the CERCLA §§ 107 and 113 claims were well plead, it rejected the motion as to the state law and declaratory relief cause of action.

Speculative/Ripeness Arguments

Next the court considered the speculative/unripe argument. In considering whether a claim is ripe for adjudication, the curt considered (1) "the likelihood that the harm alleged . . . will ever come to pass"… (2) whether the factual record . . . is sufficiently developed to produce a fair and complete hearing as to the prospective claims; and (3) the hardship that refusing to consider plaintiff's prospective claims would impose upon the parties. After considering these factors, the court agreed that defendants' argument was without merit. The District Court looked at the current status of the LWD PRP Group's negotiations with the EPA and the KDEP and found that that there was a substantial likelihood that the alleged harm would come to pass and that the court could enter a declaratory judgment for the defendant's respective equitable shares of future response costs.

Lastly, the court considered whether the complaint should be dismissed based upon the claims that the plaintiff group was not the real party in interest. After considering a number of cases where courts have allowed voluntary PRP associations to file suits under CERCLA, the court rejected this argument as well.

Conclusion and Implications

While the plaintiffs may be forced to amend their complaint after finalizing further settlements with the EPA and the KDEP, the District Court is allowing the plaintiffs to proceed under both § 107(a) and 113 at the same time. If the plaintiffs do not voluntarily dismiss the § 107(a) claim, it may be subject to appeal as the number of cases suggest that those two claims cannot be maintained simultaneously. (Danielle Sakai)

DISTRICT COURT CASE IN INDIANA IS A PRIMER FOR SUITS AGAINST SUBDIVISION DEVELOPERS WHO CAUSE FLOODING FROM JURISDICTIONAL WATERS

Stillwater of Crown Point Homeowners' Association et al, v. Stiglich, ___F.Supp.2d___, Case No. 09–CV–157–PRC (N.D. Ind. Feb. 26, 2014).

A late February decision from the U.S. District Court for the Northern District of Indiana gives attorneys a roadmap on how to pursue developers and municipalities for failure to assure appropriate permitting and engineering of projects that deal with storm water flows to jurisdictional ditches and wetlands.

Background

In this case, filed by members of a Homeowners Association, the individual owner of the LLC was found guilty of violation of Clean Water Act requirements on a theory of being the responsible individual directing the work. Additional findings of violations of permit requirements affected the corporate and LLC parties, with the City of Crown Point also sharing in the blame. The facts in the case show a developer aware of the Clean Water Act requirements and represented by a water permitting consultant, yet tripped up nevertheless by inattention to important details, to permit conditions, and to engineering necessity of assuring adequate storm water flow in heavy precipitation events. The developer put roadway crossings over a major ditch that was a tributary of a tributary of the Little Calumet River, a major navigable waterway. The magistrate who decided the case had no trouble in finding the waters involved to be "navigable" for purposes of U.S. Army Corps of Engineers (Corps) and U.S. Environmental Protection Agency (EPA) Jurisdiction under Clean Water Act §§ 401 and 404. The development required roadways over the ditch into an area where new homes were being constructed. Using what are very common designs and construction techniques, the ditch was partially filled and bridged, pursuant to a nationwide permit, NWP 26. Piping was placed under the roadways to allow water flow to be maintained.

Part of the project involved the establishment of conservation areas within the development so that the limited wetland damage that did occur from construction would be compensated for according to Corps regulations. Once the construction began in earnest, however, inspectors found violations of applicable permit conditions and also of rules for prevention of undue stormwater runoff. Citations were issued and findings of some violations occurred. Although the conditions were by and large corrected as to construction, it turned out, according to the plaintiffs' expert, the sizing of the culverts that allowed water to flow in the ditch was not adequate to handle 100-year storms. A series of heavy rain events over several years occurred, with flood damages ensuing to individual homeowner's properties.

At one point, a new set of warnings was issued by the Corps, indicating to the developers that their permit had lapsed, and that new construction that was underway was illegal. Steps were taken to get after the fact permission for the cited construction. Although not expressly stated in the opinion, it seems likely that the HoA was vigilant on the property owners' behalf. Over the years involved, both state and federal agencies acted to cite the developer for aspects of the project deemed to be violations.

The District Court's Decision

The case was originally filed against several defendants, including the city and corporate or LLC defendants. The city was deemed in violation of permitting the culverts to be built with undersized piping by the State of Indiana Department of Natural Resources (DNR). The litigation against each of the defendants was previously separately resolved by the court. The remaining individual, Mr. Stiglich, filed for bankruptcy, and the case was stayed. On its reopening, the plaintiffs moved for summary judgment. Their theories of recovery included *per se* negligence on the basis of the regulatory and permit violations, in addition to Clean Water Act citizens' suit for injunctive relief, damages and costs of litigation. Stiglich was not represented by counsel. While perhaps an attorney would have found a factual basis to fight or beat the complaint, the facts stated by the court make the outcome seem pretty inevitable.

Clean Water Act Claims

On the Clean Water Act allegations, the plaintiffs were granted summary judgment. The court found that IDEM's and the Corps of Engineers' approval of the CWA § 401 and CWA § 404 permits for the Greenview Place and Stillwater Parkway crossings was expressly conditioned on Stillwater Property's commitment to construct the crossings in conformance with the December 11, 1997 applications, including the implementation of wetlands mitigation to "restore the original hydrology levels" to all wetland areas. However, as set forth in the material facts, Stillwater Property did not construct the development as described in the December 11, 1997 applications. The court found the drainage culverts installed at the crossings were too small to efficiently convey storm water runoff that flows into and through Smith Ditch. In addition, boundaries between wetlands and uplands were not properly demarcated and separated by properly in- stalled silt fencing. As a result, the court held that all wetlands in Stillwater Subdivision were not restored to original hydrology levels. This was a violation of the explicit terms of the permits and, accordingly, the discharge of fill into Smith Ditch was not in compliance with a valid CWA permit and was unlawful pursuant to 33 U.S. C. § 1311.

Conclusion and Implications

Exactly why the developers did not adhere to the important details of the permit is not discussed. It is clear from the opinion that even though not initially in charge, once he was in charge Stiglich was directly advised on the determinations by the agencies that there was a problem, what the problem was, and that he needed to fix it or could face legal action. From these facts, and relevant cases cited in the opinion, the magistrate holds Stiglich individually liable, civilly, for damages and costs.

As a practical matter, based on this and other cases, no individual should feel comforted unduly by the use of either a corporate or LLC structure if that individual remains in charge of decisions having to do with environmental compliance and related activity. Personal responsibility will be assessed against the individuals exercising control and creating or causing violations of permits or allowing them to continue. (Harvey M. Sheldon)

DISTRICT COURT STRIKES DOWN NEBRASKA LAW ALLOWING KEYSTONE XL PIPELINE

Thompson v. Heineman, ___F.Supp.2d___, Case No. CI 12-2060 (D. Neb. Feb. 19, 2014).

On February 19, 2014, the U.S. District Court in Nebraska struck down a law permitting the Keystone XL pipeline to carve a path through the state, invalidating the governor of Nebraska's approval of the pipeline route. The court concluded that the law improperly allowed the governor to give TransCanada Corporation Keystone Pipeline, LP (TransCanada), the Keystone XL pipeline applicant, the power of eminent domain. Permission allowing the company to force landowners to sell their property should have been given by the Nebraska Public Service Commission, said the court. That agency regulates pipelines and other utilities in Nebraska.

The Keystone XL Pipeline

The Keystone XL pipeline would transport 830,000 barrels of oil daily from the Saskatchewan province in Canada to refineries on the Gulf Coast and would cost $7 billion. The pipeline route is set to run from Canada through Montana, South Dakota, Kansas, and Nebraska, connecting to existing pipeline in Oklahoma and Texas. Those states have already approved their segments of the pipeline route.

TransCanada argued that cutting directly from South Dakota through Nebraska to Kansas is the most direct route for the pipeline; circumventing the state would require approval from other states, which would cause expensive delays.

The Nebraska Lawsuit

Thompson v. Heineman was filed by three Nebraska landowners whose property lies in one of the proposed paths of the Keystone XL pipeline.

The court first noted that the issues addressed in its opinion had nothing to with the merits of the pipeline. Rather, the case concerned the constitutionality

of Legislative Bill (LB) 1161, a 2012 law amending Nebraska's pipeline siting laws enacted the previous year. The purpose of LB 1161 was to:

> …clarify the law that a pipeline carrier is to follow depending on the date an application is made for a Presidential Permit from the State Department and to provide for a process that would authorize the Nebraska Department of Environmental Quality (NDEQ) to conduct an environmental impact study of a pipeline route going through Nebraska to be used for a federal permit application when there is no federal permit application pending.

LB 1161 amended two previous pipeline siting laws:

> …in order to establish an alternative method for oil pipeline carriers to seek review and approval of a proposed pipeline route through Nebraska.

Those laws allowed carriers to seek review of proposed pipelines only from the Nebraska Public Service Commission (PSC), an agency formed in the 1890s to prevent Nebraskan governors from granting political favors to railroad executives who wanted to expand through private property. LB 1161 specifically allowed pipeline carriers to seek and obtain approval of a proposed pipeline route from Nebraska's governor following a self-funded environmental review by the NDEQ.

The District Court's Decision

LB 1161 Granted an Unlawful Delegation of Authority

Plaintiffs made four allegations regarding LB 1161's unconstitutionality. The court found merit in one of those arguments: the law constituted an unlawful delegation of authority. The court noted that article IV, § 20 of the Nebraska Constitution requires that the power to regulate common carriers exists either in the PSC or the legislature. After concluding that oil pipeline carriers subject to LB 1161 are considered "common carriers" under Nebraska law, the court addressed whether LB 1161 unlawfully divested the PSC of control over routing decisions involving such common carriers. Though the law did not compel pipeline carriers to choose the gubernatorial statutory process over the PSC's process, it did encourage pipeline applicants to go first through the governor, because if that path proved unsuccessful, the applicant could then try the PSC's process. Thus, the court held that "because LB 1161 has the effect of either temporarily or permanently divesting the PSC of control over common carriers not in the Legislature but in NDEQ and the Governor," the law violated the state constitution.

The court declared LB 1161 unconstitutional and void. Because the governor's January 22, 2013 actions approving the Keystone XL pipeline route were predicated on that statute, the court held that those actions were also invalid.

Conclusion and Implications

Before the Nebraska PSC can act to give TransCanada eminent domain authority, lawmakers in the state may have to pass a new law. Even then, it is not clear that the PSC would grant TransCanada the ability to condemn property. Furthermore, while the State Department made no major objections to the pipeline's environmental impacts, opponents of the pipeline say that the Keystone XL pipeline threatens groundwater and surface water and would disrupt soil. Though the route has been redrawn to avoid the ranchlands of the Nebraska Sand Hills, opponents argue that alternate routes still pose environmental concerns.

Canada considers the Keystone XL pipeline an essential component in its effort to export oil. The country is seeing a growth in oil sands production, and TransCanada stated that Keystone XL will bring thousands of jobs to Americans and ensure a secure supply of crude oil. Recent catastrophes, including a high-profile explosion killing 47 people in Canada last year, and an explosion this year in North Dakota, have raised concerns about transporting crude oil via train.

The court's decision likely will further delay completion of the pipeline. The state says it will appeal the ruling. Even if the appeal is successful at overturning the trial court's order, the decision whether to issue a federal permit still rests with the President. (Gwynne B. Hunter, Jeannie Lee)

DISTRICT COURT DENIES PREVAILING DEFENDANT IN CLEAN WATER ACT LITIGATION COSTS BECAUSE PLAINTIFFS' CLAIM WAS NOT FRIVOLOUS OR WITHOUT FOUNDATION

Wisconsin Resources Protection Council, et al. v. Flambeau Mining Co., ___F.Supp.2d___, Case No. 11-cv-45-bbc (W.D. Wis. Feb. 5, 2014).

In an order filed by U.S. District Judge Barbara Crabb, the U.S. District Court for the Western District of Wisconsin held that, under the federal Clean Water Act, a defendant that prevailed on appeal was not entitled to recover its underlying litigation costs accrued despite incurring costs for the defense of a cause of action that plaintiffs did not pursue and providing discovery responses that plaintiffs never looked at. The court determined that the Clean Water Act required a showing that a lawsuit was unreasonable, frivolous or groundless in order for a prevailing defendant to collect its litigation costs. The court thereby read the Clean Water Act in conformity with the Clean Air Act and Title VII (42 U.S.C. § 2000e-5k), both of which require a showing of unreasonable, frivolous, or groundless litigation to support a fee award.

Factual and Procedural Background

Plaintiffs Wisconsin Resources Protection Council, Center for Biological Diversity and Laura Gauger brought an action for declaratory and injunctive relief and civil penalties under the citizen suit provision of the Clean Water Act. Plaintiffs contended that defendant Flambeau Mining Company was violating the Clean Water Act by discharging pollutants without a Wisconsin or National Pollutant Discharge Elimination System permit issued under the act.

The plaintiffs sued Flambeau Mining Co., claiming that the defendant's mining operation had caused environmental damage to the Flambeau River.

Plaintiffs prevailed at trial before the District Court, but lost on appeal, where the U.S. Court of Appeals for the Seventh Circuit found that the defendants were protected by the Clean Water Act's permit shield protection. Defendant sought $82,524.94, which was the portion of its fees it was forced to spend defending against a claim "that plaintiffs did not pursue and for unnecessary discovery plaintiffs never looked at after it was produced." Defendant invoked § 1365(d) of the Clean Water Act, 33 U.S.C. §§ 1251-1387, which permitted the court to:

> …award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing party, whenever the court determines such award is appropriate.

The court declined to award defendant its fees and cost because it determined that plaintiff's litigation was not unreasonable brought or maintained and was not frivolous.

The District Court's Decision

The District Court quoted the text of the Clean Water Act § 1365(d), which ostensibly applied to either a prevailing plaintiff or defendant. The District Court went on, however, to analogize § 1365 to similar fee provisions in the Clean Air Act, 42 U.S.C. § 7604(d), and Title VII. Both of those statutes permit a prevailing plaintiff to collect fees "in order to promote citizen enforcement of important federal policies." Those statutes only allow fee awards to a prevailing defendant, however, if the defendant can prove that "the plaintiff's lawsuit was unreasonable, frivolous or groundless." Though there is no authority from the Court of Appeals for the Seventh Circuit interpreting § 1365(d), the District Court was confident that the Seventh Circuit would interpret § 1365(d) in conformity with the Clean Air Act and Title VII. The court thus concluded that a prevailing defendant can only recover if it shows that the litigation was unreasonable, frivolous or unfounded.

The court next considered whether plaintiffs' admission on appeal that their case targeted Wisconsin's permit scheme and its decision to monitor defendant under a mining permit as a violation of the Clean Water Act, and not a claim that defendant violated the Clean Water Act on its own. The Seventh Circuit invoked the "permit shield" and held that defendant could not be responsible for discharge

because it had a facially valid mining permit and it had no notice of the potential invalidity of that permit. But that finding did not render plaintiffs' Clean Water Act claim against defendant frivolous. Indeed, plaintiffs had prevailed at summary judgment on their Clean Water Act claim because defendant did not have a Clean Water Act permit. Based on the initially apparent validity of plaintiffs' Clean Water Act claim, defendant could not show "that the litigation itself was frivolous and without foundation," and therefore could not demonstrate entitlement to its fees.

The court recognized the logical attraction of defendant's argument, but ultimately concluded that the policy of encouraging plaintiffs to enforce federal policies mandated a rule that permitted a prevailing plaintiff to collect fees, but denied the same result for a prevailing defendant absent a showing that the plaintiff's lawsuit was unreasonable, frivolous or groundless.

Conclusion and Implications

Though § 1365(d) of the Clean Water Act appears to vest courts with the authority to award any prevailing party their fees, it appears that courts will take the narrower view that while a prevailing plaintiff is entitled to its fees simply for winning, a prevailing defendant must show that the plaintiff's litigation itself was frivolous, unreasonable, groundless or without foundation in order to successfully obtain its fees. (Danielle Sakai, Trent Packer)

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