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EASTERN WATER NEWS

KIRTLAND AIR FORCE BASE'S JET FUEL SPILL UPDATE— FIRST REMEDIATION WELL DESIGNED TO EXTRACT CONTAMINATED GROUNDWATER SCHEDULED TO START PUMPING

The *New Mexico Environment* last month confirmed the "milestone" event of the upcoming start of pumping of the first remediation well designed to extract groundwater tainted with ethylene dibromide. Officials say pumping of the first well is scheduled to begin in late June 2015. This first well is located in a church parking lot about two miles from where the fuel leak originated in the 1950s. The Church Site has not gone without note from many stakeholders and residents saying their prayers for a start to the cleanup have been answered. The progress has drawn support from those who have long believed that the best remedy needs to focus on both remediation and extraction. It is estimated that between 6 million to 24 million gallons of fuel has leaked into the groundwater. Experts believe that the spill permeates the ground in three ways: fuel trapped between the surface and the groundwater, a large concentration floating on the top of the groundwater, and a diffuse layer that is moving toward Albuquerque Bernalillo County Water Utility Authority (ABCWUA) drinking water wells.

Background

In 1999, jet fuel was discovered 500 feet below the ground in the Albuquerque Aquifer, a partial source of Albuquerque's municipal water supply. In 2007, studies concluded the spill had reached the water table. It is believed the spill's plume is traveling within the Aquifer off of Albuquerque's Kirtland Air Force Base (KAFB) and into the vicinity of southeast Albuquerque near the Ridgecrest neighborhood. The ABCWUA maintains two of its largest drinking water wells in that area. Currently, the spill is only 4,000 feet from the nearest ABCWUA drinking water well. There are differing estimates as to how quickly the fuel is moving. Some estimates show the fuel could reach the nearest well in 40 years and others say it could happen within ten. Negotiations between the ABCWUA and the U.S. Air Force (USAF) are currently underway regarding specific contingency plans should the spill reach drinking water wells.

Albuquerque's KAFB updated its storage facilities for jet fuel in the early 1950s and first received jet fuel and aviation gas in 1953. Jet fuel has leaked from the facility into the surrounding soil since then. The leaks went completely unnoticed until 1992 when workers noticed a large surface plume emerging. Pressure tests of the pipeline were not performed until 1999. Initial estimates put the spill at around 8 million gallons but the most recent estimates put the spill at as large as 24 million gallons, two times the size of the 1989 Exxon Valdez oil spill.

It is believed the jet fuel originated from leaks in underground pipes at one of Kirtland Air Force Base's aircraft loading facilities. The leaks are estimated to have occurred for a period of 40 years prior to discovery. The spill site is located in the western part of KAFB where the Bulk Fuel Facility's (BFF) fuel processing and storage occurred. The spill site includes the former fuel offloading rack and the light non-aqueous phase liquid plume, both of which are referred to as the "BFF Spill." KAFB acknowledged early on that it "owns" the BFF Spill and is committed to leading the containment and remediation efforts.

Compliance Order and Settlement

On May 22, 2009, the Water and Waste Management Division of the New Mexico Environment Department issued a draft Compliance Order and proposed civil penalty to KAFB. The parties subsequently entered into a settlement agreement on September 25, 2009. In the settlement agreement, KAFB agreed to remove bulk fuel tanks in favor of installation and operation of a new system. The agreement also required KAFB to undertake a series of initial corrective actions that were calendared from September 2009 through September 30, 2011. In 2012, KAFB and ABCWUA entered into an agreement to craft a contingency plan in the event the contamination reaches the utility's wells.

KAFB has drilled more than 130 monitoring wells in its efforts to assess the jet fuel's plume. KAFB's monitoring wells provided the data for the increase in the estimated size of the spill. The increase in the estimated size of the spill from 6 million gallons to as much as 24 million gallons has been taken very seriously by both the state and KAFB officials. The data and calculations continue to be reviewed. The actual size of the spill will remain unknown until it is fully remediated.

What is known, however, is that over the course of several decades, the spilled fuel seeped an estimated 400-500 feet downward into the Aquifer. The Rio Grande River bisects Albuquerque's Aquifer (Aquifer), which is located in the Middle Rio Grande Basin. The Aquifer is approximately 100 miles long and 25-40 miles wide. It is bounded on the west by the Rio Puerco, Tijeras Canyon on the east, Cochiti Pueblo to the north and San Acacia on the south. The Aquifer's porous composition, comprised of sand and gravel, allows for the easy flow and percolation of water. Recharge to the Aquifer comes from snowmelt in the northern mountains and approximately eight inches of annual rainfall. Factors affecting the Aquifer's recharge rate include soil permeability, topography, evapotranspiration rates, soil—moisture content, depth to the Aquifer, and irrigation return flows. The Albuquerque Aquifer is part of the 450 mile long Rio Grande Rift, which has been called one of the most impressive rifts on Earth. It originates in Colorado's San Luis Basin extending south into Mexico. The rift provides a porous foundation, or reservoir, where water is stored in huge quantities.

Recent Progress in Tracking and Isolating the Jet Fuel Plume

In February 2014, A Contingency Plan Groundwater Model was created by scientists at CH2M Hill to determine where the jet fuel plume was headed and how fast it was moving. It also incorporated plans of the ABCWUA and KAFB's pumping rates to determine how this could help slow the speed that the plume is moving. This study concluded that a production well on KAFB (KAFB-3) might be impacted by the plume by 2024. ABCWUA wells Ridgecrest W-3 and W-5 may be impacted as early as 2040 if the pumping rates by the ABCWUA were to increase. If the pumping rates were maintained at a current level, the plume would arrive in 2054.

These estimates of 30 to 40 years are longer than previously estimated by independent studies and U.S. Environmental Protection Agency (EPA) investigations. The New Mexico Environmental Department (NMED) determined that the contamination would reach ABCWUA wells in five to seven years. Much of the discrepancy in the studies' conclusions can be attributed to the unpredictable flow of the Albuquerque Aquifer, which has changed flow directions and speeds many times in the last 100 years.

The EPA, ABCWUA, and KAFB all have concluded that pumping contaminated water out of the Aquifer would help slow the plume's movement. In particular, the EPA concluded that a network of six wells could pump 750 to 1,200 gallons of contaminated water per minute. Federal and state officials are still waiting for the results of KAFB's pump-and-treat test results before committing to a pump-and-treat solution.

Significantly, in April 2014, officials at KAFB determined that dilution of the fuel-contaminated water through a treatment system is not a viable option. When KAFB first proposed to reintroduce treated water that was previously contaminated by ethylene dibromide (EDP), it was offered as a "worst-case" scenario solution. However, officials determined that the public would not accept water that had previously been contaminated by jet fuel. EDP is a known carcinogen at very low concentrations. Other possible solutions have been proposed to replace the contaminated well water with newly purchased river water supplies or drilling new wells elsewhere in the Albuquerque Aquifer.

Albuquerque Water Wells in Peril

In recent years, studies conducted by the USAF, the New Mexico Environment Department, and independent experts have estimated that the spill will reach water wells in Albuquerque in anywhere from three to 40 years. The widely varying estimates are due to the complicated mixture of sediments that the fuel is flowing through. Estimation of movement speed is also affected by the lack of knowledge regarding the total amount of fuel that was spilled.

The New Mexico Environment Department placed a deadline of July 1, 2014 on KAFB to implement an interim corrective plan while a more expansive plan is created. After this deadline was missed by KAFB, it was pushed back to December 31, 2014. In Janu-

ary 2015, the New Mexico Environment Department issued a "notice of violation" to KAFB for failing to comply with the deadline. This "notice of violation" stipulates that KAFB must pay a civil penalty of up to $10,000 as well as $5,000 each day until a plan is implemented. These penalties would be nullified if KAFB implements a plan by June 30, 2015.

Conclusion and Implications

The USAF is continuing to work with NMED's Hazardous Waste Bureau on remediation efforts in accordance with, *inter alia*, the federal Resource Conservation and Recovery Act and the New Mexico Hazardous Waste Act. In the past, the USAF has cited lack of data and data gaps as primary setbacks causing the delays in initiating a cleanup plan. Therefore, the planned start of pumping of the first remediation well evidences a lot of progress on data collection and analyses. Existing monitoring wells continue to provide valuable data. For example, monitoring wells have discovered that the spill extends at least 60 feet below the surface. Deeper wells are needed to determine whether or not the spill extends below that. More wells will also give experts a better idea about the sediment. Project engineers report that an additional three wells designed to pump and extract contaminated the groundwater will be active by the end of 2015 with four more planned for 2016. (Christina J. Bruff)

NEWS FROM THE WEST

This month's News from the West involves federal court cases from California, Washington, and Alaska. First, a U.S. District Court in California broadly construed the federal Clean Water Act to allow a lawsuit for pollution that occurred from operating a power plant approximately one hundred years ago. Next, a U.S. District Court in Washington held that a decision to delay preparing a report on Total Daily Maximum Daily Load levels of a certain pollutant was not a violation of the Clean Water Act in the absence of sufficient scientific data and certain outstanding pre-submission requirements. Finally, companies in Alaska challenged a recent ruling from the Ninth Circuit holding that the Clean Water Act's permit shield did not protect permittees from liability for violations based on coal dust falling from a conveyor belt at a coastal loading facility.

U.S. District Court in California Holds that PG&E Can Be Sued under the Clean Water Act for Pollution Arising from Plants Operated Approximately One Hundred Years Ago

San Francisco Herring Association v. Pacific Gas and Elec. Co, ___F.Supp.3d___, Case No. 14-cv-04393-WHO (N.D. Cal. Feb. 26, 2015).

A U.S. District Court applied a broad construction of the Clean Water Act to deny a request by Pacific Gas & Electric Company (PG&E) to dismiss a case involving pollution at former plants. The court held the plaintiffs could bring the suit, even for pollution that occurred approximately one hundred years ago.

PG&E owned and operated gas manufacturing plants in the nineteenth and early twentieth centuries to create gas from coal. The plants were often spread across several city blocks and were highly polluting, generating considerable toxic waste. The waste was generally allowed to leach into the ground, was dumped into waterways, and was buried onsite. Plaintiffs alleged that persisting contamination occurred in the areas where the waste was previously deposited. They asserted the issue was particularly problematic because the plants were often located in close proximity to residential areas and the San Francisco Bay shoreline.

Plaintiffs, the San Francisco Herring Association and a resident, Dan Clarke, made claims related to three particular locations of former manufactured gas plants as the source of present day contamination. Clarke's home was located within the footprint of one of the plants, and the Herring Association brought this suit alleging broader violations of the Clean Water Act, the Resource Conservation and Recovery Act, and state nuisance and trespass laws. They asserted ongoing adverse effects from the waste disposal and challenged the adequacy of PG&E's testing and investigation for toxic contamination. Plaintiffs argue PG&E's remediation efforts were fundamentally inadequate to address risks to the environment and human health.

PG&E requested dismissing the case, arguing that the plaintiffs Clean Water Act claims must fail for

three reasons: (1) the claims arose from wholly past actions; (2) the plaintiffs inappropriately identified the plants as "point sources" under the act; and (3) the claims were related to groundwater, which cannot be considered a "navigable water" subject to Clean Water Act protections. However, the court disagreed on each point, finding that even though the plants were no longer in existence and the pollution was not actively occurring, allegations of contaminants being transported through the groundwater were sufficient to constitute an ongoing violation. The court noted the statutory definition of a point source is extremely broad and refused to hold that an entire factory or plant could not be considered a point source under the Clean Water Act. Finally, the court held that while pollution was effectuated through groundwater, it was clear the San Francisco Bay (Bay), a navigable water, was the body of water that was affected for Clean Water Act purposes.

In addition to recognizing the adverse impacts to the Bay, the court recognized Clarke's injury, in the form of diminution of his property value, was sufficient for a claim under the Clean Water Act. The court held a relationship to the point source and the conduit for the violations was sufficient to support a claim even though the claim was not directly related to the affected navigable waters. Finally, the court refused to strike the Resource Conservation and Recovery Act claim rejecting PG&E's argument that the claim was precluded as duplicative of the Clean Water Act claim. Thus, the requested dismissal was denied, and the case was allowed to proceed.

U.S. District Court in Washington Finds State's Decision to Delay Completion of a TMDL Report Was Not a Violation of the Clean Water Act

Sierra Club v. McLerran, ___F.Supp.3d___, Case No. 11-CV-1759-BJR (W.D. Wash. Mar. 16, 2015).

A U.S. District Court recently held that the State of Washington's decision to delay the preparation of a report on the Total Maximum Daily Loads (TMDLs) for pollutants under the Clean Water Act, in the absence of sufficient scientific data and without having first satisfied pre-submission requirements, was not a violation of the Clean Water Act. However, the court did find that approving a task force in lieu of promptly completing the TMDLs was improper and thus required the state to take action.

Plaintiffs, the Sierra Club and the Center for Environmental Law and Policy, brought this action against the U.S. Environmental Protection Agency, claiming it had failed to perform duties required by the Clean Water Act. The act requires that the states develop TMDLs for each pollutant impairing water segments. This case centered on the failure by Washington to prepare a TMDL for polychlorinated biphenyls in the Spokane River. Rather than preparing the TMDL, the Washington State Department of Ecology approved a task force to make measurable progress toward meeting applicable water quality criteria. Plaintiffs argued that doing so clearly and unambiguously showed that the state would not be preparing the report, thus violated the EPA's duties under the Clean Water Act. But, the court disagreed.

The court found it was reasonable under the circumstances to delay the preparation of the TMDL where there was insufficient scientific data available and all pre-submission requirements had not yet been satisfied. However, the court issued a cautionary note that at a certain point the failure to prepare a particular TMDL could ripen into abandonment of the obligation to do so. However, the court chose not to define the specific contours of when and under what circumstances such abandonment would occur.

The court also considered the plaintiffs' claims that the agency had acted contrary to the law and had abused its discretion in approving the task force as an alternative to preparing the TMDL. While the court stated it would have been within the EPA's discretion to pursue reasonable means of reducing pollution in addition to establishing TMDLs, it was not within the agency's purview to allow an alternative course of action in place of meeting the statute's requirements. Thus, the court found that EPA had acted contrary to the law on that aspect of the dispute.

Petitioners Seek Supreme Court Review of Ninth Circuit's Finding of No Protection under Clean Water Act's Permit Shield for Coal Dust at a Coastal Coal Loading Facility

Aurora Energy Servs., LLC v. Alaska Cmty Action on Toxics, Case No. 14-1060 (U.S. Mar. 3, 2015).

Aurora Energy Services and the Alaska Railroad Corporation recently requested that the U.S. Supreme Court reverse a Ninth Circuit Court of Ap-

peals decision and resolve an unsettled issue among the circuits regarding protections provided by the Clean Water Act's "permit shield." The petitioners challenged the Ninth Circuit's holding that the parties were liable for violating the Clean Water Act when coal dust, which was not covered by the facility's permit, fell into the water from a conveyor belt operating over the open water at a coal loading facility on Alaska's shoreline.

The U.S. Environmental Protection Agency has long known that coal dust occasionally falls into the water during loading but has allowed the facility to operate using a permitting process authorized under the Clean Water Act. Generally, the issuance of such a permit shields the facility from liability for pollution disclosed at the time the permit was issued, assuming the facility complied with all permit requirements and that the discharge was within reasonable contemplation at the time of issuance. In their petition to the Supreme Court, the petitioners argue that the Ninth Circuit improperly abandoned this approach and found liability for the discharge of coal dust based on a strict reading of the permit.

Looking to the express language of the permit, the Ninth Circuit held that the list of authorized nonstormwater discharges was intended to be exclusive. Because coal dust was not on that list, the parties were not shielded from liability for the discharges. The petitioners argue that the Ninth Circuit's strict interpretation of the permit shield adds a weighty burden to the permitting agency, forcing all authorized discharges to be listed at the time of permit issuance. Petitioners further assert that this interpretation nullifies the effect of the permit shield for holders of general permits, which apply broadly to entire categories of discharging facilities.

Based on the Ninth Circuit reaching a different holding than its sister circuits, the petitioners have requested review by the Supreme Court, and argue that such review is warranted at this time.
(Steven Martin)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

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

Civil Enforcement Actions and Settlements—Water Quality

•EPA Region 7 has reached a settlement with a Jefferson County, Missouri property owner to resolve federal Clean Water Act (CWA) violations involving unpermitted discharges of pollutants into an unnamed tributary of Belews Creek. As part of the settlement, Greg Schellert has agreed to pay a penalty of $30,000 and fully restore the impacted portion of the tributary. A U.S. Army Corps of Engineers (Corps) inspection in March 2014 documented that Schellert violated the Clean Water Act when he, or others working on his behalf, used earth-moving equipment to discharge fill material into the tributary as a part of work associated with the construction of a dam. The tributary is classified as a water of the United States by the CWA. The work was performed without a permit issued pursuant to § 404 of the CWA. The Corps referred the case to EPA after discovering the violations.

•The Missouri Department of Transportation (MoDOT) has agreed to implement a statewide compliance program and to pay a $750,000 civil penalty to settle alleged violations of the CWA at two road construction sites. The sites are Highway 54 in Osage Beach and on Highway 67 between Coldwater and Silva. EPA inspected the sites in 2010 and 2011 and documented serious erosion control issues at both sites. Inspectors identified violations at the sites including failing to install or implement adequate stormwater control measures, neglecting to repair those that were installed, failing to develop a sufficient pollution prevention plan and update the plan as appropriate, and unsatisfactory record-keeping and self-inspections. The inspections arose from complaints received from Osage Beach residents with concerns that construction at the site resulted in the deposit of mud and sediment on nearby properties, and that water turbidity and associated sedimentation could harm aquatic life. The consent decree requires MoDOT to establish a stormwater compliance management structure to increase oversight in erosion control, including: a stormwater compliance manager to oversee stormwater compliance statewide, a stormwater compliance manager for each construction project, environmental construction inspectors for each project, and implement an electronic stormwater compliance database to track the correction of stormwater deficiencies identified during self-inspections. The consent decree also requires a stormwater training program for employees, and third-party oversight inspections, which require a consultant or MoDOT inspector not affiliated with the project to conduct additional inspections at environmentally sensitive areas in Missouri.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•In a recent settlement agreement with EPA, Hilton Oil Co., Inc. will take action to come into compliance with Underground Storage Tank regulations to protect groundwater and soil at its facility in Lawrence, Massachusetts. The company also agreed to pay a $27,000 penalty. The action stems from an EPA inspection of the facility in June 2013. A subsequent EPA complaint alleged that Hilton did not have documentation proving that it had conducted the required tank monitoring to ensure that the tanks at the facility were not leaking harmful petroleum products into the ground. EPA's complaint also alleged that the facility failed to test its tanks monthly for possible leaks, and failed to check to make sure the tanks were not rusting. Underground storage tanks are regulated by EPA under the federal

Resource Conservation and Recovery Act (RCRA). These tanks range in capacity from a few hundred to 50,000 or more gallons, and are used to store gasoline, heating oil and other fuels, waste oil and hazardous substances at gas stations, marinas, government facilities and large industrial sites.

• Integrated Environmental Technologies (IET), a South Carolina-based pesticide registrant, and Seriously Clean, Ltd., of Nixa, Missouri, a firm that served as an authorized distributor of IET's product under a different brand name, have agreed to pay civil penalties of $87,344 and $91,829, respectively, to settle alleged violations of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). According to separate but related administrative consent agreements filed by EPA, the firms sold a pesticide with claims and directions for use that differed substantially from the product's registration, in violation of FIFRA. IET is the official EPA registrant for EcaFlo Anolyte. Seriously Clean is an authorized supplemental distributor of EcaFlo Anolyte under the name Nixall Disinfectant + Cleanser. An inspection by the Missouri Department of Agriculture of the Seriously Clean facility in September 2012, and a subsequent investigation, documented that Seriously Clean had distributed IET's EcaFlo Anolyte product with claims that differed substantially from the product's registration. By agreeing to their respective settlements, IET and Seriously Clean have both certified that their operations are now in compliance with FIFRA and its regulations. In addition to the allegations pertaining to the distribution of the supplementally distributed IET product, the Seriously Clean settlement also resolves the alleged distribution of an unregistered pesticide, and the failure to submit a required production report to EPA.

Indictments, Convictions, and Sentencing

• Bonita Witt-Hird, 60, of Thorpe (McDowell County), West Virginia, was sentenced to one year and one day in federal prison for filing fraudulent water quality reports. Witt-Hird was formerly employed as the office manager for Richmorr Associates, Inc., an environmental engineering firm in Elkview, West Virginia. Richmorr provides water sampling services to wastewater treatment plants throughout West Virginia. Wastewater plants are required by state and federal law to sample wastewater discharges and the results are submitted to the West Virginia Department of Environmental Protection (WVDEP). WVDEP reviews the results to ensure compliance with water quality standards. In the event of noncompliance, WVDEP may levy fines or, in extreme cases, shut down the wastewater treatment plant. In November 2015, Witt-Hird pleaded guilty admitting that from April 2012 to June 2013 she filed approximately 80 false reports with the WVDEP. The false reports made it appear that current water quality sampling had been performed for the wastewater plants when, in fact, the test results had been copied from previous years. Witt-Hird previously pled guilty in September 2013 to obstructing an IRS investigation and served a one-year sentence related thereto. (Melissa Foster)

JUDICIAL DEVELOPMENTS

ELEVENTH CIRCUIT DIRECTS ARMY CORPS OF ENGINEERS TO REEVALUATE CLEAN WATER ACT GENERAL PERMIT FOR COAL MINING OPERATIONS

Black Warrior Riverkeeper v. U.S. Army Corps of Engineers, ___F.3d___, Case No. 14-12357 (11th Cir. Mar. 23, 2015).

In a decision reversing a grant of summary judgment in favor of the U.S. Army Corps of Engineers (Corps), the U.S. Court of Appeals for the Eleventh Circuit remanded a dispute over the validity of a nationwide General Permit regulating the discharge of material associated with coal mining operations to the Corps for reevaluation. Plaintiffs Black Warrior Riverkeeper, Inc. and Defenders of Wildlife filed suit challenging the revised nationwide General Permit the Corps issued in 2012 (NWP 21). The District Court granted summary judgment for the Corps on the basis of laches. The Eleventh Circuit concluded that plaintiffs' claims were not barred based on laches, but in light of a disclosure by the Corps that the Corps had discovered an error in the calculations underlying the permit, the Eleventh Circuit remanded NWP 21 for reevaluation by the Corps.

Background

Section 404 of the federal Clean Water Act (CWA) authorizes the Corps to issue permits for the discharge of dredge and fill materials into waters of the United States. The Corps may issue nationwide General Permits under § 404 to a specified class of activities that are:

> …similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.

The National Environmental Policy Act (NEPA) sets a similar threshold, requiring the Corps to issue an Environmental Impact Statement (EIS) for any agency action likely to cause significant environmental effects; an EIS is not required where the Corps issues a Finding of No Significant Impact.

The Corps issued NWP 21 to authorize:

> …[d]ischarges of dredged or fill material into waters of the United States associated with surface coal mining and reclamation operations.

NWP 21 covers a number of activities including the deposition of removed soil, rock, and coal residue into streams; mining through streams, or more generically creating sediment ponds and building local infrastructure. NWP 21 was first issued in 1982 and has been updated several times since. The version of NWP 21 issued in 2012 made two material changes. First, paragraph (a) reauthorized existing operations, subject to verification by a district engineer that they will continue to cause only minimal adverse effects. Second, paragraph (b) provided that all new operations may not cause the loss of greater than ½-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed. The Corps determined that these changes would not have more than a minimal adverse effect on the environment, in compliance with the CWA, and would not significantly affect the environment, making an EIS unnecessary under NEPA. Since issuing NWP 21 in 2012, the Corps reauthorized 41 projects in the Black Warrior River watershed under paragraph (a).

Plaintiffs alleged in their lawsuit that the activities authorized under NWP 21 have and will continue to have more than minimal effects on the environment. In particular, the plaintiffs asserted that the Corps acted arbitrarily and capriciously by requiring the limitations established by paragraph (b) for new operations, but not existing operations. Plaintiffs requested that the District Court vacate NWP 21 and all reauthorizations issued thereunder. The Corps, and intervening members of industry, countered that the plaintiffs lacked standing, should be barred under the doctrine of laches, and otherwise failed to meet their burden to obtain the requested relief.

On summary judgment, the District Court found that plaintiffs had standing, but committed laches by delaying the filing of their action. Notwithstanding the procedural defect, the District Court also found that the 2012 NWP 21 does not create significant, more than minimal environmental effects, and therefore held that the Corps did not act unlawfully. Plaintiffs appealed.

The Court of Appeal's Decision

On the eve of oral argument before the Eleventh Circuit, the Corps revealed that it had discovered a calculation error in its development and analysis of NWP 21. Specifically, the Corps had made the inaccurate assumption that *all* operations, both existing and new, would be subject to the limitations imposed under paragraph (b). In other words, it failed to account for the possibility that existing operations reauthorized under paragraph (a) were entitled to, and may indeed, cause the loss of greater than ½-acre of non-tidal waters of the United States. Accordingly, the Corps requested that the Eleventh Circuit remand the case to the Corps for reevaluation of environmental impact based on more accurate precepts.

Standing and Laches

The Eleventh Circuit affirmed that the plaintiffs had standing, but reversed the dismissal of plaintiffs' claims based laches. The Eleventh Circuit adopted the District Court's finding that the plaintiffs had waited to file their lawsuit until ten months after obtaining the relevant public records, but opined that the plaintiffs were entitled to take the time to review the public records, evaluate their significance, and prepare their arguments and filings. In light of that, the Eleventh Circuit held that the plaintiffs acted within a reasonable amount of time and had not committed laches.

The General Permit

As to the validity of NWP 21, the Eleventh Circuit granted the Corps' request to reevaluate the permit, taking into account that reauthorized operations would not be subject to the limitations imposed by paragraph (b). The majority determined that it would be impossible to conclude whether the Corps acted arbitrarily and capriciously based on the current record. It remanded the case back to the District Court, instructing it to: (1) remand the matter to the Corps for reevaluation; (2) determine whether any further relief, including vacating reauthorized permits or suspending future reauthorizations, was warranted; and (3) direct the Corps to make its determination within one year. Judge Totenberg issued a concurring opinion, opining that:

> …the issuance of a nationwide permit under § 404 based on a faulty and unsupported minimal impacts analysis violates § 404 of the CWA.

Accordingly, she would have instructed the District Court to suspend all future reauthorizations as well as those for projects where filling activities had not yet begun.

Conclusion and Implications

The Eleventh Circuit's ruling prolongs the uncertainty surrounding the final disposition of NWP 21 for at least another year, at which point the Corps will disclose the results of its reevaluation. In the interim, the District Court has been instructed to decide whether to uphold or vacate existing and future reauthorizations under paragraph (a) of NWP 21. Depending on the District Court's rulings, coalmine operators may be forced to suspend filling and dredging activities for existing operations. Alternatively, if the District Court declines to vacate reauthorizations under paragraph (a), operators may be able to continue their existing activities, subject to the continuing risk that NWP 21 may ultimately be modified or vacated. (Teodoro B. Bosquez IV and Duke K. McCall, III)

FOURTH CIRCUIT SPLIT PANEL AFFIRMS SUMMARY JUDGMENT IN CERCLA ARRANGER CASE

Consolidation Coal Co. v. Georgia Power Co., ___F.3d___, Case No. 13-1603 (4th Cir. Mar. 20, 2015).

The U.S. Court of Appeals for the Fourth Circuit held in a 2-to-1 decision that Georgia Power was not liable as an "arranger" under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for its sale of used transformers containing hazardous substances. The majority reasoned that, despite Georgia Power's references to the sales as "disposal" and "scrapping" of used transformers, the plaintiffs had failed to present evidence indicating that Georgia Power intended to dispose of hazardous substances when it sold the transformers to a recycler. The dissent disagreed, deeming it inappropriate to conclude at the summary judgment stage that there was no issue of material fact regarding Georgia Power's intent.

Background

In the 1980s, Georgia Power sold used electrical transformers containing polychlorinated biphenyls (PCBs) to Ward Transformer Company (Ward), which repaired and resold the transformers to third parties. In the process of repairing the transformers, Ward released PCBs into the environment. In the early 2000s, the U.S. Environmental Protection Agency (EPA) initiated a removal action at the Ward site and required various companies, including Consolidation Coal, to bear the cost of the removal action. These companies subsequently filed a CERCLA contribution claim against Georgia Power, alleging that Georgia Power was liable for the removal costs because of its sale of transformers to Ward. Specifically, the plaintiffs alleged that Georgia Power was liable under 42 U.S.C. § 9607(a)(3) as an "arranger" of the disposal of hazardous substances. After the close of discovery, Georgia Power moved for summary judgment, which the District Court granted, holding that Georgia Power lacked the requisite intent to be held liable as an arranger under CERCLA. The plaintiffs appealed.

The Fourth Circuit's Decision

The two-judge majority applied the framework outlined in *Burlington Northern and Santa Fe Railway Co. v. United States*, 556 U.S. 599 (2009) and *Pneumo Abex Corp. v. High Point, Thomasville & Denton Railroad Co.*, 142 F.3d 769 (4th Cir. 1998) to analyze whether Georgia Power intended to dispose of hazardous substances. The court began by determining that documents referring to the transformer sales as "scrapping" and "disposal" were insufficient to establish that Georgia Power's goal was disposal. The court relied in part on other documents suggesting that Georgia Power used those terms to mean that the transformers were "actually sold." The court ultimately concluded that the terminology Georgia Power used to describe the transformer sales was not dispositive in determining its intent.

Analysis under the *Pneumo Abex* Decision

Finding no direct evidence of whether Georgia Power intended to dispose of the transformers, the court analyzed the four factors identified in *Pneumo Abex*:

> ...(1) the intent of the parties as to whether the materials were to be reused entirely or reclaimed and then reused, (2) the value of the materials sold, (3) the usefulness of the materials in the condition in which they were sold, and (4) the state of the product at the time of the transferal.

Under the first factor, the court found that Ward intended to reuse the transformers as much as possible rather than sell them for scrap or dispose of them. The court considered Ward's removal of the PCB-laden oil from the transformers before resale unimportant, as that was a decision made by Ward based on the specifications of third-party buyers.

Under the second factor, the court noted that Georgia Power sold the transformers for more than scrap value and that Ward profited from its reprocessing operations. The court found no evidence that Georgia Power sold the transformers to Ward at a discount because of the presence of PCBs.

Under the third factor, the court noted that the transformers were in a condition in which they could be refurbished and reused and that Georgia Power had even reused similar transformers itself in some

instances.

Finally, under the fourth factor, the court found that the transformers were in good condition at the time of the sale because there was no evidence that they were leaking or maintained in such a way that would necessarily lead to spills. Considering these factors together, the court determined that the plaintiffs had not presented a genuine issue of fact regarding Georgia Power's intent to dispose of hazardous substances.

The Dissent

In dissent, Judge James Wynn took a markedly different view of the significance of Georgia Power's use of the terms "scrapping" and "disposal." Judge Wynn found that while courts should look "beyond the parties' characterization" of a transaction, Georgia Power's terminology was nonetheless important evidence of its intent. As part of applying the *Pneumo Abex* factors, Judge Wynn noted that many of the transformers were not in useful condition because they were filled with moisture and needed to be completely drained and repaired. He also found it significant that Georgia Power had experience repairing transformers and knew that such repairs were likely to result in spills of PCB-laden oil. Judge Wynn concluded that the case should not have been decided on summary judgment, finding that nothing in the case clearly established Georgia Power's intent, which is "generally a question for the finder of fact."

Conclusion and Implications

The Fourth Circuit's decision is notable for its construction of what constitutes evidence of intent to dispose of hazardous substances under CERCLA. While the majority acknowledged that Georgia Power theoretically could have intended to dispose of PCBs in addition to its goal of recovering money for the transformers, it set a high bar for proving such secondary intent. The majority opinion was also notable in that it concluded that summary judgment was appropriate when the intent of a party, a question traditionally reserved for the trier of fact, was dispositive. The *Consolidation Coal* decision may thus make it easier for a party that sold materials containing hazardous substances to successfully argue that it did not have the intent to dispose of the hazardous substances. In particular, it may make it easier for such a party to prevail on a motion for summary judgment. (Douglas A. Hastings and Duke K. McCall, III)

CIRCUIT COURTS OF APPEALS NOW IN CONFLICT ON THE REVIEWABILITY OF ARMY CORPS JURISDICTIONAL WETLANDS DETERMINATIONS WITH EIGHTH CIRCUIT'S DECISION IN *HAWKES*

Hawkes Co., Inc. v. U.S. Army Corps of Engineers, ___F.3d___, Case No. 13-3067 (8th Cir. Apr. 10, 2015).

A significant split in the federal Circuit Courts of Appeals arose April 10, 2015 when the Eighth Circuit ruled that a jurisdictional determination (JD) by the U.S. Army Corps of Engineers (Corps) over wetlands was reviewable under the Administrative Procedure Act (APA). The Eighth Circuit opinion held the facts pleaded in the U.S. District Court complaint were sufficient to show final agency action from which significant legal consequences would flow, such that judicial review should be accorded. In its decision, *Hawkes Co., Inc. v U.S. Army Corps of Engineers*, the Eighth Circuit panel expressly disagreed with the contrary ruling in *Belle Company, LLC, et al v. U.S. Army Corps of Engineers*, 761 F.3d 383 (5th Cir., 2014).

Background

The 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. 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 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, with

Corps personnel even telling a company representative he would need to find a new job. Allegedly, the Corps made clear there would be high cost to any permit application and that it almost certainly would be denied.

The District Court's Decision

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).

The Court of Appeals' Decision

Distinguishing *Hawkes* from *Sackett* and *Bell Company*

In Belle Company, the Eighth Circuit distinguished the facts and setting from those that were present in *Sackett*.

The Fifth Circuit noted:

> …the compliance order in *Sackett* itself imposed, independently, coercive consequences for its violation because it 'expose[d] the Sacketts to double penalties in a future enforcement proceeding, *Sackett*, 132 S.Ct. at 1372. By contrast, the JD erects no penalty scheme. It imposes no penalties on Belle. And neither the JD nor Corps regulations nor the CWA require Belle to comply with the JD.

The Fifth Circuit also indicated it viewed the fact that Belle Company could have sought a permit as an additional factor making the JD non-final for APA purposes, even though it likely would not be altered in the future. Additionally, in Belle, since there was no actual compliance order, the Fifth Circuit noted Belle Company did not have a risk of daily mounting penalty.

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 flowing 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."

Looking to U.S. Supreme Court Precedent

The Eighth Circuit majority opinion points to several cases from the U.S. Supreme Court where APA or constitutional due process review was accorded, even though the government entity said there was a lack of exhaustion of remedies or other future uncertainty that precluded review. These cases included: *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).

Although the Supreme Court case of *Bennett v. Spear*, 520 U.S. 154 (1997), deals with compliance orders, the Eighth Circuit found that the circumstances *Hawkes* plaintiffs found themselves in were substantively as full of real world jeopardy or practical harm as if a compliance order had in fact been written. A lawful use of private property had essentially been prohibited unless a person was willing to flaunt the formal determination of the federal government in order to "test" the validity of the government's JD. This factor swayed the concurring Judge (who quibbled with the reasoning respecting precedent) into accepting the majority panel determination that the plaintiffs were entitled to judicial review.

Conclusion and Implications

It is probable that there will be efforts to find a path by which the Supreme Court is asked to resolve the split among the federal Circuits. In the meantime, plaintiffs affected by JDs and who may seek judicial review thereof are well advised to include a strong statement of the facts concerning the case, and especially the indifference of the government to the impact its JD imposes on otherwise lawful expectations for use of property or other lawful activity. (Harvey M. Sheldon)

DISTRICT COURT HOLDS A STATE RETAINS DISCRETION UNDER THE CLEAN WATER ACT TO ENACT AND ENFORCE A METHOD OF IDENTIFYING IMPAIRED WATERS

Florida Wildlife Federation v. Gina McCarthy,
___F.Supp.3d___, Case No. 8:13-cv-2084-T-23 (M.D. Fl. Mar. 16, 2015).

Plaintiffs sued the U.S. Environmental Protection Agency (EPA) alleging that in reviewing Florida Department of Environmental Protection (FDEP), EPA violated federal Clean Water Act (CWA) § 303(c) by only reviewing a portion of the Impaired Water Rule (IWR) that constituted a new or revised water quality standard—instead of the entire IWR. Plaintiff alleged EPA's statutory authority to review a new or revised water quality standard implied the authority to review other provisions as well—including otherwise unreviewable antidegradation policy. The U.S. District Court for the Middle District of Florida held that plaintiff's arguments lacked support under the CWA and granted EPA's motion for summary judgment.

Background

FDEP adopted the IWR in 2001, "establishing a methodology to identify" impaired surface waters. On remand from the Eleventh Circuit Court of Appeals, the District Court ordered EPA to:

> …determine whether the IWR, or any [portion] thereof, constitutes a new or revised water quality standard.

On review, EPA determined that a portion of the IWR as a new or revised water quality standard—thereby requiring EPA's review. CWA § 303 grants the EPA authority to review and to approve or reject a state's new or revised water quality standard and the state's list of impaired waters.

> But a state retains discretion to enact and to enforce—without EPA's review and approval—both a method of identifying impaired waters and an antidegradation policy.

After reviewing the new or revised portion of FDEP's IWR in 2005, EPA disapproved the reviewed portion on "procedural grounds."

After correcting the procedural fault and amending its IWR, FDEP submitted its Amended IWR to the EPA for review in 2008. On review, EPA confirmed that FDEP corrected the procedural fault. Discussing the 2008 IWR substantively, EPA stated that it was "not revisited [the portion] of the [IWR] that had not changed since EPA's 2005 review of the Rule," and that EPA reviewed the Amended IWR portion "to determine whether … [the] amended [portion] effected a change" to the State's water quality standard. EPA approved the amended IWR constituting a new or revised water quality standard.

The District Court's Decision

Plaintiffs argued that under CWA § 303(c), the EPA had an obligation to review the entirety of the amended IWR. Plaintiffs failed, however, to argue that the entire amended IWR was a new or revised water quality standard. In a previous ruling in this case, the Eleventh Circuit ordered the EPA to review the IWR to the extent that the entire rule "would *in effect*…create [a] new or revised water quality standard" (citing to *Florida Public Interest*, Case No. 4L02-cv-408, Doc. 185 at 22.) The Eleventh Circuit further held that as to the portions of the IWR that would not have any effect on the state's water quality standard, EPA review was not required. The District Court found that:

> Therefore, the EPA correctly reviewed only the portion of the amended IWR that constitutes a new or revised water quality standard.

In arguing that EPA must review the entire IWR, plaintiffs cited to a letter in which the:

> FDEP [allegedly] formally and officially requested [that] the EPA review and approve FDEP's entire [amended] IWR… (citation omitted.) On closer examination, this letter confirmed that the FDEP submitted three sets of rule amendments to the EPA for review, and the letter contained a version of the amended IWR for ease of review. The court held, therefore, that plaintiffs' § 303(c) arguments 'were baseless.'

Plaintiffs also alleged that the EPA was obligated to review the entire amended IWR under § 303(d). Section 303(d)(2) requires the FDEP to create a list of impaired waters that cannot reach:

> …any water quality standard applicable to such waters….[even after applying] technology-based effluent limitations….For the purposes of listing waters…., the term 'water quality standard applicable to such waters'…refer[s] to those water quality standards established under section 303 of the Act, including …antidegradation requirements. The state must, therefore, consider antidegradation requirements when preparing its list of impaired waters.

The plaintiffs argued that under this section, the impaired waters list:

> …must include the assessment and evaluation of whether ambient waters are attaining applicable state antidegradation [water quality standards].

Based on this section, plaintiffs argued that the IWR must comply with the same requirement. However, plaintiffs did not argue that any portion of the IWR constituted the impaired waters list. The court's own review of:

> …the IWR reveals no portion that is the impaired waters list or '*in effect*' constitutes the impaired waters list.

Section 303(d)(2) requires the EPA to review the waters that comprise the impaired waters list, not a "methodology to identify impaired waters."

Conclusion and Implications

In the end, the District Court found that plaintiffs failed to prove that the EPA's decision was arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law.

Plaintiffs have long been fighting over the implementation of Florida's antidegradation policy seeking to invalidate Florida's impaired waters assessments going back to 2009, the point being t to force the State to add more restrictive TMDLs, and to add increased baselines for antidegradation analysis. This particular case failed in that regard. (Thierry Montoya)

DISTRICT COURT FINDS PROPERTY OWNER'S CLAIM FOR PCB EXPOSURE TIME BARRED BASED ON NOTICE OF THE CONTAMINATION FOR ALMOST TWO DECADES

Hubbard-Hall, Inc. v. Monsanto Company et al.,
___F.Supp.3d___, Case No. 3:13-cv-104 (D. Conn. Mar. 29, 2015).

The U.S. District Court for the District of Connecticut granted summary judgment in favor of defendant Monsanto Company on plaintiff Hubbard-Hall's claims related to contamination resulting from paint containing polychlorinated biphenyl (PCB) manufactured by Monsanto. Monsanto argued that Hubbard-Hall's claims were subject to a two-year statute of limitation and that Hubbard-Hall was on notice of the contamination since its environmental consultant identified the PCB contamination in 1997. The District Court found that Hubbard-Hall's claims accrued in 1997 when it discovered or should have discovered the contamination in the exercise of reasonable care.

Factual and Procedural Background

This case arises from contamination of industrial property caused by PCBs, a highly toxic substance. Plaintiff Hubbard-Hall, a chemical distributor, alleged that PCB-containing paint applied to the exterior of structures on its property migrated into building materials and surrounding soil. A predecessor of the Monsanto Company defendants (Old Monsanto) was the sole manufacturer of PCBs in the United States before their manufacturer was banned by the U.S. Environmental Protection Agency (EPA) in 1977.

In 1982, the Connecticut Department of Environmental Protection (DEP) issued a report issued a report, which identified the presences of PCBs on Hubbard-Hall's land. A decade later, in 1992, EPA

engaged a consultant to inspect the Hubbard-Hall property and collect soil samples looking for the presence of PCBs. In a report dated 1993, EPA's consultants concluded that two of the samples contained PCBs and stated that Hubbard-Hall has never used or generated waste containing PCBs and it is unknown what this contaminant may be attributed to. A copy of the EPA's consultant's report was provided to Hubbard-Hall, however, Hubbard-Hall took no steps to remediate the PCBs contamination. In 1997, Hubbard-Hall hired its own consultant to test the property for contaminants. Hubbard-Hall's consultant issued a report summarizing the information in the earlier reports and stated that earlier testing had discovered the presence of PCBs on the property. Hubbard-Hall again took no steps to remediate the property in response to that report. In 2000, Hubbard-Hall retained another consulting firm that conducted testing on site. In 2003, another report was prepared that identified the presence of PCBs on the property. Hubbard-Hall did not undertake all of the follow-up investigatory steps recommended by its own consultant. In 2004, the DEP inspected the property and determined that the property was "significantly contaminated with … PCBs." Thereafter, EPA and DEP directed Hubbard-Hall to remediate the contamination.

Hubbard-Hall filed suit against Monsanto Company under Connecticut state law seeking compensatory damages and declaratory relief. Defendants filed a motion for judgment on the pleadings based upon the ten year statute of repose and a motion for summary judgment based upon the two year statute of limitation. The U.S. District Court overruled the motion for judgment on the pleadings finding that the allegations in the complaint were sufficiently plead to allege the "useful safe life" exception to the statute of repose. The District Court granted the motion for summary judgment.

The District Court's Decision

In ruling on the motion for summary judgment based upon the two year statute of limitation, the sole question for the court was whether the references to and mentions of PCBs in the various environmental reports put Hubbard-Hall on notice that its property was contaminated through the fault of another party.

After recounting the history of the creating and disclosure of the environmental work on the property, the court noted that in order to defeat summary judgment, Hubbard-Hall had to explain why the reports authored by environmental consultants for DEP, EPA and Hubbard-Hall, which all stated that the property was contaminated with PCBs, failed to put it on notice that its property was contaminated with PCBs.

Hubbard-Hall opposed the motion and endeavored to show that the company was not sure that its property was contaminated with PCBs. The court responded and stated that Hubbard-Hall misapprehended the relevant inquiry and its responsibilities under the law. The court continued that definitive evidence of contamination was not required, but that it was incumbent on Hubbard-Hall to take reasonable steps to protect its interests once it learned it had probably been injured.

Inquiry Notice

The District Court further explained that a party like Hubbard-Hall, on notice of likely contamination, might rationally keep mum in the hope that regulators would never order it to remediate. In the event remediation happened to be mandates, the party would lose nothing; it would simply sue then. And if contamination were to escape official notice indefinitely, so much the better—no need to sue and not need to remediate. In order to avoid a party allowing contamination to fester, "the law sensibly expects more from companies on notice of contamination." The court determined that when Hubbard-Hall received reports indicating that its land was contaminated with PCBs, it was obligated to take reasonable steps to determine whether PCBs were indeed present and, if they were, where they came from. In failing to do so, Hubbard-Halls actions were not justified. Following Seventh Circuit precedence of *Vector-Springfield Properties, Inc. v. Central Ill. Light Co., Inc.*, 108 F.3d 806 (7th Cir. 1997), the District Court determined that the cause of action accrues when:

> …a reasonable person, possessed of such a letter, would be put on notice of its injury… and should determine whether legally actionable conduct was involved.

The District Court found that Hubbard-Hall's claim accrued in 1993, or at the latest in 1997, when it received the EPA's report or its own consultant's report Because it waited nearly two decades to bring the claim, it was time barred.

Conclusion and Implications

The decision lays out the choices available to companies like Hubbard-Hall nicely. Either the company take efforts to discover and remediate contamination promptly, allowing them to seek recovery from other responsible parties, or they sit back and hope that they never get order to remediate and risk not being able to recover because of their delay. The decision is supported by public policy of encouraging cleanup and holding those responsible accountable. (Danielle Sakai, Matthew Collins)

DISTRICT COURT RULES THAT ALABAMA IS ENTITLED TO A JURY TRIAL ON ITS CLAIMS UNDER THE OIL POLLUTION ACT OF 1990 ARISING FROM THE BP OIL SPILL

In re: Oil Spill by the Oil Rig 'Deepwater Horizon' in the Gulf of Mexico, ___F.Supp.3d___, Case No. 2179 (E.D. LA. 2015)

The U.S. District Court for the Eastern District of Louisiana recently ruled that the Seventh Amendment permits the State of Alabama to have a jury trial on its claims under the Oil Pollution Act of 1990 (OPA) arising from the BP Oil Spill. This case is notable because Alabama becomes the first plaintiff to secure a compensatory damages trial against BP resulting from the BP Oil Spill.

Background

This case is the latest installment in litigation proceedings involving the BP Oil Spill. On April 20, 2010, the Transocean-owned Deepwater Horizon offshore oil drilling rig exploded, which resulted in approximately 3.19 million barrels of oil discharging from the Macondo well into the Gulf of Mexico until the well was successfully capped on July 15, 2010.

A brief review of the procedural history in this case is appropriate to put the court's ruling in context:

•On May 13, 2010, Transocean instituted a limitation action ("Limitation Action") in federal court in Texas, which was later transferred to the court.

•On August 10, 2010, cases arising from the Horizon/Macondo disaster were centralized and transferred to the court in Multidistrict Litigation 2179 ("MDL 2179").

• Two complaints filed by the State of Alabama (State) on August 12, 2010, relating to its alleged losses from the BP Oil Spill were transferred to the court as 'tag along' cases to MDL 2179.

• On April 5, 2011, the State of Alabama amended the two pleadings into one Amended Complaint asserting three categories of claims: general maritime claims pled under admiralty jurisdiction, OPA claims pled under the OPA's jurisdictional provision, and state claims pled under supplemental jurisdiction (later dismissed by the court in November 2011). The Amended Complaint requested a jury for all claims in which a jury trial is available by law.

• Two weeks after filing the Amended Complaint, the State filed a claim in Transocean's Limitation Action. The State's claim did not plead any claims under OPA and expressly reserved its right to a trial by jury on claims raised in its Amended Complaint.

• In spring of 2013, the court determined in the 'Phase One' trial in the Limitation Action that three of the five Transocean entities were not entitled to limit liability under the Limitation Action. The State actively took part in the Phase One trial.

• The State now demands a jury trial for its Amended Complaint claims under OPA for, *inter alia*, lost tax revenues, lost revenue to state departments, state response and recovery costs, and resulting increased public service costs. BP filed a motion to strike this jury demand, which gave rise to the instant court order.

The District Court's Ruling

Jurisdiction and the Right to Jury Trial

The U.S. District Court first addressed the State's jurisdictional elections under Fed. R. Civ. P. 9(h) in its amended complaint. The state plead claims under admiralty jurisdiction (which are traditionally bench trials) and OPA claims under the OPA's jurisdictional provision. Noting that the Fifth Circuit's ruling in *Luera v. M/V Alberta*, 635 F.3d 181, 188 (5th Cir. 2011) affirmed a plaintiff's right to designate different jurisdictional grounds for claims with admiralty jurisdiction and other claims with federal subject matter jurisdiction, the District Court ruled that the State properly relied on the "specific and distinct jurisdictional invocations" in *Luera* to ensure that the OPA claim proceeds under the OPA's jurisdictional provision as opposed to admiralty jurisdiction (which would likely preclude a jury trial).

Next, the court considered whether there is a right to a jury trial on OPA claims. The right to a jury, if any, may be provided by statute or the Constitution, with courts looking to the statute before engaging in a constitutional analysis. Both parties agreed that OPA is silent as to the availability of jury trials. However, the court found that three courts have held that a jury is available for at least some claims or issues under OPA.

Moreover, the court noted that OPA has two separate jurisdictional provisions; one without any reference to admiralty jurisdiction and the other specifically referencing admiralty jurisdiction. This suggested that an OPA claim has its own source of federal jurisdiction independent of admiralty and does not necessarily invoke admiralty jurisdiction for all claims. However, the court acknowledged "these observations are not dispositive of the jury entitlement issue" because OPA is silent on the right to a jury trial.

The court, as a result, turned to a constitutional analysis. The key inquiry to determine if a cause of action is entitled to a jury trial under the Seventh Amendment is whether the action is analogous to "suits at common law" customarily brought before a jury at the time of the Seventh Amendment's passage as opposed to actions in equity or admiralty that do not require a jury trial. Two important factors for this determination are the nature of the cause of action and the nature of the remedy, with the latter as the more important factor.

The court first concluded that the State seeks compensatory damages in the form of money, which was the traditional form of relief offered in the courts of law as opposed to courts in equity. Further, unlike an equitable remedy where the state would seek to recapture something that BP wrongfully possessed, the State instead looks to impose personal liability on BP for expenses incurred. The claims sought, therefore, "…are not akin to a suit in equity."

Turning to the nature of the cause of action, the court found that the state's claims seek redress for injuries incurred on or to land, which were outside the jurisdiction of admiralty courts at the time of the passage of the Seventh Amendment. The court also explained that the state's claims are analogous to common law writs of trespass and OPA created new statutory rights for actions typically enforced in a court of law with a jury trial right. Based on its constitutional analysis, the court ruled that the Seventh Amendment provides for a jury trial on the state's OPA claims.

Finally, the court examined if the state's participation in the Limitation Action impacts the state' s jury demand for its OPA claims. Once limitation is denied (as was the case), the court found that the state, not the court, has discretion to determine whether to remain in the Limitation Action and adjudicate all claims or proceed to the original forum. The court therefore concluded that the state's participation in the Limitation Act provides no basis to strike their jury demand.

Conclusion and Implications

The court's ruling follows suit with three other cited cases that found a jury trial is available for certain claims under OPA. Although future claims under OPA will have to undergo the Seventh Amendment constitutional analysis, the court affirmed that OPA claims outside of admiralty jurisdiction and seeking monetary, rather than equitable, remedies are entitled to a jury. In addition, as noted earlier, this is the first case resulting from the BP Oil Spill where a plaintiff can proceed on a compensatory damages trial against BP. (Andre Monette)

DISTRICT COURT FINDS PLAINTIFF'S CERCLA COST RECOVERY CLAIMS WERE PRECLUDED BY ITS SECTION 113 CONTRIBUTION CLAIMS, WHICH WERE TIME BARRED

LWD PRP Group v. ACF Industries LLC,
___F.Supp.3d___, Case No. 5:12-CV-00127 (W.D. Ky. Mar. 12, 2015).

This action arises from a Superfund site in Calvert City, Kentucky—the LWD Incinerator Site. Plaintiff is an association composed of 58 "potentially responsible parties (PRPs)", some of which previously entered into an Administrative Settlement Agreement and Order on Consent for Removal Action (ASAOCRA) with the U.S. Environmental Protection Agency (EPA) on March 1, 2007, which originally sued defendants for: cost recovery pursuant to § 107 (a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); contribution pursuant to § 113(f) under CERCLA; and declaratory relief. Defendants filed a motion to dismiss alleging that plaintiff's 107(a) claim was precluded by its 113(f) claim; that its 113(f) claim was time barred; and that plaintiff's declaratory relief claim must fail as plaintiff's 107(a) and 113(f) claims were not viable. On review, the U.S. District Court for the Western District of Kentucky granted defendant's motion to dismiss.

Background

The LWD Incinerator Site functioned as a hazardous waste incinerator from the 1970s to 2004, at which time it was abandoned. At the state's request, the EPA conducted initial waste removal activities.

The EPA ultimately identified 58 PRPS, who eventually entered into an ASAOCRA on March 1, 2007. Pursuant to the ASAOCRA, the PRPS engaged in certain removal activities and further agreed to compensate EPA for future response costs. On September 29, 2009, the EPA issued a notice of completion of the removal activities.

Plaintiff filed its complaint on August 31, 2012. In response, 78 defendants filed a motion to dismiss which the court denied. On February 18, 2014, 77 defendants filed a motion for reconsideration or, alternatively, a motion for interlocutory appeal or motion to stay pending outcome of appeal. On April 24, 2014, the court granted its motion in part by certifying the issues raised in the underlying denied motion. The Sixth Circuit Court of Appeals subsequently reversed the District Court's denial of these appealing defendants' motion to dismiss.

Subsequently two other sets of defendants filed motions to dismiss alleging the same arguments previously made against plaintiff's claims. Plaintiff filed timely responses leaving these motions for this court's resolution.

The District Court's Decision

As it had done so previously, the court relied on extensively on the holding of *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.* 758 F.3d 757 (6th Cir. 2014), "finding nothing to distinguish *Hobart* from the present case."

Analysis under the *Hobart* Decision

The *Hobart* case analyzed the interplay between CERCLA § 107(a) and contribution actions for cleanup costs under § 113(f), in addition to the statute of limitations applicable to contribution actions. Noting CERCLA's lack of clarity, the *Hobart* court held, notably, that a private party could not bring a 107 action if it has a § 113 action.

The *Hobart* plaintiffs entered into an Administrative Settlement Agreement and Order on Consent (ASAOC) with the EPA, agreeing to perform remediation investigation and a feasibility study relating to the South Dayton Dump and Landfill Site. The settling parties also agreed to reimburse EPA's future oversight costs. The plaintiffs filed a lawsuit against a number of defendants alleging causes of action under CERCLA § 107(a) and § 113(f), as well as state causes of action. In relevant part, the district court dismissed plaintiffs' claims holding that that the ASAOC granted them the right to bring a § 113(f) contribution action, that they therefore did not have the right to bring a § 107(a) cost recovery action.

On appeal, the Sixth Circuit affirmed holding that the new EPA model administrative consent order, un-

der which the plaintiffs resolved at least some of their liability to the United States, constituted a settlement under § 113(f). The Sixth Circuit listed four factors that established the ASAOC as an administrative settlement:

> The first factor was the requirement that the party had resolved its liability. The second factor was that the ASAOC stated that the parties agreed that the ASAOC constitute an administrative settlement for purposes of § 113(f) of CERCLA. The third factor was that the ASAOC was titled an *Administrative Settlement Agreement*. The final factor was that the ASAOC contained provisions which, taken in concert, intended to resolve the appellants' liability to the government.

Applying *Hobart* to this case, the first factor was met in that the language regarding the settlement of liability contained in *Hobart's* ASAOC was identical to the language in the ASAOCRA. Second, the ASAOC in *Hobart* contained language expressly stating that it was an administrative settlement-just like the ASAOCRA in the present case. Third, the ASAOCRA is essentially titled the same as the ASAOC in *Hobart*. Finally, the covenant not to sue in *Hobart's* ASAOC and the covenant not to sue in the subject case, were nearly identical.

Statute of Limitations on the Contribution Claims/Declaratory Relief

Also similar to *Hobart*, plaintiff's contribution claim had expired under the statute of limitations contained in § 113(g)(3) requiring that an action for contribution be filed "three years from the date of settlement." Here, the ASAOCRA was signed on March 1, 2007, meaning that the statute of limitations on the contribution claims ran on March 1, 2010, some two years before plaintiff's complaint.

The court also rejected plaintiff's declaratory relief claim as there was not case or controversy.

Conclusion and Implications

The *Hobart* decision was significant in the case based on its holding that the new EPA model administrative consent order, very similar to plaintiff's in this case, constituted a settlement under § 113(f)(3)(B). That statute gives persons the right to bring a contribution action. The old model administrative consent order was modified to afford settling parties a clear path to sue other PRPs without hindrance from other decisions that held otherwise based on consent order language and ambiguities. (Thierry Montoya)

DISTRICT COURT FINDS PENNSYLVANIA'S SEWAGE FACILITIES ACT DOES NOT TRIGGER EPA'S MANDATORY REVIEW AS A REVISED OR NEW WATER QUALITY STANDARD PURSUANT TO THE CWA

The Pine Creek Valley Watershed Association, et al. v. U.S. Environmental Protection Agency, ___F.Supp.3d___, Case No. 14-478 (E.D. Penn. Mar. 17, 2015).

On July 2, 2013, the Pennsylvania Legislature amended the state Sewage Facilities Act (Sewage Act) permitting the use of "on-lot sewage systems" to achieve compliance under the state's antidegradation requirements—if the systems met the Sewage's Act requirements. Plaintiffs filed a citizen suit under the federal Clean Water Act (CWA) seeking to compel the U.S. Environmental Protection Agency (EPA) to review the Sewage Act for CWA compliance alleging that the Sewage Act represented an "end-run around antidegradation review." As the CWA's citizen suit provisions grant a court subject matter jurisdiction "to order EPA to perform only non-discretionary acts or duties" plaintiffs could invoke CWA protection "only if the EPA had a mandatory duty" to review the Sewage Act. The U.S. District Court for the Eastern District of Pennsylvania dismissed plaintiffs' complaint without prejudice holding that pursuant to relevant EPA regulations, to which the court granted deference, the court lacked subject matter jurisdiction to hear plaintiffs' CWA citizen suit action as the Sewage Act was not a revised or new water quality standard triggering EPA's mandatory duty to act.

Background

Plaintiffs filed their complaint on March 12, 2014, requesting an order compelling the EPA to review and, ultimately, reject the Sewage Act as "a revised or new water quality standard that runs afoul of the CWA." In pursuit of its remedy, plaintiffs invoked the citizen-suit provision of the CWA, 33 U.S.C. § 1365 (a)(2) and the right of action pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §§ 702, 704.

The government defendants filed a motion to dismiss challenging the CWA claim on jurisdictional grounds and the APA claim on merit grounds.

The District Court's Decision

As this is a case of statutory construction and agency discretion, *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.* (*Chevron*), 467 U.S. 837 (1984) governs. To place the *Chevron* analysis into context, the rights afforded a citizen to sue under the CWA had to be addressed.

The CWA authorizes a citizen suit:

> … against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator. [(*Id,* 33 U.S.C. § 1365(a)(2).)]…. The District Courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties…to order the Administrator to perform such act or duty, as the case may be… (33 U.S.C. § 1365(a).)]…. A…clearly mandated, federal jurisdiction under the CWA citizen suit provision. (*Miccosukee Tribe of Indians of Fl. v. U.S. EPA*, 105 F.3d. 599, 602 (11th Cir. 1997).)

Analysis under the *Chevron* Decision

Plaintiffs alleged that a mandatory duty can be derived from the CWA as the Sewage Act:

> …is the equivalent of a new or revised standard that may adversely affect federally approved antidegradation standards and must be reviewed by EPA as such.

Under *Chevron*, the court was to first determine whether Congress has "directly spoken" to the issue—whether the Sewage Act constitutes a revised or new water quality standard. More precisely, the court examined the CWA to determine whether Congress provided a definition of: "water quality standard." If not, the court would have to determine whether the EPA provided a "reasonable answer to this issue."

The court examined 33 U.S.C. § 1313(c)(2)(A) which mentions, but does not expressly define "water quality standard." This section defines the standard as consisting of two components: (1) "the designated

uses of the navigable waters involved…" and (2) "the water quality criteria for such waters based upon such uses." But that does not mean that "water quality standard" is to be reduced to these two components. The court was left to presume that Congress implicitly intended the issue to be answered by the EPA—as the agency "authorized to prescribe such regulations as are necessary to carry our [its] functions" under the CWA. (*City of Albuquerque v. Browner*, 97 F.3d 415, 422 (10th Cir. 1996).)

The EPA defines "water quality standards" is several of its implementing regulations. 40C.F.R. § 131.2 states:

> Water quality standards are provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses. Water quality standards are to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act.

The EPA's implementing regulations represent "the most focused discussion of water quality standards" which reflects "the exercise of policy-making discretion" within the gaps created by statutory silence of ambiguity.

In implementing these regulations, the EPA acted within the bounds of its statutory authority—the final step in the *Chevron* analysis. Under *Chevron*, the court "may not disturb an agency rule unless it is arbitrary or capricious in substance, or manifestly contrary to the statute." (*Mayo Found. for Med. Educ. & Research v. U.S.*, 562 U.S. 44, 53 (2011).) On their face, EPA's implementing regulations are neither of these and are necessary to EPA's role of carrying out its functions under the CWA. (*Id.*)

Examination of EPA Regulations and the Sewage Act

Having addressed *Chevron*, the court compared EPA implementing regulations to the Sewage Act. The District Court found that:

> Clearly [the Sewage Act] is not a water quality standard, let alone a revised one or new one, as that term is defined by the relevant EPA regulations. Most importantly, [the Sewage Act] does not consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses. (40 C.F.R. § 131.3(i).)

The court found that plaintiffs' APA claim also failed because "the only action that can be compelled under the APA is action legally *required*." (*Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004).)

Conclusion and Implications

The U.S. District Court found that EPA's implementing regulation, Act 41, was not a "water quality standard," as that term is defined by the EPA. "Most importantly, Act 41 does not consist of ' a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses." (Thierry Montoya)

MARYLAND COURT OF APPEALS HOLDS DIRECT TIE TO WATER QUALITY STANDARDS NOT REQUIRED IN MUNICIPAL STORMWATER PERMITS PURSUANT TO THE FEDERAL CLEAN WATER ACT

Maryland Department of the Environment v. Anacostia Riverkeeper, Case No. 2199 (Md.App. Apr 2, 2015).

In a recent decision, the Court of Special Appeals of Maryland overturned a lower state court's decision that the municipal stormwater permit for Montgomery County must directly incorporate water quality standards adopted pursuant to the federal Clean Water Act. The case is important because federal law does not explicitly require municipal stormwater permits to incorporate water quality standards but some states have adopted this requirement. In those states, compliance with water quality standards and water quality standard derived Total Maximum Daily Loads (TMDLs) is among the most expensive, and liability-ridden aspect of the municipal permitting scheme.

Background

The case is a challenge to the Maryland Department of the Environment's (Department) decision to re-issue Montgomery County (County) a municipal stormwater permit in 2010.

In 1996, the Department issued the County its first municipal separate storm sewage system (MS4) permit, for a five-year term. Between 1996 and 2008 the County's permit was renewed at least once. 2008, during the permit renewal process, the Anacostia Riverkeeper, an environmental group focusing on water quality in the Washington D.C. area, submitted comments to the Department alleging that the draft permit was deficient because it did not include enforceable language or deadlines, did not link in a meaningful way to water quality standards or TMDLs, and did not allow for meaningful public participation or review.

After receiving additional comments from other interested parties, the Department issued the permit (without substantial changes) on February 16, 2010. Anacostia Riverkeeper subsequently challenged the permit in the Circuit Court for Montgomery County. The Riverkeeper's case was based on its comments. Specifically, Riverkeeper alleged that the permit violated state and federal law by failing to require compliance with water quality standards or applicable TMDLs, and by allowing for the specific development of implementation plans outside the four corners of the permit, which thereby allowed the permit to escape meaningful public participation or judicial review.

The Circuit Court agreed, holding that both the Clean Water Act and Maryland law require compliance with water quality standards to be incorporated into MS4 permits, and that Montgomery County's permit was infirm because it failed to include strict compliance requirements. The County and Department appealed.

The Maryland Court of Appeals' Decision

From a federal perspective, the primary issue in the case was whether § 402(p) (33 U.S.C. 1342(p)) of the Clean Water Act, which regulates discharges from MS4s, supersedes the requirement in §§ 301 and 402(a) that discharges from point sources must include water quality based and technology based effluent limitations necessary to attain water quality standards.

Anacostia Riverkeeper argued that the permit continues to be subject to the technology-based limitations of § 301 (33 U.S.C. § 1311) in addition to "any more stringent limitation necessary to assure compliance with water quality standards for the receiving waters."

Applying *Defenders of Wildlife*

Relying heavily on case law from the Ninth Circuit Court of Appeals (*Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1163 (9th Cir. 1999)), the Maryland Court of Appeals rejected this argument. The court held that "Congress, by adding § 1342 the 1987 amendments to the Act, intended to treat MS4s differently and regulate them separately from, or in conjunction with, the existing requirements of § 1311." Thus, federal law does not require strict compliance with water quality standards in MS4 permits.

The Riverkeeper's argument was not without merit. Congress initially adopted §§ 301 and 402(a) of the Clean Water Act and required all point source

discharges to technology based and water quality based effluent limits designed to attain water quality standards. In 1987, Congress amended the Clean Water Act to specifically designate municipal stormwater discharges as point sources and apply a different, more flexible compliance standards. Congress did not explicitly exempt municipal discharges from the requirements of §§ 301 and 402(a). The exemption was implied by operation of the "new" municipal stormwater requirements and the latter date of the 1987 amendments.

State Law Analysis

After determining that federal law does not require strict compliance with water quality standards or TMDLs, the Maryland Court of Appeals turned to state law. Notably, the Department of the Environment did not argue that compliance with water quality standards and TMDLs was not required as a matter of state law. Instead, because they were state law requirements, the Department and the County contended that they had flexibility in how the requirements were incorporated into the permit.

The Maryland Court of Appeals agreed but ultimately found, as a matter of substantial evidence, that the permit's requirements were too lax and did not demonstrate how applicable TMDLs would be achieved.

Conclusion and Implications

The Maryland Court of Appeals decision in this case has national import. Most states have state water quality laws that require compliance with water quality standards. The question they are facing is first whether federal law requires states to incorporate water quality based effluent limits and TMDLs. If so there are specific and potentially onerous requirements that will apply. However, even under state law, incorporating TMDLs is a major area of concern for municipal dischargers. Attaining water quality standards and TMDLs is in many ways the next frontier for municipal dischargers. Regulatory authorities and NGOs are pushing municipalities to take a larger role in watershed management. Tying water quality standards and TMDLs to compliance with NPDES permits is the primary tool for making that happen. Because many TMDLs and water quality standards are not being attained, compliance requirements in a city's Clean Water Act MS4 permit can be a major source of liability. (Andre Monette)

Eastern Water Law & Policy Reporter
Argent Communications Group
P.O. Box 506
Auburn, CA 95604-0506

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