Volume 10, Number 5
June 2015

EASTERN WATER LAW™

& POLICY REPORTER

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WWW.ARGENTCO.COM

Subscription Rate: 1 year (11 issues) $735.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 506; Auburn, CA 95604-0506; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc.: President, Gala Argent; Vice-President and Secretary, Robert M. Schuster, Esq.

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EASTERN WATER NEWS

FEDERAL EMERGENCY MANAGEMENT ADMINISTRATION MANDATES STATE GRANT RECIPIENTS TO PLAN FOR CLIMATE CHANGE IMPACTS

The Federal Emergency Management Administration (FEMA) plays a significant role in approving state and local hazard mitigation plans that are required for eligibility under select federal funding programs for disaster mitigation. For a state to be eligible for hazard mitigation funding, FEMA is required to approve its mitigation plan. In its State Mitigation Plan Review Guide (Guide) released in March 2015, FEMA is mandating that, effective March 2016, states must incorporate an assessment of climate-related risks in their state hazard mitigation plans.

The Guide is FEMA's official policy on and interpretation of the natural hazard mitigation planning requirements. The previous guide by FEMA was released in 2008.

FEMA 2012 Climate Change Adaptation Policy Statement

On January 1, 2012, FEMA released a Climate Change Adaptation Policy Statement in order to "establish an Agency-wide directive to integrate climate change adaptation planning and actions into Agency programs, policies, and operations." In issuing this policy statement, FEMA acknowledged a:

> …need to address risks associated with future disaster-related events, including those that may be linked to climate change, is inherent to FEMA's long-term vision of promoting physical and economic loss reduction and life saving measures.

The 2015 Guide is part of FEMA's commitment to evaluate how climate change considerations can be incorporated into grant investment strategies with specific focus on infrastructure and evaluation methodologies or tools such as benefit/cost analysis.

State Hazard Mitigation Plans

FEMA requires that beginning in March 2016:

> …[s]tate risk assessments must be current, relevant, and include new hazard data, such as recent events, current probability data, loss estimation models, or new flood studies as well as information from local and tribal mitigation plans, as applicable, and *consideration of changing environmental or climate conditions that may affect and influence the long-term vulnerability from hazards in the state*. (Guide at p. 3, emphasis added).

Previously, State Hazard Mitigation Plans did not specifically require each state to address climate change. Some states, however, voluntarily assessed potential impacts of climate change.

FEMA approval of a State Hazard Mitigation Plan, which must be renewed every three years, is a precondition to a state award under any of the Hazard Mitigation Assistance grant programs. Annual grants routinely have exceeded one billion dollars in total. The top ten recipients of FEMA mitigation grants are Louisiana, California, Texas, Florida, New York, Iowa, Mississippi, North Carolina, Georgia, and New Jersey.

FEMA acknowledges that:

> ….there exists inherent uncertainty about future conditions and will work with states to identify tools and approaches that enable decision-making to reduce risks and increase resilience from a changing climate.

The Guide identifies impacts of climate change to include:

> …more intense storms, frequent heavy precipitation, heat waves, drought, extreme flooding, and higher sea levels…. (Guide at p. 13).

Conclusion and Implications

FEMA's adoption of the Guide may, in part, be a consequence of a petition filed by the Natural Resources Defense Council and the National Wildlife

Federation pursuant to the Administrative Procedure Act and FEMA's governing regulations in October 2012, which requested that FEMA approve only State Hazard Mitigation Plans that adequately address climate change. Becky Hammer, an attorney with the Natural Resources Defense Council's water program stated that as a result of the Guide:

> ….[i]f a state has a climate denier governor that doesn't want to accept a plan, that would risk mitigation work not getting done because of politics; the governor would be increasing the risk to citizens in that state because of his climate beliefs.

To date, Governors Rick Scott of Florida, Bobby Jindal of Louisiana, Chris Christie of New Jersey, Greg Abbott of Texas and Pat McCrory of North Carolina have rejected the premise that man-made activities have contributed to climate change. These states, all with miles and miles of shorelines, may soon risk millions, if not billions of federal dollars.

The 2015 Guide can be located at: http://www.fema.gov/media-library-data/1425915308555-aba3a873bc5f1140f7320d1ebebd18c6/State_Mitigation_Plan_Review_Guide_2015.pdf (Jonathan Shardlow)

NEWS FROM THE WEST

This month's News from the West involves California's emergency drought regulations as well as cases in state and federal courts. First, California's State Water Resources Control Board has proposed emergency drought regulations requiring that urban water purveyors cut up to 36 percent of their potable water use. Next, the Colorado Supreme Court determined that a property owner abandoned his water rights by failing to make beneficial use of water from a ditch. Finally, a Texas state appellate court found that the state water agency's drought rules curtailing use by junior right holders were invalid because they violated the doctrine of prior appropriation.

California's State Water Resources Control Board Adopts Emergency Drought Regulations Restricting Urban Potable Water Supplier Usage by Up to 36 Percent

State Water Res. Control Bd. Resolution No. 2015-0013, to Adopt Emergency Regulation for Statewide Urban Water Conservation (May 5, 2015).

The California State Water Resources Control Board (SWRCB) adopted emergency regulations aimed at reducing urban water usage by 25 percent statewide. Although cities and water agencies urged the board to consider other factors in designating demands under the proposed standard that placed urban water suppliers into nine conservation tiers based on residential per capita use, the revisions retained the structure requiring that suppliers achieve total potable water savings of up to 36 percent, in some cases. The regulations placed restrictions on total water production, which includes all potable water in a supplier's distribution system, except stored water that is not used during the required period or exported outside the supplier's service area. These state-wide restrictions will require local water retail agencies to restrict water use by their customers to meet the mandated usage reduction goals.

On April 18, 2014, the SWRCB proposed water restrictions implementing the governor's executive order addressing California's drought. On April 28, the governor also announced his intent to propose laws expanding the power of local agencies to cite water wasters, imposing fines of up to $10,000 per day for failure to comply with local water restrictions, and accelerate the permitting of local water supply projects. The regulations target 411 urban water purveyors that either serve over 3,000 customers or deliver over 3,000 acre-feet of water per year. Suppliers were assigned to nine tiers based on per capita residential water use, placing greater conservation demands on agencies with greater per capita water usage.

The emergency regulations additionally restrict all end users in California from using potable water to wash driveways and sidewalks or in a manner that causes runoff, washing vehicles without use of a water shutoff nozzle, irrigating turf on street medians, or irrigating landscaping within 48 hours of measur-

able rainfall. The regulations prohibit restaurateurs from serving drinking water unless requested by the patron, and require hotels to display notices providing guests an option to not have towels and linens laundered daily. The regulations also separately target large landscapes on properties such as campuses, golf courses, and cemeteries to reduce their potable water use for any water received from sources other than regulated urban water suppliers.

The State Water Resources Control Board tracks compliance by comparing prior water usage in 2013 and current reported water use starting upon final approval of the regulations by the state's Office of Administrative Law. Thus, local agencies are quickly preparing to implement restrictions to reduce water use within the compliance period.

Colorado Supreme Court Finds Owner Abandoned Water Rights through Nonuse

McKenna v. Witte, 346 P.3d 35 (Colo. Apr. 6, 2015).

The Colorado Supreme Court rejected a challenge brought by Tom McKenna, a cattle ranch owner that appropriated water rights from the Sanchez Ditch in Colorado. Under the doctrines of abandonment and prior appropriation, water rights are retired when the owner no longer intends to apply the water to a beneficial use. McKenna claimed that the Colorado State Engineer responsible for administering local water rights improperly found abandonment based on an alleged failure to make beneficial use of the ditch for over 20 years. Because McKenna let the ditch fall into disrepair and never tried to fix it, the Court found that he showed no intent to use the available water and therefore permanently gave up his appropriative rights. As such, the Court held that McKenna had abandoned his water rights and relinquished his entitlement to the stream.

McKenna sued the state's Division Engineer, who is responsible for preparing a list of abandoned water rights every ten years. The Division Engineer determined that McKenna had abandoned his water rights in the ditch through nonuse. McKenna objected to his inclusion on the 2010 list, claiming that he never intended to abandon his water rights. He had acquired water rights in 1991 when he bought a neglected cattle ranch. McKenna claimed that he cleaned out the old, abandoned wells on the property and drilled deeper wells for stock water. He argued that he regularly maintained the ditch since the mid-1990s, using it to irrigate native grasses in his pasture. Pointing to handwritten notes describing diversion out of the river and sporadic use of the ditch, McKenna challenged the termination of his water rights and sought to be removed from the list.

The Division Engineer responsible for preparing the abandonment list every ten years responded that the neglected ditch had also been included in the prior list in 2000. In the decade that followed, no one had seen water diverted through the ditch, which allegedly continued to deteriorate. Years of diversion records, aerial photos, and field inspections in 2011 revealed a dilapidated ditch with no usable diversion structure since at least 1982.

The Supreme Court found that this evidence contradicted the notes McKenna had used to avoid abandonment. Thus, the Court found that despite being an experienced rancher with access to engineering advice, McKenna had failed to repair or make beneficial use of the ditch for over ten years. As such, he had abandoned his water rights.

Texas Appellate Court Finds Prior Appropriation Doctrine Must Be Followed for Drought Water Right Curtailments by State Regulators

Texas Commission on Environmental Quality v. Texas Farm Bureau, Case No. 13-13-0041-CV (Tex.App. Apr. 2, 2015).

A Texas Court of Appeals declared invalid certain drought rules suspending the rights of only certain junior water right holders to water in the Brazos River Basin so that Dow Chemical Company could exercise its senior right to withdraw water. Because § 11.053 in the Texas Water Code specifically made all drought curtailments subject to the prior appropriation doctrine, the state's administrative rules violating the doctrine's first-in-time, first-in-right framework were held to be invalid.

Under the doctrine of prior appropriation, holders of more senior rights have priority than those with junior rights. Permits issued by the state include priority dates establishing the holder's place in line. Accordingly, permit holders with the earliest date on a given stream had senior rights over holders with a later date. Section 11.053 of the Texas Water Code required preserving this priority of water rights when adjusting diversions in times of drought.

In 2011, the statute clarified the state's authority to administer water rights in times of drought, making any rulemaking or enforcement actions subject to the prior appropriation doctrine. In 2012, the state then adopted drought rules applicable to the Brazos River Basin. In response to a severe drought, Dow Chemicals demanded that more junior water right holders cease their use of the basin so that the company could exercise its senior water right. The state suspended the use of water rights by holders with a priority date junior to those of the company, but it exercised its discretion under the drought rules to not suspend certain water rights designated for municipal water supplies or electric power generation based on public health, safety, and welfare concerns.

The Texas Farm Bureau and other individuals challenged the validity of the drought rules relied upon by the state to require the curtailments, claiming that these orders were subject to the doctrine of prior appropriation. They asserted that the doctrine of prior appropriation limited the agency's rulemaking or enforcement actions in suspending surface water use to the framework of first-in-time, first-in-right. Because the challenged orders allowed the state agency to suspend certain rights so that senior water right holders could obtain water, but they allowed an exemption of certain preferred uses from the curtailment or suspension orders, they allegedly violated this doctrine and were therefore invalid.

In response to these arguments, the state contended that it could consider public policy in prioritizing the nature of uses with the objective of conserving beneficial uses of water. In order to strike a balance between enforcing priority and exacerbating public health and safety concerns, the agency alleged that it had to consider factors other than the strict priority doctrine before granting emergency requests for diversion.

Because the Texas Water Code specifically made all drought curtailment regulations subject to the prior appropriation doctrine, the Court of Appeals determined that the agency's authority to regulate scarce water resources was limited to determining suspensions of water rights based on first-in-time. Accordingly, the court declared the agency's drought rules invalid. (Steven Martin)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

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

Civil Enforcement Actions and Settlements—Water Quality

•ExxonMobil Pipeline Company and Mobil Pipe Line Company (ExxonMobil) agreed to pay civil penalties, fund an environmental project and implement corrective measures to resolve alleged violations of the federal Clean Water Act and state environmental laws stemming from a 2013 crude oil spill from the Pegasus Pipeline in Mayflower, Arkansas.

Under a consent decree lodged today in federal court, ExxonMobil will pay $3.19 million in federal civil penalties and take steps to address pipeline safety issues and oil spill response capability. In addition, ExxonMobil will pay $1 million in state civil penalties, $600,000 for a project to improve water quality at Lake Conway, and $280,000 to the Arkansas Attorney General's Office for the state's litigation costs.

The oil spill occurred on March 29, 2013 after the Pegasus Pipeline, carrying Canadian heavy crude oil from Illinois to Texas, ruptured in the Northwoods neighborhood of Mayflower, Arkansas. Oil flowed through the neighborhood, contaminating homes and yards, before entering a nearby creek, wetlands and a cove of Lake Conway. Some residents were ordered to evacuate their homes after the spill and remained displaced for an extended period of time. The spill volume has been estimated at approximately 3,190 barrels, or 134,000 gallons.

•Anaplex Corporation, a metal finishing company, agreed to pay a $142,200 penalty for violations found at its Paramount, California facility. An EPA investigation in August 2010 found that the facility failed to treat pollutants in its industrial wastewater, such as cadmium, nickel and zinc, before being discharged into the Los Angeles County Sanitation District sewer system, which enters into the Pacific Ocean—a violation of the Clean Water Act. In addition, EPA discovered several hazardous waste violations including failure to properly label and close hazardous waste containers. Anaplex also failed to properly meet training requirements for its employees and did not operate the facility in a way that minimizes the possibility of hazardous waste being released into the environment. In January 2011, EPA ordered Anaplex to cease violations of the Clean Water Act, and in August 2011, EPA issued Anaplex a Notice of Violations requiring correction of the hazardous waste violations.

Indictments, Convictions and Sentencing

•On May 14, 2015, three subsidiaries of North Carolina-based Duke Energy Corporation, the largest utility in the United States, pleaded guilty to nine criminal violations of the Clean Water Act at several of its North Carolina facilities and agreed to pay a $68 million criminal fine and spend $34 million on environmental projects and land conservation to benefit rivers and wetlands in North Carolina and Virginia. Four of the charges are the direct result of the massive coal ash spill from the Dan River steam station into the Dan River near Eden, North Carolina, in February 2014. The remaining violations were discovered as the scope of the investigation broadened based on allegations of historical violations at the companies' other facilities.

Under the plea agreement, both Duke Energy Carolinas and Duke Energy Progress, must certify that they have reserved sufficient assets to meet legal obligations with respect to its coal ash impoundments within North Carolina, obligations estimated to be approximately $3.4 billion.

As part of their plea agreements, Duke Energy Business Services LLC, Duke Energy Carolinas LLC and Duke Energy Progress Inc. will pay a $68 mil-

lion criminal fine and a total $24 million community service payment to the National Fish and Wildlife Foundation for the benefit of the riparian environment and ecosystems of North Carolina and Virginia. The companies will also provide $10 million to an authorized wetlands mitigation bank for the purchase of wetlands or riparian lands to offset the long-term environmental impacts of its coal ash basins. In addition, they will pay restitution to the federal, state and local governments that responded to the Dan River spill and be placed on a period of supervised probation for five years.

Duke's subsidiaries operating 18 facilities in five states, including 14 in North Carolina, will also be required to develop and implement nationwide and statewide environmental compliance programs to be monitored by an independent court appointed monitor and be regularly and independently audited. Results of these audits will be made available to the public to ensure compliance with environmental laws and programs. The companies' compliance will be overseen by a court-appointed monitor who will report findings to the court and the U.S. Probation Office as well as ensuring public access to the information.

• A federal grand jury in Mobile, Alabama, has returned a seven-count indictment charging Det Stavangerske Dampskibsselskab AS (DSD Shipping) and four employees with violating the Act to Prevent Pollution from Ships (APPS), conspiracy, obstruction of justice and witness tampering. DSD Shipping is a Norwegian-based shipping company that operates the oil tanker M/T Stavanger Blossom, a vessel engaged in the international transportation of crude oil. Also indicted were four engineering officers employed by DSD Shipping to work aboard the vessel, Daniel Paul Dancu, 51, of Romania, Bo Gao, 49, of China, Xiaobing Chen, 34, of China, and Xin Zhong, 28, of China.

According to the indictment, in 2014, DSD Shipping and its employees conspired to bypass pollution prevention equipment aboard the M/T Stavanger Blossom and to conceal the direct discharge of waste oil and oil-contaminated wastewater from the vessel into the sea. The operation of marine vessels, like the M/T Stavanger Blossom, generates large quantities of waste oil and oil-contaminated wastewater. International and U.S. law requires that these vessels use pollution prevention equipment to preclude the discharge of these materials. Should any overboard discharges occur, they must be documented in an oil record book, a log that is regularly inspected by the U.S. Coast Guard.

• William "Billy" Franklin Johnston, the owner of one of North Carolina's largest dairy farms located in Fletcher, N.C., was sentenced Thursday to four years of probation, six months of which he has to spend in home detention, for his role in violation of the Clean Water Act in the discharging of cow feces into the French Broad River. U.S. Magistrate Judge Dennis L. Howell also ordered Johnston to pay a $15,000 fine. The dairy company, Tap Root Dairy, LLC (Tap Root), was also fined $80,000 and was placed on a four-year probationary term. The company is also required to abide by a comprehensive environmental compliance plan.

• Daryl Fischer of Seminole, Florida and Russell Taylor of Loxahatchee, Florida were sentenced on Tuesday, April 28, 2015, to terms of probation for improper use of the pesticide Aldicarb, which is marketed as Temik, announced the United States Attorney for the Middle District of Alabama, George L. Beck, Jr.

The two men were members of a hunting club leasing Bucksnort Plantation near Fitzpatrick, Alabama, and on January 31, 2014 sprinkled granules of Temik on portions of a deer carcass that they spread around the property in an effort to kill coyotes. Temik is toxic to fish, birds and other wildlife, and is not approved for use as a poison for animals. The poisoning resulted in significant loss of animal life, including three fox-hunting dogs, two red-tailed hawks, and a black vulture. In addition to their terms of probation, Fischer and Taylor are prohibited from hunting all game animals for one year, including deer and migratory birds; are ordered to pay restitution and fines in the amount of $14,249.79; and will be responsible for publishing a public notice in the Union Springs Herald regarding the misuse of toxic pesticides.

• Trans Energy, Inc., an oil and gas exploration company based in Pleasants County, West Virginia, was sentenced to two years of probation and ordered to pay fines totaling $600,000.00 after the company admitted to multiple violations of the Clean Water Act in connection with its natural gas drilling activity.

Trans Energy sought to capitalize on Marcellus Share natural gas resources in West Virginia. The company discharged materials such as rock, sand, soil and stone into streams in Marshall County, West Virginia to build large impoundments, or reservoirs of water, to supply water to nearby well sites. The reservoirs of water were subsequently used for Marcellus Shale drilling activity. Trans Energy further failed to properly train and supervise its employees and relied upon the unsubstantiated representations of a nearby property owner when determining whether environmental laws were being followed.

•Chad Ducey, 39, of Fishers, Indiana, pleaded guilty yesterday for his role in a multi-state scheme to fraudulently sell biodiesel incentives. His two brothers, Chris Ducey, 48, of North Webster, Indiana, and Craig Ducey, 44, of Fishers, also pleaded guilty for their roles in the same scheme. The Ducey brothers operated E-biofuels LLC, from a facility in Middletown, Indiana. As part of the scheme, they sold over 35 million gallons of biodiesel to customers for more than $145 million by falsely claiming that the fuel was eligible for federal renewable energy incentives, when they knew it was not. In addition, Craig Ducey pleaded guilty to a related $58.9 million securities fraud, which victimized over 625 investors and shareholders of Imperial Petroleum, a publicly-traded company and the parent company of E-biofuels. (Andre Monette)

JUDICIAL DEVELOPMENTS

U.S. EPA'S MISSISSIPPI RIVER WATER QUALITY RULE DISCRETION—WITH A REASONABLE EXPLANATION—IS REINFORCED BY FIFTH CIRCUIT COURT OF APPEALS

Gulf Restoration Network v McCarthy, 783 F.3d 227 (5th Cir. 2015).

In a decision that will disappoint the plaintiff environmental organizations and others desirous of federal takeover of Mississippi River water quality standards, the Fifth Circuit Court of Appeals has vacated a U.S. District Court decision that ordered the U.S. Environmental Protection Agency (EPA) to engage in such a federal rulemaking. On April 7, 2015, in *Gulf Restoration Network v McCarthy*, the Court of Appeals gave strong support to the reviewability of EPA decisions that deny rulemaking petitions, but it also held the trial court had not made its review with proper deference to the discretion of the agency under the pertinent section of the Clean Water Act.

Background

A group of environmental protection advocacy organizations had petitioned the Administrator of the EPA to use the agency's authority under 33 U.S.C. §1313 (c)(4)(B) [Water Quality Standards and Implementation Plans] to promulgate rules on the basis that federal rulemaking was "necessary" to meet water quality requirements of the law for the Mississippi. The petition claimed nitrogen and phosphorous loadings were not under proper control.

The EPA response acknowledged that there is significant concern about nitrogen and phosphorous contributing to violations of water quality standards, but also saying that the states were actively seeking to limit such pollution. EPA indicated that act contains a strong policy preference for state lead on regulations and that the agency believed its program of devoting funds to support state efforts was better suited to attaining desired results. Thus, EPA declined to undertake the rulemaking requested.

At the District Court

The plaintiff organizations sued the Administrator based on both the Administrative Procedure Act (APA) and the Clean Water Act. The EPA moved to dismiss the case with prejudice on grounds that the District Court had no jurisdiction to review the agency's deliberative process respecting need for regulations under the "necessity" provision cited above. The District Court decided it had jurisdiction, and it also ruled that EPA could not decline to make a determination of necessity. It ordered EPA to conduct a necessity determination, citing the Supreme Court's Clean Air Act opinion in *Massachusetts v U.S. EPA*, 127 S.Ct. 1438 (2007).

The Fifth Circuit's Decision

The Fifth Circuit reviewed the history of judicial review law briefly, noting that the Administrative Procedure Act serves as a waiver of the sovereign immunity of the United States to suit. The question under the APA is whether Congress has nevertheless by statute precluded the availability of a particular set of decisions from review, or alternatively, whether there is in the statute a clear vesting of the agency with discretion on a matter that makes the agency judgment absolute so long as it is within the bounds of the discretion granted. In such a case of discretion, there can be a preclusion of judicial review if, but only if, the discretion is so broad that reviewing courts would have no meaningful legal standards to apply. In any event, the court stated that there is a "presumption of reviewability" that the government can try to overcome by statutory and policy showings.

An Unreviewable Enforcement Decision or Denial of a Rulemaking Petition?

The Fifth Circuit next looked at whether the decision of the EPA involved unreviewable enforcement discretion, as opposed to being more like denial of a rulemaking petition. The court looked to the request that the organizations made to EPA and found that it asked for water quality standards both in the Gulf

of Mexico and within the body of the Mississippi River itself, within the borders of a number of states. The EPA argued that the refusal to adopt such water quality rules through the necessity analysis was akin to a decision not to cite a state under the Clean Air Act for having a deficient program. The Fifth Circuit pointed out that in the Clean Air Act example a state has to do something EPA thinks is violative of the statue at hand, whereas its decision whether there should be additional water quality rules under the Clean Water Act need not be based on a finding of a violation of the statute by a state. The Fifth Circuit thereby found that there is a reviewable decision being made.

The Clean Water Act Claims

The Fifth Circuit's opinion next looked at the substance of the relevant water quality provisions in the Clean Water act and decided that there is a significant amount of information on what the EPA must consider in determining whether there is the "necessity" to make additional water quality rules. Thus, there is a set of guideposts to assist and allow a federal court to exercise rational judicial review based on standards set forth in the statute involved.

EPA Has Authority *Not* to Exercise the Necessity Determination—With a Reasonable Explanation

Despite this finding of clear reviewability by which the Fifth Circuit upheld the District Court's jurisdictional determination, the Fifth Circuit went on to overrule the District Court order that the EPA must make a necessity determination. Instead, along the lines of reasoning in *Massachusetts v U.S. EPA*, the Fifth Circuit overruled the order below because it found that the EPA has authority not to exercise the necessity determination provided that the EPA makes a reasonable explanation as to why it declined to do so.

The Fifth Circuit emphasized that "reasonableness" must be grounded in the relevant statutory language, in this case 33 U.S.C. § 1313(c)(4)(B).

Remand Order

The District Court was instructed to determine if EPA's reasons for declining to make a necessity determination are valid under that test.

Conclusion and Implications

The EPA paid substantial deference to the federalism inherent in the structure of the Clean Water Act, and it also stated that it thought its limited resources were better spent by grants to assist the states than by undertaking federal rulemaking. The District Court will have to determine whether that is adequate basis for the agency to decline to make a "necessity" determination, based upon the water quality related provisions of the Clean Water Act.

The Fifth Circuit's decision is viewable online at: http://www.ca5.uscourts.gov/opinions%5Cpub%5C13/13-31214-CV0.pdf
(Harvey M. Sheldon)

FEDERAL CIRCUIT AFFIRMS DENIAL OF HOPI TRIBE'S CLAIM THAT THE UNITED STATES MUST PROVIDE SAFE DRINKING WATER ON THE RESERVATION

Hopi Tribe v. U.S., ___F.3d___, Case No. 2014:5018 (Fed. Cir. Apr. 2, 2015).

In 2012, the Hopi Tribe (Trbe) sued the United States seeking money damages to cover the cost of providing safe drinking water. (*See, Hopi Tribe v. U.S.*, Case No. 1:12-CV-00045 (Fed. Cl.). On April 2, 2015, the U.S. Court of Appeals for the Federal Circuit affirmed the dismissal of the complaint because the Tribe failed to identify a statutory or regulatory obligation on the United States to provide adequate drinking water that would justify a claim for money damages.

Background

The Hopi Tribe is a federally recognized Indian tribe that occupies a reservation in northeastern Arizona and was first established by executive order in 1882. The Tribe owns and operates the public water systems serving four affected communities; the U.S. Bureau of Indian Affairs owns and operates the system serving the fifth community. The public water systems on the reservation rely on groundwater containing unsafe levels of arsenic that exceed the federally allowed maximum.

The Tribe filed a complaint against the United States in the Court of Federal Claims seeking damages to cover the cost of providing alternative sources of drinking water in all five communities. The Court of Federal Claims dismissed the complaint, finding the Tribe failed to establish jurisdiction under the Indian Tucker Act and the Tribe appealed.

The Court of Appeals' Decision

Waiver of Sovereign Immunity and Claims Under the Indian Tucker Act

Suits against the United States are limited by the doctrine of sovereign immunity. However, such immunity is waived by the Indian Tucker Act, which provides that the Court of Federal Claims has jurisdiction over claims against the United States by Indian tribes. The Indian Tucker Act does not itself create any substantive rights; tribes must still assert a claim for money damages arising out of other sources of law specified in the Act.

To establish jurisdiction under the Indian Tucker Act, the Supreme Court has created a two-part test. First, the claimant must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the government failed to faithfully perform those duties. Second, if that threshold is passed, the court must then determine whether the substantive source of law mandates compensation for damages sustained as a result of a breach of the duties. *U.S. v. Navajo Nation*, 556 U.S. 287, 290-91 (2009).

The Tribe Failed to Show the United States Owes a Duty for Drinking Water Quality

Applying the two-part test, the Tribe alleged the United States had a fiduciary duty to ensure adequate water quality on the reservation by referring to: (1) the Executive Order of 1882 and its ratification in the Act of July 22, 1958, Pub. L. No. 85-547, 72 Stat. 403 (1958), as interpreted under the reserved-water-rights doctrine; and (2) other statutory provisions authorizing various agencies to promote safe drinking water on reservations. The Court of Appeals found that neither the Act of 1958 nor the Executive Order of 1882 referred to drinking water on the reservation, much less instructed the United States to manage drinking water quality. Instead, the Court of Appeals stated there was only "bare trust language" that was insufficient to establish a fiduciary duty.

The Tribe asked the Court of Appeals to read the Act of 1958 in light of the reserved-water-rights doctrine (also referred to as the *Winters* doctrine) and find fiduciary duties regarding water quality on the reservation. Under the doctrine, when the United States reserves land for an Indian tribe, it also by implication reserves the amount of water necessary to fulfill the purpose of the reservation. This reserved water right gives the United States the power to exclude others from diverting waters that feed the reservation but does not give the United States responsibility for the quality of water within the reservation, indepen-

dent of any third-party diversion or contamination. When applying the reserved-water-rights doctrine, the Court of Appeals found no Congressional intent that the United States be responsible for providing water infrastructure and treatment to eliminate naturally occurring contaminants.

The Tribe pointed to other statutory provisions that involve drinking water on the Hopi Reservation: the Indian Health Improvement Act; the Indian Sanitation Facilities Act; and other federal funding for the extension, operation, and maintenance of water supplies on Indian lands. The Tribe argued that these statutes demonstrate the United States exercises comprehensive control over water resources on the Hopi Reservation pursuant to congressional authorization. The Court of Appeals found they could not infer from control alone that the U.S. has accepted a fiduciary duty to ensure adequate water quality on the reservation.

The Court of Appeals held that the sources of law relied on by the Tribe did not establish a specific fiduciary obligation on the United States to ensure adequate water quality on the Hopi Reservation. The Tribe failed to identify a specific trust-creating statute or regulation that the United States violated, so the court did not need to reach the second step of determining whether the specific obligation is money mandating. (Slip Op. at 13.) The Appeals Court affirmed that the Court of Federal Claims did not have jurisdiction over the Tribe's claim under the Indian Tucker Act.

Conclusion and Implications

Although the Court of Appeals identified that water quality on parts of the Hopi Reservation is unacceptable, it upheld dismissal of the Tribe's complaint as lacking jurisdiction under the Indian Tucker Act because the Tribe failed to identify a specific money-mandating obligation that the United States violated. The Tribe has until June 1, 2015, to seek review by the Supreme Court of the United States. A full text of the decision in *Hopi Tribe v. U.S.* is available at: http://www.cafc.uscourts.gov/images/stories/opinions-orders/14-5018.Opinion.3-31-2015.1.PDF
(Katie R. O'Ferrall, Meredith Nikkel)

NINTH CIRCUIT WIDENS CIRCUIT SPLIT ON SCOPE OF THE CLASS ACTION FAIRNESS ACT'S LOCAL SINGLE EVENT EXCEPTION

Jocelyn Allen, et al. v. The Boeing Company, et al, ___F.3d___, Case No. 15-35162 (9th Cir. Apr. 27, 2015).

Owners of property in the vicinity of Boeing airplane manufacturing facilities in Washington State filed a mass tort action, alleging Boeing caused damage to their property through the release of toxic chemicals to groundwater over a 40-year period, and that Boeing's environmental remediation consultant was negligent in carrying out its investigation and remediation of the pollution. Boeing removed the case to federal court on the basis of diversity jurisdiction and the Class Action Fairness Act (CAFA). The U.S. District Court granted plaintiffs' motion to remand on the grounds, *inter alia*, that the allegations fell within the "local single event exception" to federal jurisdiction under CAFA. The Ninth Circuit Court of Appeals reversed, holding that the term "event or occurrence" in the local single event exception does not apply to claims of environmental damage based on similar but multiple events and occurrences extending over a period of time. In doing so, the Ninth Circuit acknowledged its disagreement on this point with the Third and Fifth Circuits' interpretations of "event or occurrence."

Background

Plaintiffs own property in the vicinity of a Boeing manufacturing facility in Auburn, Washington. From the 1960s to the 1990s Boeing used solvents at the facility, allegedly resulting in hazardous chemicals leaching into groundwater and ultimately damaging plaintiffs' property. Pursuant to remediation requirements initiated by Washington State in 1987, Boeing retained Landau in 2002 as an environmental remediation consultant. In addition to their property damage claims alleged against Boeing, plaintiffs alleged Landau negligently carried out its investigation and remediation duties.

Plaintiffs filed suit in November 2013 in Washington state court; Boeing removed to federal court in April 2014, asserting, in addition to diversity jurisdiction, federal jurisdiction under CAFA. CAFA allows removal to federal court of "mass actions," defined as:

> any civil action … in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiff's claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

Although the parties agreed that plaintiffs met this definition, CAFA includes several exceptions to federal jurisdiction. At issue in this case was the local single event exception, which:

> …excludes any civil action in which 'all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that alleged resulted in injuries in that state … . *Nevada v. Bank of America*, 672 F.3d 661, 672 (9th Cir. 2012) (citations omitted).

As all of the alleged events, occurrences and damages at issue occurred in Washington, the only issue before the court was whether the alleged contamination arose from "an event or occurrence."

The District Court held the alleged contamination fell within the local single event exception and ordered the cause remanded to state court. Boeing was granted leave to appeal.

The Ninth Circuit's Decision

Analysis under *Nevada v. Bank of America*

Examining the text of the statute and its legislative history, the Ninth Circuit extended its prior ruling in *Nevada v. Bank of America* to hold environmental damage resulting from repeated but similar occurrences over a period of time are not "an event or occurrence" within the meaning of the local single event exception. In the environmental context, an event or occurrence is limited to a discrete event such as an oil or chemical spill.

In *Nevada v. Bank of America* the Ninth Circuit had previously held that alleged fraudulent issuance and processing of loans by Bank of America over a period of years did not constitute an event or occurrence, as the alleged activity extended over a period of time and activities with respect to each loan involved an individualized examination of the applicant's credit worthiness, the value of the collateral and other disparate issues. However, in this case the alleged contamination resulted from the same or similar activities—the release of hazardous chemicals to groundwater—over a discrete period of time.

Legislative History of the Single Event Exception to CAFA Jurisdiction

Examining the legislative history of the local single event exception to CAFA jurisdiction, the Court found that Congress intended to limit the scope of this exception to:

> …cases involving a single event or occurrence, such as an environmental accident, that gives rise to the claims of all plaintiffs. *Nevada*, 672 F.3d at 668 (citations omitted).

The court noted that the Senate Report on the exception further stated it was intended to apply:

> …'only to a truly local single event with no substantial interstate events' in order to 'allow cases involving environmental torts such as a chemical spill to remain in state court if both the event and the injuries were truly local.' *Id.* (citations omitted).

The Ninth Circuit compared the scope of the local single event exception to another exception to CAFA jurisdiction, the local controversy exception allowing remand to state court of mass actions involving at least two-thirds citizens of one state and principal injuries all within the state. 28 U.S.C. § 1332(d)(4)(A). The court reasoned that allowing repeated occurrences over time to be included in the local single event exception would cause the two exception to be duplicative, at least where all of the damages were alleged to occur within one state. In order to give meaning to both exceptions, the court held that "an event or occurrence" could not be interpreted to mean events or occurrences happening repeatedly

over time, even if related or similar and leading to the same injury.

Conflict Amongst the Circuits

This conclusion conflicts with that of the Third Circuit, which in *Abraham v. St. Croix Renaissance Group, L.L.L.P.*, 719 F.3d 270 (3rd Cir. 2013), interpreted "event or occurrence" to apply to events "that share some commonality and persist over a period of time," such as the erosion and wind dispersal of buaxite from spoils piles, resulting in property damage. The Ninth Circuit's holding also conflicts with that of the Fifth Circuit in *Rainbow Gun Club, Inc. v. Denbury Onsholre, L.L.C.*, 760 F.3d 405 (5th Cir. 2014), which held that a "single event or occurrence may also be constituted by a pattern of conduct in which the pattern is consistent in leading to a single focused event that culminates in the basis of the asserted liability," such as a series of negligent acts leading to the failure of an abandoned oil well.

Conclusion and Implications

In support of its holding the Ninth Circuit drew heavily on the legislative history of CAFA and noted as well the Supreme Court's own reliance in *Dart v. Cherokee Basin Operating Co. v. Ownes*, 135 S.Ct. 547, 554 (2014), on that history in which the Supreme Court noted:

> …there was no presumption against removal jurisdiction and that CAFA should be read 'with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant.'

Pending resolution of this circuit split, environmental mass tort claims for damage confined within one state's boundaries will face wildly disparate treatment when defendants seek removal to federal court under CAFA. (Deborah E. Quick, Duke McCall III)

SECOND CIRCUIT DENIES PROPERTY OWNERS AFFIRMATIVE DEFENSE IN CERCLA CASE AND ORDERS THE PAYMENT OF $6.7 MILLION BECAUSE THEY FAILED TO SHOW DUE CARE

State of New York v. Adamowicz, ___F.3d___, Case No. 14-1702-cv (2nd Cir. Apr. 23, 2015).

The U.S. Court of Appeals for the Second Circuit affirmed the judgment of the U.S. District Court for the Eastern District of New York holding that property owner defendants were responsible parties under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and that they had failed to establish the third party defense and failed to demonstrate they used due care with regards to the property.

Procedural and Factual Background

This was a cost-recovery action brought under § 107(a) of the CERCLA. Plaintiff, the State of New York, sought to recover costs incurred as a result of the investigation and cleanup of the National Heatset Printing (NHP) Site (Site), a hazardous waste site located in Suffolk County, New York, and the site's down gradient defendants' property.

Defendants were the owners of the Site, which had been leased out to NHP as part of its lithographic multi-color printing of newspaper insert and circular operations. Diluted fountain solution was used to clean the printing presses and the waste created was stored in drums. There was a history of spills from the printing operation. NHP later abandoned the Site in April 1988 and subsequently went through bankruptcy proceedings.

Upon discovering the contamination at the Site, the State Department of Environmental Conservation (State) undertook investigation and remedial activities in response to the significant levels of PCE on the Site. The State thereafter brought the instant action seeking

The U.S. District Court granted summary judgment for New York on the issue of defendants' liability but held that defendants were entitled to a trial regarding the State's cleanup costs. Following a bench trial on damages, the District Court entered a final judgment ordering defendants to pay $6,731, 096.17 to the State for its response costs, as well as requiring

them to cover the State's future response costs associated with appellants' property.

Defendants appealed and argued that the District Court erred in concluding that there was no genuine factual dispute as it related to their statutory defense of third-party liability.

The Second Circuit's Decision

Congress enacted CERCLA to create a:

> …broad remedial statute designed to enhance the authority of the EPA to respond effectively and promptly to toxic pollutant spills that threatened the environment and human health.

As CERCLA is a remedial statute, it must be:

> …construed liberally to effectuate its two primary goals: (1) enabling the [Government] to respond efficiently and expeditiously to toxic spills, and (2) holding those parties responsible for the releases liable for the costs of the cleanup.

The defendants did not dispute that their property fell within CERCLA's domain, that their property was contaminated, that the financial costs incurred by the State to remediate that contamination qualified for reimbursement, or that the District Court properly calculated the amount of those costs. The defendants only challenge the District Court's grant of summary judgment as it relates to their affirmative defense under 42 U.S.C. § 9607(b)(3).

Issue of an Affirmative Defense to CERLA Liability

Section 9607(b)(3) sets forth a limited affirmative defense from liability under CERCLA. An otherwise liable defendant can seek shelter under this limited defense if he can establish that the release of a:

> …hazardous substance and the damages resulting therefrom were caused solely by . . . an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant.

The defendant also must establish that:

> …(a) he exercised due care with respect to the hazardous substance concerned . . . in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.

Defendants' main argument is that the contamination was caused not by their tenant, NHP, but by contractors removing NHP's printing presses. Importantly, appellants allege that this all occurred at a time when NHP's bankruptcy filing severed NHP's contractual relationship with the appellant.

Summary Judgment

The Second Circuit agreed with the District Court that defendants fail to meet their burden in establishing a genuine factual dispute as it relates to their affirmative defense. The court undertook *de novo* review and determined that as an initial matter, vague assertions about the possibility that unidentified contractors caused the contamination did not create a triable issue of fact. Moreover, the court reasoned, even if defendants' unsubstantiated argument regarding the source of the contamination was accepted, it still falls short of establishing the last two elements required to raise an affirmative defense: that they demonstrated due care and took proper precautions. As to these, there was no genuine factual dispute that appellants had knowledge of NHP's operations and authority over and access to the property being contaminated. It thus cannot be said that appellants:

> …took all precautions with respect to the particular waste that a similarly situated reasonable and prudent person would have taken in light of all relevant facts and circumstances.

The failure to present sufficient evidence that the property owners used due care in managing the property required the court to reject the affirmative defenses and find for the State.

Conclusion and Implications

This case emphasizes the limited number of affirmative defenses available to a property owner under

CERCLA and that if a defendant is going to raise such an affirmative defense they are going to have to produce evidence to support that claim, as well as establish that they owned and maintained their property and the contaminants with due care. (Danielle Sakai)

DISTRICT COURT DEFERS TO VIRGINIA STATE AGENCY IN GRANTING SUMMARY JUDGMENT TO COAL COMPANY IN CLEAN WATER ACT CITIZEN SUIT

Southern Appalachian Mountain Stewards v. Red River Coal Company, Inc., ___F.Supp.3d___, Case No. 2:14-CV-00024 (W.D. Va. Apr. 13, 2014).

Environmental groups filed a citizen suit against Red River Coal Company under the federal Clean Water Act (CWA), alleging that Red River violated its CWA permit by discharging pollutants in excess of applicable permit limits. Red River and the plaintiffs filed cross motions for summary judgment. The U.S. District Court for the Western District of Virginia granted summary judgment to Red River, reasoning the conclusions of the state agency charged with administering Red River's CWA permit were entitled to deference and the state agency deemed Red River to be in compliance with the discharge limits in its permit.

Background

The CWA generally prohibits the "discharge of any pollutant by any person" except as permitted under the CWA. The CWA's National Pollutant Discharge Elimination System (NPDES) program authorizes discharges of pollutants from point sources in accordance with permit conditions. The NPDES program requires each state to develop Total Maximum Daily Loads (TMDLs) for pollutants discharged into the state's waterways. The TMDLs establish the maximum amount of a pollutant that a body of water can receive and still meet applicable water quality standards. TMDLs further divide sources of pollution along the water body and set waste-load allocations or daily caps for each point source of pollution.

The CWA authorizes the U.S. Environmental Protection Agency (EPA) to delegate authority to states to administer the NPDES program. In Virginia, EPA has delegated authority to administer the NPDES program to the state. The CWA also authorizes citizens to bring suit against NPDES permit holders for alleged violations of their NPDES permits.

The Virginia Division of Mined Land Reclamation (DMLR), the state agency that oversees the NPDES program for coal mine operations in Virginia, issued a NPDES permit to Red River which required that any discharge of pollutants for which a TMDL had been established to "be made in compliance with the TMDL and any applicable TMDL implementation plan." After Red River received its NPDES permit, the DMLR issued a TMDL for the South Fork of the Pound River that set daily and annual waste-load allocations for total suspended solids and total dissolved solids discharged from Red River's operations.

Plaintiffs subsequently filed a citizen suit, alleging that Red River's discharges of total suspended solids and total dissolved solids were higher than the limits set in the TMDL, and sought declaratory relief, an injunction against future violations, and civil penalties. In response, Red River moved to dismiss, arguing that it was in compliance with its permit, which allowed for phased implementation of the TMDL. The U.S. District Court denied the motion, concluding that further development of the factual record was necessary. After further evidence of state's position with respect to Red River's compliance with its NPDES permit was developed, the parties filed cross motions for summary judgment.

The District Court's Decision

The District Court began its analysis by noting that there was no genuine issue of material fact to preclude summary judgment. Specifically, there was no dispute that Red River had discharged total suspended solids and total dissolved solids in excess of the daily and annual waste-load allocations in the TMDL, and there was no dispute as to the DMLR's interpretation of the permit and the opinion of the agency that Red River was in compliance with the conditions of its NPDES permit.

Red River's Discharges and the Scope of the NPDES Permit

The question before the court was whether Red River's discharges, in fact, violated the conditions of its NPDES permit. The answer to this question turned on the proper interpretation of the condition in Red River's NPDES permit that the discharge of a pollutant subject to a TMDL "must be made in compliance with the TMDL and any applicable TMDL implementation plan." The TMDL adopted by the DMLR and approved by U.S. EPA provided that a "phased" TMDL would be implemented in accordance with EPA guidance and would "utilize an adaptive management approach" that employs:

> …an iterative implementation process that moves towards achieving water quality goals while collecting, and using, new data and information.

The purpose of this approach was:

> …to provide time to address uncertainties with TMDLs and make necessary revisions while interim water quality improvements are initiated.

Pending the development of a revised TMDL, the TMDL stated that the waste-load allocations would be effective and implemented by the DMLR using a "staged approach."

The DMLR interpreted the TMDL provisions to be consistent with its "transient/aggregated permitting approach," which included the following requirements:

> (1) mining wasteloads are monitored and tracked against the total wasteload allocations assigned in the TMDL; (2) best management practices (BMPs) are implemented in order to maintain and/or reduce actual loads; and (3) additional reduction actions may be required where an individual source exceeds the total wasteload.

Under this permitting approach, the agency provided notice to permittees if further actions were required to reduce wasteloads and retained authority to modify permit conditions or to initiate enforcement actions. According to the DMLR, which had provided Red River notice of the need for additional waste-load reduction actions, Red River had complied with all of the agency's requirements with respect to the "transient/aggregated" approach to the implementation of the TMDL.

The Issue of Exceeding the TMDL Limits

Plaintiffs argued that, notwithstanding the agency's views, Red River was in violation of the plain language of its NPDES permit because Red River's discharges exceeded the TMDL limits. The court rejected this argument, observing that it ignored the provision of the permit requiring that discharges be made in compliance with "any applicable TMDL implementation plan" and Red River's compliance, according to the agency, with the applicable TMDL implementation plan. In the court's view, the plaintiffs implicitly sought to challenge the agency's interpretation of the permit as allowing for the phased implementation of the discharge limits established in the TMDL. The court noted that an agency's interpretation of, and findings of fact under, permits it is authorized to enforce is entitled to deference, particularly where the agency's technical expertise is involved. In addition, the court noted that it must adhere to the strong public policy against federal court interference in DMLR decisions absent a finding that the DMLR has violated federal law. Because plaintiffs made no attempt to establish that the DMLR's findings and conclusions were inadequate or violated federal law, the court concluded it must defer to the DMLR's conclusion that Red River had complied with its NPDES permit.

Conclusion and Implications

The District Court's determination that the DMLR's findings and conclusions were entitled to deference is significant. This determination not only doomed plaintiffs' claims against Red River, but may spell trouble for future citizen suits. Such suits typically are filed when the responsible federal or state agency has failed or refused to act. If the reason the agency has failed or refused to act is because it does not view the regulated party to be in violation of applicable permits, rules or regulations, then, under the District Court's reasoning, it may be difficult for plaintiffs to prevail in such a challenge, absent proof that the agency itself has violated federal law. (Duke K. McCall, III)

DISTRICT COURT FINDS NPDES PERMIT DOES NOT REQUIRE COMPLIANCE WITH STATE'S WATER QUALITY STANDARDS FOR COLOR, ODOR, AND TURBIDITY

Altamaha Riverkeeper, Inc. v. Rayonier, Inc., ___F.Supp.3d___, Case No. CV 214-44 (S.D. Ga. 2015).

Altamaha Riverkeeper, Inc. (plaintiff) is a non-profit organization whose goal is to protect and restore the habitat and water quality of the Altamaha River in the State of Georgia. In that regard, plaintiff monitors wastewater discharges to ensure compliance with permits and water quality. Rayonier, Inc. (defendant) operates a pulp mill that produces cellulose products from wood chips; the mill discharges some 50 to 60 million gallons of wastewater into the Altamaha River under permit. Plaintiff sued defendant alleging that defendant's wastewater was so much darker than Altamaha's waters, and that its wastewater "was so malodorous," that its discharges violated Georgia's water quality standards for color, odor, and turbidity. Plaintiff alleged that defendant's discharges had such an impact on Altamaha's water quality that its discharges violated Georgia's narrative water quality standards. Defendant filed a motion for summary judgment, which the U.S. District Court granted. Interpreting the federal Clean Water Act's (CWA) National Pollutant Discharge Elimination System (NPDES) permit the Georgia Environmental Protection Division (GEPD) granted to defendant, the District Court held that there was no evidence suggesting that GEPD:

> …intended to make [defendant's] permit conditions coextensive with the water quality standards found in the [Clean Water Act] and Georgia's Rules,…requires GEPD to use sufficient words…to arrive at that intention in the permit itself.

Background

The Clean Water Act is intended to restore and maintain the "integrity of the Nation's waters." (33 U.S.C. § 1251(a).) CWA directs that no one is entitled to discharge any pollutant from any point source into waters of the United States. (33 U.S.C. §§ 1311(a), 1362(12).) Discharges are privileged conditioned on compliance with the requirements of an NPDES permit. (33 U.S.C. §§ 1311(a), 1342.) One of the hallmarks of an NPDES is its requirement that the permittee conduct monitoring adequate to demonstrate compliance or non-compliance with the permit's terms, requiring the certification of the results under threat of criminal sanction. (*Id.* §§ 1342(a)(2), 1318(a)(A); 40 C.F.R § 122.44(i)(1).

Citizens may file suit on their own behalf alleging violations of an NPDES permit. (33 U.S.C. § 1365(a), (f)(6).) However, where a permittee discharges pollutants in compliance with the terms of an NPDES permit, the permit "shields" the permittee from liability under the CWA. Section 1342(k)'s permit shield:

> …affords an absolute defense to a permit holder that complies with the conditions of its permit against citizen suits" seeking to enforce certain provisions of the CWA. (citing to 33 U.S.C. § 1342(k) and *Black Warrior Riverkeeper, Inc. v. Black Warrior Minerals, Inc.*, 734 F.3d 1297, 1303 (11th Cir. 2013).)

To resolve this matter, the District Court had to examine the language of defendant's GEPD issued NPDES permit. If the language of the permit, taken as a whole, is plain and capable of construction, then the court must determine the permit's meaning. However, if the permit language is ambiguous, courts may take extrinsic evidence into consideration to interpret the permit:

> However, under Georgia law and Eleventh Circuit precedent, courts turn to extrinsic evidence to explain ambiguity in a contract 'only when a contract remains ambiguous after the pertinent rules of construction have been applied.' (quoting from *Claussen v. Aetna Cas. & Sur. Co.* 888 F.2d 747, 749 (11th Cir.1989.)

The District Court's Decision

The Issue of Ambiguity

At issues was whether defendant's NPDES permit incorporates Georgia's water quality standards set forth in Rule 391-3-6-.03(5)(c). The District Court found two occurrences where this occurred.

The first page of defendant's NPDES permit states, in pertinent part, that "in compliance with the CWA, the State Act, and their respective rules and regulations," defendant is authorized to discharge into the Altamaha River "in accordance with the conditions set forth [in respective parts] of the Permit." This language means that GEPD authorized defendant's NPDES permit "in compliance" with federal and state acts and their implementing rules, but did not mean that defendant "may only discharge in compliance with federal and state acts and their attendant rules and regulations."

Plaintiff argued that in *Culbertson v. Coats American, Inc.*, 913 F.Supp. 1572 (N.D. Ga. 1995) that court held that this language in an NPDES permit does, in fact, incorporate Georgia's water quality standards as an NPDES permit condition. However, the District Court here refused to apply *Culberson* as that case concerned a defendant that conceded to the seminal fact that this provision did indeed intend to make compliance with Georgia water quality law a permit requirement; defendant, here, was challenging this point. Moreover, the *Culbertson* court did not undertake the same procedures for interpreting the permit as this court had.

The NPDES permit's second reference to Georgia's water quality standards was ambiguous. The permit states:

> The Permittee shall comply with effluent standards or prohibitions established by section 307(a) of the Federal Act and with chapter 391-3-6-.03(5) of the State Rules and may not discharge toxic pollutants in concentrations or combinations that are harmful to human, animals, or aquatic life.

The court found that this section is ambiguous because its use suggests that it is strictly concerned with toxic pollutants, whereas the actual rule lists a host of water quality standards having nothing to do with toxicity. Because of this ambiguity, the District Court had to turn to rules of contract construction to ascertain its meaning.

Intent of the Parties

Here, the District Court could not ascertain the parties' intent regarding Georgia's water quality standards. Plaintiff alleged that GEPD's intent in drafting the permit "necessarily was to meet the requirements of the Clean Water Act." However, that supposed intent was undermined by another portion of the permit stating:

> …[n]othing in this permit shall be construed to preclude the modification of any condition of this permit when it is determined that the effluent limitations specified herein fail to achieve the applicable State water quality standards. This provision could only:
>
> …contemplate the possibility that the Permit's conditions do not, in fact, incorporate all of Georgia's water quality standards as conditions of the permit.

Public Interest Argument

Looking beyond canons of contract interpretation, plaintiff argued that courts should favor a construction in the public interest where a contract dispute is of public concern. This is:

> …a rule of construction rather than one of interpretation, one that for reasons of public policy requires the court to give to a contract that legal operation that is of public advantage, when a choice between that and a less advantageous operation is reasonably open.

The District Court agreed with the notion that the public does have an interest in protecting the Altamaha River, however, the public would also have an interest in ensuring:

> …that businesses and industries are given explicit notice of what kinds of discharges will violate their NPDES permits before subjecting them to onerous civil penalties. That interest wins out in this matter.

Conclusion and Implications

This decision did not likely intent to suggest that defendant's discharges did not have a harmful effect on the Altamaha River, or to minimize plaintiff's alleged injuries. This case stands for the proposition plaintiff failed to show a violation of defendant's NPDES permit--*i.e.* failing to show that defendant's permit required it to comply with relevant water quality standards. (Thierry Montoya)

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