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EASTERN WATER NEWS

EPA PROPOSES SEVERAL RULE CHANGES ON HOW IT MAKES FORMAL WATER QUALITY DETERMINATIONS AND OTHERWISE ENFORCES STATE WATER QUALITY PROGRAM REQUIREMENTS

The September 4, 2013 Federal Register includes important formal U.S. Environmental Protection Agency (EPA) proposals that the agency says will clarify how it enforces Water Quality Requirements under the Clean Water Act (CWA). 78 Fed. Reg. 54517 *et seq*. The rules involved concern state water quality programs, and they will affect all parties involved in state water quality program content. In its preamble, EPA explains that Part 131 of 40 CFR, dealing with state and tribal programs, has only been amended twice since its initial adoption in 1983: by adoption of a tribal entity process for rulemaking and a clarification that state-made rule changes are effective only upon EPA approval. Nevertheless, EPA says discussions on the subject of state-federal interplay and authority have been carried on for years, in part through an advance notice of proposed rulemaking and a multi-year process focused on the Great Lakes.

Background

EPA has been entangled in disagreements with various states and environmental groups over why, how and when water quality standards are required to change, and the environmental groups in states like Florida have also challenged the agency to require stricter rules of the state decision makers. The sweep and authority of the CWA have been the subject of a number of fairly recent Supreme Court decisions, and there is generally a sense in some state and political camps that the agency is engaged in more centralization and federalization of decision making on water use and water quality than it should. EPA also has been brought into court for review of determinations it does not regard as "final" for purposes of judicial review. These factors and the pressures of explaining itself have led the agency to address six key subjects in this important Proposed Rule: (1) what constitutes an Administrator's determination that new or revised Water Quality Standard are necessary; (2) what designated uses are appropriate; (3) how will triennial reviews of state programs be handled; (4) how should antidegradation concepts be applied; (5) when and why are Water Quality Standard variances available to states; (6) how will compliance schedules be determined and authorized.

The Proposed Changes

Each of the proposals is briefly summarized and commented upon in this article. States and organizations that are interested in or affected by water quality standards need to analyze whether the proposals should be adopted.

What Constitutes a 'Determination' by the EPA Administrator that a Water Quality Standard Must Be Adopted or Amended?

Section 303(c)(4)(B) of the CWA gives authority to the Administrator to decide that a new water quality standard is needed or an existing standard must be revised. The administrator is to do so after weighing all relevant factors. EPA circuitously states that it has, in effect, been successfully second-guessed by concerned parties as to when a "determination" has occurred, and the agency does not like that to happen. For example, in a recent case a U.S. Court of Appeals agreed that a policy statement in a letter to a Senator could be deemed a "determination" for purposes of invoking judicial review. As a result, the agency was forced to change its policy on the flexibility accorded water treatment plants in meeting discharge standards at the end of their discharge pipes.

EPA's proposed solution is that there is not going to be anything that qualifies as a determination unless the document or decisions constituting the alleged determination contain an authorized signature and expressly declare that it is a § 303(c)(4)(B) determination. (Proposed 40 CFR 131.22(b)).

Commenters are already positing the question whether this proposed "clarity" on what a determi-

nation is may not possibly be a means of the agency avoiding judicial review in circumstances where it has an adopted policy, is enforcing the policy, and the policy is causing problems, but there is no available review for lack of the magic words.

What Use Must States and Tribes Designate When they Adopt a New or Revised Water Quality Standard?

When adopting new Water Quality Standards, states and tribes have to designate the uses of the waters that they intend to enable. There has been a range of discretion accorded to the decision makers at the state and tribal level, so that local issues, of both economic and environmental nature, may be weighed. EPA now proposes that for purposes of what is deemed "clarity," the designated use of a water body must automatically be the highest attainable use (HAU), unless it is shown with an adequate use attainability analysis that such highest use is not a possible or "attainable."

EPA's regulatory proposal does include language that enables state and tribal discretion in describing the uses, including the opportunity to designate a location specific use. However, EPA is insisting on a "prospective analysis" that anticipates availability of future treatment options and altered management practices.

Triennial Reviews

EPA is proposing a revision to the triennial review requirements applicable to states and tribes. The states and tribes will be expressly required to consider whether revision of Water Quality Standards should occur as part of their triennial review process. They will be required to deal with any newly developed information that is published pursuant to EPA's duty under § 304 (a) of the CWA to recommend additional means of attaining water quality standards or otherwise reflecting the latest water quality science and research. In effect, the § 304(a) information will become a driver of state revisions to Water Quality Standards if the proposed rule is adopted.

What Antidegradation Policies Are Necessary and How Should Antidegradation Decisions Be Made?

EPA is proposing to tighten the process of assuring that the CWA's policy against "backsliding" or antidegradation is honored at the state and tribal level by requiring a fairly rigorous analysis by states and tribes anytime that they wish to limit Water Quality Standards due to important non-environmental reason, such as cost or importance of maintaining local industries. The process to be expected will be more costly and likely more time consuming than present rules allow. It will necessitate a reasoned, in-depth and public process of consideration of alternatives. It is difficult to summarize the process envisioned, as its description takes the better part of six Federal Register pages. Since the present water quality standards amendment process already can take more than three years of time in specific situations, states will likely seek some leeway from these proposed rules.

How Will Variances Be Granted to a Water Quality Standard?

One form of leeway that is afforded to the states in the current proposal is the use of variances. EPA proposal says that variances are a preferred way of dealing with cost and time issues. It says that some people, including states, are confused on what a variance is. The proposal references published guidance documents that explain the agency interprets the law to enable variances:

> …if the state or authorized tribe demonstrates that the variance meets the same requirements as a permanent designated use change, even though the Water Quality Standard regulation lacks explicit provisions on the issue. 78 FR 54531.

Althoughperhaps more confusing than clarifying, the agency goes on to say that states can legally justify leeway to individual dischargers or spots within a water body on a case by case basis, provided their record is replete with justification, progress is otherwise occurring, and EPA approval is given. The proposed rule identifies examples of variances and how they should be documented and justified. EPA also proposes language that makes clear that the given designated use or Water Quality Standards remains effective elsewhere for the water body than the situation a given variance specifically covers.

What Minimum Standards Are There for Authorizing Compliance Schedules Applicable to Water Quality Standard Implementation?

EPA proposes to codify a decision that the administrator made in an individual case dealing with issuance to a specific firm of a "compliance schedule." *See, In the Matter of Star-Kist Caribe, Inc.*, 1990 324290 (EPA). Basically, it proposes that the practice is lawful if a state or tribe has a state or tribal law that authorizes the issuance of compliance schedules on a case-by-case basis and the issued schedules include enforceable steps and measureable parameters to be met on schedule. The issuance of a compliance schedule would not be effective unless it is also approved by the agency.

Conclusion

A few other changes that the agency terms corrective and clarifying are made to the Part 131 regulations. Details are provided in the proposal. The comment period on the proposed changes to the regulation of Water Quality enforcement runs through December 3, 2013. (Harvey M. Sheldon)

U.S. BUREAU OF RECLAMATION REVISES ITS WATER CONTRACT POLICY MANUAL

After soliciting public comment since late 2011, the U.S. Bureau of Reclamation (Bureau) finalized updates and revisions to its water contract policy manual. The policy modernization tracks the Bureau's continuing transition from its historical focus on water resource development to water resource management. This is not to say that the Bureau is abandoning its water resource development mission, but the agency's water contract policy modernization reflects land use development trends within its projects and alters rate structures accordingly. Revised definitions of "irrigation" and "municipal and industrial" (M&I) water uses within the new policy manual will restrict application of the more favorable rate structure afforded to agricultural-based water uses.

Definition Revisions

The Bureau's policy manual revisions were the result of a lengthy process including multiple rounds of public comment. The revisions were first released for a 30-day public comment period in September 2011. That comment period was later extended by an additional 60 days. The Bureau then issued a subsequent draft reflecting the prior public comment received, and provided an additional 90-day public comment period for the reposted drafts. Throughout that time, Bureau personnel made presentations at several water user forums and held numerous meetings with stakeholder groups requesting more information.

A major focus of the Bureau's policy manual revisions included the redefinition of several key terms and the use of new terms within Reclamation Manual (RM) PEC P05 governing Water-Related Contract and Repayment General Principles and Requirements. Key definitional revisions included drawing a greater distinction between the terms "Irrigation" and "M&I" water uses. The purpose was to track and re-classify non-agricultural irrigation uses (such as irrigation for parks, lawns, and golf courses) developing within Bureau projects resulting from development and urbanization, and to adjust water supply rate structures accordingly.

The revised definitions read as follows:

> (1) *Irrigation Use:* The use of contract water to irrigate land primarily for the production of commercial agricultural crops or livestock, and domestic and other uses that are incidental thereto.
>
> (2) *M&I Use:* The use of contract water for municipal, industrial, and miscellaneous other purposes not falling under the definition of 'irrigation use' above or within another category of water use under an applicable federal authority.

The revised policy manual further distinguishes between "irrigation" and "M&I" uses through a footnote clarifying:

> This [irrigation use] definition reflects [the Bureau's] water-related contracting laws—most explicitly Section 202 of the Reclamation Reform Act of 1982 (RRA), which defines the term 'irrigation water' as "water made available

> for agricultural purposes from the operation of [Bureau] project facilities pursuant to a contract with the Secretary" (43 USC 390bb(5)).

It does not include uses such as watering golf courses; lawns and ornamental shrubbery used in residential and commercial landscaping, gardens, parks and other recreational facilities; pasture for animals raised for personal purposes or for nonagricultural commercial purposes; cemeteries; and other similar uses (except to the extent that some of these uses may be incidental to uses that are primarily agricultural).

In addition to revising and authoring various definitions, the Bureau's policy manual revisions further reiterated that the agency is not authorized to deliver or store project or non-project water, permit the use of federal facilities, or recover reimbursable project costs except pursuant to a duly executed contract authorized by federal law.

The Extent of 'Prospective Application'

Section 2(B) of the revised policy manual expressly states that to the extent the revised manual imposes new requirements for water-related contracts, the new requirements are to be imposed prospectively to contracts executed, renewed, amended, or supplemented through the formal contracting process between the contractor and the Bureau on or after the contract's issuing date. Despite this "prospective application" clause, many in the irrigation community expressed concern over what the new "irrigation" and "M&I" use definitions might mean for existing water supply contracts. Water delivery entities feared that prior development and urbanization within their boundaries could lead to Bureau rate increases under the revised definitions.

Prompted by agricultural and water supply organizations such as the Family Farm Alliance and the National Water Resources Association, Bureau officials (including members of the Solicitor's Office of the Department of Interior) confirmed that the policy manual's revisions do not apply to existing water supply contracts, even where irrigation water has historically been used for non-agricultural purposes where there is evidence that both the Bureau and the contractor were aware of the non-agricultural uses and neither party treated the matter as a contract compliance issue. According to the Bureau, for existing contracts where non-agricultural uses have been allowed with the Bureau's knowledge under prior agency interpretations of irrigation use, current and future changes in water use from agricultural to non-agricultural uses will continue to be allowed under the same pre-policy manual revision terms.

However, federal officials made clear that definitional changes and higher M&I water supply rates would apply to any situation necessitating the negotiation of a new contract or the revision or amendment of an existing contract. Situations triggering application of the new policy revisions include reservoir storage space conveyances from one party to another whether by purchase, condemnation, or other method because these instances result in the addition of a new contractor party that did not previously exist under former contracts with the agency.

While it is known that M&I rates for water will be higher, exact pricing is not predetermined. Instead, the Bureau announced that M&I rates will be negotiated on a case-by-case basis through the formal contracting process taking into consideration market conditions, current delivery cost structure, and infrastructure rehabilitation projections. All revenue collected beyond water storage and delivery costs will be managed to benefit the project in which the funds originated as a means by which to defray future project construction, rehabilitation, and any emergency/extraordinary maintenance costs.

Conclusion

The Bureau of Reclamation said it will continue to engage in additional policy revision education and outreach on the national level. Nonetheless, the agency designated its local Area Offices as the primary source for information about how the new policies and definitions would apply in specific local situations. (Andrew Waldera)

ECONOMIC IMPACTS OF DESIGNATING CRITICAL HABITAT FOR ENDANGERED SPECIES GET EARLIER REVIEW UNDER NEW RULE

Effective October 2013, a new rule impacting the federal agencies responsible for consultation and listings (and critical habitat) under the federal Endangered Species Act takes effect requiring analysis to included economic impacts earlier in the rulemaking process and enhances agency discretion in the nature and scope of critical habitat.

Background

The Endangered Species Act calls on the U.S. Fish and Wildlife Service (or, in some circumstances, the National Marine Fisheries Service; collectively: the Services) to list species that they find to be "threatened" or "endangered" and to designate the "critical habitat" of such species. In deciding whether to list a species, the Services focus on scientific and commercial data about the species and do not consider the economic impacts of the listing. Before designating critical habitat, however, they are required to consider "the economic impact, the impact on national security, and any other relevant impact, of specifying a particular area as critical habitat." Indeed, the statute authorizes them to exclude any area from critical habitat if they find that the benefits of doing so outweigh the benefits of including the area (unless the exclusion would result in extinction). Nonetheless, the Services have long relegated their economic assessment to the end of the process, sometimes releasing it to the public only shortly before announcing their final decision.

The Final Rule

The Services recently adopted a rule, effective October 30, 2013, that requires them to analyze economic impacts earlier in their rulemaking process and also bolsters their claims of wide discretion in deciding on critical habitat.

Economic Analysis Available for Public Comment

The rule requires the Services to make their economic analysis available for public comment when they publish a proposal to designate critical habitat and to consider the probable economic, national security, and other relevant impacts of the designation on proposed or ongoing activities before they finalize the designation. By this, the Services respond to a February 28, 2012, memorandum by President Obama directing them to propose regulations calling for economic analysis to be presented simultaneously with scientific assessment.

Comparing the Impacts: Pro and Con

The rule specifies that the Services compare the impacts with and without the designation. By this, the Services mean to clarify that they will evaluate only the "incremental" impacts of the designation itself and not the impacts of both the designation of critical habitat and the listing of a species compared to the pre-existing "baseline." The Tenth Circuit Court of Appeals earlier invalidated that approach in *New Mexico Cattlegrowers Association v. U.S. Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001) because the similarity of the Services' regulatory restrictions on listed species and critical habitat usually led them to conclude that the designation of critical habitat had no impact beyond the impacts of the listing. The court held that the FWS must analyze:

> …all of the impacts of a critical habitat designation, regardless of whether those impacts are attributable co-extensively to other causes.

The Ninth Circuit later invalidated the Services' regulatory restrictions on critical habitat in *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F. 3d 1059 (9th Cir. 2004), and a few years after that the Services resumed the incremental approach, noting that the predicate of the *New Mexico Cattlegrowers*' holding had been eliminated. The new rule confirms the Services' continued use of the incremental approach.

Agency Discretion in the Designation of Critical Habitat

The rule also provides that the Services have discretion to exclude any particular area from critical habitat upon determining that the benefits of exclusion outweigh the benefits of inclusion. By this, the

Services mean to emphasize that, in keeping with an October 3, 2008, opinion of the Solicitor of the Department of the Interior, the exclusion of areas from critical habitat is always optional and the Services:

> …may choose not to exclude an area even if the impact analysis and subsequent balancing indicates that the benefits of exclusion exceed the benefits on inclusion and such exclusion would not result in the extinction of the species.

Conclusion and Implications

By requiring analysis of economic impacts at the outset and enabling the public to review and comment on that analysis, the new rule may lead to more serious consideration of economic impacts in decisions of which areas to designate as critical habitat. On the other hand, the Services' adherence to the incremental approach, which so confines the scope of economic analysis as to render it nearly pointless, and their claimed discretion to disregard the results of even that limited analysis suggest that economic impacts will continue to play a relatively small role in the Services' decisions. (David Ivester)

FOOD AND DRUG ADMINISTRATION PROPOSES NEW WATER QUALITY STANDARDS FOR AGRICULTURAL WATER

A rule proposed by the federal Food and Drug Administration (FDA) sets out new quality standards and testing regimes for agricultural water used on produce. The FDA introduced this rule under the authority granted to it by the Food Safety Modernization Act. The proposed rule, entitled "Standards for the Growing, Harvesting, Packing and Holding of Produce for Human Consumption," but more often referred to as the "Produce Safety Rule," focuses on identified routes of microbial contamination, and has been released for public comment. The comment period for the proposed rule closes on November 15, 2013.

The Food Safety Modernization Act and Agricultural Water Quality

The Food Safety Modernization Act (FSMA) was passed by Congress in 2011, and gives the federal Food and Drug Administrative broad new regulatory authority over every aspect of the food supply chain, from growing, to harvesting, to end-point sales to consumers. As part of this authority, FSMA directed the FDA to enact new regulations focused on providing preventative measures to protect against adulteration and contamination in the United States' food supply, particularly with regard to water used on raw produce.

The Proposed Rule

The FDA's proposed Produce Safety Rule, sets out certain standards for agricultural water used on produce, in pursuit of the general requirement that all agricultural water be "of safe and sanitary quality for its intended use." The proposed rule's Agricultural Water Standards (Subpart E) draw upon good agricultural practices laid out by the California and Arizona Leafy Greens Marketing Agreement, and are intended to reflect best practices that many farms already employ. Still, for farms and water users not subject to this agreement, the Produce Safety Rule and its affiliated water safety standards represent a serious change in the current regulatory environment.

The proposed rule is not yet final, but has been circulated by the FDA for public comment. At the end of the comment period, the FDA will consider all comments submitted and adopt a final rule, which will be published in the Federal Register as a binding regulation. Information on the proposed rule and procedures for commenting may be found at on the FDA's website, at http://www.fda.gov/Food/guidanceregulation/FSMA/ucm334114.htm.

Parties that Must Comply with the Agricultural Water Standards

The Produce Safety Rule's agricultural water standards impose an obligation on the agricultural water users directly, rather than water suppliers, and are triggered whenever water is applied to produce (whether during irrigation, at harvest, or during processing). As a result, the rule applies with equal

weight to surface and groundwater users, though more stringent requirements are imposed on water from sources that have traditionally higher contamination risks.

A broad spectrum of water users, particularly produce growers, will be impacted by the rule. As currently drafted, the standards would apply broadly to any water used on raw and unprocessed "fruits and vegetables grown for human consumption," at any point from planting to harvest and packing. For example, the rule applies to water that is applied directly to a field as irrigation, used to prepare crop sprays, used to rinse crops in the field, and used to make ice for packing and refrigerating produce. The rule would not apply to a defined list of specific fruits and vegetables that are rarely consumed raw, nor would it apply to produce grown for personal consumption, or destined for commercial processing that will reduce microorganisms of public health concern (*i.e.*, "kill-step" processing). Small farms would also be eligible for a qualified exemption and reduced requirements, provided that they operate below certain base production thresholds.

Users that obtain water from a public water system and can provide documentation that the requirements of the Produce Safety Rule are being met by that water system are relieved of most of the requirements of the rule. To be considered a public water system, the federal Clean Water Act requires that the water system serve at least 25 individuals daily, at least 60 days a year, *or* have at least fifteen service connections. Irrigation districts that were created before 1994 and provide only incidental residential water use are specifically excluded from the definition of a public water system.

Agricultural water users who do not fall into one of these exceptions (for example, a riparian user pumping water directly from a creek to irrigate a commercial lettuce field), must comply with the requirements of the proposed rule, assuming that it is adopted by the FDA.

Proposed Standards to Achieve Agricultural Water of a 'Safe and Sanitary Quality'

As a baseline requirement, the Produce Safety Rule mandates that all agricultural water must be of "safe and sanitary quality for its intended use." To meet this objective, the rule requires an agricultural water user handling or growing fresh produce to (a) inspect his or her water delivery system annually, and identify possible hazards on the system; (b) test water quality, including testing for *E. coli*; (c) treat water when contamination has occurred; and (d) maintain records regarding the water's quality and testing procedures. The water user must also maintain the system throughout the year in order to prevent it from becoming a source of contamination to covered produce, and keep records of the user's inspection and maintenance efforts.

The proposed rule requires water quality testing for any water that is: (1) is used to make treated agricultural teas; (2) directly contacts the harvestable portion of the crop prior to or during the harvest; (3) directly contacts food-contact surfaces; (4) is used for hand-washing during and after harvest; or (5) is used to sprout seeds. As to testing frequency, the proposed rule divides untreated surface water into two categories based on its potential to be impacted by runoff and the amount of control and protection that can be provided by the farm. Water that is susceptible to a significant amount of runoff, such as flowing surface waters (rivers, streams, or creeks), natural ponds, or lakes, are subject to more frequent testing. Water that is less subject to contamination from runoff, such as groundwater extracted and stored in an on-farm reservoir, may be tested less frequently.

The testing results must demonstrate that any *E. coli* present in the agricultural water is below applicable regulatory limits. For water that is applied directly to the harvestable portion of the crop during growing, the proposed rule would impose U.S. Environmental Protection Agency's (EPA) recreational water standard for *E. coli*. This standard requires less than 235 colony-forming units (CFU) of generic *E. coli* per 100 ml of water sampled. More stringent standards are imposed for water that comes into contact with produce during or after harvest, water that comes into contact with food-contact surfaces, water used to wash hands during or after harvest, water used to irrigate sprouts, and water used to make treated agricultural teas. In order to ensure these standards are met, the proposed rule requires that growers test the water using an appropriate analytical method. If the water exceeds the applicable standard for *E. coli*, for example, the grower is required to immediately discontinue use of that source of agricultural water and take follow-up actions, such as treatment of the water or water system.

Finally, the FDA would allow water users to follow alternatives to certain specified requirements, provided that those alternatives provide the same level of public health protection as the procedures laid out in the proposed rule. Any alternative approach must be well documented and supported by scientific evidence, though it is not required to be submitted to the FDA prior to implementation. Regardless of the compliance method used, the proposed rule requires agricultural water users to document their inspections, and retain records related to water treatment, water quality, and monitoring results.

Conclusion and Implications

The Produce Safety rule imposes a burden on food producers, rather than on water suppliers directly: it does not require a water district, for example, to verify the quality of its agricultural water before a landowner applies that water to a lettuce field. Still, because the proposed rule provides exemptions for water users who obtain their water from a public water system that can verify that the water meets certain public health standards, water districts, irrigation districts, and mutual water companies need to be aware of the rule and its requirements. These entities may see pressure from landowners and members to guarantee certain minimum water quality standards as part of their regular operations. The deadline for comments on the proposed rule is November 15, 2013. The rule will be effective 60 days after a final rule is published in the Federal Register, although all entities would receive an additional two years to comply with the water quality standards portion of the rule. (Ashley Porter, Rebecca Anderson Smith, Joe Schofield)

STUDY LINKS YOUNGSTOWN, OHIO EARTHQUAKES TO 'FRACKING'

Researchers have released a study linking a series of earthquakes in the Youngstown, Ohio area to hydraulic fracture mining (fracking). These earthquakes occurred near a fracking well site, culminated a 3.9-magnitude quake and ceased after the well was shutdown. The study determined that fracking liquid caused increased pressure along an ancient fault in the area triggering the earthquakes. The earthquakes ceased when this pressure dissipated. The study highlights another potential concern with this controversial practice.

Fracking Background

Hydraulic fracturing is a form of oil and gas extraction. A technique in which water is mixed with sand and chemicals, and the mixture is injected at high pressure into a wellbore to create small fractures to extract oil and gas. In fracking, fluids are injected into the formation for certain reasons. First, a "proppant" (typically sand, or small resin or ceramic beads) is added to ensure fractures do not collapse under the weight of the formation. Second, chemicals and additives can be added to make sure the proppant remains in the proper gel-like state. Third, other additives may be added to dissolve the proppant and allow the fluid to be returned to the surface. Fourth, still others are designed to ensure bacteria growth does not clog the well. All of these additives may eventually come to the surface along with other water that exists in the formation. While some are harmless, some are toxic and proper disposal of these fluids is important.

Fracking has become especially profitable over the geological formation known as the Marcellus Shale. This formation is located in parts of Ohio, West Virginia, Pennsylvania and New York. Some estimate that the Marcellus Shale contains approximately 489 trillion cubic feet of natural gas. Economic investment in the area related to fracking has been an important economic stimulus to this rural area.

Youngstown Earthquakes

Between January 2011 and February 2012 over 109 small earthquakes were detected near Youngstown, Ohio. This was especially anomalous as this area had experience no known earthquakes in the past. The earthquakes were generally minor and occurred at a rate of approximately twelve per month. The earthquakes culminated in a 3.9-magintude shock on December 31, 2011. Ultimately, over twelve earthquakes over 1.8-magintude occurred during the time

period, and many were felt by those in the area. The earthquakes ceased after a fracking well in the area was shut down by the Ohio Department of Natural Resources in December 2011.

A Recent Study

An article in the July edition of the *Journal of Geophysical Research*, "Solid Earth examined the cause of the earthquakes," determined that fracking liquid from a well had increased pressure along an ancient fault triggering the earthquakes. The study determined that the quakes ceased when this pressure dissipated.

The study was authored by Won-Young Kim, a researcher at Columbia University. Professor Kim charted each earthquake and determined that the frequency and intensity of the earthquakes was closely linked to daily pressure levels in the fracking well. He also determined that the epicenters of each earthquake occurred at the well or along the ancient fault line that was connected to the well. Based on this, the researchers:

> … conclude[d] that the recent earthquakes in Youngstown, Ohio were induced by the fluid injection at a deep injection well due to increased bore pressure along the preexisting subsurface faults located close to the wellbore.

The study adds to the body of research indicating that fracking may lead to increased earthquakes. In addition, the study particularly highlights the timing of earthquakes due to fracking operations and the need for understanding the risk of triggering nearby faults. In Youngstown, earthquakes were closely linked to well pressure, including declining in periods around holidays due to decreased well activities. Given this close connection, Professor Kim noted the need for increased monitoring to detect nearby faults that could be triggered by fracking operations:

> We need to find better ways to image hidden subsurface faults and fractures, which is costly at the moment. If there are hidden subsurface faults near the injection wells, then sooner or later they can trigger earthquakes.

Conclusion and Implications

This study is interesting for a number of reasons. First, it is additional support for the claim that fracking can lead to earthquakes. As fracking begins to be used in seismically sensitive areas, this may become more important. Second, while most concerns with fracking have dealt with fluid disposal and water contamination concerns, states considering allowing or expanding fracking operations may be forced to consider seismic risks. Third, given the economic potential for fracking and its likely continued or expanded use, the study highlights the need for early and increased seismic monitoring to detect nearby faults or other fractures that could be triggered by fracking well operations. (Joshua Nelson, Mala Subramanian)

NEWS FROM THE WEST

This month's News From The West covers cases from Colorado, Washington, and Nevada. First, the Colorado Supreme Court held that properly quantified transmountain lawn irrigation return flows are legally indistinguishable from effluent water, and thus can be used as a substitute supply of water for exchanges. Next, a Washington appellate court granted summary judgment to an irrigation district after finding the district behaved reasonably in maintaining a wasteway. Finally, the U.S. District Court for Nevada allowed a suit to proceed against a wildlife refuge and its manager for depriving private land of its vested water rights.

Colorado Supreme Court Allows Denver to Use Lawn Irrigation Return Flows as Substitute Supply of Water

In re Water Rights of the City and County of Denver v. Englewood, 2013 Colo. 50 (Colo. 2013).

In 1968, the city of Denver, Colorado, filed a statement of a claim in a civil action, identified as C.A. 3635, claiming an appropriative right to the entire flow of the South Platte River. The city claimed the river water for an array of beneficial uses, including the exchange of water by the use of any public stream in substitution for water supplied or taken by Denver. Three years later, Denver received permission to use the Colorado River for substitute supply purposes, and over a decade after that, Denver received permission to enact a change decree, allowing it to use the Chatfield Reservoir as an additional point of diversion. In 1992, a Water Court held that the decree, in conjunction with the 1968 statement of claim and the 1971 alterations, sufficiently notified downstream appropriators on the South Platte River that Denver intended to use imported Colorado River Water, including transmountain effluent, as substitute supply for the decreed exchanges.

That 1992 decision is instrumental in the resolution of this case. In 2004, the city of Englewood challenged Denver's use of transmountain lawn irrigation return flows as a substitute supply of water for its exchanges. However, both the Water Court and the Supreme Court held that properly quantified transmountain lawn irrigation return flows are legally indistinguishable from reusable transmountain effluent and, therefore, Denver could rely on those return flows as a substitute supply for the appropriative rights of exchange decreed in C.A. 3635. Additionally, the Court found that junior appropriators, like Englewood, cannot claim injury premised solely upon the proper operation of the C.A. 3635 exchanges.

The Court relied on previous decisions for the propositions that junior water users have no legal expectation with respect to imported reusable water and that Denver has always intended to reuse its imported water through the exchanges. Users of imported transmountain water enjoy greater rights to use and reuse than do users of native water under the Court's framework. Those users' rights to reuse and make successive use of imported transmountain water exist to the maximum extent feasible to minimize the amount of water removed from western Colorado, and an appropriator who imports transmountain water need not have the intent to reuse or successively use that water at the time of the appropriation to maintain the subsequent right of use.

This decision indicates that an appropriator in Colorado who imports transmountain water has the right to reuse and make successive uses of that water so long as it can be properly quantified. A junior appropriator will also not be allowed to claim injury based solely on the proper operation of exchanges.

Washington Appellate Court Holds Irrigation District Operation Methods Reasonable

Jackass Mt. Ranch, Inc. v. S. Columbia Basin Irrigation Dist., Case No. 30270-9-III, (Wash.App. July 9, 2013).

Jackass Mountain Ranch was damaged in a landslide caused by seepage from an irrigation wasteway operated by the South Columbian Basin Irrigation District. The Ranch sought damages from the District on theories of inverse condemnation, negligence, *res ipsa loquitur*, and trespass.

The Superior Court and appellate court ruled in favor of the District on all claims. The Ranch argued the landslide was a direct and proximate result of the District's operation of the wasteway. However, the court held that the seepage was caused by the wasteway's design and construction by the U.S. Bureau of Reclamation, not its operation by the District.

Further, the court found no evidence that the District's operation increased the amount of seepage. Undisputed testimony established that the District's operation methods and practices were reasonable and within the standard of practice for irrigation systems. The other claims were dismissed because seepage could have occurred without negligence, and negligence was required to win on those grounds.

The District is required to maintain the standard of care set by the Bureau of Reclamation for operation and maintenance of the wasteway. However, the District contended it was not responsible for the landslide because the seepage was due to the Bureau of Reclamation's design and construction. The District asserted its only responsibility was to exercise reasonable care in the operation and maintenance of the wasteway, which it had done. The court held the determinative issue was whether the District's act of operating the wasteway caused the seepage. As the court concluded the design and construction, not the District's operation, was the proximate cause of the seepage, it affirmed summary judgment in the District's favor. The repayment contract between the Bureau of Reclamation and the District established that seepage was anticipated and is a natural consequence of the mere existence of the wasteway, and this would occur regardless of who operated the wasteway. The court also concluded the District had a duty to exercise reasonable care and caution in the maintenance and operation of the wasteway as a reasonable careful and prudent person, acquainted with the conditions, would exercise under like circumstances

U.S. District Court in Nevada Allows Claims Against Fish and Wildlife Service to Proceed

Ministerio Roca Solida v. U.S., ___F.Supp.2d___, Case No. 2:12-CV-1488 (D. Nev. July 10, 2013).

Plaintiff Ministerio Roca Solida is a nonprofit Christian religious organization that operated a church camp in Nye County, Nevada, and filed suit against Ash Meadows Wildlife Refuge, and Sharon McKelvey, who was the refuge's manager at the time of the events in question. In August 2006, Pastor Victor Fuentes formed and incorporated Solid Rock Ministry in Nevada, and a few months later, the ministry purchased 40 acres of land in Nye County. Though the parcel was private land, it was located within the boundaries of Ash Meadows. The parcel had vested water rights to a desert stream that ran through the property, and those rights had been in place since 1887. Plaintiff used the stream for baptisms, to water animals, and for use in religious meditation.

The suit arose when Ash Meadows engaged in a water diversion project that prevented the stream water from entering plaintiff's property, instead diverting it around the parcel. Plaintiff claims McKelvey undertook the project without the requisite permits and took steps to ensure regulators would hinder plaintiff's ability to operate a church camp. McKelvey stated that Ash Meadows undertook the project pursuant to a water impact statement that she had submitted to the Nevada Division of Water Resources, which was devoid of any indication that private landowners with vested water rights were situated within the affected land and would be directly impacted by the project. The complaint claimed the project-deprived plaintiff of its vested water rights, reducing the value of the land and interfering with the free exercise of religion within the parcel. Additionally, the newly diverted water overflowed the artificially created channels, causing over $86,000 in damages plaintiff sought to recover.

The U.S. District Court denied Ash Meadows' motion to dismiss, holding that it has jurisdiction over the claims, that plaintiff stated claims properly, and that the claims could proceed. While the court determined certain claims were inadequately briefed, it allowed all of the allegations to survive the motion to dismiss and proceed to trial. Finally, the court held that plaintiff may maintain an action against McKelvey in her individual capacity because the U.S. Supreme Court does prohibit an action for the type of violations claimed and because qualified immunity does not apply. The court therefore allowed the suit to proceed. (Melissa Cushman)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

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

Civil Enforcement Actions and Settlements—Water Quality

•EPA found multiple violations of the federal Clean Water Act (CWA) spill prevention rules and spill response requirements at Wondrack Distributing, Inc.'s fuel distribution facility located in Yakima, Washington. U.S. Environmental Protection Agency (EPA) inspectors at the Wondrack facility noted that the facility's spill prevention plan had not been fully implemented, nor was it adequate for the facility, and evidence of procedures, inspection, and training were not available, nor was a complete copy of the plan. EPA inspectors also found that secondary fuel containment on site had breaches from unknown piping and cracks in the walls. The company agreed to pay a $27,522 penalty in its settlement with the EPA.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•EMD Millipore Corporation, of Billerica, Massachusetts, has agreed to pay $2,681,500 in civil penalties to settle EPA allegations that it violated the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and its implementing regulations on numerous instances over many years. In a Consent Agreement and Final Order (CAFO), EPA alleged that EMD Millipore Corp. violated FIFRA on numerous occasions since 2008 by producing, importing, distributing and selling pesticide devices in violation of federal pesticide requirements. The devices were used in laboratories for research, development and manufacturing purposes. Although the allegations of noncompliance were serious and involved numerous violations over years, EPA is not aware of any specific human health or environmental harm caused by the violations in this case. The $2.6+ million penalty is the second largest civil penalty ever paid in an EPA enforcement case under FIFRA, and is the largest such penalty levied by EPA in New England. The types of violations resolved by this settlement include: importing regulated pesticide devices into the United States for distribution or sale without submitting "Notice of Arrival" forms to EPA; selling misbranded pesticide devices that lacked important label information about where they were made; producing pesticide devices in a then-unregistered establishment in Jaffrey, New Hampshire; and filing incomplete annual production reports with EPA by failing to list pesticide devices that were produced at a facility in Molsheim, France and then imported into the United States. EMD Millipore operates as the Life Sciences Division of Merck KGaA, Darmstadt, Germany (MDG). EMD Millipore was created in 2011 after MDG had acquired Millipore Corporation, a predecessor company that was also the subject of a FIFRA enforcement case settled with EPA in 2010. EMD Millipore distributes and sells a variety of products, including many that are regulated as "devices" under FIFRA. FIFRA classifies devices essentially as physical contrivances intended to mitigate pests and, as such, they are subject to fewer FIFRA requirements than chemical pesticides. While pesticide devices need not be registered under § 3 of FIFRA, they are required to be produced in registered establishments and to comport with certain labeling provisions. Devices also are subject to FIFRA reporting requirements when they are produced, imported, or sold. EMD Millipore produces devices at several facilities in the U.S. and Europe but the allegations arose from the Jaffrey, New Hampshire and Molsheim, France operations. The devices in question are used, in part, to help ensure the safety and integrity of biotech and pharmaceutical drug therapies, as well as beverage-making. The settlement requires EMD Millipore to certify that it is currently operating in compliance with FIFRA and its implementing regulations and that it has fully addressed the alleged violations. EMD Millipore also certifies that it provided EPA with true

and accurate information during the investigation of the case. Under the CAFO terms, EMD Millipore does not admit liability for the violations.

•A commercial waste handler in Rhode Island has agreed to pay a fine of $58,278 and to spend $252,152 to clean hazardous chemicals out of approximately sixty schools in Rhode Island and Massachusetts in order to settle EPA claims that the company violated state and federal hazardous waste laws at a facility in Providence, Rhode Island. Northland Environmental and its owner, PSC Environmental Services, will remove chemicals from 60 high schools and middle schools within a 50-mile radius of their Providence facility where the violations occurred. The companies have agreed to pack up and properly dispose of both hazardous and non-hazardous wastes stored at the schools, conduct hazardous waste training for science and art teachers, and purchase safety equipment such as storage cabinets for flammable chemicals, eye washes, and deluge showers for classrooms where hazardous chemicals are used. This project will be done over eighteen months during times when the schools are closed. EPA alleged that Northland/PSC Environmental Services violated the federal Resource Conservation and Recovery Act (RCRA) and state hazardous waste laws by failing to properly identify certain hazardous wastes and failing to properly maintain hazardous waste tanks and containers. They also stored incompatible hazardous wastes next to one another, creating a potential for fire or explosions but quickly came into compliance after the violations were identified. Rhode Island schools within a 50-mile radius of the Northland facility were sent emails letting them know of the opportunity to have toxic, hazardous, or chemicals prohibited by the state removed by participating in this project. Schools that were interested provided a list of the chemicals that need to be removed. In addition to paying the fine and completing the environmental project, Northland/PSC has agreed to make sure the Providence facility remains in compliance with federal and state hazardous waste management regulations. Northland/PSC's Providence facility accepts and handles a broad spectrum of wastes including acids, alkalis, flammable wastes, water reactive wastes, cyanides, sulfides, oxidizers, toxic wastes, oily wastes, photochemical wastes and laboratory packs. Hazardous and non-hazardous wastes are received, stored and or consolidated and then shipped off site for treatment or disposal.

Indictments, Convictions, and Sentencing

•Southwest Rice Mill Inc. president and owner Frederick Marque De La Houssaye, 60, of Crowley, Louisiana, pleaded guilty to one count of negligent discharge of hazardous materials and was sentenced to serve 24 months of probation and 160 hours of community service, and was ordered to pay a $2,500 fine. Southwest Rice Mill was ordered to pay restitution of $1,012,401. According to evidence presented at the guilty plea, from May 27, 2011 to May 31, 2011, De La Houssaye and Southwest Rice Mill Inc. negligently discharged waste oil into navigable waters. Mill laborers were performing routine maintenance on May 27, 2011 on a railroad spur, which in part the mill leased from Acadiana Railroad, in an effort to maintain drainage ditches for the mill and Acadiana Railroad. While performing the spur maintenance near the mill with an excavator, a laborer negligently struck the valve of an aboveground storage tank containing waste oil. After the valve was struck, oil began to shoot ten to fifteen feet from the tank and accumulated in a drainage ditch. The laborer who struck the valve called his supervisor, De La Houssaye. About an hour later, De La Houssaye arrived at the scene. An unknown amount of oil had spilled from the tank and flowed into Bayou Blanc. De La Houssaye ignored his duty to report the spill, and he and the laborers later left the site. The Crowley District Fire Chief received a call May 28, 2011 from a resident reporting an oil spill on Bayou Blanc. Burke traced the oil spill back to the drainage ditch at the mill. De La Houssaye told investigators he planned to deal with the spill after the May 31, 2011 Memorial Day holiday. Environmental authorities were called to the scene to investigate and began cleanup efforts, which cost federal, state, and local authorities $1,012,401. (Melissa Foster)

JUDICIAL DEVELOPMENTS

D.C. CIRCUIT COMPELS NUCLEAR REGULATORY COMMISSION TO RESUME NUCLEAR WASTE STORAGE LICENSING PROCEEDINGS

In re Aiken County, ___F.3d___, Case No. 11-1271 (D.C. Cir. Aug. 13, 2013).

The U.S. Court of Appeals for the District of Columbia Circuit recently revisited a writ petition filed by Aiken County, South Carolina, Washington, other state and local governments where nuclear waste is currently being stored, and individuals (petitioners), which sought a writ of *mandamus* requiring the Nuclear Regulatory Commission (NRC) to resume processing the U.S. Department of Energy's (DOE) license application (Application) to store nuclear waste at Yucca Mountain, Nevada. After reviewing the status updates filed by the parties pursuant to an order it issued in August of 2012, the Court of Appeals had found that the NRC was "simply defying a law enacted by Congress," and thus granted the petitioners' writ and ordered the NRC to resume processing the DOE's Application.

Factual and Procedural Background

The Nuclear Waste Policy Act (NWPA) requires the NRC to "consider" the DOE's application to store nuclear waste at Yucca Mountain and "issue a final decision approving or disapproving" the application within three years of its submission. The NWPA allows the NRC to extend the decision deadline by an additional year if it issues a written report explaining the reason for the delay and providing an estimated completion time.

The DOE submitted the Application in June 2008, and Congress appropriated Fiscal Year 2011 funds to the NRC so that it could perform the licensing process. However, in 2011, rather than meeting its review and decision deadline under the NWPA, the NRC shut down its review of the Application:

> …dismantled the computer system upon which it depended, shipped the documents to storage, and reassigned the program's personnel to [other] projects.

In 2012, petitioner's filed a writ of mandate seeking to compel the NRC to process the DOE's Application. On August 3, 2012, the Court of Appeals issued an order staying the writ petition and directing the parties to file status updates regarding fiscal appropriations that would potentially shed light on Congress' intent to enact legislation terminating the NRC's licensing process. Between that time and August 13, 2013, when the Court of Appeals issued its opinion, the NRC did not make any progress on the Application, Congress did not alter the legal framework of the NRC's licensing authority, and the NRC had at least $11.1 million in appropriated funds to continue considering the Application. Accordingly, the Court of Appeals granted the petitioners' writ.

The D.C. Circuit's Opinion

Article II Executive Authority to Ignore Statutory Mandates: No Funds Appropriated or Constitutional Objection

The Court of Appeals' opinion focused on "bedrock principles" of constitutional law. Because the NRC, as a federal agency, is part of the executive branch, the Court of Appeals began its analysis from the principle that the President (and subordinate executive agencies) must follow statutory mandates so long as there is appropriated money available and the President has no constitutional objection to the statute. The Court of Appeals considered and rejected each of the NRC's justifications for not following the NWPA's licensing application mandate, noting that none of the objections were constitutional in nature and thus by definition could not justify ignoring a statutory mandate.

First, the NRC argued that in order for it to resume the DOE Application licensing process, Congress must appropriate the full amount of funding necessary to complete the licensing process. The Court of Appeals rejected this argument on the reasoning that Congress often appropriates funds on a step-by-step basis, and when that is the case, agencies may not

ignore statutory mandates simply because Congress has not yet appropriated all the funds necessary to complete a project.

Second, the NRC argued that it was likely that Congress was going to stop appropriating funds to the licensing process and, as such, it would be a waste of resources to resume the process. The Court of Appeals responded that an agency may not rely on political guesswork about future congressional appropriations as a basis for violating existing mandates. It stressed that a "judicial green light" to this kind of agency speculation would disrupt the balance of power in favor of the Executive and at the expense of Congress.

The NRC's third and related argument was that the small amount of funds that Congress had recently (in the past three years) appropriated to the licensing process indicated a desire to shut down the process altogether. Again, the Court of Appeals rejected the NRC's position, citing the well-settled tenet of constitutional law that "Congress speaks through the laws it enacts," and that the judiciary should not infer that Congress has implicitly repealed or suspended statutory mandates based simply on the amount of money it has appropriated.

Fourth, the Court of Appeals noted that the record suggested that the NRC simply may not want to pursue the option of storing nuclear waste at Yucca Mountain as a matter of agency policy. Here, the Court of Appeals reiterated the two instances where the Executive may not follow a statutory mandate (where no funds have been appropriated or where it has a *constitutional* objection to the mandate) and pointed out that a *policy* disagreement is not sufficient to warrant violation of a statutory mandate.

Article II Executive Authority to Ignore Statutory Mandates: Prosecutorial Discretion

Next, the Court of Appeals discussed the other instance under Article II where the executive branch is authorized to ignore a statutory mandate; namely, where the executive branch is exercising prosecutorial discretion. This discretion comes from the Executive Power Clause (Article II, § 1, Clause 1), the Take Care Clause (Article II, § 3), the Oath of Office Clause (Article II, § 1, Clause 8), and the Pardon Clause (Article II, § 2, Clause 1). The Court of Appeals explained that the President's power to decline to prosecute a party for a statutory violation is not limited to situations where the President has a constitutional objection to the statute, but can also be based on other, even purely policy, objections. As for the President's authority to pardon a party, that power is absolute and can be exercised for any reason.

The Court of Appeals then explained that the principal of prosecutorial discretion did not justify the NRC's inaction with regard to the DOE's Application because prosecutorial discretion applies to decisions whether to punish or sanction a party for violating federal law—it does not apply to decisions whether to implement or administer programs mandated by federal law.

Conclusion and Implications

It is clear from its opinion that the Court of Appeals was frustrated with the NRC for its delay in processing the DOE's Application ("the [NRC] is simply flouting the law"), and perhaps even with Congress for failing to indicate its position on the matter. The Court of Appeals noted that it had:

> …repeatedly gone out of [its] way over the last several years to defer a mandamus order against the [NRC] and thereby give Congress time to pass new legislation that would clarify this matter if it so wished.

It noted that because no progress had been made by either branch over the past year, it "had no good choice but to grant the petition."

This case may be an indication of how the D.C. Circuit views its Article III powers in the balance of power between the three governmental branches. Given that the dissent articulated reasons for denying the writ (*e.g.*, the NRC did not have enough money to process the Application), the Court of Appeals' opinion shows that—despite its hesitancy to order such an extraordinary remedy as a writ compelling an agency to act—if the Court of Appeals believes it has given an agency ample time to act and the agency continues to delay, the Court of Appeals will take more drastic measures to protect a Congressional mandate. This ruling does not affect the NRC's substantive decision when it does consider and approve or deny the DOE's Application, however. But it does require the NRC to perform the federally mandated licensing process under the NWPA. (Jordan Ray, Duke McCall III)

THIRD CIRCUIT FINDS PLAINTIFF MAY PROSECUTE CERCLA CONTRIBUTION CLAIM RELATED TO LIABILITY UNDER STATE LAW

Trinity Industries, Inc. v. Chicago Bridge & Iron Co., ___F.3d___, Case No. 12-2059 (3rd Cir. Aug. 20 2013).

The U.S. Court of Appeals for the Third Circuit has considered the extent to which a settlement of state liability for environmental contamination affects the contribution scheme provided under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The court also considered if injunctive relief under the federal Resource Conservation and Recovery Act (RCRA) is available when a remediation under an existing remedial plan has already commenced.

Factual and Procedural Background

The environmental contamination at issue in this case is located at a 53-acre industrial property in Pennsylvania (property). Trinity Industries, Inc. and Trinity Industries Railcar Corporation (together, Trinity) acquired the property in 1988 and manufactured railcars there until 2000. Trinity purchased the property from a third party who had purchased it from defendant Chicago Bridge & Iron Company (CB&I) in 1985. Since 1910, CB&I manufactured steel products such as storage tanks, pressure vessels, water towers, and bridge components on the property. In 2006, after investigating allegations that hazardous substances were being released from the property, the State of Pennsylvania initiated enforcement proceedings against Trinity. Trinity and the state entered into a settlement agreement and Consent Order, pursuant to Pennsylvania law, whereby Trinity plead no contest and agreed to fund and conduct "Response Actions" according to a schedule approved by the state. The Consent Order named Trinity as a "responsible person" for the release of hazardous substances at the property, but reserved the right for Trinity to seek contribution from third parties, including CB&I.

After signing the Consent Order that bound Trinity to undertake remediation, Trinity filed suit under CERCLA and RCRA, seeking contribution from CB&I for its share of remediation costs and injunctive relief ordering CB&I's participation in the remediation. Trinity claimed that CB&I contaminated several sections of the property and presented evidence indicating that CB&I's activities left residual materials on the site. The District Court ruled in favor of CB&I on the CERCLA and RCRA claims. Thereafter, Trinity appealed the U.S. District Court's determination.

The Third Circuit's Decision

The Consent Order and the CERCLA Contribution Claim

First, the Court of Appeals considered whether CERCLA allows for a contribution claim where the party seeking contribution has resolved its liability under state environmental laws. Trinity argued that the Consent Order was a resolution of liability pursuant to CERCLA, which entitled Trinity to seek contribution from CB&I. However, the U.S. District Court determined that CERCLA was inapplicable to Trinity's case because the Consent Order, decided under state law, did not resolve Trinity's CERCLA liability. CERCLA requires a resolution of liability for "response actions," which is a CERCLA-specific term describing an action to clean up a site or minimize the release of contaminants in the future. Therefore, the District Court reasoned that a claim for contribution may be proper under CERCLA only when liability for CERCLA claims, rather than a broader legal claim, is resolved. However, the Third Circuit found that CERCLA does not require that a party settle its liability under CERCLA in particular to be eligible for contribution. The court noted that the statutory language of CERCLA requires only the existence of a settlement resolving liability to the United States or a state for a response action. However, CERCLA does not provide that the "response action" at issue must have been initiated pursuant to CERCLA. The Third Circuit's decision was a split from precedent in other circuits, however, the court was persuaded by the lack of any indication to the contrary in the plain language of the statute. Therefore, the Third Circuit remanded this issue to the District Court to consider Trinity's claim for contribution.

RCRA and Injunctive Releif

Next, the court considered whether injunctive relief pursuant to RCRA is available where a remediation plan has already been instituted and begun. To prevail under RCRA, a plaintiff must prove: (1) that the defendant is or was a "generator or transporter of solid or hazardous waste or one who was or is an owner or operator of a solid or hazardous waste treatment, storage, or disposal facility"; (2) that the defendant contributed to the "handling, storage, treatment, transportation, or disposal of solid or hazardous waste"; and (3) that the waste "may present an imminent and substantial endangerment to health or the environment." Despite finding that Trinity had proven these elements, the District Court denied injunctive relief under RCRA because the Consent Order already required Trinity to institute remediation measures at the property. Section 7002(a)(1)(B) of RCRA permits a District Court "to order [a person who may have contributed to endangerment] to take such . . . action as may be necessary." Further the court noted that RCRA is not principally designed to effectuate the cleanup of toxic waste sites or to compensate those who have attended to the remediation of environmental hazards. Rather, RCRA is intended to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal in order to minimize the present and future threat to human health and the environment. Therefore, the court ruled that Trinity did not show that CB&I's participation in the remediation would aid in the minimization of future threats. Accordingly, the Third Circuit ruled that CB&I's participation was "necessary" as required by RCRA, now that the Trinity had already agreed to carry out the remediation plan. Therefore, the Court of Appeals affirmed the District Court's decision that an injunction under RCRA was not available.

Conclusion and Implications

This decision stands for the proposition that where a party is required to take action to clean up a site or minimize the release of contaminants in the future under an applicable state law, its actions may constitute a "response action" under CERCLA. Accordingly, once a response action has been commenced, that party may be eligible for contribution under CERCLA even if the response action was not a result of liability under state law. Because there is a split in authorities, this may be an issue ripe for U.S. Supreme Court review.

As to RCRA, this case affirms the established principle that RCRA can be used to force a party to participate in the cleanup, but once that cleanup is underway, there will be no claim under RCRA to require third parties to participate in those remedial activities. (Danielle Sakai, Lucas Quass)

SECOND CIRCUIT HOLDS THE DISTRICT COURT CANNOT PREVENT PARTIES FROM LITIGATING ACTIONS RELATED TO CERCLA CONSENT DECREE IN STATE COURT

U.S. v. Steven A. Schurkman, et al., ___F.3d___, Case No. 12-3079-cv (2nd Cir. Aug. 27, 2013).

The U.S. Court of Appeals for the Second Circuit has vacated the U.S. District Court's decision to prevent Joseph S. Manne (Manne) from filing a claim in New York state court against an appraiser for fraud and negligent misrepresentation in connection with a Consent Decree in a federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) action. The court relied on the general rule that federal courts cannot interfere with a state court action, even if the Consent Decree stated that the federal court would retain jurisdiction over the decree.

Factual and Procedural Background

In October 2000, in response to reports of contaminated wells in Dutchess County, New York, the U.S. Environmental Protection Agency (EPA) and the New York State Department of Environmental Conservation determined that the source of the contamination was a septic tank on property owned by defendant Manne's father. Later, the EPA also discovered a buried acid waste pit on the site that contained several hazardous substances.

In February 2001, after incurring significant costs in cleaning up the site, the EPA sent a Notice of Potential Liability and Request for Information, which identified the elder Manne as potentially liable for the cleanup costs. After Manne's father passed away, the United States brought an action against Manne in federal court, seeking approximately $1.5 million in response costs under CERCLA.

The parties ultimately reached a settlement in 2010, which was embodied in a Consent Decree. Under the terms of the decree, Manne agreed to pay the United States an amount equal to the appraised value of certain property owned by a trust of which Manne was the beneficiary. The United States was to provide a list of three appraisers, one of which Manne would select. According to the Consent Decree, the appraised value was unreviewable by the courts. Furthermore, the Consent Decree provided that the federal District Court would retain jurisdiction over the matter for enforcing and interpreting the decree.

The appraised value of the property was determined to be $1,290,000. In accordance to the Consent Decree, the federal District Court entered judgment against Manne for $1,290,000 plus interest.

Even though the Consent Decree stated that the appraisal was unreviewable, Manne filed a motion to modify or vacate the judgment, based on various objections to the appraisal. In essence, Manne argued that the appraiser overvalued the property by using improper comparables and ignoring various characteristics of the property that should have resulted in a lower value. The District Court denied the motion, relying on the Consent Decree's provision that that the appraisal could not be reviewed.

Undeterred by the federal court's decision, Manne filed an action in New York state court against the appraisers, asserting claims for negligent misrepresentation, gross negligence, and fraud. The reasons for these claims were the same as those raised in Manne's motion to vacate the judgment against him.

The United States informed the U.S. District Court of Manne's state court action. The District Court, finding that the state court action interfered with the federal court's jurisdiction over the Consent Decree, issued an injunction forbidding the state court action, and from litigating any issues related to the Consent Decree in court other than the Southern District Court of New York. Manne appealed.

The Second Circuit's Decision

The Second Circuit focused on two federal statutes. The first, the All Writs Act, grants federal courts the authority to issue:

> …all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The second, the Anti-Injunction Act, limits the circumstances in which federal courts can enjoin state court proceedings. Specifically, the Anti-Injunction Act provides that a federal court:

> …may not grant an injunction to stay proceedings in a State court except … where necessary in aid of its jurisdiction.

The Court of Appeals began its analysis by noting the general policy *against* interfering with state courts. The court then considered that the "aid of its jurisdiction" exception to the Anti-Injunction Act had been interpreted as expressing the long-standing rule that a court with jurisdiction over *property* at issue in a case has the authority to prevent other courts from exercising control over that property.

In contrast, the Court of Appeals noted, previous court decisions have rejected federal court interference over state courts when an action involved *personal* liability, rather than disposition of property. Consequently, the "in aid of its jurisdiction" exception to the Anti-Injunction Act is limited to actions in which the court exercises jurisdiction over real property. Even if a federal court has "exclusive jurisdiction" over enforcement of a settlement, a state court action involving the same subject matter will be permitted. Whether the state court will follow the federal court's lead is for the state court to decide.

In addition to the foregoing, the Second Circuit noted that Manne's state court action merely sought damages against the *appraisers*. The Consent Decree, and the $1,290,000 payment to the United States based on appraised value, would be undisturbed. The Court of Appeals therefore vacated the District Court's injunction against Manne's state action.

Conclusion and Implications

While the factual scenario in this case is not expected to be often repeated, inasmuch as Consent

Decrees often result from CERCLA litigation, this case holds that litigation involving these decrees can be maintained in state court, even if the federal court retains jurisdiction over the decree itself. This gives the party prosecuting a claim somehow related to the Consent Decree more flexibility and may limit the federal government's involvement in that case, as the federal government generally declines to consent to state court jurisdiction. (Danielle Sakai, Kevin Abbott)

SEVENTH CIRCUIT FINDS CLEAN WATER ACT'S 'PERMIT SHIELD' APPLIES TO A FACIALLY VALID PERMIT WHERE THE HOLDER LACKS NOTICE OF POTENTIAL INVALIDITY

Wisconsin Resources Protection Council v. Flambeau Mining Company, ___F.3d___, Case No. 12-2969 (7th Cir. Aug. 15, 2013).

Flambeau Mining Company (Flambeau) obtained a mining permit from the Wisconsin Department of Natural Resources (WDNR), which also imposed restrictions on Flambeau's storm water discharge. It is undisputed that Wisconsin was authorized by the U.S. Environmental Protection Agency (EPA) to implement and administer its own Wisconsin Pollutant Discharge Elimination System (WPDES) program, and to do so through WDNR. Wisconsin Resources Protection Counsel and several environmental groups (WRPC) challenged the validity of Flambeau's permit alleging that Flambeau's copper discharges into "waters of the Unites States" should have been regulated under a separate NPDES permit placing restrictions on storm water discharges. WRPC further alleged that WDNR lacked the authority to regulate storm water discharges under state statute NR §216.21(4)(a), as that statute had not been approved by EPA. Flambeau filed a motion to dismiss the action based on the federal Clan Water Act (CWA) "permit shield" defense as it was undisputed that Flambeau's discharges had fully complied with its WDNR issued mining permit. The U.S. District Court denied the motion holding that the CWA §1342(k)'s permit shield did not apply because Flambeau did not show that the EPA has approved use of state mining permits via §NR 216.21(4) as a substitute for [a WPDES] permit.

The Seventh Circuit Court of Appeals reversed invoking the permit shield as: (i) Flambeau was told by WDNR that its mining permit constituted a valid WPDES permit; (ii) WDNR's authority to regulate Flambeau under the CWA was confirmed by NR §216.21(4)(a); and, (iii) Flambeau had no notice that NR §216.21(4)(a) was potentially invalid.

Background

Flambeau's Permit History

Flambeau operated an active mine in Ladysmith, Wisconsin from 1993 until 1997. The mine was adjacent to the Flambeau River, which ultimately reaches navigable waters of the United States. During the mine's active operation, WDNR regulated Flambeau under separate WPDES and mining permits; the mining permit also imposed restrictions on Flambeau's storm water discharge. Flambeau had a reclamation plan in place to restore the mine site at the cessation of active mining. Flambeau sought a modification of its reclamation plan following City of Ladysmith and private party requests that Flambeau preserve the mine site's current buildings, which were not slated for preservation under the original reclamation plan. Flambeau agreed and sought modification from WDNR of its reclamation plan and mining permit. After public comment, WDNR approved Flambeau's new reclamation plan and modified its mining permit.

As part of WDNR's review of Flambeau's modification requests, WDNR also reviewed Flambeau's potential storm water discharges from the mine site, ultimately deciding to terminate Flambeau's separate WPDES permit and to regulate Flambeau's storm water discharges under its mining permit pursuant to NR §216.21(4)(a). WDNR determined that this approach was permitted under NR §216.21(4)(a), because of:

> …a functional equivalence from the mining permit to the storm water permit at the time; that [WDNR] could have equal protection, if

not greater protection, under the mining permit.

On March 20, 1998, WDNR sent Flambeau a letter clarifying this change in the regulation of Flambeau's storm water discharges at the mine stating, in pertinent part, that:

> …[t]he current water handling procedures are acceptable to the department and are consistent with the Mining Permit, including the Surface Water Management Plan, and the Wisconsin Pollutant Discharge Elimination System (WPDES) Permit.

On September 8, 1998, WDNR again reiterated its intent to regulated Flambeau's storm water discharges under its mining permit rather than under a separate WPDES permit. WDNR terminated Flambeau's WPDES permit on September 23, 1998. At all relevant times, Flambeau's mine discharges complied with its mining permit.

Wisconsin's Approved Storm Water Regulation Program

EPA approved Wisconsin's WPDES program in 1974. In 1993 and 1994, the state amended its laws and regulations to conform to the CWA's storm water regulatory requirements. In 1994, Wisconsin submitted its proposed modifications, NR §216.21(4)(a) included, to EPA for its approval. EPA responded with comments concurring with the state's regulatory approach, although EPA did not ever issue a formal letter of approval. Since, 1994, the state has been regulating storm water discharged under WPDES and other permits—in this case a mining permit—so long as the other permits are equally as stringent as required under the storm water regulations. *See*, Wisconsin Administrative Code ch. NR 216. Here, WDNR believed the public would benefit from the regulation of Flambeau's storm water discharges via its mining permit as that approach would result in more frequent inspections of the mine site, than would a separate WPDES permit.

The CWA's 'Permit Shield'

The permit shield insulates permit holders from an enforcement action alleging that permit conditions are not sufficient. Congress expressed this very point in 33 U.S.C. §1342(k):

> Compliance with permits…Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317 and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health…

As the United States Supreme Court held the permit shield serves to:

> …relieve [permit holders] of having to litigate in an enforcement action the question whether their permits are sufficiently strict. In short, [the permit shield] serves the purpose of giving permits finality. *E.I. du Pont de Menours & Co. v. Train*, 430 U.S. 112, 138 n. 28 (1977).

The Seventh Circuit's Decision

The issue of whether the permit shield applies is a question of law reviewed under a *de novo* standard:

> We begin by noting that there is evidence that the EPA approved NR §216.21(4)(a). However, we need not decide whether the EPA approved this specific provision of Wisconsin's WPDES scheme because, even if Flambeau's permit were legally invalid, we cannot, consistent with the requirements of due process, impose a penalty on Flambeau for complying with what Wisconsin deemed a valid WPDES permit.

Notice

The court found Flambeau's reliance on the validity of the mining permit was in good faith and, as such, it would not have been on notice that it could not rely on a mining permit, or that it would have to take alternative action. The court's rationale was supported by its previous decision in *U.S. v. Cinergy Corp*, 623 F.3d 455 (7th Cir.2010). In *Cinergy*, the court reversed a lower court's holding of liability under the Clean Air Act because a permittee's conduct complied with a State Implementation Plan (SIP) that EPA approved. The court held that a permittee could not be liable under the terms of a modified SIP

that had not been submitted or approved by EPA at the time of the conduct at issue.

The Seventh Circuit found that, here, Flambeau had no notice that its WPDES permit was invalid, or that it needed to obtain another as it was undisputed that Wisconsin, through its WDNR, was the appropriate CWA administrator possessing the authority to issue mine site NPDES/WPDES permits, and that entity told Flambeau that a mining permit equated to a WPDES permit. Moreover, had Flambeau searched the state's Administrative Code, an analysis suggested by WRPC in its briefing, it could only have reasonably concluded that the state could regulate storm water through a mining permit. *Cinergy* stands for the proposition that a private party is entitled to rely on published regulations and, a "straightforward reading of [the regulation] permitted" WDNR to regulate storm water via a mining permit.

The court rejected WRPC's argument that Flambeau was on notice that it needed a separate WPDES permit because it previously had a mining permit and a separate WPDES one:

> However, the WDNR made clear, by its termination of the separate permit and by its consistent position that a separate WPDES permit was unnecessary, that it would not issue a separate permit. 'The law does not require the doing of a futile act.' *Id.* citation omitted.

Moreover, the court found the mining permit's language directing a permit holder to obtain all other permits required by law is irrelevant as NR §216.21(4)(a) allowed the WDNR to determine that a separate permit was unnecessary.

The Seventh Circuit found that WRPC's argument was really a collateral attack of the state's WPDES program, which would improperly place on a permit holder the burden to prove the validity of legislative and regulatory transactions to which they were not directly involved. The state's WPDES modification exchange was with EPA and did not directly involve Flambeau. The court found that to impose on Flambeau the obligation of proving the validity of the state's permits would undermine the Supreme Court's stated purpose of the shield provision—"to giv[e] permits finality." *Id.* quoting *E.I. du Pont de Nemours*, 430 U.S. at 138 n. 28.

Conclusion and Implications

This case involved a *de minimis* discharge from a storm drain that was actively monitored by WDNR under a storm water regulation program that was approved by EPA. There was no legitimate purpose for holding Flambeau liable for such minimal storm water discharges when it had consistently and fully complied with its permit that WDNR admits was at least as strict as the former WPDES permit. The CWA shield should apply to such cases as other jurisdictions have so held. *See, e.g., Hughey v. JMS Development Corp.*, 78 F.3d 1523 (11th Cir.1996). (Thierry Montoya)

NEW JERSEY APPELLATE DIVISION CURTAILS STATE SPILL ACT BY ENGRAFTING SIX-YEAR STATUTE OF LIMITATIONS

Morristown Associates v. Grant Oil Company, et al., Case No. A-0313-11T3 (N.J.App.Div. Aug. 23, 2013).

Contrary to the historic trend of the New Jersey state court's aggressively interpreting state law to protect the state's natural resources, the Appellate Division (an intermediate appellate court) has found for the first time that New Jersey's Spill Act has a six year statute of limitations. The Spill Compensation and Control Act (Spill Act) was the precursor to the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), which has both a three and six year statute of limitations—but prior to this recent decent there was no statute of limitations for Spill Act actions in contribution against other polluters. The Appellate Division's decision is remarkable not only because it significantly curtails the Spill Act's grasp but further, because the Appellate Division applied this novel interpretation retroactively.

Background

In 1979 plaintiff Morristown Associates purchased a small shopping center called Morristown Plaza, located on Lafayette Avenue in Morristown, New Jersey. Prior to the time that plaintiffs purchased the Morristown Plaza, Plaza Cleaners (Owned by Robert Herring) had installed underground storage tanks (USTs) to hold heating oil for steam boiler that he used in the dry-cleaning business. Because the tank was covered by concrete, plaintiffs allege that first became aware of the UST owned by Herring in 2003. In 2006 plaintiffs filed suit against the predecessor owners of the USTs as well as the prior owner of the shopping mall. Defendants responded that the claim was barred due to the passing of the statute of limitations, which is typically six years in New Jersey for damage to real property. Plaintiffs proceeded on their claim that there was no statute of limitations under the Spill Act because no court in New Jersey had ever found that there was a statute of limitations.

The Appellate Division's Decision

In addition to arguing that there was neither case law nor statutory language to support the finding that the Spill Act had a statute of limitations, plaintiffs cited to an unpublished decision holding that there is no statute of limitations because the New Jersey Legislature wanted the Spill Act to have broad powers. Further, plaintiffs argued that they had no reason to believe that their were leaking USTs on site. According to plaintiff's expert, Peter Elliott, the UST should have been trouble free for 30 years but leaked well prior to the 30-year time period due to corrosion. Although plaintiffs were unaware of the UST owned by herring, plaintiff was aware of other UST that have been located onsite and that were required to be removed. Oddly, in 1993 when plaintiff Morristown associates were attempting to refinance the property, an environmental audit was conducted by engineering company and found that there were no UST onsite. This finding by the engineering company was false and was based simply upon on the review of the available paperwork (it was a Phase I audit) and did not involve magnetometer or physical survey of the property.

The Statute of Limitations Issue

On July 31, 2006, plaintiff filed a three-count complaint against one defendant (Grant Oil & Co.) and then subsequently file amended complaints over the next several years. Dismissing plaintiff's complaint, however, the trial court—which was subsequently affirmed in this Appellate Division decision—found that the Plaza Cleaners knew or should have known about of the contamination onsite in 1999. Further, the court found that the complaint in contribution under the Spill Act was untimely because for the first time in New Jersey history, the court found that Spill Act claims are subject to a six-year statute of limitations. Specifically the court held that the general six year statute of limitation of damage to property applies to private claims for contribution pursuant to the Spill Compensation and Control Act. In response, plaintiff alleged that the trial court had erred in applying a six-year statute of limitations because New Jersey Legislature had not incorporated a statute of limitations under the Spill Act. Under this view, that the Spill Act does not contain a statute of

limitation, was supported by both unpublished case law in New Jersey as well as a decision *Pitney Bowes v. Baker Industries*, 277 NJ Super 484, 488-489 (App. Div.1994).

The New Jersey Appellate Division, however, did not feel constrained by the earlier unpublished decisions, nor by the *Pitney Bowes* decision and noted that all parallel federal cases due in fact have a statute of limitations where those claims arise under the CERCLA, or the federal Resource Conservation and Recovery Act (RCRA). Next, the Appellate Division noted that under the New Jersey statutes there is a six year statute of limitations for all claims for trespassed real property and that although the Spill Act did not incorporate or reference that statute of limitations, it was also true that the legislature must have been aware that this was the statutory limit for traditional trespass and nuisance claims. Applying this logic, the appellate court found that the trial court was correct to determine that Plaza Cleaners should have known no later than 1999 that an UST had leaked onsite and there was an obligation to engage in due diligence at that point in time.

Conclusion and Implications

First, a question regarding the breadth of the decision—the Appellate Division noted that a six-year statute of limitations applies to "a private claim for contribution." Does the Appellate Division intend that a public claim, *i.e.*, a claim by the New Jersey Environmental Protection would not be subject to a six year statute of limitations and, if so, what would be the basis for having a different statute of limitations against the government as opposed to a claim by a private party? Second, the Appellate Division's decision appears to engage in a bit of bootstrapping, which is particularly odd in a case that is decided as novel question of law. The novel question of law is whether a statute of limitations should be imbued into the Spill Act. What is odd and potentially academically challenging is that the Appellate Division relied as part of the basis for interpreting the Spill Act (which was passed in 1976) for the manner in which CERCLA has been applied on the federal level. CERCLA was not passed until 1980 so how could it conceivably served as a basis for the thought process of the legislature in 1976? Further, CERCLA is a federal statue with defined statutory periods for claims and contributions and claims for a direct recovery—the Spill Act has neither of these limitations and therefore it is a questionable read upon which to rely. Third, and perhaps most importantly, it is odd that the Appellate Division would grasp for a case to which to determine that the Spill Act is not subject to a statute of limitations where the factual record is not completely clear. In this case, for example, the plaintiffs had engaged in some due diligence and had a reasonable argument that they acted in a timely fashion. If this is so, should eth Appellate Division applied the new rule (that there is a six-year statue of limitation retroactively to this plaintiff without a further factual finding? Perhaps this is a reflection that the Spill Act and other environmental statutes will be read more narrowly, which is inconsistent with the trend with which they have been read in the past.
(Jeffrey Pollock)

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