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EASTERN WATER NEWS

U.S. SUPREME COURT WILL RULE ON REVIEWABILITY
OF U.S. ARMY CORPS OF ENGINEERS'
JURISDICTIONAL WETLANDS DETERMINATIONS
TO RESOLVE A SPLIT IN THE CIRCUIT COURTS OF APPEALS

On December 11, 2015 the U.S. Supreme Court agreed to review a case on petition for *certiorari* filed by the U.S. Army Corps of Engineers (Corps), dealing with judicial reviewability of jurisdictional determinations. The Corps suggested that a case from the Eighth Circuit decided this spring is a good case for the Supreme Court to review in order to resolve the split in the Circuit Courts of Appeals on whether a Corps jurisdictional determination (JD) is reviewable under the Administrative Procedure Act (APA). In the decision for which review is granted, *Hawkes Co., Inc. v U.S. Army Corps of Engineers*, 782 F.3d 994 (8th Cir. April 10, 2015), the Eighth Circuit panel expressly disagreed with the Fifth Circuit's contrary ruling in *Belle Company, LLC et al v. U.S. Army Corps of Engineers*, 761 F.3d 383 (U.S. Cir. 2014). The Corps subsequently sought reconsideration from the Eighth Circuit in *Hawkes*, but that request was denied.

The Fifth Circuit case, *Belle Company*, was also subject to a petition for *certiorari*. However, the Supreme Court has denied the petition in *Belle*. A petition for rehearing in *Belle* is pending (as of December 11, 2015), Case No. 14-493 (filed Apr. 16, 2015).

Background

The background facts in *Hawkes* are that companies intending to mine peat in northwestern Minnesota were told by the Corps that their 510 acres are within "waters of the United States" under the federal Clean Water Act. The companies unsuccessfully appealed that JD within the Corps' administrative regime. They then filed suit under APA when, although their appeal was decided in their favor by the Corps reviewer, the Corps itself came to the same determination on remand. Their complaint in the U.S. District Court included a fairly detailed recitation of facts about the treatment they received during Corps examination of their intent to mine the peat. The acreage in question was to serve as an extension

area for mining ongoing for years by the companies. They were expressly discouraged from pursuing their intentions repeatedly. Allegedly, the Corps made clear there would be high cost to any permit application and that it almost certainly would be denied. The Eighth Circuit's opinion held the facts pleaded in the District Court complaint were sufficient to show final agency action from which significant legal consequences would flow, such that judicial review should be accorded.

The District Court had dismissed the companies' complaint, finding that review was premature, since the companies had not been denied a permit under the Clean Water Act. This was in keeping with the Corps position. Indeed, the Corps even argued that the JD was not "final agency action" in *Hawkes*, although the Supreme Court itself characterized a JD as final action in the important fairly recent case of *Sackett v U.S. EPA* 132 S. Ct. 1367 (2012).

On Appeal to the U.S. Supreme Court

The Corps' brief in support of the *certiorari* petition to the Supreme Court poses the following question for review:

Whether the United States Army Corps of Engineers' determination that the property at issue contains 'waters of the United States' protected by the Clean Water Act, 33 U.S.C. 1362(7); see 33 U.S.C. 1251 et seq., constitutes 'final agency action for which there is no other adequate remedy in a court,' 5 U.S.C. 704, and is therefore subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 701 et seq.

The Corps suggests that the ruling in *Hawkes* is also contradicted by the Ninth Circuit's decision in *Fairbanks N. Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586 (9th Cir. 2008), *cert. denied*, 557 U.S. 919 (2009).

By hearing *Hawkes*, the Supreme Court is likely to determine the nature of restrictions the United States can put on property in the name of Clean Water Act compliance without first obtaining a court order after enforcing to stop development. This is because in many cases, unless an owner wishes to risk criminal prosecution by proceeding as originally desired, the only question for a property owner after the Corps asserts its Clean Water Act jurisdiction on a given property is whether the development the owner wanted can still reasonably occur both physically and economically. In their eventual decision on *Hawkes*, the Supreme Court is likely to try to identify how the case presents issues like or unlike an important string of prior rulings in which the right to judicial review was granted. See, e.g. *Frozen Food Express v. U.S.*, 351 U.S. 40 (1956), *Columbia Broadcasting System v. U.S.*, 316 U.S. 407 (1942), *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-50 (1967); accord *Bell v. New Jersey*, 461 U.S. 773, 779 (1983); and *Bennett v. Spear*, 520 U.S. 154 (1997).

In *Sackett v. U.S EPA*, 132 S.Ct. 1367 (2012) the Court allowed an APA suit. In *Sackett* filling of wetlands had already occurred, so the posture of the applicant was not the same as either *Belle Company* or *Hawkes*, where activity was desired but all still in the future. The major departure of the Eighth Circuit decision in *Hawkes* from the Fifth Circuit analysis is a rejection of the concept that the consequences flow-

ing from the JD are not serious and tangible enough to provide a need for and right to have judicial review under the APA. Both the Fifth and Eighth Circuits believed a JD was a final agency action, where they differ is on whether the second requisite of the right to APA review has been triggered, i.e. whether the action is:

...one by which rights or obligations have been determined, or from which legal consequences will flow.

Conclusion and Implications

There are many people and interests that could be affected by the decision in *Hawkes*. Among the petitions for granting the writ there are both opponents and proponents of the Corps' view. The National Home Builders is seeking confirmation of the Eighth Circuit ruling, as is the Pacific Legal Foundation. The *Belle* case drew diverse interests, and many of the same institutions, from the American Farm Bureau to environmental groups could ask to file briefs as *amici* in *Hawkes*. Between this case and the regulatory battles that are ongoing, 2016 promises to be an eventful year in terms of Supreme Court and Circuit Court of Appeals review of the meaning and impact of the Clean Water Act on manmade changes to real estate around the company. (Harvey M. Sheldon)

INTERSTATE BATTLE FOR RIGHTS TO MISSISSIPPI DELTA GROUNDWATER BREWS BEFORE THE U.S. SUPREME COURT

A long-standing dispute is pending before the U.S. Supreme Court involving groundwater rights in the Mississippi Delta. Fiercely complex factually and legally, *Mississippi v. Tennessee* (Docket No. 220143) might have sweeping implications across the nation.

Factual Background

In the Mississippi Delta aquifers reportedly could be tapped historically simply by drilling through a thin layer of alluvium of approximately 150 feet, even during the 20th century as irrigation and other uses ramped up significantly. Scientists have discovered that good drinking water is found far deeper, in a layer known to geologists as the Middle Claiborne Aquifer. Contrary to common lay perceptions, a

groundwater well displaces water not just vertically, but also horizontally over time in what is referred to as a "cone of depression," which is shaped similarly to a funnel so that the "cone" is narrow at the bottom and wide at the top.

The States of Mississippi and Tennessee have tangled before over water supplies and rights appurtenant thereto as to "whose water is it?" In 2010, the Supreme Court denied Mississippi's request for an appeal relating to a similar dispute. Afterward, Mississippi and Tennessee, along with Arkansas, which also overlies portions of the aquifer, began to study the water and discuss its shared use.

According to the Mississippi Department of Environmental Quality, between 1965 and 2006 Memphis

produced more than 363 billion gallons of water or up to 20 percent of the city's water supply.

Unhappy with the pace of discussions, Mississippi filed a new motion with the Supreme Court during June 2014, seeking \$615 million and claiming that Tennessee declined to negotiate a compact. Mississippi contends the cones of depression that originate in Memphis are now large enough to extend across the state line, meaning that some of the water being pumped in Memphis once sat beneath Mississippi but is now drawn into the cone of depression (or funnel).

Whose Water Is It?

Deciding against the recommendation of the solicitor general during May 2015, the Supreme Court elected to grant Mississippi's request to hear the case. The issues are: (1) Whether the Court will grant Mississippi leave to file an original action to seek relief from respondents' use of a pumping operation to take approximately 252 billion gallons of high-quality groundwater; (2) whether Mississippi has sole sovereign authority over and control of groundwater naturally stored within its borders, including in sandstone within Mississippi's borders; and (3) whether Mississippi is entitled to damages, injunctive, and other equitable relief for the Mississippi intra-state groundwater intentionally and forcibly taken by respondents.

The Solicitor General's rationale was, in part, that Mississippi had not alleged injuries to its present or expected future uses of the water that are sufficiently specific to justify the Supreme Court's immediate intervention, and instead Mississippi's claim should be framed to seek equitable apportionment of the aquifer premised on allegations of real and substantial injury. Generally, surface water that crosses state boundaries can be divvied up by act of Congress, or, more commonly, by a compact between states (which also must be approved by Congress). When neither exists, it is up to the Supreme Court to decide what constitutes an "equitable apportionment" of the interstate water.

Mississippi, however, argues that the aquifer should not be treated like surface water that typically flows through streams because groundwater typically moves very slowly through soils, clays, rock and other geological materials. Further, it argues that water below Mississippi's surface is Mississippi's, and what's below Tennessee is Tennessee's.

As of September 16, 2015, the Honorable Eugene E. Siler, Jr., of London, Kentucky, was appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings, to direct subsequent proceedings, to summon witnesses, to issue subpoenas, and to take such evidence as may be introduced and such as he may deem it necessary to call for. As of November 18, 2015, the oath of the Special Master was filed with the Supreme Court.

Conclusion and Implications

State law generally controls water rights issues, however, federal jurisdiction and law apply to federal reserved water rights and to some extent interstate issues such as those presented by *Mississippi v. Tennessee*. Potentially creating sweeping implications, the Supreme Court seems open to the possibility that a state can claim absolute ownership of groundwater. In addition, Mississippi's claims run counter to the recommendations of most scientists and water-policy experts who advocate for "conjunctive" system of water management that treats all of water as "one water." In such a system, surface water and groundwater are managed as parts of a single, continuous system rather than a separate system. Even if the Supreme Court does not affirm Mississippi's claims, but instead prods the states to make a deal, such a deal will be the first agreement exclusively involving interstate boundary groundwater. Progress on the case may be monitored online at the Supreme Court's website at: <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/22o143.htm> (Wes Miliband)

OBAMA ADMINISTRATION REJECTS KEYSTONE PIPELINE XL

Although environmental review of the Keystone XL pipeline concluded that the project's contribution to global greenhouse gas emissions to be modest, the Obama administration rejected the proposed pipeline on October 30, 2015, citing that the approval of the project would undercut America's global leadership in climate change.

Background

The Keystone XL pipeline is a proposed 1,179-mile (1,897km) pipe that would run from the oil sands in Alberta, Canada, to Steele City, Nebraska, where it could join an existing pipe. It could carry 830,000 barrels of oil sands crude each day.

The proposed XL pipeline has the same origin and destination as the existing Keystone pipeline—granted presidential permit in 2008 by President George W Bush—but takes a more direct route. The pipeline would allow for increased supply of oil from Canada.

A section running south from Cushing in Oklahoma to the Gulf opened in January 2014. At the coast, there are additional refineries and ports from which the oil can be exported.

The pipeline would be a privately financed project, with the cost of construction shared between TransCanada, an energy company based in Calgary, Alberta, and other oil shippers.

Oil Sands Production

The crude oil transported from Canada's oil sands, also known as bitumen deposits, is distinct from conventional oil. Conventional oil is a mixture of mainly pentanes and heavier hydrocarbons recoverable at a well from an underground reservoir and liquid at atmospheric pressure and temperature. Unlike bitumen, conventional oil flows through a well without stimulation and through a pipeline without processing or dilution.

The oil sands are a thick, viscous mixture of bitumen hydrocarbons combined with water, sand, heavy metals and clay. The bitumen is separated from the oil sands through heating processes and is then upgraded into higher valued products for end-use markets.

The bitumen deposits in Alberta have allowed Canada to claim the world's third-largest recoverable

reserves of crude oil. Because there's so much less tar sands crude than conventional oil, coal and natural gas, oil from Canadian tar sands only accounts for 0.1 percent of the world's greenhouse-gas emissions and has a smaller potential to warm the planet than other fossil fuels.

Keystone XL Environmental Impact Disputed

The \$5.4 billion XL pipeline has become the focus of intense controversy. Foes say it will contribute to climate change; supporters say it will secure U.S. oil supplies from a friendly neighbor and create U.S. construction jobs.

Environmentalists had sought to block construction of the pipeline because it would have provided a conduit for petroleum extracted from the Canadian oil sands. The process of extracting that oil produces about 17 percent more planet-warming greenhouse gases than the process of extracting conventional oil. "From a market perspective, the industry can find a different way to move that oil," said Christine Tezak, an energy market analyst at ClearView Energy Partners, a Washington firm. "How long it takes is just a result of oil prices. If prices go up, companies will get the oil out."

But numerous U.S. State Department reviews concluded that construction of the pipeline would have little impact on the demand for oil sands, because it was already being extracted and moving to market via rail and existing pipelines.

The report stated that:

...the proposed Project is unlikely to significantly affect the rate of extraction in oil sands areas (based on expected oil prices, oil-sands supply costs, transport costs, and supply-demand scenarios).

Rejection of the Project Was Not Solely Focused on Environmental Impacts

Regardless of the merit of the arguments, the Obama administration rejected the XL pipeline project. Secretary of State John Kerry concluded the Keystone XL Project is not in the country's national security interest, and President Obama announced from the White House that he agreed.

"America is now a global leader when it comes

to taking serious action to fight climate change, and frankly, approving this project would have undercut that leadership,” President Obama said.

In citing his reason for the decision, President Obama noted the State Department findings that construction of the pipeline would not have created a significant number of new jobs, lowered oil or gasoline prices or significantly reduced American dependence on foreign oil.

According to the State Department analysis, building the pipeline would have created jobs, but the total number represented less than one-tenth of 1 percent of the nation’s total employment. The analysis estimated that Keystone would support 42,000 temporary jobs over its two-year construction period—about 3,900 of them in construction and the rest in indirect support jobs, such as food service. The department estimated that the project would create about 35 permanent jobs.

President Obama said that he believed Keystone XL has had an:

...over-inflated role in our political discourse, and said the project’s potential to create jobs and the potential environmental threats were exaggerated.

As a result, “[a]ll of this obscured the fact that this pipeline would neither be the silver bullet to the U.S. economy proclaimed by some, or the death knell to climate proclaimed by others,” Obama said. Obama also cited falling gasoline prices as another argument against the project:

While our politics have been consumed by a debate about whether or not this pipeline would create jobs or lower gas prices, we’ve gone ahead and created jobs and lowered gas prices.

Conclusion and Implications

After a seven-year debate over the Keystone XL Pipeline, it is clear the Obama administration’s decision was firmly rooted in establishing the United States as a global leader in climate change, not based upon the political discourse of whether the project would create jobs or the potential environmental threats. Only time will reveal whether the symbolism of the Keystone XL rejection carries on to a greater impact on future climate change policy. (Jennifer Barlock, Jonathan Shardlow)

EPA SEEKS COMMENTS ON CLEAN WATER ACT REGULATION OF STORMWATER DISCHARGES ON FOREST ROADS

On November 10, 2015, the U.S. Environmental Protection Agency (EPA) published a Notice in the *Federal Register* seeking public comment and additional information on the effectiveness of programs addressing water quality impacts associated with stormwater discharges from forest roads. This Notice arose out of a court order in *Environmental Defense Center, Inc. v. U.S. EPA*, 344 F.2d 832 (9th Cir. 2003), part of an ongoing legal challenge to the EPA’s exercise of regulatory authority over stormwater discharges on forest roads. The court order requires EPA to address whether § 402(p)(6) of the Clean Water Act (CWA) requires regulation of stormwater discharges from forest roads by May 26, 2016.

Legal Background

Section 402(p) of the federal Clean Water Act sets parameters for the administration of the EPA’s National Pollutant Discharge Elimination System

(NPDES) permits. Under § 402(p), NPDES permits are required for discharges from certain “point sources,” while the EPA has discretion under § 402(p)(6) to address other sources of stormwater discharge as necessary to “protect water quality.”

The Silvicultural Rule

The EPA’s Silvicultural Rule (40 C.F.R. § 122.27) defines a silvicultural point source as “any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States,” and further explains that:

...the term does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subse-

quent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff.

Accordingly, the EPA read § 402(p) to require an NPDES permit only for those silvicultural sources identified in the Silvicultural Rule.

The Ninth Circuit's Decision in *EDC v. U.S. EPA* and EPA's Response on Remand

In 2003, the Environmental Defense Center challenged the EPA's stormwater regulation program, contending that the EPA had arbitrarily failed to regulate discharges from forest roads, and that § 402(p)(6), if interpreted properly, required the agency to do so (even if no NPDES permit was required). *Environmental Defense Center v. US EPA*, 344 F.3d 832 (9th Cir. 2003) (*EDC v. EPA*). The Ninth Circuit Court of Appeals remanded the issue back to the EPA to consider whether § 402(p)(6) required it to regulate forest roads. In 2012, the EPA issued a notice clarifying that only stormwater discharges associated with rock crushing, gravel washing, log sorting, and log storage were "industrial activities" triggering the NPDES permit requirement. Other forest road discharges associated with silvicultural activity did not require an NPDES permit. In 2013, the U.S. Supreme Court held that discharges of stormwater that ran off logging roads into ditches, culverts and channels did not require an NPDES permit. *Decker, Oregon State Forester, et al. v. Northwest Environmental Defense Center*, 133 S.Ct 1326 (2013).

2014 Amendment to the Clean Water Act

In 2014, the CWA was amended to explicitly prohibit the EPA from requiring an NPDES permit for runoff resulting from particular silviculture activities, provided that those activities were "conducted in accordance with standard industry practice." 33 U.S.C. 1342(l). Those activities included:

...nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance. 33 U.S.C. 1342(l).

However, the law did not bar the EPA from exercising regulatory authority over those roads through other methods, including through regulations promulgated pursuant to § 402(p)(6).

2014 Petition and Ninth Circuit's Order

In December 2014, Environmental Defense Center and the Natural Resources Defense Council filed a petition with the Ninth Circuit to compel EPA to respond to the question remanded in the 2003 *EDC v. EPA* decision of whether § 402(p)(6) requires regulation of stormwater discharges from forest roads. The court entered an order establishing a schedule requiring EPA to issue a final determination by May 26, 2016.

The 2015 Notice

The EPA's November 2015 Notice observed that notwithstanding the agency's 2012 determination that no NPDES permit was required for stormwater discharges on forest roads, developments in industry practices, data collection, and statutory and regulatory changes necessitated this additional call for comments and information on the:

...implementation, effectiveness, and scope of approaches and programs that are currently in place for addressing stormwater discharges from forest roads.

The purpose of this call for information is to determine whether additional EPA oversight is necessary in this area, beyond the NPDES permitting scheme.

Specifically, the EPA's prior research indicates that improperly designed, constructed, maintained, or abandoned forest roads, can lead to impacts on waterways, including sediment buildup and changes in stream hydrology. At the same time, EPA recognizes that not every forest road causes water quality impacts, and that the majority of impacts on water quality caused by forest roads can be traced to a relatively small subset of forest roads.

Four Considerations Crucial in Determining Forest Road Regulation under the CWA

The 2015 Notice outlines four considerations that the EPA views as crucial to its decision as to whether or not further forest road regulation is required: (1) the success of existing management and regulatory

strategies, “including federal, state, local, tribal, private, and voluntary BMP-based programs;” (2) the “utility of addressing site-specific factors;” (3) the need to “prioritize actions;” and (4) “the benefits of accountability measures.”

To aide in this decision, the EPA requested additional comments on: (1) the ways in which forest and logging roads are identified and classified by states, tribes, and other federal agencies; (2) the effectiveness and scope of existing programs on stormwater discharges by other regulatory entities; (3) which specific elements of a forest road program are most important to ensure it is effective and protective of water quality; and (4) what additional measures could be implemented in existing programs to increase water quality protection from forest roads stormwater discharges where necessary.

The November 2015 Notice is intended to:

...solicit input on the implementation and effectiveness of existing public and private programs, whether voluntary or legally binding and enforceable, in mitigating water quality impacts from stormwater discharges from forest roads, rather than to receive additional comments or materials on water quality impacts of these discharges.

Conclusion and Implications

The comment deadline ends on January 11, 2016. After considering those comments, the EPA will issue a determination as to whether stormwater discharges from forest roads are subject to any additional regulation under Clean Water Act § 402(p)(6). The agency is required to submit its determination by May 26, 2016. If the EPA determines that additional regulation is necessary, additional rulemaking may follow that May 2016 determination.

(Rebecca Smith, Meredith Nikkel)

NEWS FROM THE WEST

In this month’s News from the West, we report on the following events: (1) Arizona/New Mexico spar over a water diversion project from the Gila River, approved by the Bureau of Reclamation; (2) Oregon’s adoption of new water quality trading rules; and (3) in California, new ballot initiatives are being proffered to amend the state constitution to establish water use priorities while simultaneously diverting funds from the state’s high speed rail project to water projects.

Federal Approval of the Gila River Diversion Project Raises Controversy

On November 24, 2014, the New Mexico Interstate Stream Commission (ISC) voted in favor of a project to divert water from the Gila River for use in southwestern New Mexico farms and cities. According to the project, the water would be diverted at times of high flow and stored for later use. The vote met the December 31, 2015 deadline for federal funding; thus, \$62 million has been allocated for this project. On July 22, 2015, the ISC approved a 14—member unit to design and build the Gila River Diversion Project. This unit, called the New Mexico Central Arizona Project (CAP), is composed of

county and municipal governments, irrigation ditch associations, and soil and water conservation districts in Catron, Grant, Luna, and Hidalgo counties. Despite the opposition from environmentalists and economists, the U.S. Department of Interior reached an agreement with water managers in New Mexico on November 23, 2015, to take the next step in the Gila River Diversion Project.

Background

The Gila River, a tributary of the Colorado River, flows through New Mexico and Arizona. The source of the River is located in western New Mexico’s Sierra County. In 2008, a national conservation agency listed the Gila River as one of the most endangered rivers in America. Recent agricultural and urban interests have caused a high impact on the Gila River, taking out more water than the river can provide.

The proposed project calls for a dam that would divert water from the river through a 108—inch diameter tunnel and canals or pipelines into a 13,000 acre-foot reservoir. According to the ISC, the actual average yields of the diversion will be between 6,000 and 8,000 acre-feet, with potentially no yield during times of low flow. The cost of the first phase of the

project is projected to be at least \$380 million, which is more than twice the amount of the \$128 million federal subsidiary. A second phase of the project, designed to increase the storage volume to 45,000 acre-feet and move water to Deming, NM, adds another \$800 million to the cost.

U.S. Department of Interior officials claim that the signing of the agreement does not deny the agency's discretion to further evaluate the Gila Project. The decision to move forward with the project will allow for extensive environmental and economic feasibility reviews. The director of the ISC has provided assurances that an Environmental Impact Study must be completed before any construction can begin. Furthermore, there is a 2019 deadline for completing the studies that will determine the federal government's decision to continue or end the project. If the Secretary of Interior determines that there were reasons outside of New Mexico's control that delayed the studies, the deadline may be extended to 2030.

The Gila River Diversion Project—The View from New Mexico

The Gila River Diversion Project remains a topic of debate among New Mexico officials and residents. Proponents of the project claim that the water will help to support the communities in southwestern New Mexico, even if it is a small amount. Opponents argue that not only is the project highly expensive, but it will also have negative impacts on the environment. Supporters claim that the project is vital to supplying the agricultural communities in southwestern New Mexico. Although studies have shown that the average yield of the project may not be high, proponents claim that New Mexico is an arid state and cannot afford to pass up the water.

Opponents are not only concerned with environmental issues, but also with the costs of the project. An executive director of the Gila Conservation Association stated that if the environmental compliance process is honest, it is unlikely that the project will continue citing damage to the environment and endangered species' habitat. Furthermore, federal funding for the project falls far below the estimated cost, and taxpayers may become the ultimate last source of funding. Critics have continuously claimed that the cost of the project is too high for the small amount of water that it will yield.

Conclusion and Implications

The federal approval of the Gila River Project has raised controversy and the need for review before continuation. The project is one step closer to its launch, but several agencies and officials are still opposed to its continuation. The ecological and economic impacts of the project are clear, and a plethora of studies will need to be conducted over the next few years before plans are solidified.

(Christina J. Bruff, SB)

New Water Quality Trading Rules Adopted by Oregon Environmental Quality Commission

The Oregon Environmental Quality Commission (EQC) recently adopted new rules governing water quality trading pursuant to its delegated authority under the federal Clean Water Act (CWA). The final rules proposed to the EQC by the Oregon Department of Environmental Quality (DEQ) included modifications in response to public comment on the original proposal; however, the rules maintain the same basic trading framework originally proposed by DEQ. If successfully implemented, the rules should provide a more consistent framework for water quality trading in Oregon and encourage trading by a broader range of regulated entities. However, the proposed rules generated significant public comment and could face legal challenge.

Background on Water Quality Trading in Oregon

The U.S. Environmental Protection Agency adopted a policy endorsing water quality trading as a compliance option under the CWA. In 2001, the Oregon legislature adopted the Willamette Watershed Improvement Trading Act directing DEQ to:

...develop and implement a pollution reduction trading program as a means of achieving water quality objectives and standards in this state.
ORS 468B.555(1).

In most circumstances, water quality trading involves a point source discharger with a CWA compliance obligation (such as a wastewater treatment plant) purchasing credits representing water quality improvements from non-point sources generated through implementation of Best-Management Practices or restoration activities that reduce applicable

pollutant loading. Instead of relying on traditional end-of-pipe infrastructure to meet compliance obligations, water quality trading can generate equivalent or greater improvement of a particular regulated water quality parameter (such as temperature or nutrients) through stream restoration or other projects that also provide additional non-compliance related environmental benefits, such as riparian habitat improvement.

Water quality trading in Oregon has to date generally focused on reducing temperature loading, an important water quality parameter for cold-water fish, including salmon. For example, instead of building a large refrigeration plant to cool its wastewater, as would otherwise have been required as part of its National Pollutant Discharge Elimination System (NPDES) permit renewal process, the City of Medford worked with a local environmental group to reduce the heat load in the Rogue River by twice as much as required through upstream riparian restoration and revegetation actions. Similarly, Clean Water Services, a large wastewater service provider in the Portland metropolitan area, has traded for the water quality benefits of riparian shading and flow augmentation projects to meet its own heat load reduction obligations resulting from the 2001 Total Maximum Daily Loads (TMDL) for the Tualatin River.

However, despite these visible success stories, Oregon has only approved three water quality trades over the past decade. In part, the absence of an established regulatory scheme to provide predictability regarding trading requirements and outcomes is believed to have discouraged trading by more regulated entities. The new rules are intended to help streamline the process and provide the predictability and certainty sought by regulated entities, and to dampen concerns of environmental organizations who may be skeptical regarding verifiability of water quality trading benefits.

Oregon's Water Quality Trading Rules

The new rules first clarify DEQ's authority to utilize water quality trading in implementing the CWA. Specifically, the rules indicate that water quality trading can be used to demonstrate compliance with an NPDES permit or a § 401 water quality certification issued by DEQ for a federal permit or license.

The rules specific certain water quality parameters which are eligible for trading: temperature, oxygen-demanding substances including biochemical oxygen

demand, ammonia, nutrients, sediment and total suspended solids. DEQ also may authorize trading of other non-listed pollutants or water quality parameters on a case-by-case basis so long as such trading does not cause or contribute to violations of water quality standards. Trading of toxic, environmentally persistent, or bioaccumulative pollutants, however, is generally prohibited.

Before trading may occur, DEQ must first approve a regulated entity's trading plan. Trading plans, which are subject to public notice and comment prior to approval, must include a variety of elements, such as a description of the water quality parameters proposed for trading, the trading baseline, the trading area, the Best Management Practices (BMPs) used to generate water quality benefits, how the credits will be generated and quantified, monitoring and reporting, adaptive management provisions, and verification protocol. Under the final rule, certain required elements of approved trading plans will also be incorporated directly into permits or § 401 water quality certifications as "stand alone" enforceable permit conditions.

Public Comment

Public comment on the proposed rules was received from a variety of sources. While the rules adopted by the EQC largely followed DEQ's original proposal, the final text was amended in response to a variety of public comments.

For example, the publicly noticed version of the rules proposed prohibiting trading for "pollutants that are toxic and either persist in the environment or accumulate in the tissues of humans, fish, wildlife or plants." Some commenters supported this prohibition stating that trading for toxics would be experimental and risky, while other commenters urged DEQ to allow trading for toxic pollutants as a pilot program or on a case-by-case basis. In the light of the prohibition of trading for toxic pollutants contained in the U.S. Environmental Protection Agency's Water Quality Trading policy, DEQ's final rules proposal maintained the prohibition on trading, but revised it slightly from the original proposal to clarify that the prohibition does not apply to trading that may occur as an element of a pollution reduction plan under a variance granted to a permittee pursuant to the DEQ's existing water quality permitting rules.

Further, rather than require an entire trading plan be incorporated as an enforceable condition by reference, as was proposed in the publicly-noticed

version of the rules, DEQ revised the proposed rule in response to comments to state that certain required elements of the trading plan are to be “incorporated as enforceable conditions” of an NPDES permit or § 401 water quality certification. These include the specific parameter to be traded, the trading baseline, trading area, BMPs utilized, trading ratios, monitoring requirements, and information related to credits, including generation methods, quantity required, and duration. In explaining this change, DEQ found the revised proposed rule structure, which requires required elements of approved trading plans to be incorporated into permits or § 401 water quality certifications as “stand alone” enforceable conditions to be a:

...robust way to ensure the enforceability of water quality trading and its essential elements, while also providing trading entities the flexibility to adaptively manage the lesser components of their trading projects.

The rule’s prohibition on the use of public conservation funds to generate water quality trading credits generated more public comments than any other provision of the proposed rules. Some commenters stated that DEQ should not include any prohibition on the use of public conservation funds and argued that placing any prohibition on funding complicates trading and creates a disincentive for collaborative projects among public and private partners. In contrast, comments supporting limits on the use of public conservation funding stated that DEQ should align itself with existing inter-agency recommendations signed by state and federal agencies in 2008 limiting the use of public funds for regulatory obligations. In proposing the final rule, DEQ emphasized the importance of aligning the rule with other state agency policies on the use of public conservation funds for regulatory obligations.

DEQ also revised the proposed rule to clarify that the duration of credits will be described and controlled by the approved trading plan; the trading plan must identify “the length of time credits are expected to be used.” DEQ expects that the duration of some trade projects and the benefits they generate may span decades, while others may be short-lived. The use of credits from these projects will be subject to requirements of current trading plans and permit requirements.

Conclusion and Implications

As adopted, Oregon’s new rules regarding water quality trading should provide greater clarity and certainty for regulated entities considering water quality trading as a possible compliance mechanism, compared to the current state of affairs where water quality trading is considered solely on a case-by-case basis. However, given the comments received by the agency, legal challenge to the new rules remains a distinct possibility.

(Daniel Timmons)

Proposed California Initiatives Submitted to Amend Constitution to Establish Water Use Priorities and to Divert High-Speed Rail Funds to Water Storage Facilities

On November 12, 2015, George Runner, Vice-chair of the California Board of Equalization, and State Senator Robert Huff (R-San Dimas) submitted to the Office of the Attorney General two proposed companion statewide ballot initiatives. The first, the Water Priorities Public Interest and Public Trust Constitutional Amendment and the New Surface Water and Groundwater Storage Facilities Bond Act of 2016 (Constitutional Amendment and the Water Storage Act), proposes a constitutional amendment providing that the highest priorities of beneficial use and water conservation in the state shall be domestic use and irrigation through the development and maintenance of surface water and groundwater storage facilities. Additionally, the proposal reallocates up to \$8 billion of uncontracted high-speed rail bonds and \$2.7 billion from Proposition 1, the Water Quality, Supply, and Infrastructure Improvement Act of 2014 (Proposition 1), to address what the measure’s proponents call California’s immediate and higher priority water supply needs?

The companion measure, the Stop the Train-to-Nowhere Act of 2016 (Stop the Train Act), amends the 2008 Safe, Reliable High-Speed Passenger Train Bond Act (Proposition 1A) to prohibit further bonds for high-speed rail and rail-related purposes, redirecting existing bond funds to authorized water storage facilities. The proposal allows the High-Speed Rail Authority to continue to study the feasibility of completing the high-speed rail route, but only the full route from San Francisco to Los Angeles with connections to Sacramento and San Diego, and only if funded by continuing annual appropriations from state general funds.

The Constitutional Amendment

According to the findings set forth in the proposed Constitutional Amendment, statutes, court decisions and regulatory interpretations of “beneficial use, public use and the public trust have imposed substantial legal and administrative impediments to the accomplishment of the people’s priorities with respect to water use” and have “thwarted the development of new surface water and groundwater storage facilities mandated by the voters.” Thus, the Constitutional Amendment proposes to expressly establish domestic use and irrigation as the highest priorities in the state of beneficial use of water and water conservation, with priority over other uses in the public trust. If approved by the voters, the Constitutional Amendment would add § 2.5 to Article X of the California Constitution:

2.5 Reasonable and Beneficial Public Uses of Water—Priorities

Because of the conditions prevailing in this State, in order fully to implement section 2 hereof, the public interest in assuring the highest priorities of beneficial use and water conservation, as a public benefit and to satisfy the public trust, shall be first, domestic use, and second, irrigation use through the development and maintenance of surface water and groundwater storage facilities. Neither the Legislature nor the Executive Branch may alter or limit, or delegate to any subordinate agency the power to alter or limit these priorities for such reasonable and beneficial public uses of water for other uses in the public trust.

The New Water Storage Facilities Act

The Water Storage Act implements the priorities to be established by the Constitutional Amendment. Noting reports that the high speed rail project approved by the voters in 2008 as Proposition 1A was facing mushrooming costs, dismal prospects for completion of the entire route, and vanishing federal and private funding sources, the Water Storage Act proposes to reallocate \$8 billion in uncontracted high speed rail bonds to address the state’s “immediate and higher priority water supply needs.” The Water Storage Act also notes that bond funding approved by the

voters in 2014 under Proposition 1 is limited to water storage projects that provide at least half of their public benefits for purposes unrelated to domestic water use and irrigation, “an unacceptable limitation on the priority of use of funds appropriated for public benefits associated with water storage projects.” The Water Storage Act thus redirects up to \$2.7 billion of Proposition 1 funds to specified water supply needs. The Water Storage Act does not authorize additional net state bond obligations.

Funds reallocated under the Water Storage Act will be deposited in a State Surface Water and Groundwater Storage Fund (Fund).

Funds cannot be used for environmental mitigation measures, except for environmental mitigation required as part of the projects authorized under the Water Storage Act. Additionally, water deliveries, transfers, and exchanges of water from storage facilities resulting from these projects may be made only if such delivery, transfer or exchange has as its primary purpose the priorities established by the Constitutional Amendment.

Defunding High-Speed Rail Activities

The Stop the Train Act, a separate initiative measure, provides that available Proposition 1A bond funds shall not be expended for high speed rail purposes, and no further bonds shall be issued or sold for high-speed rail or rail-related purposes. The Stop the Train Act allows the High Speed Rail Authority to continue to study the feasibility of completing the full route from San Francisco to Los Angeles with connections to Sacramento and San Diego, including design work, environmental studies, approvals, permitting, and research and development activities, but it may only carry out such activities if funded by continuing annual appropriations by the Legislature from state general funds, not Proposition 1A bond funds. All other activities and operations by the High Speed Rail Authority are severely curtailed.

The Stop the Train Act also redirects net proceeds received from outstanding Proposition 1A bonds issued and sold before the effective date of the proposed Act to one of two purposes: Any other purpose upon appropriation by the voters approving an initiative measure at the same time as this initiative measure; or, if the voters fail to adopt such a companion initiative; To retire the debt incurred from issuance and sale of those outstanding bonds.

Procedural Issues

The California Attorney General's office has the responsibility to prepare a title and summary for the proposed initiative measures prior to the proponent circulating qualification petitions to collect signatures from registered voters. Petitions for constitutional amendments must be signed by electors equal in number to 8 percent of the votes for all candidates for Governor at the last gubernatorial election; petitions for proposed statutes must be signed by electors equal to 5 percent of such votes. If sufficient signatures are obtained, the proposed measure is presented to the Secretary of State, who submits the measure at the next general election held at least 131 days after it qualifies, or at any special statewide election held prior to that general election. Once the measures are on the ballot, only a simple majority is needed for approval.

Conclusion and Implications

The ballot measures proposed by Runner and Huff shift unspent funds from California's high speed rail project to build new surface water and groundwater storage projects. Additionally, the measures seek to prioritize domestic and agricultural water use over other public trust uses, such as for environmental protection. Although the measures must still obtain sufficient signatures from registered voters to qualify for the 2016 ballot, if the proposals qualify and are approved by the voters, significant changes could result in how courts and regulators apply the doctrines of reasonable and beneficial use and the public trust in allocating the state's water supplies.
(Kathryn Horning)

PENALTIES & SANCTIONS

**RECENT INVESTIGATIONS, SETTLEMENTS,
PENALTIES AND SANCTIONS**

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

**Civil Enforcement Actions and Settlements—
Water Quality**

• On December 3, 2015, EPA announced a settlement with Koppers Inc. requiring the company to take action to prevent the threat of oil spills at its Follansbee, West Virginia facility. Koppers is located 50 yards from the Ohio River, the source of multiple Ohio River drinking water intakes downstream. It converts crude petroleum into refined products, has 92 above-ground tanks and can store more than 18 million gallons of oil. Under the agreement, Koppers will prepare a plan to respond to a worst-case discharge in the northern area of the facility; improve secondary containment in the northern area of the facility after its plan is approved by EPA; and, evaluate all above-ground oil storage tanks and develop an integrity testing schedule to reduce tank rupture or collapse. EPA's action was taken under the authority of §§ 311(c) and (e) of the Clean Water Act governing the prevention and response to accidental releases and spills of oil and hazardous.

**Civil Enforcement Actions and Settlements—
Chemical Regulation and Hazardous Waste**

• On November 19, 2015, EPA announced a settlement with Powercon Corporation under which Powercon agreed to pay a \$40,000 penalty to settle alleged violations of hazardous waste regulations at its manufacturing facility in Severn, Maryland. EPA cited Powercon for violating the federal Resource Conservation and Recovery Act (RCRA). The alleged violations included failure to: conduct weekly inspections of hazardous waste storage areas; comply with personnel training and recordkeeping requirements; comply with contingency plan and maintenance

requirements; and properly label universal waste batteries.

• On December 8, 2015, EPA announced a settlement with the U.S. Army for alleged violations of its hazardous waste permit at Fort Wainwright, Alaska. As part of the settlement, the Army has agreed to pay \$59,220 in penalties. The Army facility is covered under a RCRA permit, which requires the Army to notify EPA of any new or newly discovered solid waste management units. EPA alleges that the Army violated its RCRA permit by failing to notify the Agency when an old munitions and explosives dump was discovered within the Fort's Small Arms Range Complex in June 2013. The Army failed to notify EPA within the required 15 days when it investigated the dump and failed to provide a required assessment of the dump. EPA learned of the dump more than a year later in a technical memo from the Army's contractor.

• EPA announced that it ordered Sparks, Nevada-based WellPlant Inc. to stop selling Mold Manager, an unregistered pesticide in violation of the Federal Insecticide, Fungicide, and Rodenticide Act. The EPA has issued the "Stop Sale" order to prevent WellPlant and its affiliated company, GST International, Inc., from continuing to distribute or offer for sale "Mold Manager," a product that prevents mold, mildew, algae and moss. The product is made in Oregon and has been offered for sale online and distributed to customers in California, Iowa, Idaho, Illinois, Minnesota, North Carolina, Nevada, Oregon, Ohio and Canada.

Indictments Convictions and Sentencing

• The U.S. Department of the Interior's Bureau of Safety and Environmental Enforcement (BSEE), the EPA and DOJ, announced a settlement with ATP Oil & Gas Corp. Under the settlement, ATP has agreed to resolve actions under the Clean Water Act (CWA) and the Outer Continental Shelf Lands Act

(OCSLA) concerning unauthorized discharges of oil and chemicals from a floating oil and gas production platform into the Gulf of Mexico. The settlement imposes a combined total of \$41.85 million in judicial and administrative penalties for the violations. The United States alleges that ATP discharged oil and an unauthorized chemical dispersant into the Gulf of Mexico from ATP's oil and gas production platform known as the ATP Innovator. A BSEE inspection of the ATP Innovator in March 2012 revealed alleged unlawful discharges of oil and a piping configuration that routed an unpermitted dispersant—a chemical mixture to break up oil—into the facility's wastewater discharge pipe to mask excess oil being discharged into the ocean. The settlement agreement resolves the judicial claims against ATP by imposing a CWA civil penalty of \$38 million. Injunctive relief concerns related to the safe future operation of the ATP Innovator were addressed by ATP-IP in a prior settlement.

- Black Elk Energy Offshore Operations LLC, Grand Isle Shipyards Inc., Wood Group PSN Inc., as well as Don Moss, 46, of Groves, Texas, Curtis Dantin, 50, of Cut-Off, Louisiana, and Christopher Srubar, 40, of Destrehan, Louisiana, have been charged with crimes for a November 2012 explosion on an oil production platform that resulted in the death of three workers, the injury of others and an oil spill. According to the indictment, the defendants were involved in different capacities while construction work was being done of the West Delta 32 plat-

form when it exploded. Black Elk Energy Offshore Operations LLC and Grand Isle Shipyards Inc. are charged with three counts of involuntary manslaughter, eight counts of failing to follow proper safety practices under the Outer Continental Shelf Lands Act and one count of violating the Clean Water Act. Wood Group PSN Inc., Moss, Dantin and Srubar are charged with felony violations of OCSLA and the Clean Water Act.

- A federal grand jury in Greenville, North Carolina, has issued a nine-count indictment charging two engineering officers employed by Oceanfleet Shipping Limited with crimes relating to the illegal discharge of oily wastes directly into the sea. Oceanfleet Shipping Limited is a Greek shipping company that operates the cargo carrier M/V Ocean Hope. The two engineering officers indicted are the vessel's Chief Engineer, Rustico Yabut Ignacio, 65, of the Philippines; and the Second Engineer, Cassius Flores Samson, 51, of the Philippines. According to the indictment, in 2015 Samson bypassed pollution prevention equipment with an unauthorized hose connection, or "magic pipe," to discharge oil sludge generated by the M/V Ocean Hope directly into the sea. Samson also ordered crewmembers on numerous other occasions to pump oily mixtures from the vessel's bilges into the sea using the ship's General Service Pump rather than processing these mixtures through the vessel's pollution prevention equipment.
(Andre Monette)

JUDICIAL DEVELOPMENTS

DISTRICT COURT FINDS CERCLA DAMAGES A PRP CAN RECOVER FROM OTHER PARTIES MUST BE REDUCED BY THE AMOUNT OF RESPONSE COSTS PAID BY INSURERS

Appvion, Inc. and NCR Corp. v. P.H. Glatfelter Co.,
___F.Supp.3d___, Case No. 08-C-16 (E.D. Wis. Nov. 10, 2015).

This decision comes from a lengthy federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) cost recovery action. Appvion, Inc. (Appvion) filed a motion for protective order in response to several defendants' attempts to obtain from Appvion information detailing the payments and settlements it received from several of its insurers or indemnitors. Accordingly to some of the defendants, Appvion received some \$350 million in insurance recoveries, when in fact it is only out-of-pocket about \$16 million. Appvion rejected these request for information based on the collateral source rule, i.e., alleging that any monies it received was irrelevant its cost recovery action. The U.S. District Court for the Eastern District of Wisconsin held that the collateral source rule should not shield Appvion from making the discharges sought by defendants.

Background

In the 1950s, NCR developed a paper system that could make multiple copies without the use of carbon paper. This paper system was called NCR Paper brand carbonless copy paper (CCP). When production of CCP began in 1954, the transfer solvent in the microcapsules was Aroclor 1242. Aroclor 1242 was a commercially available mixture of PCBs that Monsanto manufactured and sold to NCR and others. In April of 1971, long before any laws were passed concerning the use of PCBs, NCR voluntarily discontinued all use of Aroclor 1242 in the emulsion for CCP.

The Appleton Coated Paper Company facility in Appleton, Wisconsin (Appleton Plant or ACPC) was one of the primary producers of CCP during the time period that PCBs were used in the CCP emulsion. The Appleton Plant was not a paper mill. Instead, the Appleton Plant was a coating facility, whose business is the application of specialized coating materials to different types of base papers. Thus, the Appleton Plant did not actually manufacture paper; it produced

CCP by applying specialized coatings (some of which were prepared using the CCP emulsion) onto base paper.

The District Court's Decision

Examining the Collateral Source Rule

Appvion rejected the request for payments it received from its insurers and other indemnitors under the collateral source rule. The collateral source rule in tort law provides that:

...if an injured party received compensation for the injuries from a source independent of the tortfeasor, the payment should not be deducted from the damages that the tortfeasor must pay. (*Black's Law Dictionary*, 279 (8th ed. 2004).)

Courts interpreting the rule's applicability in CERCLA cases have uniformly held that it does not apply in the CERCLA § 113 context. Appvion argued that this case is different because:

...it was deemed a non-labile, or innocent party, whereas other Defendants are all jointly liable as potentially responsible parties, or PRPs.

In other CERCLA cases declining the rule, those courts have noted that the normal rationale behind the rule does not apply:

Contribution action under CERCLA § 107 is a mechanism for allocating costs among joint tortfeasors and are governed wholly by equity. Equity would not be served by requiring a District Court to remain blind to alternate sources of recovery for one tortfeasor and the possibility of its recouping more than 100 percent of its

share. (*NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682, 707 (7th Cir.2014).)

The Tenth Circuit explained it more fully:

...a CERCLA contribution action is not a personal injury action by an innocent plaintiff. Instead, it is a claim between two or more culpable tortfeasors, and the policy underlying the collateral source rule—to provide the innocent party with the benefit of any windfall—is simply not advanced in such cases. (*Friedland v. TIC-The Indus. Co.*, 566 F.3d 1203-1206-07 (10th Cir.2009).)

Here, Appvion was not a tortfeasor, was not a PRP, and was not jointly liable with the other parties. As such, it did not believe that the CERCLA rationale against the rule would apply to it.

Appvion's arguments aside, it is also true that although the parties in a § 113 action are jointly liable PRPs, CERCLA is a strict liability statute and, "thus traditional notions of fault or blame do not always come into play." (*Farmland Indus. Inc. v. Morrison-Quirk Grain Corp.*, 987 F.2d 1335, 1339 (8th Cir.1993).) Thus, even if the parties are jointly liable, that would not make them akin to culpable tortfeasors:

In fact that Court has already attributed the fault for PCB damage largely to NCR, one of the plaintiffs. Given that many of the Defendants are largely blameless (in a culpability sense, if not in the sense of the statute), it would make little sense to apply the collateral source

rule in order to reward an 'innocent party' at the expense of the culpable tortfeasor. In short, in terms of the considerations that give rise to the collateral source rule, a party's status as a litigant under § 107 versus § 113 does not necessarily carry much significance. The overall purpose of CERCLA would be better served if the rule did not apply.

The District Court held that declining the rule would create "clarity and uniformity to the law," regardless of which section of CERCLA would apply.

Moreover, the court held that as CERCLA's primary purpose is to cleanup a site, those that might have to fund a cleanup should not be barred from funds that will aid their ability to do so. The court, accordingly, held that the collateral source rule could not shield Appvion from making the payment disclosures sought by defendants.

Conclusion and Implications

All federal District Courts have addressed the applicability of the collateral source rule, but the issue has yet to be addressed by a federal court of appeal. The issue of how to account for insurance proceeds may also turn on state law. If insurance proceeds are not allocated to response costs, courts charged with interpreting state law may not offset response costs under CERCLA by the amount of those proceeds. (*See*, L. Larson & J. Ferrell, "No Double Dipping: Insurance Recovery Reduces Amounts Recoverable from PRPs in Colorado CERCLA case," *Marten Law Group* (Feb. 20, 2008).) (Thierry Montoya)

DISTRICT COURT FINDS A GENERATOR THAT DISPOSES OF ITS OWN WASTE 'BENEFITTED FROM THE DISPOSAL' AND THEREBY IS A CERCLA ARRANGER

MEMC Pasadena, Inc., v. Goodgames Industrial Solutions, LLC,
___F.Supp.3d___, Case No. 4:13-CV-599 (S.D. Tx. 2015).

MEMC Pasadena, Inc. (MEMC) disposed waste at the U.S. Oil Recovery Superfund Site. MEMC produced granular polysilicon, a base material used to manufacture silicon wafers and other related products. Goodgames Industrial Solutions, LLC (GIS) is an environmental consulting and waste management company that was hired by MEMC to coordinate the

disposal of sodium silicate waste with GIS acting as a waste broker for this waste until 2009 or 2010. Before this court was a motion for summary judgment by GIS and a motion for partial summary judgment filed by MEMC. GIS sought recovery on all of its claims—federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and

state law claims. MEMC requested summary judgment only as to GIS' liability for contribution under CERCLA. Of interest, is the U.S. District Court for the Southern District of Texas' grant of MEMC's motion based on GIS' *arranger* liability.

Background

Beginning in late 2004, MEMC hired GIS to coordinate the disposal of its sodium silicate waste stream. As a waste broker, GIS facilitated the movement of waste from MEMC, as the waste generator, to an approved waste disposal facility. The approval process for waste disposal runs in two directions. The waste generator approves the disposal facility based on its evaluation of cost and the facility's ability to treat and dispose of the waste. The disposal facility approves the waste by receiving a sample to test for composition, treatability, and compatibility. GIS facilitated both approval processes for MEMC and U.S. Oil Recovery LLC.

GIS recommended the U.S. Oil Site to MEMC as a disposal facility, informing MEMC of the costs associated with the Site. GIS would receive a quote from U.S. Oil for disposal of a particular type of waste. GIS would then present a quote to MEMC with the costs for disposal and transportation, plus GIS's markup.

Prior to selecting the U.S. Oil Site, it was MEMC's practice to perform a site visit. GIS's Mr. Goodgame organized MEMC's visit to the Site for an audit. In October 2004, three MEMC employees performed an audit of the Site. After the audit, GIS sent MEMC the completed prequalification package for the Site, when returned, GIS passed it along to U.S. Oil, U.S. Oil completed it and returned it to GIS, and GIS then submitted it to MEMC for its review. MEMC ultimately approved the Site for disposal.

When MEMC had waste that was approved to go to U.S. Oil, MEMC would contact Mr. Goodgame to schedule the waste to be transported there. A MEMC engineer would call or email Mr. Goodgame to ask how many loads U.S. Oil could handle. Based on Mr. Goodgame's answer, a MEMC engineer would complete the manifest for transporting the waste. At MEMC's request, GIS provided MEMC with waste manifests with the information about the disposal site and the transporter completed. GIS would also pick up samples of the waste. In addition, GIS would contact a trucking company previously approved by MEMC and instruct it to pick up waste at MEMC at

a particular time and day and deliver it to U.S. Oil.

U.S. Oil always dealt directly with GIS and not with MEMC. U.S. Oil's invoices were sent to GIS, GIS's accounts would review these invoices and then create invoices for MEMC's payment. The relationship between U.S. Oil and GIS was so entrenched that U.S. Oil considered GIS its customer, not MEMC.

On December 20, 2012, the U.S. Environmental Protection Agency (EPA) Superfund Division sent GIS a letter about the Site, notifying GIS that it:

...believes that [GIS] may be liable under § 107(a) of CERCLA with respect to the Site as a person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person.

On March 6, 2013, MEMC filed its complaint against GIS alleging eight claims for relief: contribution under § 113 of the CERCLA, contribution under §§ 361.343 and 361.344 of the Texas Solid Waste Disposal Act (TSWDA), breach of contract, negligence/gross negligence, professional negligence, breach of fiduciary duty, negligent misrepresentation, and fraud/fraudulent misrepresentation. The complaint also sought attorney's fees, costs, and interest.

On July 20, 2015, the parties filed the motions before the District Court.

The District Court's Decision

Arranger Liability under CERCLA

MEMC alleged that GIS was liable for contribution under CERCLA as an "arranger." Whether arranger liability "attaches is fact intensive and case specific." (*Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 610 (2009).) The U.S. Supreme Court has held that:

...an entity may qualify as an arranger under section 9607(a)(3) when it takes intentional steps to dispose of a hazardous substance (Citations omitted).

Here, there was no dispute that MEMC incurred response costs to support a contribution claim against

GIS. The difficult question was whether GIS is a responsible person under CERCLA section 9607(a).

Analysis under the *Burlington Northern and Vine Street* Decisions

The cases of *Burlington Northern and Vine Street LLC v. Borg Warner Corp.* 776 F.3d 312, 317 (5th Cir. 2015) provide the standard for determining arranger liability:

- Under *Burlington Northern*, the plaintiff must establish that the purported arranger took ‘intentional steps to dispose of a hazardous substance.’ (*Vine Street LLC*, *infra*, at 317, quoting from *Burlington Northern*, 556 U.S. at 611.)

Both cases focused on the disposal aspect of arranger liability:

In both cases, the purported arranger was found not liable based on two factors. First, the primary purpose of the transaction involved a useful product, and waste disposal was a mere peripheral occurrence. Second, the purported arranger did not intentionally dispose of the hazardous substance because it took steps to reduce the discharge. (*Id.*)

The District Court found that neither factor is present in this case, which turned on the issue of what it meant to “arrange for.”

Using the ordinary understanding of “arrange,” the court held that GIS was an arranger. The court used one important instance to justify its decision:

GIS suggested the U.S. Oil Site, organized MEMC’s site visit, coordinated the exchange of paperwork between MEMC and U.S. Oil for the Site to be added to MEMC’s approved contractor list, advised MEMC about the number of loads U.S. Oil could handle, delivered samples of MEMC’s waste to U.S. Oil, contacted transporters to pick up MEMC’s waste, received invoices directly from U.S. Oil, and sent invoices to MEMC with a 10-26% markup for GIS’s services.

Conclusion and Implications

GIS claimed that it lacked sufficient decision making authority over the disposal process to be held liable as an arranger. But the District Court disagreed. Although CERCLA §107(a)(4) expressly requires that transporters select the disposal site to be deemed liable, §107(a)(3), which concerns arranger liability, lacks a similar requirement. (Thierry Montoya)

DISTRICT COURT HOLDS THAT STORMWATER IS A POLLUTANT SUBJECT TO REGULATION UNDER THE CLEAN WATER ACT

Puget Soundkeeper Alliance v. Whitley Manufacturing Co., Inc.,
___F.Supp.3d___, Case No. C13-1690RSL (W.D. Wash. 2015).

Puget Soundkeeper Alliance (plaintiff) sued Whitley Manufacturing Co. Inc. (defendant) for violating the federal Clean Water Act (CWA) by discharging stormwater associated with industrial activities into navigable “waters of the United States” without a permit. On plaintiff’s motion for summary judgment, the U.S. District Court for the Western District of Washington held that stormwater was a pollutant subject to regulation under the CWA-when Congress created the statute:

Even if the definition of ‘pollutant’ is strictly and narrowly construed to include only those

items specifically listed (a theory that does not have universal acceptance), Congress was well within its discretion to clarify that the phrase ‘industrial, municipal, and agricultural waste’ includes stormwater that comes in contact with those materials.

Background

The CWA authorizes any “citizen” to bring an action:

...against any person ... who is alleged to be in violation of an effluent standard or limitation

... or any order issued by [EPA] or a State with respect to such a standard or limitation. (33 U.S.C. § 1365(a).)

To file a lawsuit in federal court, a private citizen must first provide an alleged violator with notice of the alleged violations 60 days prior to initiating an action, and must also send that notice to relevant federal and state authorities. Federal regulations address the necessary level of detail in a notice letter, generally requiring a description of the alleged violation with enough specificity that the defendant can come into compliance. Citizens may not sue if the U.S. Environmental Protection Agency (EPA) or a state is “diligently prosecuting” an action, but may intervene as a matter of right. Otherwise, if settlement does not occur, citizen plaintiffs can lodge their complaint in a federal court and, if they “prevail or substantially prevail,” recover reasonable attorney fees and costs and civil penalties of up to \$37,500 per violation per day. (*Id.* § 1365(b)(1).)

The District Court’s Decision

The CWA defines a pollutant as:

...dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. (33 U.S.C. § 1362(6).)

Until the mid-1970s, EPA attempted to exempt stormwater from CWA regulation:

...because it had trouble distinguishing between point-source and nonpoint-source discharges and because it was overwhelmed trying to regulate the vast number of sources throughout the country. (*Decker v. Nw. Env’tl. Def. Ctr.*, 133 S.Ct. 1326 (2013).)

However, the D.C. Circuit held the exemptions unlawful in *Nat. Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir.1977). EPA then issued new regulations attempting to clarify which discharges were point sources subject to CWA regulation.

In 1987, Congress stepped in and required permits from stormwater discharges emanating

from presumptively dirty sources, such as large municipalities, previously-permitted sources, and ‘industrial activity.’ (*Ecological Rights Found. v. Pac. Gas and Elec. Co.*, 713 F.3d 502, 505 (9th Cir.2013).)

Congress expressly excluded these sources from the general exemption granted to “discharges composed entirely of stormwater.” (*Decker, supra*, 133 S.Ct. at 1336.)

EPA subsequently defined “stormwater discharge associated with industrial activity” to capture those discharges associated with industrial activities. This definition includes stormwater discharges from manufacturing buildings, material handling sites, storage areas, and accompanying yards and access roads. (40 C.F.R. §122.26(b)(14).)

In the State of Washington, stormwater discharge from industrial facilities is generally permitted under the state’s Industrial Stormwater General Permit (ISGP). The ISGP requires industrial facilities to manage and monitor stormwater runoff to ensure that contaminated stormwater is not discharged to wetlands, creeks, rivers, or marine waters. An ISGP permit requires permittees to: (1) prepare, implement, and update as necessary a Stormwater Pollution Prevention Plan (SWPPP) that, among other things, identifies on-site pollutant sources and Best Management Practices (BMPs) to prevent or reduce pollution, and includes a facility assessment, monitoring plan, and descriptions of applicable BMPs; (2) timely perform appropriate stormwater sampling and visual inspections, and submit proper reports of the sampling and inspections to Ecology; and (3) compare the sampling results to the benchmarks for those parameters and comply with the permit’s corrective action requirements and other recordkeeping obligations.

Here, defendant alleged that, notwithstanding that its stormwater discharges were “associated with industrial activity” therefore requiring a permit under the CWA, plaintiff’s claim should fail as there was no private right of action to enforce § 1342(p)’s permit requirement.

In the absence of a direct cause of action under § 1342(p), the argument goes, plaintiff must show that defendant’s stormwater discharge contained a ‘pollutant’ as the term is defined in

§ 1362(6) before it can establish a violation of the CWA's prohibition against 'the discharge of any pollutant.' (*Id.*)

The District Court agreed with defendant that no private right of action under § 1342 exists and that plaintiff must show that defendant discharged a pollutant, in order to establish a violation of § 1311:

Contrary to defendant's argument, however, plaintiff need not prove that defendant's stormwater contained a particular substance in a particular quantity because Congress, in enacting § 1342(p), determined that defendant's stormwater is, in and of itself, a pollutant.

The CWA compels this conclusion. In determining that the discharge of stormwater associated with industrial activity requires a permit, Congress necessarily found that the stormwater itself is a pollutant subject to regulation under the CWA. This conclusion is supported by case law. (*Nat. Res. Def. Council, Inc. v. U.S. EPA*, 966 F.2d 1292, 1304 (9th Cir).)

Conclusion and Implications

Although the court agreed with defendant that plaintiff could not bring a citizen suit on grounds that defendant failed to obtain a permit for its stormwater discharges, that victory was not resounding as the court held:

[I]n determining that the discharge of stormwater associated with industrial activity requires a permit, Congress necessarily found that the stormwater itself is a pollutant subject to regulation under the CWA.

Any unpermitted discharge of stormwater associated with industrial activity would, therefore, necessarily amount to a violation of the CWA, and that such a violation could independently give rise to citizen-suit liability. As stormwater "associated with industrial activity" covers a broad swath of discharges—those in that category should take extra care to eliminate such discharges to avoid CWA liability.

(Thierry Montoya)

DISTRICT COURT HOLDS OWNER OF CONSERVATION EASEMENT LACKED STANDING TO CHALLENGE CORPS' ADMINISTRATION OF THE CLEAN WATER ACT MITIGATION BANK PROGRAM

Walther v. U.S. ___F.Supp.3d___, Case No. 3:15-cv-0021-HRH (D. Ak. 2015).

A property owner in Alaska sued the United States, alleging that the U.S. Army Corps of Engineers (Corps) induced him to encumber his property with a perpetual conservation easement by promising him that the Corps would require the Alaska Railroad (Railroad) to purchase mitigation banking credits from him when the Corps issued a federal Clean Water Act permit to the Railroad. According to the property owner, the Corps instead required the Railroad to purchase invalid mitigation banking credits from another source. The United States moved to dismiss the lawsuit, asserting that the property owner lacked standing to challenge the Corps' administration of the mitigation banking program. The U.S. District Court for the District of Alaska agreed and granted the motion, concluding that even if the credits the Corps directed the Railroad to purchase were invalid it was not likely that a favorable decision would redress the plaintiff's alleged economic injuries

because the Railroad, the Clean Water Act permittee, was not required to use mitigation banking credits to meet its obligations under the Clean Water Act.

Background

Under the Clean Water Act, discharges of dredged or fill material into waters of the United States are prohibited unless authorized by a permit from the Corps. Such permits generally require mitigation of potential adverse impacts through avoidance, minimization, and compensatory mitigation. Avoidance requires "the selection of the least environmentally damaging practical alternative." Minimization requires "practicable project modifications and permit conditions that minimize adverse impacts." Compensatory mitigation requires appropriate compensation "for unavoidable adverse impacts after all avoidance and minimization measures have been taken."

"Permit applicants are responsible for proposing an

appropriate compensatory mitigation option to offset unavoidable impacts,” and have three options for accomplishing such mitigation: (1) mitigation banks, (2) fee in-lieu programs, and (3) permittee-responsible mitigation. Mitigation banks are the preferred method of compensatory mitigation, but the Corps’ district engineer makes the final determination of what the most practicable and appropriate compensatory method is based on case-specific circumstances.

The Corps encouraged Scott Walther, who purchased land in Alaska suitable for development, to encumber his land with a conservation easement though assurances that the Corps would require the Alaska Railroad to purchase mitigation bank credits from him. Based on these assurances, Walther formed and became the owner of a company that entered into a mitigation bank agreement with the Corps, recorded a perpetual conservation easement on the property, and paid \$140,000 to a third party as financial assurance for ongoing performance under the mitigation bank agreement. However, when the Corps issued a § 404 dredge and fill permit to the Railroad, it required the Railroad to purchase mitigation banking credits from another party. Walther and his company asserted the credits the Corps required the Railroad to purchase were not valid under applicable regulations and filed suit under the Administrative Procedure Act, asserting that the Corps failed to perform its non-discretionary duties in accordance with the applicable Clean Water Act regulations. The United States moved to dismiss the plaintiffs’ complaint for lack of standing.

The District Court’s Decision

To establish standing, Walther and his company were required to show it was “likely, as opposed to

merely speculative” that the injuries they alleged would be redressed by a favorable decision.

Walther and his company asserted that the remedy they sought was a court order requiring the Corps to comply with its non-discretionary duties in administering the Clean Water Act permit program. They claimed that such an order would restore the value of the mitigation banking credits held by Walther’s company. The District Court, however, concluded it was “speculative, at best,” that the plaintiffs’ economic injuries would be redressed by a determination that the Corps had failed to comply with its non-discretionary duties in approving the mitigation banking credits the Railroad purchased. The court explained that even if the mitigation banking credits the Railroad purchased were invalid, the Railroad would not be required to purchase such credits from Walther’s company. Under the applicable regulations, the Railroad would be free to propose, and the district engineer might approve, a compensatory mitigation program that does not involve any purchase of mitigation banking credits.

Conclusion and Implications

The District Court’s decision appears to foreclose the ability of a mitigation bank owner to challenge the Corps’ administration of the Clean Water Act mitigation bank program because the permittee would always have the option to choose another alternative to satisfy its mitigation obligations. Such a determination could serve as a disincentive for others to enter into mitigation bank contracts with the Corps in the absence of contractual protections for the mitigation bank owner.

(Duke K. McCall, III)

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