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EASTERN WATER LAW™

& POLICY REPORTER

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EWL

FEATURE ARTICLE

BUILDING A BETTER BAY THROUGH LITIGATION: NATIONAL ASSOCIATION OF HOME BUILDERS FILES SUIT CHALLENGING THE CHESAPEAKE BAY CLEAN WATER ACT TMDL

By Erica Zilioli

The Chesapeake Bay is the largest estuary in the United States and the third largest in the world. Its watershed covers 64,000 square miles and receives water from six states—Delaware, Maryland, New York, Pennsylvania, Virginia, and West Virginia—and the District of Columbia (Bay States). Given its prominence and ecological significance, the Chesapeake Bay truly lives up to its status as a "national treasure." But it also has suffered from the effects of heavy nutrient pollution and sedimentation in the highly developed region where it is located, resulting in increasing ecological damage.

To address that damage, the Bay States and the U.S. Environmental Protection Agency (EPA) have attempted to control pollution and improve the ecological health of the bay. Historically, those efforts have been largely ineffective. In January 2011, however, EPA attempted to change that by issuing the Chesapeake Bay Total Maximum Daily Load (TMDL) under the Clean Water Act (CWA) in hopes of restoring the bay's health by established pollutant load limits for nitrogen, phosphorous, and sediment in its waters. Like other TMDLs, the Chesapeake Bay TMDL sets specific milestones for tracking the progress made towards achieving its the pollution reduction goals. But the Chesapeake Bay TMDL is distinctive from other TMDLs because it imposes first-of-their kind enforceable regulatory consequences for failure to meet those milestones.

The environmental community applauded EPA's inclusion of new enforceable milestones in the TMDL. Unsurprisingly, the regulated community was not as enthusiastic.

On June 27, 2011, the National Association of Home Builders (NAHB) filed a lawsuit in the U.S. District Court for the Middle District of Pennsylvania challenging the Chesapeake Bay TMDL pursuant to the CWA. The premise of NAHB's lawsuit is that the Chesapeake Bay TMDL and its enforceable milestones are not only unique, but they also are unlawful because they exceed EPA's authority under the CWA. NAHB's challenge raises significant legal arguments that could prevent EPA from accomplishing its goal of using the Chesapeake Bay TMDL as a model for future TMDLs slated for development for other watersheds in the future. (*National Association of Home Builders v. U.S. Environmental Protection Agency*, Case No. 1: 11-CV-1213, *filed* June 4, 2011 (M.D. Pa.).)

Background—Clean Water Act

Section 303 of the Clean Water Act requires states to establish water quality standards that identify a designated use and water quality criteria protective of that use. If waters within a state's boundaries fail to meet those water quality standards, the state must designate those waters as "impaired" under CWA § 303(d). Section 303 also requires each state to establish priority rankings of its impaired waters and to develop TMDLs capable of restoring the quality of those waters. A TMDL represents the maximum amount of a pollutant a waterbody can receive from point and non-point sources in a watershed while still

meeting applicable water quality standards. The main sources of these pollutants typically are agriculture, wastewater, other urban and suburban runoff, and airborne contaminants.

TMDLs create no independently enforceable standards. Instead, they are implemented through other statutory mechanisms, such as the National Pollutant Discharge Elimination System (NPDES) permit program under § 402 of the CWA. NPDES permits authorize discharges only from point sources, not from nonpoint sources, however.

EPA and the Bay States Move to Action

As a result, EPA, which is responsible for overseeing the NPDES program, has tried to enhance water quality through less direct means, such as federal grants to encourage improved agricultural practices that reduce nonpoint source pollution. Many of these efforts have focused on or been inspired by the degraded ecological health of the Chesapeake Bay.

EPA has not been alone in this fight. The Bay States also have worked with the federal government to prevent further impairment to the Chesapeake Bay. In 1980, Maryland, Pennsylvania, and Virginia created a policy-focused legislative body called the Chesapeake Bay Commission in response to EPA's landmark study showing the decline of the bay's ecological health. Subsequently, in 1983, those three states and the District of Columbia worked with the Chesapeake Bay Commission and EPA to establish the Chesapeake Bay Program. Under that program, the member parties committed to several voluntary initiatives to protect and restore the bay's ecosystem. For example, members focused new attention and resources on designating various areas of the Chesapeake Bay Watershed within their respective jurisdiction as "impaired" by identifying those waters on CWA § 303(d) lists for impairments related to water quality, dissolved oxygen, and chlorophyll-*a* attributed to excessive nitrogen, phosphorous, and sediment loads.

In 2000, Maryland, Pennsylvania, Virginia, and the District of Columbia took the additional step of committing to improve the water quality within their jurisdictions to the point that they could remove the designated impaired waters from their CWA § 303(d) lists by 2010. Unfortunately, that initiative, known as Chesapeake 2000, did not achieve its lofty goals, and the bay and its tributaries continue to be plagued by poor water quality, reduced fish and shellfish populations, and degraded habitat.

Ensuing Litigation

In response to what they perceived as a failure to discharge its statutory duties, several environmental groups took up the mantle of protecting the Chesapeake and sued EPA for failing to protect the bay. *See, e.g., Am. Canoe Assoc., Inc. v. U.S. Environmental Protection Agency*, Case No. 98-979-A (E.D. Va. 1999); *Kingman Park Civic Assoc. v. U.S. Environmental Protection Agency*, Case No. 1:98-CV-00758 (D. D.C. 2000); *Fowler v. U.S. Environmental Protection Agency*, Case No. 1:09-CV-00005-CKK (D. D.C. 2009). Those lawsuits produced a settlement agreement under which EPA agreed to implement bay-wide programs to reduce pollution from nitrogen, phosphorous, and sediments, including preparing a TMDL by December 31, 2010.

The 2011 Chesapeake Bay TMDL

On January 5, 2011, EPA issued the Chesapeake Bay TMDL. *See,* 76 *Fed. Reg.* 549 (Jan. 5, 2011). According to EPA, the TMDL will impose a "pollution diet" and a novel accountability framework on the Bay States to clean up nitrogen, phosphorus, and sediments in the Chesapeake Bay Basin. EPA characterized the TMDL as the "largest and most complex thus far," as it covers a 64,000-square-mile watershed that receives water from the District of Columbia and large sections of Delaware, Maryland, New York, Pennsylvania, Virginia, and West Virginia. The "pollution diet" mandates a 25 percent reduction in nitrogen, 24 percent reduction in phosphorus, and 20 percent reduction in sediment by 2025. The jurisdictions also must initiate steps to reduce urban and farm pollution, or face legal consequences from EPA. The TMDL requires at least 60 percent of pollution control measures to be in place by 2017.

EPA developed the Chesapeake Bay TMDL using Watershed Implementation Plans (WIP) that the Bay States developed. Those WIPs detail how and when the jurisdictions will meet pollution reduction targets. The TMDL identifies two-year milestones related to total pollution load reductions, pollution reductions by source, and funding that will be used to implement the relevant measures during each two-year period. The deadline for meeting the first set of

milestones is December 31, 2011. Through the end of 2011, the Bay States will implement the Phase I WIPs while simultaneously developing their Phase II WIPs. Phase II WIPs are expected to focus on local stakeholders with targets for affecting the TMDL on a smaller scale. The Phase III WIPs, due in 2017, will be designed to provide additional restoration actions beyond 2017 and to ensure that the 2025 bay restoration goals are met. EPA has indicated that it plans to expand the unique enforcement-based methodology of the Chesapeake Bay TMDL to large watersheds in other regions if the framework proves effective.

National Association of Home Builders v. U.S. Environmental Protection Agency

On June 27, 2011, NAHB challenged the Chesapeake Bay TMDL in a lawsuit filed in the U.S. District Court for the Middle District of Pennsylvania. NAHB's lawsuit, which seeks declaratory and injunctive relief, was consolidated with an existing lawsuit brought by agricultural groups in the same court to challenge the Chesapeake Bay TMDL. *See, American Farm Bureau Federation v. U.S. Environmental Protection Agency*, Case No. 11-CV-67 (M.D. Pa. Jan. 10, 2011).

Prior to filing its lawsuit, in late 2010, the NAHB wrote a letter to EPA, which from hindsight, might be viewed as a warning of impending litigation. (*See,* http://www.nahb.org/fileUpload_details.aspx?contentID=148270&fromGSA=1).

In this letter, NAHB makes clear its position that EPA lacks plenary authority to issue the TMDL:

> EPA claims broad CWA authority as the basis for its development of the Chesapeake Bay TMDL. Contrary to this assertion, NAHB contends EPA is overstepping its authority to develop and direct the implementation of the comprehensive TMDL and to require, approve, or modify state WIPs.

NAHB's complaint reflects the organization's objection to "EPA's encroachment into state authority over TMDL implementation." Specifically, NAHB argues that EPA lacks authority under the CWA to establish a TMDL for nitrogen, phosphorous, and sediment and to impose an accountability framework on the Bay States. More broadly, NAHB argues that EPA may not step into the shoes of states to establish a TMDL on behalf of those states, let alone enforce such a TMDL. NAHB further challenges the Chesapeake Bay TMDL to the extent it (a) applies to waters that do not meet the legal criteria for "impaired," (b) establishes pollutant loading allocations for individual sources and categories of sources, and (c) assigns pollutant load allocations to areas outside of the Chesapeake Bay.

Four Causes of Action

NAHB's complaint asserts four separate causes of action. First, NAHB argues that EPA violated the CWA and the Agency's own regulations by promulgating the Chesapeake Bay TMDL. Second, NAHB asserts that the Chesapeake Bay TMDL is arbitrary and capricious in violation of the Administrative Procedure Act (APA). Third, it contends that EPA violated the APA by failing to provide meaningful public notice and comment opportunities prior to issuing the Chesapeake Bay TMDL. Finally, NAHB argues that the Chesapeake Bay TMDL exceeds the scope of EPA's CWA authority and, therefore, is *ultra vires*. NAHB requests that the court vacate the Chesapeake Bay TMDL and issue a declaratory judgment stating that the TMDL is arbitrary and capricious, an abuse of discretion, *ultra vires*, and contrary to the CWA and the APA. NAHB further requests that the court enjoin EPA from enforcing the Chesapeake Bay TMDL.

Conclusion and Implications

NAHB's challenge to the Chesapeake Bay TMDL highlights the legal obstacles EPA faces before advancing its new agency-centric TMDL policy, which EPA believes is necessary to implement and enforce meaningful pollution reduction and ecosystem restoration programs under the CWA. Standing in EPA's way is the CWA. The statute is clear that the states, not EPA, are responsible for establishing and enforcing TMDLs. Just as clear, however, is that a series of judicially enforced consent decrees settling various lawsuits brought by environmental groups require EPA to establish the Chesapeake Bay TMDL. These apparently conflicting mandates place EPA in the unenviable position in which any action (or inaction) it takes will almost certainly lead to more litigation.

Because the NAHB lawsuit presents important issues that could redefine state and federal responsibili-

ties under the Clean Water Act, this litigation likely is only the opening volley in a battle that will play out in the courts in the years to come. Regardless of the district court's decision, the U.S. Court of Appeals for the Third Circuit almost certainly is in line to next consider the scope and requirements of the CWA's TMDL program. In the meantime, stakeholders will continue to wait with bated breath.

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EASTERN WATER NEWS

ENVIRONMENTAL GROUPS SERVE 60-DAY NOTICE ON KENTUCKY COAL MINING COMPANIES FOR ALLEGED CLEAN WATER ACT VIOLATIONS

Several environmental groups in June served a 60-day notice of intent to sue letter on Kentucky coal companies International Coal Group and Frasure Creek Mining LLC, despite a $660,000 settlement the companies recently reached with the Kentucky Energy and Environment Cabinet (Cabinet). The environmental groups have alleged that the Cabinet has not diligently prosecuted the violations.

Background

According to the groups' 60-day notice letter, the Kentucky Energy and Environment Cabinet filed complaints against ICG and Frasure Creek in Franklin County Circuit Court on December 3, 2010, alleging multiple violations of the Clean Water Act, 33 U.S.C. § 1251 *et seq*. In both instances, the alleged violations included failure to submit discharge monitoring reports for certain outfalls, failure to accurately report date, and failure to comply with permit limits. IGC and Frasure Creek reportedly settled with the Cabinet for a total of $660,000 for the violations.

Under the Clean Water Act's citizen suit provision, 33 U.S.C. § 1365, a citizens group must provide 60 days notice to an alleged violator and to environmental regulators before filing a lawsuit, and a government enforcement action will preclude a citizen suit provided the government entity is "diligently prosecuting" an action in court. In their June 28, 2011 notice letter the environmental groups, including Appalachian Voices, the Waterkeeper Alliance, Kentuckians for the Commonwealth, and Kentucky Riverkeeper, alleged multiple ongoing violations of the Kentucky Pollutant Discharge Elimination System Coal General Permit, Permit No. KYG040000 (General Permit) by the two coal companies.

The environmental groups also alleged that the Cabinet had failed to diligently prosecute the violations despite the earlier complaint by the Cabinet and settlement with the coal companies. The groups have repeatedly accused the state government of laxity in enforcement against coal companies, which are a significant employer within the state.

Coal Mining Scrutiny

Coal mining operations throughout Appalachia have been under heightened environmental scrutiny recently. On March 1, 2011, the U.S. Environmental Protection Agency announced that Arch Coal Inc. had agreed to pay $4 million in fines for its operations in Kentucky, West Virginia and Virginia.

In addition, the U.S. Environmental Protection Agency is reconsidering environmental regulations that might have an effect on coal mining operations, such as the stream buffer zone rule adopted during the Bush Administration that the environmentalists had companies had opened the floodgates for controversial mountaintop coal mining techniques, which involve blasting rock in higher elevations to expose coal deposits and placing spoil materials in valleys. Environmental groups had challenged the December 12, 2008 final rule entitled "Excess Spoil, Coal Mine Waste, and Buffers for Perennial and Intermittent Streams," 73 *Fed. Reg.* 75,814. The groups alleged that the new final rule essentially gutted the stream buffer zone rule that had been in place since 1983, which prohibited the dumping of mining overburden within 100 feet of streams unless it could be shown that such activities "will not adversely affect the water quantity or quality or other environmental resources of the stream." According to the preamble, the new rule amended 30 C.F.R. Part 780 to provide that:

> …perennial and intermittent streams and their buffer zones generally be avoided [by mining activities] unless it is not reasonably possible to do so.

On April 27, 2009, Department of the Interior Secretary Ken Salazar announced plans to vacate the

Bush administration's new rule, saying the rule was legally deficient because of failure to consult with the U.S. Fish and Wildlife Service regarding affects to at-risk species. Secretary Salazar stated that the new rule failed to adequately protect water quality and stream habitats. On November 30, 2009, the OSM requested comments on alternatives for revising the stream buffer zone rule and other rules concerning mountaintop mining. Reverting to the 1983 rule is among the potential options for the next version of the stream buffer zone rule. The settlement with the conservation groups was entered March 19, 2010. Under the settlement agreement, the conservation groups will hold off on further litigation until after the rulemaking milestones of February 28, 2011 for a new proposed rule and July 29, 2012 for the final.

Conclusion and Implications

Activities of coal companies continue to act as a magnet for environmental groups determined to have an impact on the manner in which coal companies operate. The 60-day notice letter against ICG and Frasure Creek are just the latest chapter in the ongoing struggle between conflicting interests that continues to play out in courtrooms, in boardrooms, in administrative rulemaking proceedings, and in legislatures. (William Wilcox, Jr.)

CITIES CONSIDER PRIVATIZING WATER SYSTEMS IN DIFFICULT TIMES

In the current difficult financial times, cities are considering selling the bathwater to save the baby. A growing trend of privatizing municipal water systems took center stage in California's Inland Empire City of Rialto on June 29, 2011 when the city council rejected a proposal by American Water Works Company, Inc., to lease and operate the city's water and wastewater systems for the next 30 years. The vote came on the heels of a recent meeting at which over 300 Rialto residents voiced their opposition to the proposal. The proposed agreement would have provided the City of Rialto $30 million in up-front payments. However, the lease included rate increases of more than 84 percent over the next two years for Rialto residents, as well as service fees and capital charges of over $23 million payable by the city each year.

The Allure of Privatization

The appeal of leasing or selling a municipal water system to a private entity in order to shore up a faltering budget becomes palpable when municipal jobs are facing the chopping block. After the City of San Jose was forced to lay-off firefighters and other city workers to close a $118.5 million budget deficit, Mayor Chuck Reed directed his city manager to study privatizing the city's water resources. Although many in San Jose felt the city should retain at least some ownership and control over its vital resources, such as water, in the midst of tough economic conditions, Mr. Reed indicated that the ultimate decision depended on financial conditions. Similarly, in 2009, Pittsburg began considering the possibilities of privatization when faced with bridging a $200 million gap in city pension obligations.

Other than providing cash to cities during hard times, privatization may also serve to redistribute the costs of a water system from the tax base of the general populace to those using greater volumes of water. Generally, municipal bonds are issued to fund improvements and these bonds are paid back over time with revenue from taxes. When a municipal water system is privatized, the private company often funds improvements through rate increases on a per unit basis. Although this increase will impact each user of water, those who utilize more units will bear a greater portion of the cost. Thus, rather than all equally sharing the cost of bond financing through general taxes, in a privatized system those who make use of greater volumes of water may end up paying a proportionally larger share of the increase.

The Risks

Despite the allure of short-term revenues, privatization may present tangible long-term risks. In the late 1990s Atlanta, Georgia privatized its water

system, but in only four years the city was forced to re-assume control due to poor water quality and excessive costs. Driving residents and cities' concern about the financial risks and potentially faltering water quality is the introduction of a new constituency; namely, private companies who bring in shareholders interested in earning profits but who do not have to rely or use local water. Where a city operates the water system, its actions are to benefit its residents and the local administration is accountable to residents through elections. When a water system is privatized, the operator's actions are to benefit its shareholders and, although an operator is ultimately accountable to its customers, the reactions of those served are often delayed due to layers of administration and the difficulty of opposing local utility actions. Despite these concerns, cities regularly and successfully delegate administrative roles to private companies for many municipal services. Municipalities may achieve success in privatization when the cities are strong enough to ensure benefits to shareholders do not come at a cost to the quality of service or increased rates charged to residents.

A notable concern for cities considering whether to sell their water facilities to a private company is the cities' continued ability to receive state or federal grant and loan funding. In California, state and federal funding for water systems is commonly routed through the Safe Drinking Water State Revolving Fund. Under this program, a disadvantaged community may only receive grant funding if the public water system is owned by a public agency or a not-for-profit water company. In certain communities and under certain agreement terms, privatizing a municipal water system may prevent that city from receiving otherwise available state or federal grant funds.

A National Trend?

Recently, Indianapolis, Indiana sought to gain relief from an EPA order for $1.7 billion in system improvements by selling its water and sewer systems to the same public trust that provides the local natural gas service. In the view of Indianapolis, the costs of the system updates are intended to be offset by minimized rate increases over the coming years and savings through the consolidation of the water and gas administrative procedures. Conversely, Milwaukee, Wisconsin recently decided not to agree to a similar proposal to privatize its water system.

Conclusion and Implications

Opinions on the issue of water privatization are mixed. Some see it as a mechanism to transfer the expense and risks associated with water service to a private entity that may be able to better manage them over the long term. Others see privatization as a transfer of an indispensable resource out of public hands. Ultimately, the decision of whether to privatize water and water systems is one that will be based on the facts and circumstances surrounding each unique water resource. Regardless of how public agencies ultimately reconcile the competing concerns and benefits of privatization, the option of privatization is likely to remain on the table for many years to come. (Steve Anderson)

NEWS FROM THE WEST

This month' s News from the West features cases from Colorado, California, and Nevada. First, the Supreme Court of Colorado found that the first step to appropriate water rights must satisfy the anti-speculation doctrine. Next, a California Court of Appeal concluded that the California Environmental Quality Act (CEQA) does not require separate approval of Water Supply Assessment, and that a failure to exhaust administrative remedies prevents the maintenance of a challenge to the adequacy of the environmental impact report. Lastly, the U.S. District Court for Nevada denied a trespass action brought by the federal government against defendants grazing their cattle on federal land, finding that Nevada law recognizes that water rights can vest when cattle drink water, and that a right access to the water for cattle may entail a right for the cattle to graze nearby as well.

The 'First Step' to Appropriate Water Rights Must Satisfy the 'Anti-Speculation' Doctrine

Upper Yampa Water Conservancy Dist. v. Dequine Family L.L.C., 249 P.3d 794 (Colo. 2011).

In *Upper Yampa Water Conservancy District v. Dequine Family L.L.C.*, the Colorado Supreme Court dismissed Upper Yampa Water Conservancy District's application for a conditional water right on the ground that the water district had failed to show that that water had been put to beneficial use or there were plans for future beneficial use, and that it had also failed to substantiate a reasonable anticipation of future need based on projected population growth.

According to the Court, under Colorado law, the first step to appropriate water requires that the applicant satisfy the "anti-speculation" doctrine. This doctrine prohibits the appropriation of water for the purpose of speculative sale or transfer, and "speculation" includes any appropriation of water without a specific plan or intention to divert a specific quantity of water for a specific beneficial use. Mere storage of diverted water is insufficient to establish beneficial use. In addition, firm contractual commitments with municipalities or other agencies responsible for supplying water to individual users are also insufficient to meet the specific plan for beneficial use. However, a challenge that water appropriation is "speculative" can be defeated by demonstrating a need for additional water supply. "Need" can be shown by demonstrating that existing water rights are inadequate to satisfy existing demand, coupled with a specific plan to put the additional water to a beneficial use. Alternatively, an applicant may prove a reasonable future need (in case of contracts with governmental entities) by showing projected population growth.

The Court found that the Upper Yampa Water Conservancy District was only relying on existing contractual obligations, without any showing that current water rights were inadequate, and also found that the water district had failed to substantiate a specific plan to put the water to beneficial use. Because there was also no showing of a reasonable anticipation of future population growth, the Court denied the water district's application for conditional water rights for failing to pass the first step of the anti-speculation doctrine.

California Environmental Quality Act Does Not Require Separate Approval of Water Supply Assessment

Citizens for Responsible Equitable Environmental Development v. City of San Diego, 196 Cal. App.4th 515 (Cal.App. 2011).

In *Citizens for Responsible Equitable Environmental Development v. City of San Diego*, a California Court of Appeal denied a petition for a writ of mandate against the City of San Diego relating to the city's 2009 approval of an addendum to a 1994 Environmental Impact Report. The petitioner argued that the city did not follow the statutory procedure in adopting a required Water Supply Assessment under the California Water Code and CEQA because it did not separately approve the Water Supply Assessment, and that new information on the effect of greenhouse gas emissions on climate change also required a comprehensive supplemental environmental impact report rather than an abbreviated addendum. The court denied the petition on both procedural and substantive grounds.

The court dismissed the challenge to the Water Supply Assessment, holding that the city did not need to separately approve the water supply assessment and did not need to reference it in the notices for hearings on the project. The purpose of a Water Supply Assessment is to assist local governments in deciding whether to approve a project. Accordingly, it only serves an advisory and informational purpose, and the court held that the approval of the addendum also covered the approval of the underlying water supply assessment, and therefore was procedurally adequate.

The court also dismissed the arguments regarding the need for an Environmental Impact Report instead of an addendum. Procedurally, the court found the petitioner had failed to exhaust its administrative remedies, and exhaustion of administrative remedies is a jurisdictional prerequisite to maintenance of a CEQA action. Here, the petitioner's comment letters on the project contained only general, unelaborated objections that did not raise any specific environmental concerns, and thus failed to satisfy CEQA's exhaustion doctrine. While the letters had an attached DVD, the court found that the petitioner could not rely on documents buried among thousands of other documents on the DVD, because the city had no opportunity to evaluate and respond to them. The court also found information regarding greenhouse gas emissions was known before the city approved the 1994 environmental impact report, and thus did not constitute new information requiring the preparation of another environmental impact report instead of a simple addendum.

Water Rights May Create Sufficient Right of Way to Defeat a Trespass Action

U.S. v. Estate of Hage, Case No. 2:07-cv-01154-RCJ-LRL (D. Nev. May 16, 2011).

A U.S. District Court denied the plaintiff United States' motion for summary judgment in a trespass action against the Estate of Hage relating to cattle grazing on federal land. The court found a genuine dispute of material fact as to whether the defendants' water rights in the disputed areas included the right to graze nearby.

The court reviewed the defendants' ditch rights of way and found that they may include the ability to permit cattle to graze within a reasonable distance from water sources and appurtenant ditches. The court further found that local law and custom with respect to the behavior and supervision of cattle determines the scope of the reasonableness, which is a factual finding. Since the defendants did have rights of way in certain ditches used to water cattle, grazing nearby may fall within a reasonable distance and therefore defeat the federal government's trespass action.

Under Nevada law, a diversion of water occurs when the cattle drink. Accordingly, the court held that when relevant water rights vest in watering cattle, it may convert to a permission to graze near the water source. Since the defendants' predecessors-in-interest appropriated certain water for the purpose of watering their livestock, the defendants would have inherited the same water rights. Finally, the court held that while the federal government may manage its lands under the federal Grazing Act, it may not take away vested water rights without just compensation. The government may not revoke grazing licenses and threaten a trespass action to prevent access to water when such access is a vested right. The court held that holding otherwise would render the water rights under the state law worthless, and it would constitute a taking of the right to use the water. (Jill Willis)

FLOOD CONTROL DEVELOPMENTS

FLOOD CONTROL MANAGEMENT AND LIABILITY UPDATE

Bipartisan Flood Control Bill Passes House, Awaits Uncertain Future in Senate

A bipartisan bill extending and changing the Federal Emergency Management Agency's (FEMA) National Flood Insurance Program (NFIP) easily passed the House of Representatives in mid July, earning praise from environmentalists, the insurance industry and local communities. Among the primary reforms in the Flood Insurance Reform Act of 2011 (HR 1309) is a suspension of the mandatory flood insurance purchase requirement for special flood hazard areas, a provision that would give communities time to phase in insurance costs for homeowners or correct flood deficiencies before such requirements take effect. The bill also removes some federal subsidies for flood insurance, which over time will increase the cost of flood insurance policies. Approval by the Senate and the President is still required, and it is unclear whether the Senate will approve a long-term reauthorization of NFIP before the current short-term extension expires on September 30.

The National Flood Insurance Program

The U.S. Congress established the NFIP with the passage of the National Flood Insurance Act of 1968. NFIP is a federal program enabling property owners in participating communities to purchase insurance as a protection against flood losses in exchange for State and community floodplain management regulations that reduce future flood damages. Participation in the NFIP is based on an agreement between communities and the federal government. If a community adopts and enforces a floodplain management ordinance to reduce future flood risk to new construction in floodplains, the federal government will make flood insurance available within the community as a financial protection against flood losses. This insurance is designed to provide an insurance alternative to disaster assistance to reduce the escalating costs of repairing damage to buildings and their contents caused by floods.

Since Hurricane Katrina in 2005, NFIP has gone into $18 billion in debt. There have been several lapses of authority for the program over the past few years, and multiple short-term extensions. Over the past couple of years Congress has discussed a longer-term extension in the form of a bill with more sweeping policy changes to the program.

Current Legislation

HR 1309, introduced by House Financial Services Committee Chairwoman Judy Biggert (R-Ill.), would extend the insurance program for five years and revamp it by increasing premiums, implementing new flood maps and giving FEMA, which administers the NFIP, more flexibility in managing flood risks.

In its title the bill purports to "improve the financial integrity and stability of the program, and to increase the role of private markets in the management of flood insurance risk." Among the bill's primary provisions is a suspension of the insurance purchase requirement for areas determined to be in special hazard zones after the law takes effect. The bill would also raise the annual limit on increases in insurance premiums from 10 percent to 20 percent. In other words, insurance premiums will likely increase under this legislation. The bill also sets minimum deductibles of $1,000 for properties with full-risk rates, and $2,000 for properties with discounted rates. Beginning in 2012, maximum coverage limits (currently $250,000 for residential structures, $100,000 for residential contents and $500,000 for commercial properties) would be indexed to inflation.

The bill requires studies by FEMA and the comptroller general of options and strategies for privatizing the NFIP. It gives FEMA authority to carry out such initiatives based on the capacity of private insurers and financial markets to assist communities on a voluntary basis in managing the financial risks associated with flooding.

The bill provides for a five-year phase in of flood insurance rates for newly mapped areas, and re-establishes the Technical Mapping Advisory Council to

develop new mapping standards. The council operated from 1995 to 2000.

One major amendment included in the bill and supported by the insurance industry would require FEMA to find Write-Your-Own companies to take over more than 800,000 flood policies formerly underwritten by State Farm Insurance. FEMA's Write-Your-Own program allows insurance companies to write and service NFIP's standard flood insurance policy in their own names even though the federal government retains responsibility for underwriting losses. The purpose of the program is to increase the number of policies and to improve service to policyholders. The amendment also requires FEMA to reduce the number of flood insurance policies that are directly managed by FEMA to not more than 10 percent of the total policies in force.

Another noteworthy amendment, which was proposed by Representative Candace Miller (R-Mich.) and rejected by the House, would have terminated the NFIP altogether by January 1 and allowed states to form interstate compacts to provide flood insurance.

Reaction to the Legislation

The bill's passage was heralded by both the insurance industry and a national environmental organization. For insurance companies such as the American Insurance Association, a five-year extension of NFIP provides certainty and boosts consumer and business confidence in the program. American Rivers, an environmental advocacy organization, points to the phasing out of subsidies for flood insurance as a positive for the environment. According to American Rivers, NFIP encourages development in floodplains (destroying wetlands and other habitat) by offering insurance rates that are lower than what would be offered in a private market. Therefore, increased insurance rates will reduce development in floodplains.

Local communities are pleased with the suspension of the mandatory flood insurance purchase requirement, and with the bill's requirement that FEMA improve its floodplain mapping process. Communities that are working to revise a floodplain map and a special hazard zone designation will benefit from the suspension of the insurance purchase requirement, potentially saving local homeowners from high insurance premiums altogether.

Conclusion and Implications

Although it is not clear whether the Senate will pass a similar bill, HR 1309 represents a bipartisan effort to extend the NFIP program, add certainty to both the insurance industry and communities in floodplains, and modify the program to make it more financially stable. (Andrea Clark)

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 accussed are presumed innocent until convicted or judged liable. Most settlements are subject to a 30-day public comment period.

Civil Enforcement Actions and Settlements—Water Quality

•EPA and homebuilder D.R. Horton, LLC reached an agreement regarding alleged violations of federal regulations that protect against pollution from stormwater runoff. Under the agreement, D.R. Horton will pay a $99,000 penalty and will also pay $104,420 to The Land Conservancy of New Jersey to partially fund a 212-acre land acquisition and preservation project in Mount Olive, New Jersey. The land is undeveloped forest and farmland near the Raritan River that provides more than one million New Jersey residents with clean drinking water. Under the federal Clean Water Act (CWA), developers of sites one acre or larger are required to implement stormwater pollution prevention plans to keep soil and contaminants from running off into nearby waterways. The rate at which water carries soil and contaminants off of construction sites is typically ten to 20 times greater than that from agricultural lands, and 1,000 to 2,000 times greater than those of forested lands. EPA inspected D.R. Horton's Grande at Hanover construction site in Whippany, New Jersey in October 2009 and discovered that the company lacked the necessary stormwater discharge permits for the site since 2005. Stormwater ran off the Hanover site and into the Whippany River, possibly polluting the river. EPA also inspected D.R. Horton's Grande at Springville construction site in Mount Laurel, New Jersey in October 2009 and found that the company had failed to obtain a permit for the site, failed to perform required inspections of the site for eight months, and failed to submit environmental compliance reports and certifications from 2005 to 2008. As a result of EPA's inspections, D.R. Horton improved its management of stormwater at the Hanover site, and both sites were brought into compliance with stormwater management regulations.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•A settlement has been reached with Hecla Mining Company to resolve one of the largest cases ever filed under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the federal Superfund statute. Under the settlement, Hecla will pay $263.4 million plus interest to the United States, the Coeur d'Alene Tribe and the State of Idaho to resolve claims stemming from releases of wastes from its mining operations. Settlement funds will be dedicated to restoration and remediation of natural resources in the Coeur d'Alene Basin. The agreement brings closure to the CERCLA lawsuit and establishes a strong basis for future cooperation between Hecla and the governments in the Coeur d'Alene Basin. The lawsuit was originally brought against Hecla and other mining companies by the Coeur d'Alene Tribe in 1991 and was joined by the United States in 1996. Idaho joined the lawsuit on the date of settlement in order to participate in the settlement and resolve its claims against Hecla. Specifically, the lawsuit sought damages for injuries to natural resources such as clean water, fish, and birds caused by millions of tons of mining wastes that had been released into the South Fork of the Coeur d'Alene River and its tributaries. EPA and Idaho have been performing cleanup work in the Coeur d'Alene Basin since the early 1980s, and the suit also sought to recover cleanup costs. Prior to reaching this settlement with Hecla, the United States, the tribe and Idaho had settled their claims against other defendants named in lawsuits regarding historic mine releases in the Coeur d'Alene Basin. The current case history included a 78-day trial in 2001 by the United States and the tribe against ASARCO and Hecla on liability issues. ASARCO, the other primary defendant named in the lawsuit, reached settlement with

the United States in 2008 while it was emerging from Chapter 11 bankruptcy. After the ASARCO settlement, postponed the second phase of the trial against Hecla was postponed to allow time to reach a settlement. The settlement also includes a process for coordinating Hecla's future mining operations with cleanup activities in the Coeur d'Alene Basin. The Bunker Hill Superfund site is one of the nation's largest and most contaminated Superfund sites. At one time, the Upper Basin, or Silver Valley, was one of the largest silver producing districts in the world. As a result, the basin has been contaminated by the release of metals like lead and arsenic. Although measurable improvements in public and environmental health have been achieved since EPA began cleanup of the site in the 1980s, widespread contamination remains a challenge and cleanup work will continue for many years.

• A Massachusetts and a Vermont company that each store significant amounts of oil are facing EPA penalties of up to $177,500 for failing to take adequate precautions meant to prevent and contain oil spills. Specifically, EPA's New England office alleged that Knight Oil of Salisbury, Massachusetts, and Rowley Fuels of Allburgh, Vermont, failed to adequately prepare and maintain Spill Prevention, Control, and Countermeasure (SPCC) plans. Both complaints were based on inspections by EPA staff. The complaint against Knight Oil alleged the violations took place at its facilities at 49 Congress St. and 91 Congress St. in Amesbury, Massachusetts. Among other things, SPCC plans require adequate containment to prevent spilled oil from reaching surface waters. Several surface waters, including the Back River, Clarks Pond and the Powwow River could be affected if oil were spilled from either facility. EPA's New England office also alleged in a separate complaint that Rowley Fuels failed to adequately maintain and implement an SPCC plan at its facility at 10 Industrial Park Road in Allburgh, Vermont. Because of the facility's proximity to surface waters and a municipal stormwater drain system, which both drain into Lake Champlain, a fuel-oil spill at the facility could result in fuel-oil being discharged into Lake Champlain. In addition to facing penalties that could be as high as $177,500, the companies must take steps to bring the facilities into immediate compliance with the federal spill prevention and response planning requirements. Since the complaints were filed, both companies have taken steps to bring the facilities into compliance with federal SPCC requirements.

Indictments, Convictions, and Sentencing

• Freedman Farms, Inc. and its president, William B. Freedman pleaded guilty in federal court in New Bern, North Carolina to violating the CWA when they discharged hog waste into a stream that leads to the Waccamaw River. After a week of trial that began on June 28, 2011, Freedman Farms pleaded guilty to a felony violation of the CWA for discharging hog waste into Browder's Branch, a tributary to the Waccamaw River that flows through the White Marsh, a large wetlands complex. Freedman Farms is in the business of raising hogs for market, and this particular farm had approximately 4,800 hogs. The hog waste was supposed to be directed to two lagoons for treatment and disposal. In December 2007, hog waste was discharged from Freedman Farms directly to Browder's Branch. William Freedman pleaded guilty to a misdemeanor violation of the CWA for his role in the discharge. According to the plea agreement, the government and the corporate defendant jointly asked the court to sentence Freedman Farms to pay $1.5 million, serve a term of five years' probation, and publish a public apology. Under the plea agreement for William Freedman, the defendant faces up to one year in prison. If the court decides to accept the plea agreement, the sentencing hearing for both defendants will take place on a date to be scheduled by the court. (Melissa Foster)

JUDICIAL DEVELOPMENTS

ELEVENTH CIRCUIT FINDS THE ARMY CORPS MUST ALLOCATE WATER FOR ATLANTA

Alabama v. U.S. Army Corps of Engineers, ___F.3d___, Case No. 09-14657 (11th Cir. June 28, 2011).

On June 28, 2011, a *per curium* panel of the U.S. Circuit Court of Appeals for the Eleventh Circuit ruled that the U.S. Army Corps of Engineers (Corps) has authority to allocate additional water from a reservoir near Atlanta, Lake Lanier, for drinking water supplies. The Court of Appeals directed the Corps prepare a new plan for management of the reservoir within a year, and retained jurisdiction over the matter.

Background

Lake Lanier is the reservoir formed by Buford Dam, on the Chattahoochee River, approximately 40 miles upstream of Atlanta, Georgia. The Buford Dam was constructed by the Corps from 1950 to 1957, at the direction of federal legislation and with federal money. According to contemporaneous reports, the purposes of the project included flood control, power generation, navigation and water supply, and the reservoir is managed to generate maximum hydroelectric power while also ensuring a minimum continuous flow of water downstream for water supply.

In 1958, Congress enacted the Water Supply Act (WSA), which supplemented the 1946 River and Harbors Act, the legislation underlying the construction of Buford Dam. The Water Supply Act allows the allocation of storage in projects such as Lake Lanier for water supply, provided that the receiving localities paid for the allocated storage and the allocation did not seriously affect the existing purposes or require major structural or operational changes.

Until 1973, pressure on Lake Lanier's allocation was relatively limited. Thereafter, population growth caused several localities to withdraw water downstream from Lake Lanier, without allocations. The Corps granted several interim allocations, but decided to wait until the completion of a Water Resources Management Study before granting permanent allocations. When released, the study recommended a preferred alternative of the construction of a "reregulation dam," but Congress failed to appropriate funds to kick-start the project. The Corps then moved to utilize the second alternative suggested by the Study, the reallocation of existing storage. The situation effectively led to regulatory paralysis, and eventually many of the interim allocation contracts entered into by the Corps expired.

In June 1990, Alabama sued the Corps seeking more water, and Florida and Georgia intervened. Three other related lawsuits were subsequently initiated, as the regional actors sought to position themselves for the water allocation battle. The parties entered into a Memorandum of Understanding in 1992 and into a Compact in 1997, which was subsequently approved by Congress. The end result was, as the court described it, a "live and let live" provision that preserved the status quo pending the establishment of an allocation formula, except that withdrawals could be increased to satisfy reasonable demands for water. This basic premise survives until the present day, despite machinations between competing courts and multidistrict litigation eventually ended in front of Senior U.S. District Judge Paul Magnuson. Judge Magnuson held that the Corps had exceed its authority in allocating increasing amounts of water from Lake Lanier for water supply, because the WSA applied to interim allocation and the allocation of over 21 percent of Lake Lanier's storage to water supply was a major operational change invalidating the Corps' allocations. Magnuson directed the parties to negotiate a settlement by July 2012, with Atlanta's water withdrawals at risk of drastic limitations.

The Eleventh Circuit's Decision

Water Supply Purpose Authorized

The Court of Appeals first reviewed a number of jurisdictional challenges, ultimately finding that it possessed the power to review the various appeals before it. With respect to the merits, the court first

turned to the Corps' previous rejection of Georgia's 2000 request to allow it to increase withdrawals. The court held that the Corps rejection was contrary to the clear congressional intent to include water supply as an authorized purpose for the Burford project, as evidenced by the 1946 Rivers and Harbors Act and a contemporaneous report adopted by Congress in the enactment of the Act. After reviewing the language of these sources, the court held that water supply could not be viewed as a merely incidental purpose of the project, and the fact that the local users were not asked initially to contribute costs to the project does not obviate this fact. In so holding, the court rejected the Corps' argument that its interpretation of the statute was due *Chevron* deference and remanded the request to the court for further determination.

The court then examined claims from Gwinnett County, Georgia that were distinct from those presented by Georgia and the Corps. As an initial matter, the court reviewed the county's claim that it was due an allocation of 10 million gallons per day (MGD) for water supply, as directed by a 1956 Act of Congress. The District Court had held that this congressional authorization had expired, but the Court of Appeals disagreed, finding that the lower court had misread the 1956 Act. While the District Court held that the 1956 Act had limited the allocation to 50 years, the Court of Appeals held that the 1956 Act only limited the duration of a Corps contract with the county for the 10 MGD to 50 years. Because no allocation had been provided to the county in reliance on the 1956 Act, the limitation was not yet applicable.

The court next analyzed the county's claim to a "right to acquire" 40 MGD of storage space pursuant to a 1974 agreement between the Corps and the county. The 1974 agreement expired in 1990, and the county had not exercised its option. The court held that the county's right to exercise the option had lapsed, as it had failed to exercise them in a reasonable time period. The court also rebuffed the county's claim to just compensation for the Corps taking of a water intake in the course of the construction of the Burford project. The court noted that this argument had not been advanced before the District Court and therefore was of no effect in the appeal. In any event, the court held that the claim was meritless because the federal navigational servitude was dominant over the county's claim.

The Remand Order

In remanding Georgia's request, the court provides explicit instructions to the Corps to consider water supply as well as power generation, flood control and navigation. While the court directed the Corps to balance water supply and power generation, Congress intended that water supply would not be subordinate to power supply and that the water supply allocation could be increased to accommodate population growth in Atlanta. The court leaves it to the Corps to determine how this balance should be fine-tuned, and directs that the Corps do so in light of the congressional intent expressed in the WSA and the 1956 Rivers and Harbors Act. To keep the 20-year old matter moving, the court allows the Corps just one year to address the remand, with the panel retaining limited jurisdiction to monitor compliance with this deadline.

Conclusion and Implications

The practical effect of this decision is critical —Atlanta will have water. While other parties to the litigation are contemplating motions for reconsideration *en banc*, the inertia will be behind a finding in favor of water supply over other interests. Given that the south is facing water disputes on several fronts, this opinion is the proverbial "sigh of relief." If the opinion stands, the Corps faces a tight timeframe and must execute a difficult and delicate balancing act. Hopefully, this decision moves the Corps and the parties to move this matter to an actual resolution, to provide the region with some stable future. (Patrick Zaepfel)

FIRST CIRCUIT HOLDS HYDROELECTRIC FACILITY MODIFICATIONS REQUIRED FERC APPROVAL PURSUANT TO THE FEDERAL POWER ACT

L.S. Starrett Co. v. The Federal Energy Regulatory Commission, ___F.3d___, Case No. 10-1470 (1st Cir. June 15, 2011).

The First Circuit Court of Appeals has recently affirmed the decision of the Federal Energy Regulatory Commission (FERC) that a energy company was required to seek licensing pursuant to § 23(b) of the Federal Power Act (FPA) if it proceeded with certain proposed changes to its hydroelectric generating facility. The First Circuit found that licensing was required if:

> (1) its facility is located on a stream over which Congress has Commerce Clause jurisdiction, (2) its proposed changes constitute 'post-1935 construction' within the meaning of the FPA, and (3) the proposed modifications will affect the interests of interstate or foreign commerce.

Background

L.S. Starrett Company owns a hydroelectric generating facility on the non-navigable Millers River of Athol, Massachusetts. This facility consists of an 87-acre-foot reservoir and a 20-foot-high, 127-foot-long concrete dam. There are powerhouse generators at each end of the dam. The powerhouse on the right side of the dame has an installed capacity of 250 kW and actual capacity of 80 kW. The left side generator had an installed and actual capacity of 112kW. In 2006, the left-side generator failed.

Prior to the left-side generator's failure, the combined installed capacity for the facility was 362 kW and an actual capacity of 192 due to the physical limitations of the site. The installed capacity was memorialized in a 1992 FERC order, which concluded that the facility did not require FERC licensing because there had been no post-1935 construction.

After the left-side generator failed, however, Starrett began to investigate its options for replacement or repair. It concluded that it would be most cost effective to install a new left-side generator rather than repair the old one. The new left-side generator's installed and actual capacity would have been 198 kW. The proposed project would also increase the project's combined installed capacity to 448 kW and its total actual capacity to 278 kW. Notably, the 278 kW total actual capacity of the project would remain less than the previous total installed capacity of 362 kW.

In September 2008, believing that it did not require FERC licensing to proceed with its proposed changes, Starrett ordered a new turbine generator and began preparations for installation. Starrett needed to upgrade its facility in order to install the new turbine. While doing so, the U.S. Fish and Wildlife Service requested that FERC investigate Starrett's work over concerns that the increased capacity of the project would negatively impact migratory fish.

In May 2009, FERC concluded that Starrett's proposed work would increase the capacity of the project, constituting a post-1935 construction and, therefore, trigger FERC's licensing jurisdiction. Starrett maintained that the proposed work would not lead to an increase in capacity above the 362 kW total because only the installed capacity, not the actual capacity, would be over 362 kW. FERC issued an order finding that licensing of the project was required. Upon review, the court agreed with FERC.

The First Circuit's Decision

Under the Federal Power Act, a hydroelectric project without a pre-1920 permit is subject to FERC's licensing jurisdiction if it: (1) is located on a navigable water of the United States; (2) occupies lands of the United States; (3) Utilizes surplus water or water power from a government dam; or, (4) [a] is located on a stream over which Congress has Commerce Clause jurisdiction, [b] is constructed or modified on or after August 26, 1935, and [c] affects the interests of interstate or foreign commerce.

FERC concluded that the Starrett's dam was subject to licensing under the fourth criterion.

A Commerce Clause Stream

Preliminarily, the court needed to analyze if the hydroelectric plant is located on a stream over which

Congress has Commerce Clause jurisdiction. The Millers River was considered to be a Commerce Clause stream because it is a tributary of the Connecticut River, which is navigable. Commerce clause streams are navigable waters and tributaries of navigable waters. Thus, while the Millers River was not navigable, it was a tributary of navigable waters and, therefore, considered a Commerce Clause stream.

Post-1935 Construction

Next the court turned to the issue of whether the proposed work must be considered post-1935 construction. In 1935, Congress amended the Federal Power Act to require any one intending to construct a dam on non-navigable streams first obtain a license. In considering the plain meaning of *construction*, the court concluded that it included Starrett's proposed work.

Starrett argued that the project's new actual capacity would remain below the pre-installed capacity and therefore should not be considered construction. But, since both the actual and installed capacities would be greater than before, the court concluded that FERC's interpretation of construction was reasonable.

The court found that in deciding whether to grant a license, FERC should consider many factors: the purposes of the license, energy conservation, damage to wildlife, protection of recreational opportunities and the preservation of other environmental aspects. Taking all that FERC is required to consider, the court found that FERC did not act unreasonably in determining that the proposed work constituted post-1935 construction.

The Effect on Interstate Commerce

Lastly, the court stated before FERC can exert its licensing jurisdiction over post-1935 construction, it must find that the interests of interstate of foreign commerce would be affected by the proposed construction. FERC concluded that the dam meets the interstate commerce requirement because the dam is a member of a class of small hydroelectric projects that collectively have a substantial impact on interstate commerce.

Starrett contended that it is improper for FERC to rely on this cumulative effect theory because it leaves FERC's Commerce Clause jurisdiction without boundary. It also argued that FERC did not show that the Starrett's facility belongs to a class of hydroelectric projects that collectively affect interstate commerce.

The court found that full authority under the Commerce Clause includes the power to reach a local activity whose effect on commerce, taken together with that of many others similarly situated is far from trivial. Thus, a small hydroelectric project that affects commerce only slightly can still be subject to congressional regulation if it is part of a class with a significant cumulative effect.

Further, the court pointed out that Starrett's dam produces power that Starrett would otherwise receive from the interstate grid. And small hydroelectric projects that displace power from the national grid can have a significant cumulative effect on interstate commerce.

Conclusion and Implications

From the First Circuit's detailed analysis of what it takes to trigger FERC's authority under the FPA and it's conclusion in this case, the decision may portend that even a small hydroelectric facility on non-navigable river may still need to seek licensing pursuant to the Federal Power Act to replace broken or damaged equipment. Given the broad powers of the Commerce Clause and the plain meaning of construction, even minor additions or improvements may require licensing from the Federal Energy Regulatory Commission. (Gregory Snarr, Thierry Montoya)

NINTH CIRCUIT FINDS RAILROADS NOT LIABLE PURSUANT TO STATE OR FEDERAL THEORIES OF RECOVERY FOR GROUNDWATER CONTAMINATION UNDER THEIR TRACKS

Redevelopment Agency of the City of Stockton v. BNSF Railway Company
___F.3d___, Case Nos. 09-16585, 009-16739, 09-17640 (9th Cir. June 28, 2011).

On June 28, 2011, the Ninth Circuit Court of Appeals held that certain railroad companies were not liable under federal and state theories of recovery for the petroleum contamination that migrated onto their property from the pollutant next door.

Background

In 1968, California contracted with the BNSF Railway Company and the Union Pacific Railroad Company (Railroads) for the relocation of their existing track in order to make room for a freeway interchange in the City of Stockton. As part of their agreement, the Railroads planned and approved grading and drainage improvements to the property. One of the improvements was the installation of a "french drain" pipeline underneath the track. The french drain was designed to improve soil stability by draining water under and around the train track.

After the Railroads completed their improvements, they laid their track across the property. The Railroads agreed to maintain the track, roadbed and drainage. The State of California agreed to give the Railroads all rights-of-way for track operation. Although the Railroads began running trains over the track in 1970, the state did not actually transfer deed to the underlying land to the Railroads until 1983.

In 1988 the Railroads sold their interest in the property to the City of Stockton Redevelopment Agency (SRA) so that it could develop the property. In 2004 the SRA sold a portion of the property to a commercial developer and indemnified the developer for costs incurred due to any existing contamination. The developer soon discovered petroleum contamination in the soil and groundwater along the path of the french drain. Testing indicated that the contamination occurred before 1984 and emanated from a nearby petroleum facility. The french drain served as a pathway through which the petroleum leaks of the nearby facility migrated underground onto the property.

After spending millions excavating and removing the contamination, the SRA sued the Railroads to recover its cleanup costs and to require the Railroads to clean up any remaining contamination. The SRA alleged that the Railroads were liable for the contamination under the Polanco Redevelopment Act as well as common law nuisance.

In granting the SRA's summary judgment motion, the trial court ruled that the Railroads were liable for the contamination under nuisance law and under the Polanco Act's Water Code provision, but not under the Polanco Act's federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) provision. On appeal, the Ninth Circuit Court of Appeals found that the Railroads were not liable for the contamination under any theory.

The Ninth Circuit's Decision

Common Law Nuisance

It was clear that soil and groundwater, laced with petroleum, constituted a nuisance. Under California law, anything that is injurious to health is indecent or offensive to the senses, or an obstruction to the free use of property qualifies as a nuisance. Further, this type of interference must be both substantial and unreasonable. For the court, the oil contamination met all these requirements; however, it concluded that the Railroads were not responsible for the contamination.

The court found that the Railroads were not liable under nuisance law because they neither created the nuisance nor acted unreasonably in failing to discover and abate the nuisance.

The critical question was whether the Railroads created or assisted in the creation of the nuisance. While the contamination would not have migrated onto the property *but for* the french drain, the Railroads' did not actively or knowingly generate the nuisance condition. Thus, the court found that the Railroads' conduct was not active, affirmative, or

knowing. They did not create the nuisance, spill the petroleum, or affirmatively direct its flow through the french drain. And while the Railroads acted affirmatively by installing the french drain, that conduct was unrelated to the contamination.

The court also found that the Railroads were not liable for the nuisance as possessors of the property because they lacked actual knowledge of the contamination while they were in possession of the property. In California, a possessor of land can be liable for nuisance on their land even if they did not create it. In such instance, liability flows simply from his or her possession and control of the land in question. The owner, however, must know or should have known, of the contamination. Since the petroleum was only discoverable by excavation, the Railroads could not have known of the contamination based on their periodic visual inspections of the land and there was no reason to excavate and inspect the subsurface of the property. Thus, the Railroads were not liable under nuisance theories based on their ownership of the land.

The Polanco Act

The Ninth Circuit also found that the Railroads were also not liable under California's Polanco Act because they were not responsible parties. Under the Polanco Act, a redevelopment agency can recover contamination remediation costs from any responsible party. A person or entity is a responsible party under either (1) California Water Code, or (2) CERCLA.

The court found that the Railroads did not violate the California Water Code because they did not discharge the contamination. Under the Water Code, a party is liable for discharges into water or if a party creates a condition of pollution or nuisance. Similar to its nuisance analysis, the court found that a but-for causation is insufficient to impose liability for a discharge under the Water Code. Causing or permitting contamination does not encompass those whose involvement with a spill is remote and passive. Since the Railroads had no involvement with the actual petroleum spill, their involvement with the emission of contamination from the french drain was entirely passive and unknowing. Thus, for a lack of active, affirmative or knowing conduct with regard to the contamination flowing through the french drain into the soil, the Railroads were deemed to not have discharged waste into the water.

The court's steadfast attitude applied equally to the Railroads and CERCLA. The court held that they were not owners of the property within the meaning of CERCLA since the oil spills occurred in the 1970s and the Railroads did not acquire title to the land until 1983. As noted above, the Railroads acquired all rights of way to operate on the land in 1968. The court, however, found that this grant of license and easement could not be considered a valid land sales contract and, therefore, the Railroads were not CERCLA owners of the property.

The Railroads might have been held liable under CERCLA as operators of the property, but that theory was not advanced because the petroleum spill was entirely unrelated to the Railroads' use of the easement. In short, the court found that the Railroads did not violate the Polanco Act's CERCLA provisions because they did not hold title to the property at the time of the contamination and, therefore, were not responsible for the discharge of the petroleum

Conclusion and Implications

Perhaps the Ninth Circuit's own langauge best sums up its view on liability in the instant case as follows:

> There is no evidence that the Railroads actively or knowingly caused or permitted the contamination as required for nuisance liability and liability under the Polanco Act's Water Code provision. Nor were the Railroads "owners" of the property under the Polanco Act's CERCLA provision when the contamination occurred. Because the record establishes no genuine issue of material fact as to the Railroads' liability, the Railroads are entitled to summary judgment. Therefore, we need not reach any of the damages issues on appeal or cross-appeal.

So in the end, in the absence of proximate cause, as a matter of law, the Railroads bore no liability. (Gregory Snarr, Thierry Montoya)

DISTRICT COURT DISMISSES ENVIRONMENTAL CLAIMS FOR INJUNCTIVE RELIEF IN 'DEEPWATER HORIZON' GULF OIL SPILL

In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, On April 20, 2010, ___F.Supp.2d____, Case No. MDL 2179 (E.D. La. 2011).

The U.S. District Court for the Eastern District of Louisiana dismissed the plaintiffs' claims for injunctive relief against Transocean, British Petroleum (BP) and other defendants for alleged violations of the Clean Water Act (CWA), Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) and Endangered Species Act (ESA) in connection with the Gulf of Mexico oil spill in April 2010. The District Court determined (1) that the plaintiffs lacked standing to bring their claims for injunctive relief; (2) that the plaintiffs' claims for injunctive relief were moot; and (3) that the claims for injunctive relief should be dismissed because the defendants were no longer "in violation" of the applicable statutes. In doing so, the court dismissed the D1 Master Complaint in its entirety.

Factual and Procedural Background

The April 20, 2010 explosion and capsizing of the "Deepwater Horizon," a mobile offshore drilling unit owned by defendant Transocean and under contract to defendant BP, caused millions of gallons of oil to be released into the Gulf of Mexico before the well was finally contained approximately three months later. The spill generated multi-district litigation, involving hundreds of cases with over 100,000 individual claimants. As such, the District Court created several "pleading bundles" for the purposes of filing master complaints, answers and any motions to dismiss.

Pleading Bundle D1 was created to include claims for injunctive relief brought against private parties. The plaintiffs filed a D1 Master Complaint, seeking a declaration that the defendants violated the CWA, CERCLA, EPCRA and ESA and an injunction to prevent the defendants from operating their offshore facility in such manner that would result in further violations. Defendants Transocean and BP in turn filed motions to dismiss the D1 Master Complaint.

The District Court's Decision

Plaintiffs Lack Standing to Bring Their Claims

The District Court clarified that to have standing to bring a claim for injunctive relief, a plaintiff must show that (1) it has suffered an "injury in fact"; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed through the granting of an injunction. The District Court determined that the plaintiffs lacked standing to bring a claim because granting an injunction would not be likely to redress the injuries alleged.

Under the CWA, CERCLA, ESA and state law claims, the court determined that granting an injunction would not provide any benefit or reduction in pollution, as required by law, because the oil well had already been capped and permanently sealed. There was no ongoing release from the well and no viable offshore facilities from which future releases could occur. Thus, granting an injunction would not serve any purpose or redress any alleged harm. Further, the District Court asserted that an injury is not redressable by a citizen suit when the injury is already being redressed by other means. Here, BP and numerous government agencies had already been engaging in remediation efforts prior to the filing of the Master Complaint and plaintiffs had failed to allege any deficiencies associated with those efforts.

The District Court also stated that injuries are not redressable for purposes of standing when a claim depends on the actions of actors not present before the court. Because the defendants did not unilaterally direct the cleanup activities in the Gulf—such activities were under the control of the National Incident Commander, Federal On Scene Coordinator, Unified Area Command, and the U.S. Coast Guard, in cooperation with other federal agencies—an injunction issued by the District Court against the defendants would not actually resolve any potential deficiencies in the ongoing cleanup.

Regarding the EPCRA claim, the District Court determined that the plaintiffs lacked standing because there was no longer an ongoing release of oil and the data regarding the spill and its cleanup was easily accessible (the operations were already subject to EPCRA reporting requirements). As such, granting an injunction requiring compliance with various reporting requirements would not redress any injury alleged to have been sustained by the plaintiffs as a result of the incident.

Plaintiffs' Claims for Injunctive Relief Are Moot

The District Court also declared all the plaintiffs' claims for injunctive relief to be moot because the well was longer discharging oil. The court clarified that an action is rendered moot when any event eliminates the controversy after the lawsuit commences. It is irrelevant that the controversy was in existence at the time the suit was filed. Here, the plaintiffs sought prospective injunctive relief to stop violations the CWA, CERCLA, EPCRA and ESA caused by the release of oil into the environment. As such, the plaintiffs were required to demonstrate an ongoing violation of these statutes caused by an ongoing release of oil. Because the oil discharges had already concluded, and no future-oriented injunction could provide any meaningful relief for the plaintiffs—an injunction clearly could not stop the past oil discharges because the discharges had already ceased.

The Defendants Was Not 'In Violation' of the Applicable Statutes

The District Court also stated that the plaintiffs did not have an actionable claim because they were unable to show that the defendants were "in violation" of the CWA, CERCLA, ESA and EPCRA. The court clarified that a claim for injunctive relief by a citizen plaintiff can only proceed if the plaintiff shows continuing violations or a reasonable likelihood of future reoccurrences of the violations. Courts do not have jurisdiction over citizen suits for past violations, and a mere assertion of a possible reoccurrence is insufficient. Here, the court found that because there were no longer any facilities from which oil releases could occur and because the well had been permanently sealed, there was no continuing violation and no reasonable possibility that any future violations could occur. The release of oil had occurred entirely in the past.

Conclusion and Implications

This case demonstrates that when seeking injunctive relief in an environmental lawsuit, a citizen plaintiff must clearly show ongoing violations or a reasonable likelihood of future violations of the applicable statutes. Reliance on past or speculative violations, even large scale or disaster actions, will not likely be sufficient for a claim to survive a motion to dismiss. In addition, plaintiffs seeking injunctive relief must show that granting an injunction will actually redress the injuries alleged. A court will not likely grant an injunction if the violations alleged have already ceased, if the harm is in the process of being remedied, or if the injunction would not bind all the parties responsible for remedying the alleged harm. (Rebecca Couch, Adam Wagmeister)

DISTRICT COURT FINDS STATE LAW CLAIMS NOT PREEMPTED UNDER CERCLA, BUT DISMISSES SEVERAL CLAIMS ON OTHER GROUNDS

State of New York v. West Side Corp., ___F.Supp.2d___, Case No. 07-CV-4231 (E.D. N.Y. June 3, 2011).

The U.S. District Court for the Eastern District of New York has dismissed three of six causes of action brought by the State of New York against West Side Corporation (West Side) and its perchlorethylene (PCE) suppliers to recover costs related to site cleanup. The court rejected the argument that all state law claims were preempted by the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The court dismissed two common law public nuisance claims under the three-year statute of limitations and an indemnification action because the state had failed to allege that it had a duty to clean the site. However, the court refused to dismiss a restitution claim under the statute of limitations. Two CERCLA claims were not subject to the motion to dismiss.

Factual and Procedural Background

This decision relates to a lawsuit brought by the State of New York and Alexander Grannis, the then-Commissioner of the New York State Department of Environmental Conservation (DEC), for the cleanup of a site contaminated with PCE, a chemical commonly used in dry-cleaning. The defendants include West Side, the owner and operator of the contaminated site and PCE manufacturer-distributors Dow Chemical Company (Dow), Ethyl Corporation (Ethyl), and PPG Industries, Inc. (PPG).

West Side operated a PCE storage distribution center at a site in New York from 1969 to 1990. Dow, Ethyl, and PPG supplied West Side with PCE for redistribution or repackaging. The PCE was stored in aboveground storage tanks at the site, from which spills are alleged to have occurred during the time that the defendants operated on the site. In 1997, following a subsurface investigation, the site was designated an "inactive hazardous disposal site."

The state pursued response actions at the site under CERCLA, and now seeks recovery of $6 million in costs. The state raised six causes of action, including two state law public nuisance claims, one state law claim for indemnification, one state law claim for restitution, and two claims under CERCLA § 107. The defendants moved to dismiss the four state law claims

The District Court's Decision

The court addressed four major issues: First, whether the state law claims of public nuisance, restitution, and indemnification are preempted by CERCLA; Second, whether the statute of limitations barred the public nuisance claims; Third, whether the statute of limitations barred the restitution claim; and Fourth, whether the indemnification claim had been properly pled.

Federal preemption may be either express in the plain wording of a statute, implied by its breadth of coverage, or necessary due to actual conflict with state law. The court noted that CERCLA expressly does not preempt state law recovery, though it does expressly bar double recovery. In addition, the court noted that CERCLA did not impliedly preempt state law claims either. CERCLA, the court agreed, was not intended to occupy the entire hazardous waste field or to prevent the enactment of supplemental state laws.

Conflict Preemption

Regarding conflict preemption, the Second Circuit case *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998) was highlighted for its watershed importance. In *Bedford*, a property owner, who had incurred soil contamination remediation costs, sought recovery from tenants of the property. The property owner sought recovery under CERCLA § 113(f), which allows potentially responsible parties (PRP) who have been sued to seek contribution from other PRPs, rather than CERCLA § 107(a), which permits government agencies to seek reimbursement for remediation costs. In order to promote settlement, a PRP who has not settled its case with the government is barred from seeking contribution from settling parties under CERCLA. The *Bedford* court held that state law recovery claims might bypass this bar, and must be dismissed on conflict preemption grounds. In this

case, a § 107 action, because the settlement framework in § 113 is not implicated, the court held that conflict preemption does not apply.

Whether state law claims were conflict preempted because of the potential for double recovery was also addressed. The court held that as a threshold matter double recovery remains merely a threat, thereby not justifying the dismissal of state law claims. The court noted the imprudence of a contrary holding considering the uncertainty of recovery under CERCLA.

Public Nuisance

Next, the court addressed whether the statute of limitations applied to the public nuisance actions. New York's statute of limitations bars recovery of damages for injury to property after three years from the date of discovery of the injury. New York claimed it was seeking equitable relief rather than damages, and therefore the statute was inapplicable to its public nuisance claims. The court disagreed, arguing that because the relief sought was solely monetary, the statute of limitations applied. As the Complaint had been filed on October 10, 2007, the injury must have been discovered after October 10, 2004, to survive dismissal. In 1997, DEC had classified the site as an inactive hazardous waste disposal site. Prior to classification, a preliminary site assessment had resulted in a finding that the presence of hazardous waste could be documented. The court considered this classification to be ample evidence that the harm had been discovered by 1997, and dismissed both public nuisance claims as time-barred.

Restitution

On the third issue, the court held that the statute of limitations did not apply to the restitution claim. The defendants argued that because the restitution claim rested on public nuisance, it is similarly time-barred. The court disagreed, reasoning that the rights affected by the wrongdoer in a public nuisance action directly affect the general public, thereby satisfying the requirements of a restitution claim. The court noted that the dismissal of one type of claim as time-barred does not require dismissal of the rest, and that the state had properly alleged a restitution claim. The court, therefore, denied defendants' motion to dismiss this claim.

Indemnification

On the final issue, the court found the indemnification claim deficient because it failed to allege a state duty to remediate the site under law. Without such a duty, the state would not be at risk of incurring liability to a third party for which the state would be entitled to indemnification. The court dismissed the claim without prejudice, permitting the state to amend its complaint. However, the court warned that the state may not wish to do so because the acknowledgement of a duty might subject it to third-party liability over unremediated sites.

Conclusion and Implications

While the District Court's actions significantly trimmed New York's lawsuit against West Side and its PCE suppliers, the decision was not a complete defeat for the state. Three claims remain, and it is too early to tell whether the state will eventually recover. In addition, victory on the issue of preemption is of national significance. Should it prove influential, this ruling may permit states to continue to seek recovery of hazardous waste remediation costs through state claims without fear of preemption by CERCLA. (Danielle Sakai; Thomas Rice)

NEW JERSEY'S WATER QUALITY PLANNING ACT WITHSTANDS REGULATORY CHALLENGE

In the Matter of the Adoption of N.J.A.C. 7.15-5.24 (b) and N.J.A.C. 7.15.-5.25 (e) (N.J.App.Div. June 29, 2011).

Appellant Bi-County Development Corporation unsuccessfully challenged New Jersey's Water Quality Management Planning Rules (WQMP), which prohibited in pertinent part sewage lines being extended into "environmentally sensitive areas" including wetlands, riparian zones, endangered species habitat, and areas with national heritage priority status. Bi-County Development Corporation simultaneously challenged a corollary regulation that set a maximum nitrate level for septic system discharge. The builder's primary challenge was that the regulations promulgated by the New Jersey Department of Environmental Protection (NJDEP) were not really wetlands protection or water protection regulations but rather land use regulations limiting density and therefore had been incompetently promulgated and approved. The New Jersey State Appellate Division found in favor of the NJDEP because the water pollution control regulations were necessary in order to prevent deterioration of wetlands and riparian zones as well as other sensitive areas.

The Appellate Division's Analysis

NJDEP'S Enabling Statute, the Water Quality Planning Act and the Water Pollution Control Act

The court commenced its analysis noting that the NJDEP's Enabling Statute authorizes that agency to formulate comprehensive policies for the conservation of natural resources of the state and promotion of environmental protection. With specific application to the Water Quality Planning Act, the NJDEP enabling law provides for the restoration and maintenance of water quality in the State of New Jersey, including a planning process to control and maintain water quality. Similarly, the New Jersey Water Pollution Control Act provides for restoration, enhancement and maintenance of the state's waters, including ground and service waters. New Jersey adopted the Water Quality Planning Act and the Water Quality Pollution Control Act in response to the federal Water Pollution Control Act, which established and integrated federal system to address water pollution throughout the United States. The Water Pollution Control Act requires identification of areas with substantial water quality problems and obligates the states to create area wide waste treatment management plans. In response to this obligation, the State of New Jersey acted and in 1989 the NJDEP promulgated the WQMP Rules providing for continuing water quality planning processes and wastewater management planning.

Background

The Wastewater Management Plan is a written and graphic description of existing and future wastewater related jurisdictions, wastewater service areas and selected environmental features and treatment works. In this case New Jersey had adopted N.J.A.C. § 7:15.24. This regulation restricted the extension of public sewer lines in environmentally sensitive areas which Bi-County Development Corporation notes effectively limits the density of development that a property can sustain because it must use a septic system for waste treatment rather a sewer line. The Appellate Division agreed with Bi-County Development Corporation that the effect of N.J.A.C. § 7:15.24 would be to limit construction but the court also noted that the NJDEP had established that the restriction was not absolute and could be challenged based upon a request to the NJDEP to consider a variance to the regulation. The NJDEP also explained that the WQMP prohibit extension of sewer lines into environmentally sensitive areas in order to conserve public resources and because those areas cannot sustain dense development. As the NJDEP explained it, their goal was not to prohibit all development but rather, to prohibit that development which would necessarily cause an unacceptable impact to environmentally sensitive properties.

Agency Deference

Having explained the basis for the challenge by Bi-County Development Corporation, the Appellate Division noted that the courts generally defer

to an agency's decision and presume that regulations they pass are valid because regulatory agencies like the NJDEP have specialized expertise necessary to enact regulations addressing technical matters and are particularly well equipped to read and understand the massive documents supporting and opposing those regulations.

Legislative Mandate

In addition to considering the deference given to regulatory agencies, the court also considered the New Jersey Legislature's charge to the NJDEP that the Water Quality Protection Act (WQPA) required that the people of the State of New Jersey have a paramount interest in the protection and preservation of public health and welfare. Both the legislature in passing the WQPA as well as the NJDEP in defending the challenge brought here, noted that one significant impact to extensions of sewer lines was to effect species under the Endangered and Non-Game Species Conservation Act (ENSCA), N.J.S.A. 23:2A-1-13. The court then considered whether the regulations promulgated by the NJDEP and challenged by appellant builder would also satisfy the need to protect historical properties within New Jersey as well. Perhaps most significantly, the court noted the broad discretion that the NJDEP enjoys in a grant of authority to set policy and promulgate regulations for the conservation of natural resources of the state, the promotion of environmental protection and the prevention of pollution in the environment to the state. As the Appellate Division perceived the matter, N.J.A.C. 7:15-5.24(b)(4) was not a wetlands building regulation and does not impose significant restrictions on areas adjacent to wetlands nor does it expand the size of the buffer zone. Rather, the language implemented by the NJDEP simply did not impose restrictions on areas adjacent to wetlands. In short, the Appellate Division affirmed the NJDEP's regulations and denied the builder's challenges because the court felt that the NJDEP had struck the proper balance between a property owner's interest in developing land and on the other hand the state's obligations to preserve protected species habitat, preserve water quality and protect the environment as well as to conserve public sewage resources.

Regulation of Nitrates

Having considered the challenge to the regulation regarding extension of sewer lines, the court then made short shrift of appellant's challenge to the nitrate maximum regulations set forth at N.J.A.C. 7:15-5.25(e). In short appellant builder's challenge was that the regulations were based on a theoretical calculation and not based upon existing nitrate levels nor did the regulations satisfy any rational basis given the concentrations in question. The Appellate Division completely disagreed and felt that the NJDEP had conducted numerous calculations to determine the average amount of nitrate in the water and, further, had set forth a rational basis for their conclusions. In short, in less than two pages the Appellate Division considered and rejected the appellant's challenge regarding the nitrate limitations.

Conclusion and Implications

Although the court found that the laws here do not have an impact upon properties outside of wetland areas but rather simply limited building construction with an effluent pipe that led into wetland areas, the court's analyses really makes little sense. As a practical matter, one cannot build in many of the areas complained about by appellant without a discharge pipe because there simply is no public sewerage and a septic field is impractical with such a high water table. An appeal on a technical basis is unlikely to successful and the New Jersey Supreme Court is highly unlikely to grant *certiorari* to hear the matter in any event. In short, builder beware—on technical issues the NJDEP is often going to prevail not because they are right but because the Appellate Division is required to give the agency great deference. (Jeffrey Pollock)

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