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# EASTERN WATER LAW™

## & POLICY REPORTER

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## EASTERN WATER NEWS

# PENNSYLVANIA COMMISSION SUES ENERGY PRODUCER OVER ALLEGED COAL MINE DISCHARGES INTO WEST VIRGINIA/ PENNSYLVANIA'S DUNKARD CREEK CAUSING FISH KILLS

*Pennsylvania Fish and Boat Commission v. Consol*, Case No. 11-C-556 (Cir. Ct., Monongalia Cty., W.V.); *Pennsylvania Fish and Boat Commission v. Consol* ,Case No. ___, (Comm. Pleas, Greene Cty., Pa.).

On September 2, 2002, the Pennsylvania Fish and Boat Commission (PFBC) filed two separate lawsuits against Consol Energy Inc., and two related entities (Consol), seeking damages related to illegal discharges from several intertwined Consol coal mines into the West Virginia stretch of Dunkard Creek. *PFBC v. Consol*, Case No. 11-C-556 (Cir. Ct., Monongalia Cty., W.V.), and Case No. ___ (Comm. Pleas, Greene Cty., Pa.). In September 2009, these discharges allegedly caused a fish kill in Dunkard Creek, spanning over 30 stream miles in West Virginia and Pennsylvania.

### Background

According to the complaint, on September 8, 2009, after assisting their counterparts in West Virginia with reports of an upstream kill of fish, mussels, and amphibians, PFBC biologists discovered more dead specimens in the mainstem of Dunkard Creek, just below Brave, Greene County, Pennsylvania. PFBC staff then conducted a biological investigation of the kill, which revealed impacted individuals as late as September 15, 2009.

Monitoring results from several Consol mining operations located in West Virginia indicated that Consol had discharged high concentrations of chloride, in violation of the relevant Clean Water Act National Pollutant Discharge Elimination System (NPDES) permits, into Dunkard Creek from at least May 1, 2009 to November 30, 2009. In addition, during at least the month of September 2009, Consol released high levels of total dissolved solids from these discharge points, in violation of the relevant NPDES permits. These discharges created brackish water conditions favorable for a bloom of golden algae (*Prymnesium parvum*), which, when stressed, releases toxins fatal to fish and other aquatic life.

### Massive Fish Kills Alleged, Common Law Claims (So Far)

In the complaint, PFBC alleges that the algae bloom resulting in a massive fish, mussel and amphibian kill over the 19-mile stretch of Dunkard Creek located in Pennsylvania, including approximately 43 thousand fish, 15 thousand mussels (including 59 Pennsylvania endangered Snuffbox mussels), and 6,500 Mudpuppy salamanders. In addition, PFBC alleges that the resulting the loss of reproductive adults will result in loss future reproduction of 100 thousand fish (up to 2018), 145 thousand mussels, and 51 thousand mudpuppies (both up to 2029). PFBC estimated that 15 thousand lost angler trips (through 2018) due to the fish kill.

Due to the interstate nature of the violations of law and resulting injuries, the PFBC has brought suit against Consol in both the Pennsylvania and West Virginia state courts. The West Virginia suit seeks monetary compensation for the lost aquatic life and lost use of the natural resource for Pennsylvanians, as well as punitive damages. The West Virginia complaint relies on common law claims, including nuisance, trespass, negligence *per se*, negligence, and strict liability. The Pennsylvania suit has been initiated by filing of a writ of summons, meaning that a complaint has yet to be filed and the particular claims are not yet identified.

The suits follow in the aftermath of a March 2011 settlement between Consol, the United States, and the State of West Virginia resolving claims for civil penalties arising from the discharges alleged to have caused the Dunkard Creek fish kill and other violations, for a payment of $5.5 million. Consol also agreed to pay $500,000 to the West Virginia Division of Natural Resources West Virginia as compensation for the injury to the State's natural resources due to the Dunkard Creek fish kill, and also agreed to

design, install and operate treatment systems to assure that similar incidents do not occur in the future. The settlement, encapsulated in a Consent Decree before the U.S. District Court for the Northern District of West Virginia, did not require Consol to admit liability or the factual allegations contained in the underlying complaints. *U.S. and West Virginia v. Consol*, Case No. 1:11-CV-28 (Stamp, J., *consent decrees entered* June 15, 2011 and July 6, 2011).

### Conclusion and Implications

By the numbers, the Dunkard Creek fish kill was a dramatic event; one of the largest fish kills in Pennsylvania's recent history. Although early press reports speculated that the golden algae had hitchhiked into the Creek on gas drilling equipment, the Consol settlement with the EPA and West Virginia indicates that Consol acknowledges that its discharges are related to the fish kill, even if not a legally binding manner. Given the timing of the filing of the PFBC lawsuits, the statute of limitations for the common law tort claims was likely approaching and the PFBC filed suit to protect its claims, possibly while negotiating a settlement with Consol.

While the West Virginia suit lays out the PFBC tort claims, the Pennsylvania complaint, if it is filed, may include a broader array of statutory and natural resources damages claims, including broader claims for the lost value of the impacted species and specific claims under state and federal law. Litigation strategy may dictate that one of the lawsuits be stayed, but their interaction may be the most legally significant aspect of the matter, at least if the West Virginia suit remains a tort suit and the Pennsylvania suit evolves to include a more robust set of claims. While Pennsylvania environmental law is well developed in its traditional aspects, a two-jurisdiction suit by the PFBC is not traditional. This and the scale of Dunkard Creek fish kill, make this matter one to watch. (Patrick Zaepfel)

## CLEAN WATER ACT SECTION 401 CERTIFICATIONS A TOUGH HURDLE IN ILLINOIS

In September, the Illinois Environmental Protection Agency (IEPA) issued a denial of a § 401 certification to a so-called "mega-dairy" farm in the northwestern quarter of the state. The IEPA denied the Clean Water Act § 401 Water Quality Certification application submitted by Tradition Family Dairies. The application had been pending since 2008 and at least two significant supplemental information submittals were since filed by the applicant. However, community opposition was organized and included extensive objections on water quality issues.

IEPA officials have detailed the reasons for denial of the application in a 12-page letter dated Sept. 2 to Tradition Family Dairies, headquartered in Bakersfield, California. However, a copy of the letter was not made available to the public or your correspondent by either the agency or the applicant's counsel.

According to the IEPA news release, the primary reasons for the decision to deny the application, were: (1) Failure to demonstrate that the proposed activity would not cause violations of the applicable water quality standards; (2) Inadequate rationale for the need to lower water quality of the receiving stream, which would occur due to the placement of the fill material; (3) Inadequate explanation as to why impact to the South Fork of the Apple River cannot be avoided; (4) Inadequate information on the characterization of the receiving stream that is to be filled and (5) Failure to demonstrate that the proposed activity would not result in water pollution, based on site geology and hydrogeology.

IEPA indicates it will reevaluate the dairy's certification application, provided deficiencies identified in the denial letter are submitted.

### Comment Letters to IEPA

According to the *Decatur Tribune*, the IEPA received almost 100 letters asking them to reject the permit certification during the public comment period on the application. Among the environmental groups that submitted letters opposing the facility were HOMES, Illinois Citizens for Clean Air and Water (ICCAW), Prairie Rivers Network, Trout Unlimited, and Sierra Club.

"This smart decision by the IEPA has been a long time coming, but it was worth the wait," said Stacy James of Prairie Rivers Network. "We are relieved that Bos's manure pond will not become the headwater of a tributary of the Apple River."

This is a serious setback for A.J. Bos, apparently the principal owner of the applicant. Bos is said to be a California investor who had planned to bring in 11,000 cows, that opponents claim would endanger the pristine Apple River Canyon State Park and jeopardize dozens of family-owned farms.

### The Feds Weigh In

This past February, the U.S. Department of Justice alerted the State of Illinois that they were considering filing an enforcement action against the facility due to the mega-dairy's failure to comply with other provisions of the Clean Water Act in accordance with the U.S Environmental Protection Agency's requests. Then in April, the Illinois Attorney General filed a quarter of a million dollar lawsuit against the mega-dairy for an illegal discharge of silage leachate that occurred in October of 2010.

### Conclusion and Implications

Water quality certifications are commonly required for discharge permits. However, the Illinois Pollution Control Board has interpreted Illinois law in such a way as to require significant amounts of data and information from an applicant. The burden is on the applicant, and, ultimately, the agency, to have enough data and information to make a positive finding that degradation will not occur. The expense and time involved for applicants is thus considerable, and the burden is pretty high as well.

In water permit application cases prior to 2008, applicants generally made explanatory statements of reasons why water quality degradation was not to be expected from any new or increased discharge subject to the application. However, in that year, the Illinois Pollution control Board determined that a discursive assessment not backed up by data would fail in the face of some data form opponents that indicated a water quality threat. This concept was upheld in the appellate court, in *Illinois Environmental Protection Agency v. Illinois Pollution Control Bd.*, 386 Ill.App.3d 375, 896 N.E.2d 479, 324 Ill.Dec. 693 (2008), and has been since followed.

Given the increased constraints on state personnel imposed by the current economic slowdown, getting a controversial permit issued on water quality questions is proving to be a very tough challenge in Illinois. (Harvey M. Sheldon)

## NEWS FROM THE WEST

This month's News from the West covers a California case, a Montana case, and a Nevada case. First, a California Court of Appeal finds a water supply analysis underlying environmental review of a residential development project sufficient to support the conclusion that sufficient water is available to serve the project. Second, the Supreme Court of Nevada expressly adopts the public trust doctrine and determines its application in Nevada. Finally, the Supreme Court of Montana finds that a conservation group has sufficient ownership interest in water, even though that was limited to environmental and recreational interests, to require the Montana Water Court to hold a hearing on its objections to certain water rights claims.

### California Appeals Court Upholds Water Supply Analysis for Residential Project in City of Rocklin

*Clover Valley Foundation v. City of Rocklin*, 197 Cal. App.4th 200 (Cal.App. 2011).

Plaintiffs Clover Valley Foundation and others brought suit challenging the City of Rocklin's approval of a residential development project in Placer County, California. The plaintiffs alleged several violations of the California Environmental Quality Act (CEQA)—California's version of the National Environmental Policy Act. Among the petitioners' other claims, they alleged that sufficient evidence did not support the Environmental Impact Report's (EIR)

conclusion that an adequate water supply would be available for the project. However, the appeals court concluded that the EIR's water supply analysis was sufficient.

The residential project required roughly 630 acre-feet of water per year (afy), and the Placer County Water Agency, which has available approximately 17,360 afy of uncommitted water, certified that it had an adequate supply and sufficient infrastructure to meet the project's demands for the next 20 years. However, because this water is made available on a first-come, first-served basis, it was theoretically possible, depending on when build-out was complete, that the water would not ultimately be available for the project.

The plaintiffs challenged the EIR and its water supply analysis under California's landmark decision in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 150 P.3d 709 (Cal. 2007), a California Supreme Court case governing an EIR's analysis of water supply impacts. The plaintiffs claimed that the EIR's analysis failed to verify that sufficient water would be available and that the alternative sources discussed in the EIR were too uncertain to be considered viable. The court disagreed. Under *Vineyard*, identified future water supplies "must bear a likelihood of actually proving available," and the court found that the written certification satisfied this test. Given the demand of only 631 afy and the availability of over 17,000 afy, the court considered water availability to be a virtual certainty, which is more than CEQA requires.

### Nevada Supreme Court Unanimously Adopts Public Trust Doctrine

*Lawrence v. Clark County*, 254 P.3d 606 (Nev. 2011).

In *Lawrence v. Clark County*, the Nevada Supreme Court expressly adopted the public trust doctrine and determined its application in Nevada. The public trust doctrine is the legal concept that the people of each state are sovereign, and hold the absolute right to all their navigable waters, and the soils underlying those waters, for their common use. The consideration of this issue was triggered by a change in state law, requiring an executive state agency to transfer land to Clark County. The Nevada State Land Registrar refused to deed approximately 330 acres of land adjacent to the Colorado River because he believed it was non-transferable under the public trust doctrine. Clark County sued, claiming that the common law public trust doctrine had been superseded by state law. In a unanimous decision, the Nevada Supreme Court officially adopted the public trust doctrine, but declined to find that this prohibited all transfers of land.

The Court emphasized existing public trust doctrine principles in Nevada laws. First, the court noted several Nevada Supreme Court cases that have implicitly acknowledged the doctrine and adhered to its principles. Second, the Court highlighted public trust doctrine principles in the Nevada Constitution's Gift Clause, which requires courts to strike down transactions disbursing public funds if not made for public purposes. This clause, the Court stated, implied the people's intent to constrain the legislature's ability to alienate public trust lands as well as public funds. Third, the Court noted that two statutory sections evince the public trust doctrine. One section requires the use of state lands in the best interest of state residents, the other provides that the state's water belongs to the public. Finally, the Court established that the doctrine acts as an inherent limitation on the State's sovereign power under controlling U.S. Supreme Court authority, which held that the state holds property in trust for the people, it may only dispose of it in the public's interest.

Next, the Court delineated the application of the public trust doctrine in Nevada. First, it held that the doctrine applies only to land that was submerged beneath "navigable" water, *i.e.*, water usable as a highway of commerce, when Nevada joined the United States. Second, the doctrine continues to apply to dry land created by avulsion, a sudden change in the course of the stream, but not to land created by reliction—the gradual exposure of the land. Third, the doctrine prohibits the transfer of title unless it is in the public's interest. To determine whether a dispensation is in the public interest, the Court adopted Arizona's test: (1) whether the dispensation was made for a public purpose, (2) whether fair consideration was received; and (3) whether the dispensation maintains the trust for the use and enjoyment of present and future generations. The Nevada Supreme Court sent this case back to the lower court to determine whether the land transfer at issue met these requirements.

## Montana Supreme Court Requires Water Court to Hear Conservation Group's Objections

*Montana Trout Unlimited v. Beaverhead Water Company*, 255 P.3d 179 (Mont. 2011).

*Montana Trout Unlimited v. Beaverhead Water Company* concerns the interpretation of a Montana statute permitting a hearing on objections to preliminary water decrees. Montana Trout Unlimited, a conservation organization, had objected to the water rights claims of Beaverhead Water Company in Montana Water Court. Beaverhead argued that the group could not challenge the decree because Montana Trout Unlimited lacked an ownership interest in the water, and because only designated state agencies could represent the public's interests. The Montana Supreme Court disagreed, concluding that Montana Trout Unlimited must have its objections heard by the Water Court because it had a sufficient ownership interest in the water and its use to satisfy the statutory requirements.

The Montana Constitution and other laws provide for a process to adjudicate water rights. When a claim to certain water rights is made, the state's Water Court examines the claim, data from the Department of Natural Resources and Conservation, and other pertinent information, then issues an interlocutory, temporary preliminary, or preliminary decree. Public notice of the decree provides the opportunity for any objections, and the Water Court then holds hearings on the issues raised by the objections, then issues a final decree.

In April 2007, the Water Court issued a temporary preliminary decree in Basin 41D, the Big Hole River in southwestern Montana. Montana Trout Unlimited filed timely objections. Montana Trout Unlimited is an organization of anglers devoted to the conservation, protection, and restoration of coldwater fish, including wild and native trout in Montana, that has been actively involved in cooperative restoration efforts for arctic grayling and wild trout in the Big Hole River Basin. Despite the organization's demonstrated recreational and environmental interests in the water, Beaverhead argued that it lacked standing and moved to dismiss the group's objections. While the Water Court found that Montana Trout Unlimited did have environmental and recreational interests in the water at issue, it found that only the Montana Department of Natural Resources and Conservation or Department of Fish, Wildlife and Parks were authorized to represent the public's interests in water rights adjudication, and that the organization's interests were not sufficient to confer standing in its own right. The Water Court also expressed the concern that finding that persons and entities with recreational interests had property interests in the water would make notice requirements for water rights adjudication efforts meaningless, preventing further adjudication of water rights.

The Montana Supreme Court reversed the Water Court's decision. First, the Supreme Court found no express limitations in the water right adjudication statutes, rules, or case law on who can file an objection to a temporary preliminary decree. On this basis, the Court held that public recreational and conservation interests in water adjudication could be represented by parties other than a state department with jurisdiction over natural resources or wildlife. Second, the Court held that Montana Trout Unlimited had a sufficient ownership interest in water or its use to require the Water Court to hold a hearing on its objections. The Court found that the ownership interest required by statute was met by Montana Trout Unlimited's specific environmental and recreational interests in the river basin and its common interest in the waters of the state under the public trust doctrine. The Supreme Court also emphasized the importance of broad rights of participation in water adjudications, pointing out that, in previous cases, the Water Court had specifically invited all interested persons to respond as objectors, and that opening the process to permitting such objections had not overwhelmed the process, and would not in the future because of the Water Court's powers to manage the hearings. Finally, the Supreme Court found that the public notice requirements would not change by expanding the scope of participation in objections to preliminary water rights decrees. (Jill Willis)

## FLOOD CONTROL DEVELOPMENTS

# FLOOD CONTROL MANAGEMENT AND LIABILITY UPDATE

### Judge Dismisses Lawsuit Against FEMA and Reprimands Agency

In August a federal judge dismissed a lawsuit filed by Illinois communities challenging a proposed levee de-accreditation by the Federal Emergency Management Agency (FEMA). The lawsuit was based on a letter from FEMA announcing that the levees protecting the American Bottom area of Illinois would be de-accredited. In a strange twist, FEMA acknowledged at oral argument that the levees were in fact accredited, but refused to retract its earlier letter. The judge took the unusual step of chastising FEMA for this discrepancy and making a firm statement about the state of the area's levees.

### Background

The "American Bottom" is a 174-square mile area in the floodplain of the Mississippi River in the Metro East region of southern Illinois. In October 2007 FEMA sent a letter to community leaders indicating that the levee system protecting the area no longer provided protection from a 100-year flood, and those levees would effectively be removed from flood insurance maps. The letters cited studies performed by the U.S. Army Corps of Engineers (Corps), and FEMA produced early drafts of Flood Insurance Rate Maps (FIRMs) showing the levees as de-accredited. This would have meant that most homeowners and businesses in the American Bottom would have been required to purchase costly flood insurance and comply with harsh building restrictions.

### Lawsuit Against FEMA

The Metro East communities, including, Madison, St. Clair and Monroe counties, filed suit in 2010 in the U.S. District Court seeking to set aside FEMA's proposed flood maps showing the Metro East levee systems as de-accredited. However, during questioning during the case by Judge Gilbert, FEMA was unable to identify a basis for its decision to de-accredit the levees, and since the case began FEMA has determined that it must go back and redo its analysis of the levees.

During questioning at trial FEMA acknowledged that the 2007 letter's announcement and preliminary FIRMs de-accrediting the levees "are no longer operative" and that the existing pre-2007 FIRMs (indicating that the levees are accredited) are currently effective. Under these unusual circumstances, and in light of the fact that there was no final determination de-accrediting the levees, Judge J. Phil Gilbert concluded that the lawsuit is moot.

As an aside, the court held that FEMA was protected from suit under the doctrine of sovereign immunity, which generally provides that the federal government is immune from suit unless immunity is waived. Here, immunity was not waived because FEMA had not issued a final determination de-accrediting the levees.

What makes the decision unique is the court's final note about what it calls FEMA's "Potomac Two-Step." Noting that FEMA acknowledged in court that its 2007 letters are no longer operative but refused to state it in writing, Judge Gilbert wrote:

> The Court cannot comprehend why FEMA—a governmental agency whose mission

is to serve the public—cannot or will not withdraw or rescind, in written form, the portion of the October 2007 letters stating the levees and levee systems do not meet regulatory requirements and will be deaccredited.

Stating that FEMA was "compelled to talk out of both ends of its mouth" on the issue, the Court felt obligated to make the following statement, in bold text within its opinion:

> The Court wishes to make clear—to anyone with any interest whatsoever in the American Bottoms area, especially current, prospective, and formerly prospective residents and businesses of the region—that the levees of the American Bottoms are accredited and have been accredited at all times relevant to this lawsuit.

### Conclusion

Although FEMA now acknowledges that area levees are now accredited as providing adequate flood protection, the communities in Southwest Illinois are moving ahead with plans to invest in the area's levee systems to eliminate any doubt that they meet all applicable regulatory and engineering standards.

### K-Mart and Sears Bring Suit against the Corps and Levee Districts to Recover after Hurricane Katrina Levee Breaches

K-Mart Corporation and Sears Roebuck & Co. are seeking $14.5 million in damages from the Corps, three New Orleans levee districts and the districts' insurer. The plaintiffs claim that the Corps and levee districts were negligent in the design and maintenance of several levees that were breached during Hurricane Katrina, flooding the city and damaging two of the plaintiffs' stores.

At the heart of the plaintiffs' claims against the Corps are allegations that the agency repeatedly permitted construction of flood control facilities that were not up to Corps standards. In 2007, K-Mart and Sears filed claims with the Corps for damages. The Corps has neither accepted nor rejected the claims, and plaintiffs have now brought the issue federal court to recover against the agency. The complaint cites the findings by the Interagency Performance Evaluation Taskforce, which issued a report in March 2007 concluding that the levee system was incomplete and inconsistent.

The filing also directs claims against the levee districts, whose allegedly insufficient care and inspection of the levees contributed to their failure. The suit claims that inadequate design and maintenance of the levees in the area exacerbated the damage caused by Hurricane Katrina, and resulted in greater loss to the plaintiffs' stores and the surrounding area. According to the plaintiffs:

> …none of the flood wall breaches…would have occurred as a result of Hurricane Katrina alone….Rather, these breaches occurred solely as a result of defendants' faulty and negligent engineering, design, construction, and maintenance.

The case, *Kmart Corp. et al. v. U.S.*, case number 2:11-cv-02062, was filed in the U.S. District Court for the Eastern District of Louisiana. No trial date has yet been set.

### New Corps Study Suggests Benefits to Trees on Levees

A study released by the Corps researchers in early September suggests that tree plantings on levees can boost flood safety in some situations. The study was based on field research at levees sites across the nation, and concluded that trees at the base of levees can improve levee safety by binding the soil together with their roots. Though some uncertainties remain, the study also concluded that seepage as a result of tree roots in the levees, which had previously been pointed to as a justification for the tree ban, had a "negligible" impact on levee safety.

The results of the study potentially conflict with the Corps' current levee vegetation policy, which was revamped in 2007 to permit only grass to grow on levees. If local levee agencies fail to comply with this policy, they risk losing federal disaster aid. The results of the Corps study, and the Corps' response to it, have particular salience in California, where the Department of Water Resources estimates that tree removal on the Central Valley's 1,600 miles of levees could cost as much as $7.5 billion.

Citing some inconclusive results in the study, the Corps reports that it currently has no intention of changing the vegetation policy. Still, Tammy Conforti, the national manager of the Army Corps Levee Safety Program, said the Corps is drafting a new "stand-alone document" that would augment the current vegetation policy. That document would provide for site-specific exceptions to the grass-only policy, based on the unique conditions on a particular levee site. These developments, as well as the Corps' efforts to create regional teams of experts to investigate these and other issues, suggest that the Corps may be to incorporate some flexibility into the policy in the future. (Andrea Clark)

## PENALTIES & SANCTIONS

# RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

### Civil Enforcement Actions and Settlements—Water Quality

•Dow Chemical Company (Dow) has agreed to pay a $2.5 million civil penalty to settle alleged violations of the CAA, Clean Water Act (CWA) and the Resource Conservation and Recovery Act (RCRA) at its chemical manufacturing and research complex in Midland, Michigan. In addition to paying a penalty, Dow will implement a comprehensive program to reduce emissions of volatile organic compounds (VOCs) and hazardous air pollutants (HAPs) from leaking equipment such as valves and pumps. These emissions are generally controlled through work practices, such as monitoring for and repairing leaks. The settlement requires Dow to implement enhanced work practices, including more frequent leak monitoring, better repair practices, and innovative new work practices designed to prevent leaks. In addition, the enhanced program requires Dow to replace valves with new "low emissions" valves or valve packing material, designed to significantly reduce the likelihood of future leaks of VOCs and HAPs. According to the 24-count complaint, filed simultaneously with the settlement, Dow allegedly violated CAA requirements for monitoring and repairing leaking equipment, for demonstrating initial and continuous compliance with regulations applicable to chemical, pharmaceutical and pesticide plants, and for failing to comply with reporting and recordkeeping requirements. The complaint also asserts that Dow violated the CWA's prohibition against discharging pollutants without a permit and violated the RCRA's requirements for hazardous waste generators.

•A settlement between the United States and the Jersey City, New Jersey Municipal Utilities Authority (JCMUA) will resolve Clean Water Act violations for JCMUA's failure to properly operate and maintain its combined sewer system. JCMUA violations included releases of untreated sewage into the Hackensack River, Hudson River, Newark Bay and Penhorn Creek. JCMUA will invest more than $52 million in repairs and upgrades to its existing infrastructure and pay a civil penalty of $375,000. Under the settlement, JCMUA is required to comply with its CWA permit and will conduct evaluations to identify the problems within the system that led to releases of untreated sewage. JCMUA will also complete repairs to approximately 25,000 feet of sewer lines over the next eight years. Finally, JCMUA will invest $550,000 into a supplemental environmental project that will remove privately owned sewers from homes in several neighborhoods in Jersey City and replace them with direct sewer connections, creating better wastewater collection in those areas.

•The Metropolitan St. Louis Sewer District (MSD) has agreed to make extensive improvements to its sewer systems and treatment plants, at an estimated cost of $4.7 billion over 23 years, to eliminate illegal overflows of untreated raw sewage, including basement backups, and to reduce pollution levels in urban rivers and streams. The settlement reached between the United States, the Missouri Coalition for the Environment Foundation, and MSD requires MSD to install a variety of pollution controls, including the construction of three large storage tunnels ranging from approximately two miles to nine miles in length, and to expand capacity at two treatment plants. These controls and similar controls that MSD has already implemented will result in the reduction of almost 13 billion gallons per year of overflows into nearby streams and rivers. MSD will also be required to develop and implement a comprehensive plan to eliminate more than 200 illegal discharge points within its sanitary sewer system. Finally, MSD will engage in comprehensive and proactive cleaning, maintenance and emergency response programs to improve sewer system performance and to eliminate overflows from its sewer systems, including basement backups, releases into buildings and onto property. The settlement will also significantly advance the use of large scale green infrastructure projects to control

wet weather sewer overflows by requiring MSD to invest at least $100 million in an innovative green infrastructure program, focused in environmental justice communities in St. Louis. MSD, in conjunction with the city of St. Louis economic redevelopment authorities, will transform numerous vacant or abandoned properties to productive use—helping to revitalize disadvantaged communities and resulting in cleaner air and green space. MSD will conduct public education and outreach, and collaborate with local residents and neighborhood groups, including those representing minority and/or low-income neighborhoods, in selecting the locations of green infrastructure projects. MSD has also committed to spending $230 million in a mitigation program to alleviate flooding and another $30 million in an enhanced pipe-lining program, both of which are focused exclusively in environmental justice areas. These programs and the pioneering green infrastructure program of the settlement will further the DOJ and EPA's work to advance environmental justice. In addition to improving its sewer system and treatment plants, MSD will spend $1.6 million on a supplemental environmental project (SEP) to implement a voluntary sewer connection and septic tank closure program for low-income eligible residential property owners who elect to close their septic tanks and connect to the public sewer. MSD will also pay a civil penalty of $1.2 million to the United States. MSD's sewer system collects and treats domestic, commercial and industrial wastewater from a population of approximately 1.4 million in the city of St. Louis and nearly all of St. Louis County. The system covers more than 525 square miles, and includes seven wastewater treatment plants, 294 pumping stations and more than 9,630 miles of sewer lines, making it the fourth largest sewer system in the United States. The settlement resolves the claims brought by the United States in a lawsuit filed in June 2007 wherein the United States alleged that on at least 7,000 occasions between 2001 and 2005 failures in MSD's sewer system resulted in overflows of raw sewage into residential homes, yards, public parks, streets and playground areas.

• The City of Newport, Rhode Island has agreed to eliminate illegal discharges of sewage into Narragansett Bay from its wastewater treatment plant and wastewater collection system. The City has also agreed to: take actions to reduce the pollutants associated with storm sewer discharges to Easton's Beach; purchase and distribute rain barrels to residents in order to capture stormwater for reuse; and take other actions to encourage low impact development. The EPA estimates that Newport will spend about $25 million to address these issues. The City will also pay a $170,000 penalty to be split between the federal and state governments. The settlement is the result of a federal and state enforcement action brought by the DOJ on behalf EPA, the State of Rhode Island through the Rhode Island Department of Environmental Management, and the National Environmental Law Center on behalf of Environment Rhode Island and certain Rhode Island citizens. Under the consent decree, Newport is required to develop a comprehensive system wide plan to address discharge violations at its wastewater treatment plant and eliminate overflows from its wet weather sewage treatment facilities and from other points in its collection system. Planned actions include identifying and removing extraneous sources of water from its collection system by eliminating stormwater connections and repairing or replacing leaky pipes. The city will also take measures to reduce the levels of bacteria in discharges from its storm sewer system to Easton's Beach.

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

• In a settlement valued at more than $1.7 million, Clean Harbors of Braintree, Inc. has agreed to pay a significant penalty and perform additional projects in response to a complaint regarding numerous violations of hazardous waste management and emergency planning laws at the company's Braintree, Massachusetts facility. Under the settlement, Clean Harbors will pay a $650,000 penalty and will spend $1,062,500 on a SEP consisting of planting approximately 1400 trees in low-income and historically disadvantaged environmental justice areas in Boston. It is expected that Clean Harbors will work with the City of Boston Parks and Recreation Department to implement the project over a two-year period. Clean Harbors also will comply with an enhanced waste analysis plan that goes beyond what is currently required in its hazardous waste permit. This plan will help to ensure that the hazardous waste Clean Harbors receives and generates will be properly characterized and managed. Further, Clean Harbors

has installed and will maintain a vapor collection system for its tanks that will collect and treat VOC emissions. EPA identified nearly 30 violations of both RCRA and EPCRA at a June 2007 site inspection of the Braintree Clean Harbors facility. Those violations included inadequate waste characterization, the failure to properly maintain its hazardous waste tanks, inadequate secondary containment, and improper storage of incompatible wastes. At the time of the inspection, many of the company's hazardous waste tanks were deteriorating and in poor condition. In July 2007, EPA issued an administrative order directing Clean Harbors to immediately address numerous conditions identified during the inspection that could have posed a danger to human health or the environment. Clean Harbors came into compliance soon after the 2007 order. Inspectors from the Massachusetts Department of Environmental Protection (MassDEP) participated in the June 2007 inspection and provided support to EPA during the settlement process. In a separate consent order, MassDEP required Clean Harbors to replace all of the old storage tanks, as well as implement numerous other needed infrastructure upgrades at the facility. Clean Harbors has purchased and installed new hazardous waste tanks. (Melissa Foster)

## JUDICIAL DEVELOPMENTS

# D.C. CIRCUIT UPHOLDS GENERAL VESSEL DISCHARGE PERMIT AGAINST CHALLENGES THAT EPA DID NOT PROVIDE OPPORTUNITY FOR NOTICE AND COMMENT

*Lake Carriers' Association v. U.S. Environmental Protection Agency,* ___F.3d___, 0Case Nos. 09-1001, 09-1010, 09-1076, 09-1115 (D.C. Cir. 2011).

Trade associations challenged the issuance of a general National Pollutant Discharge Elimination System (NPDES) permit by the U.S. Environmental Protection Agency (EPA) authorizing incidental vessel discharges that contained both general conditions and conditions applicable only in individual states. The petitioners alleged that by publishing the draft permit before the states added their state-specific discharge requirements, EPA not only denied the public an adequate opportunity to comment on the states' requirements, but also acted arbitrarily and capriciously by failing to consider the cumulative effects of the individual states' requirements. The court denied the challenge and upheld the permit, finding that any failure to receive comments on the states' requirements was harmless error because petitioners did not demonstrate that EPA had the authority to revise or reject state amendments to a general NPDES permit.

### Background

The Clean Water Act (CWA) prohibits the discharge of pollutants into the waters of the United States without an NPDES permit. Under CWA § 401, NPDES permit applicants must provide EPA with a "certification from the state in which the discharge originates." States may also attach additional, state-specific requirements to their certifications that "shall" be incorporated into the applicant's final NPDES permit.

For the past several decades, EPA regulation 40 C.F.R. § 122.3(a), exempted vessels from having to obtain an NPDES permit. However, this exemption was vacated following a 2008 opinion issued by the Ninth Circuit. *See, Northwest Envtl. Advocates v. EPA,* 537 F.3d 1006 (9th Cir. 2008). In response to this decision, EPA developed the Vessel General Permit (VGP), a far-reaching NPDES permit authorizing the discharges previously exempted under § 122.3(a). The draft VGP, published in June 2008, did not include any state-specific conditions; instead, the published announcement informed the public that EPA was in the process of seeking state certifications. The draft VGP also established a 45-day notice and comment period, during which time EPA received several comments suggesting that the anticipated state-specific requirements would create a burdensome regulatory patchwork. EPA responded that any requirements imposed by the states would necessarily become part of the general permit, as EPA lacks discretion under the CWA to amend or reject states' certification conditions.

The final VGP, published in December 2008, contained approximately 100 state-imposed conditions with which covered vessels must comply when they are located within the territorial waters of the associated state. Shortly after the final VGP was issued, three trade associations filed petitions seeking review of the final VGP. Those petitions were consolidated and brought before the D.C. Court of Appeals.

### The D.C. Circuit's Decision

#### Deprivation of Opportunity for Public Comment

Petitioners alleged first and foremost that EPA deprived the public of its right to comment on the final VGP—in violation of the Administrative Procedure Act (APA)—because the published draft VGP did not contain the more than 100 state certification conditions that were incorporated into the final VGP. EPA offered two counter-arguments. First, EPA contended that the CWA does not mandate that the public be provided an opportunity to comment on state requirements; rather, a certifying state "shall establish . . . , *to the extent it deems appropriate*, proce-

dures for public hearings." The court did not agree with this reading, finding that the public's right to comment on agency decisions cannot be supplanted with other, statute-specific rules unless the supplanting statute does so expressly, and the requisite expression of congressional intent was not present in the cited portion of the CWA. The court was, however, persuaded by EPA's second argument: that the petitioners had failed to show that any opportunity for comment could have influenced the final VGP because the petitioners had failed to establish that EPA even had the authority to amend or reject the states' certification conditions.

Petitioners responded with a technical parsing of the CWA, contending that the CWA permits EPA to consider input from the states, but that a permit for a mobile source with discharges in multiple states must ultimately originate with the EPA. The court disagreed with petitioners' interpretation, noting that the cited language was not applicable to the VGP because the state-specific conditions do not apply to *all* pollutants discharged by a vessel, but only to those discharged within the territory of the particular state imposing the requirement. The court also noted that the petitioners had waived their right to assert this argument because they failed to raise this issue before the EPA.

Petitioners argued that the opportunity for comment would not have been fruitless because it would have alerted EPA of potential constitutional issues with the final VGP. Specifically, petitioners alleged that when taken together, the state and federal conditions in the final VGP are potentially incompatible and thus, violate due process. Additionally, petitioners argued that the cumulative effect of the final VGP regulations created an impermissible burden on interstate commerce. The court rejected both of these arguments. First, the court found no violation of due process because the potentially conflicting state requirements never apply to a vessel simultaneously; thus, full compliance with the final VGP is not impossible. Second, the alleged burden on interstate commerce becomes problematic under the dormant Commerce Clause only if it is created by state law, and the issue before the court was the validity of a *federal* permit.

In short, petitioners' constitutional and statutory construction arguments were unavailing, and the court declined to remand EPA's promulgation of the final VGP on those grounds.

### Arbitrary and Capricious Action

Petitioners also alleged that EPA acted arbitrarily and capriciously by failing to consider comments it received in response to the draft VGP, many of which raised the concern that the then-unknown state conditions would create a burdensome patchwork of regulations. The court rejected this argument because EPA did, in fact, consider these comments, and gave the public the same answer that it gave the court: that the CWA does not permit EPA to create a single, nationwide permit that does not accommodate conditions set by individual states for vessels traveling within their territories. The court found that EPA's response was not only well-considered and not arbitrary, but also a correct interpretation of the CWA.

Petitioners also alleged that EPA did not properly consider the economic impact of the final VGP on small businesses, as required under the Regulatory Flexibility Act (RFA). The court acknowledged that EPA did not analyze the effect of the state conditions on small businesses, but noted that petitioners had failed to raise that issue with the EPA, even though the draft VGP clearly expressed EPA's understanding that it was not required to conduct that analysis. Accordingly, this argument was also waived and could not be raised before the court.

### Conclusions and Implications

This *per curiam* order brings closure to an issue affecting thousands of vessels, and affirms the validity of the state-specific discharge requirements appended to the final VGP. It also highlights the limits of EPA's authority to craft discharge rules under the CWA: after its vessel exemption was vacated, the CWA required EPA to share its authority with the states. More broadly, the opinion suggests that an agency performing duties that are effectively mandatory may not violate the APA by failing to accept or consider public comments. (Rebecca Couch, Jeremy Esterkin)

# NINTH CIRCUIT HOLDS A CITIZEN SUIT UNDER CERCLA CANNOT BE USED TO ENFORCE VIOLATIONS OF AN EPA ADMINISTRATIVE ORDER

*Pakootas v. Teck Cominco Metals, Ltd.*, ___F.3d___, Case No. 08-35951 (9th Cir. 2011).

The Ninth Circuit Court of Appeals has held that a citizen suit under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) cannot be used as a vehicle to enforce penalties for a violation of the U.S. Environmental Protection Agency's (EPA) administrative order. The Ninth Circuit found that plaintiffs who sued to collect $24 million of pollution-related penalties had no standing.

## Background

The Columbia River flows from Canada through the United States to the Pacific Ocean, watering farmland and powering hydroelectricity along the way. From 1905 to 1995, Teck Cominco, a smelter mine located in British Columbia, had been dumping polluting slag into the Columbia River, which flowed down to and caused environmental damage in the United States. The smelter annually dumped about 145,000 tons of waste into the Columbia River.

In August 1999, the Confederated Tribes of the Colville Reservation petitioned the EPA to study the contamination of the Columbia River in northeastern Washington, where they live. The EPA assessed the site and found contamination that included heavy metals such as arsenic, cadmium, copper, lead, mercury and zinc. The EPA completed its site assessment in March 2003, concluding that a significant amount of slag had contaminated the Columbia River's waters and biological ecosystem. Thus, the EPA determined that the site was eligible for listing on the National Priorities List (Superfund list), which qualified it for CERCLA-financed remedial action.

As the predominant source of contamination, the smelter approached the EPA and expressed willingness to perform an independent, limited human health study if the EPA would delay proposing the site for Superfund listing. The EPA and Teck entered into negotiations, but the two sides stalemated over the scope and extent of the proposed investigation.

In December 2003, the EPA issued a unilateral administrative order to Teck. The order directed Teck to investigate and determine the full nature of contamination at the site due to the smelter, including conducting activities like project scoping, data collection, risk assessment, treatability studies, and analysis of alternatives. Teck did not comply with the order, but the EPA did not seek to enforce the order.

Therefore, plaintiffs, members of the Colville Tribes, filed an action to enforce the EPA's order under the citizen suit provision of CERCLA. The plaintiffs sought a declaration that Teck had violated the order, injunctive relief enforcing it against Teck, and penalties for non-compliance and recovery of costs and fees. The complaint alleged that the smelter knew that the released pollution would likely cause harm to individuals, such as the plaintiffs, who use the Upper Columbia River for recreation.

Meanwile, the EPA and Teck settled in June 2006. Teck agreed to personal jurisdiction in the U.S. District Court and signed a contractual agreement to perform remediation. The EPA covenanted not to sue for penalties or injunctive relief for noncompliance with its unilateral administrative order so long as Teck performed its obligations under the parties' contract.

In all, there were 892 days that Teck did not comply with the terms of the EPA administrative order. The plaintiffs then amended their complaint and limited their relief sought to civil penalties for Teck's 892 days of noncompliance with the EPA's administrative order—$27,500 a day or $24 million. The court concluded, however, that the plaintiffs' claim for penalties was jurisdictionally barred by CERCLA and did not fall within any of CERLCA's exceptions.

## The Ninth Circuit's Decision

### CERCLA Citizen Suit Interferes with Cleanup Efforts

CERCLA contains a jurisdiction-stripping provision whereby federal courts are without jurisdiction to review any challenges to a "removal or remedial action" selected by the EPA. 42 U.S.C § 9613(h). The

purpose of this statue is to protect the execution of a CERCLA plan during its pendency from lawsuits that might interfere with the expeditious cleanup effort.

The plaintiffs claimed that their lawsuit only sought past penalties and so is not a challenge of a remedial action under CERLCA. The court, however, disagreed. Under the EPA/Teck contract, the EPA agreed not to sue for the 892 days of penalties, conditioned upon the satisfactory performance by Teck of its cleanup obligations. That conditional covenant not to sue acted as EPA's $24 million hammer hanging over Teck's head. The court found that if the plaintiffs were able to enforce the 892 days of penalties, the EPA would be left bare-handed and Teck could then walk away from its cleanup efforts in the name of economic efficiency.

Further, the court noted that polluters do not have unlimited financial resources. If the orange is squeezed dry, the juice going to pay penalties cannot go to the contractors who perform the cleanup work. Thus, the court found that a citizen's suit for past penalties always has the potential to interfere with ongoing cleanup efforts and is a challenge to an EPA remedial action.

### The Exception Did Not Apply

The plaintiffs also argued that if their citizen's suit for penalties is considered a challenge, then their suit is excepted by virtue of U.S.C. § 9613(h)(2) which provides that actions may be brought to enforce an order to recover EPA penalties. The court found, however, that the plaintiffs do not fall under this exception's purview.

The (h)(2) exception gives the EPA the ability to impose fines as an enforcement mechanism or cost recovery action for the Superfund. These fines are not disbursed to persons claiming to be injured by the pollution. Thus, the penalty money is Superfund money, payable to the government, not payable to citizens who bring lawsuits.

Under this theory, the plaintiffs in effect sought a penalty payable to the Superfund where the EPA chose not to recover these fees.

### Conclusion and Implications

Courts lack jurisdiction to adjudicate citizen suits for penalties associated with a violation of an EPA administrative order. In this case, the EPA chose not to enforce its penalties in exchange for Teck's compliance with their settlement agreement. Plaintiffs, therefore, were jurisdictionally barred from enforcing these penalties in a citizen suit. (Gregory Snarr, Theirry Montoya)

## DISTRICT COURT HOLDS CERCLA SECTION 107 COST RECOVERY IS ONLY RECOURSE FOR PARTY WHO INCURRED INVESTIGATION AND REMEDIATION COSTS VOLUNTARILY

*Queens West Development Corporation, et. al. v. Honeywell International Inc.*, ___F.Supp.2d___, Case No. 10–4876 (D. N.J. Aug. 17, 2011).

The District Court for New Jersey granted in part and denied in part defendant Honeywell International Inc.'s (Honeywell) motion to dismiss three counts of plaintiff Queens West Development's (QWD) complaint under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Honeywell argued that because QWD incurred its investigation and remediation costs voluntarily, and CERCLA preempts sate law, QWD's claims should be dismissed. Honeywell also argued that QWD's claim for restitution should also be dismissed. The court agreed and granted Honeywell's motion to dismiss the CERCLA and related state law claims, but permitted QWD to proceed with its alternative claim for restitution.

### Background

QWD sued Honeywell for costs attributed to the past and future investigation and remediation of a parcel of land located along the East River waterfront in Long Island City, New York (site). The site had been contaminated by Warren Chemical and Manufacturing Company (Warren) and its successors, which owned Warren Chemical Works. While

located at the site, Warren Chemical Works produced roofing and paving products and, as a result, released and disposed of substantial amounts of coal tar, creosote material, and related hazardous substances into the soil and groundwater at the site. Through a series of mergers and acquisitions, it is undisputed that Honeywell is the legal successor to Warren. Years later, the site was designated for redevelopment as part of the Queens West Development Project.

Under the approval and oversight of the New York State Department of Environmental Conservation (NYSDEC), and pursuant to the NYSDEC's Brownfield Cleanup Program and Voluntary Cleanup Program, QWD investigated the site and uncovered the extensive coal tar contamination. QWD then began remediating the site and has incurred necessary response costs of approximately $16 million. In an attempt to recoup its costs, QWD filed suit against Honeywell alleging claims for cost recovery under §107(a) of CERCLA, contribution under §113(f) of CERCLA, private nuisance, and restitution.

## The District Court's Opinion

### Contribution

The court first considered whether QWD could assert a claim for contribution under § 113(f)(3)(B) of CERCLA. Honeywell argued that § 113(f)(3)(B) was not available to QWD for three reasons. First, Honeywell argued that § 113(f) was not available because QWD incurred all of its costs voluntarily. Second, Honeywell argued that the costs incurred by QWD were not costs of reimbursement provided to the government, as required under CERCLA. Third, Honeywell argued that QWD's lack of an "administrative or judicially approved settlement" with the government made a § 113(f) claim unavailable. QWD asserted that it was not precluded from attempting to recover its costs under §107(a) and/or §113(f).

### The Relationship between Contribution and Cost Recovery

The District Court considered the seminal case law contemplating the relationship between §113(f) and §107(a) claims under CERCLA and agreed with Honeywell that the only relief available to QWD was a cost recovery claim under § 107(a)(4)(B). The court noted that QWD had incurred all of its costs voluntarily, and case law is clear that costs incurred voluntarily are only recoverable under §107(a). Further, the court pointed out that while some courts have acknowledged that there might possibly be some overlap between §107(a) and §113(f), it was clear that QWD was not a potentially responsible party. In this case, there was no allegation that QWD participated in or otherwise contributed to any of the contamination at the site. Thus, QWD could not maintain an action for contribution under §113(f), because an action for contribution is a "tortfeasor's right to collect from other responsible for the same tort." Finally, the court also highlighted the fact that QWD had not alleged that they had entered into an "administrative or judicially approved settlement." QWD argued that this requirement was satisfied because it was in the process of resolving its liability with NYSDEC. However, the court stated that, in its view, §113(f) required that the resolution of a party's liability be accomplished by way of an administrative or judicially approved settlement. Thus, the court determined that QWD's pending status with NYSDEC was simply not enough and dismissed its § 113(f) claim.

### Nuisance

Next, the court considered whether QWD had a viable claim for private nuisance. The court analyzed QWD's claim for nuisance under New Jersey and New York laws and found that it failed under both. Honeywell properly argued that case law indicates that a "historic contamination" at a site does not qualify as an invasion, which is required in an action for nuisance. Despite QWD's argument that the essence of a nuisance claim is the invasion of one's interest in the private use and enjoyment of land and that Honeywell (through its predecessor, Warren) had interfered with this interest, the court determined that QWD simply could not establish the requisite "invasion" had occurred. The court opined that because the latent contamination had been at the site for decades it could not be said to have invaded QWD's property. In addition, Honeywell argued that the doctrine of *caveat emptor* precludes nuisance claims against predecessors in title.

### Restitution

Finally, the court considered Honeywell's motion to dismiss QWD's claim for restitution. Here, QWD

argued that Federal Rule of Civil Procedure 8(d)(2) permits a party to state alternative claims and as such, its CERCLA claims and restitution claim should both be permissible at this juncture. The court agreed and allowed QWD to proceed with its CERCLA § 107 as well as with its state common law restitution claim.

### Conclusion and Implications

The court's opinion adds to the growing case law supporting the proposition that § 107 claims for cost recovery and § 113 claims for contribution are distinct causes of action available in distinct circumstances. The District Court reiterates the conclusion that where § 107 is available, § 113 is not, and vice-versa. With regard to an environmental claim under private nuisance law, this opinion indicates that where historical contamination of a site can be shown, then a claim for nuisance will likely fail due to the inability to establish an "invasion" occurred. (Rebecca Couch, Kate Conard)

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

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

The U.S. District Court for the Eastern District of New York has dismissed three of six claims 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. 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 (2nd 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.

### Statute of Limitations and 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.

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)

# MARYLAND COURT OF SPECIAL APPEALS UPHOLDS POULTRY LITTER WATER QUALITY GENERAL PERMIT

*Assateague Coastkeeper, et al. v. Maryland Department of the Environment*, Case No. 471, September Term 2010 (Md.App. Sept. 6, 2011).

The Maryland Court of Special Appeals in September upheld the General Permit issued by the Maryland Department of Environment (MDE) for Maryland animal feeding operations.

The MDE promulgated the water quality General Permit, Maryland Permit No. 09AF, to regulate a larger portion of the state's poultry litter. It extends regulatory scrutiny beyond just operations that qualify as concentrated animal feeding operations (CAFO) under Clean Water Act regulations and includes a class of Maryland animal feeding operations (MAFO) which are of similar size as CAFOs but do not discharge or propose to discharge to surface water. Under the permit, a MAFO automatically becomes a CAFO if it discharges to surface water.

The state discharge permit required for MAFOs addresses only groundwater; it does not permit discharges to surface water. Although General Permit requirements for CAFOs and MAFOs are the same in many respects, including submission and review of nutrient management plans (NMPs), discharge requirements for MAFOs are relaxed in some respects. One aspect of the MAFO requirements that environmental groups objected to was that it allows MAFOs to store dry manure in the field for up to 90 days without a plastic liner as compared to the 14 days allowed for CAFOs.

## Background

According to MDE, prior to issuance of the General Permit, issued December 1, 2009, Maryland had fewer than 15 CAFOs regulated under its 1996 General Permit. In February 2010, MDE reported that more than 450 farms had already applied for coverage under the permit.

According to MDE, pollution on poultry farms typically comes from two sources: excess fertilizer on crops, which runs off and pollutes local waterways, and discharge of nutrients through improper storage of "chicken litter," a mixture of manure and wood shavings used for bedding. Chicken litter may be used for fertilizer, reducing the amount of chemical fertilizers needed to grow crops. Prior application of fertilizer is addressed through a NMP) developed in conjunction with the Maryland Department of Agriculture.

The General Permit does not permit discharge of storm water to surface water if it has come into contact with manure or other farm contaminants. The General Permit mandates containment and minimization of discharges through use of best management practices such as retention ponds without outlets, good housekeeping, and storing manure and chicken litter in roofed areas.

Upon adoption, the Maryland Department of Agriculture had estimated that approximate 75 to 100 poultry operations would fall into the larger category, and 100 to 125 will be covered in the second category. Funding under the Agricultural Water Quality Cost-Share Program, including funding from the 2010 Chesapeake and Atlantic Coastal Bays Trust Fund, is reportedly available to assist farms to meet new MAFO requirements, and technical assistance is available from soil conservation districts.

The permit requires a soil conservation and water quality management plan be integrated with a nutrient management plan to start controlling pollution from animal waste from production areas to fields, authorizes water quality and management monitoring by state agencies, and authorizes inspections and enforcement of water quality problems by MDE.

According to news reports, farmers have vigorously opposed early drafts of the regulations and the general permit, arguing that the regulations and general permit would hurt the smaller contract producers. The poultry industry on Maryland's Eastern Shore reportedly is a multi-billion dollar business, raising more than 300 million chickens annually—producing some 700 million pounds of manure. Much of the manure is used as fertilizer on farm fields, although many farmers lack sufficient acreage to spread fertilizer without overapplying it and causing runoff. But poultry processors, farmers and agricultural concerns

argued that Maryland's long tradition of poultry raising was being threatened. Many argued that Maryland should instead adopt oversight that would entail voluntary efforts to meet federal Clean Water Act standards.

### Challenge to the General Permit

Environmental groups, arguing that the General Permit was inconsistent with Clean Water Act requirements, challenged the General Permit respecting MAFOs because it:

> …allows open storage of poultry litter under conditions that are certain to result in discharges of pollutants to the waters and groundwaters of Maryland [and]…fails to ensure compliance with water quality standards and TMDL waste load allocations prior to permit coverage approval.

The appellate court, however, sided with MDE, holding that since the Maryland General Permit was actually broader than federal law, because it extended to operations that do not discharge to surface waters.

> Its decision to regulate [MAFOs] which, as indicated, previously were not regulated, is consistent with the statutory policy goal to 'prevent, abate and control pollution of the waters of this state.' That appellants would like stricter controls … is not dispositive.

### Conclusion and Implications

The historically slow, steady degradation of the Chesapeake Bay has been a frequent target of environmental groups and political leaders. Although MDE's new MAFO program was considered to be aggressive regulation of poultry operations at the time of its adoption—and associated regulations were vigorously opposed by poultry growers—environmental groups nevertheless challenged its provisions as being insufficient to protect the state's waters. Such disputes are likely to continue as competing values clash in the Chesapeake Bay region. (William Wilcox, Jr.)

## NEW HAMPSHIRE SUPREME COURT FINDS AMBIGUITY CREATES RIGHT OF ACCESS TO POND

*Austin v. Silver*, Case No. 2010-534 (N.H. Sept. 15, 2011).

The New Hampshire Supreme Court was confronted with the question whether a successor owner of a portion of a property had a right of access to a local pond when the predecessor owner of the dominant parcel failed to provide them that right. Finding there was an ambiguity in the manner in which the dominant parcel had been divided and deeded to successor owners, despite any clear grant of a riparian right of access to a local pond (Rocky Bound Pond in Croydon, New Hampshire), the New Hampshire Supreme Court found it's nonetheless to be ambiguous and, therefore, granted the right.

### Background

This case arose to the New Hampshire Supreme Court on an appeal from David James and Carolyn Austin and Robert Guinto, who owned a parcel of land surrounding Rocky Bound Pond in Croydon, New Hampshire. A neighbor, Leslie and Sophie Silver, obtained a parcel of land from an earlier owner (John A. Heath and Donna Donas J. Reney) who had historically owned both the parcels obtained by the petitioners Austin Guinto, as well as the parcel that the Silvers' acquired. Unfortunately, after the deed from Heath to Reney in 1950, there was a lack of clarity in whether the portion that the Silvers acquired retained the right of access to the pond and when the Silvers insisted that they have this right, the Austins and Guintos filed an action to bar them from using it.

### The Supreme Court's Decision

The New Hampshire Supreme Court noted that resolving an issue for quiet title requires the Court interprets the relevant deeds. Interpretation of deeds in a quiet title action is ultimately a question of law

to be resolved by the Court. The Court's determination of the disputed deeds, in turn, is based upon the parties' intentioned derived from construing the language of the deed from as nearly as possible the position of the parties at the time of the conveyance and by interpreting the surrounding circumstances and behavior of the parties subsequent to the conveyance. The Court noted that if a deed is clear and unambiguous, then the role of any interpretation is limited to non-existent because the meaning of the deed is clear. Where, however, the language of the deed is ambiguous, extrinsic evidence of the parties' intentions and circumstances surrounding the conveyance may be used by the Court to clarify the terms.

### Resolving Property Rights in the Face of an Ambiguous Deed

The Court then noted that a deed is patently ambiguous when its language fails to provide sufficient information to describe the conveyance adequately without reference to extrinsic evidence. Further, a latent ambiguity exists when the deed's language is clear but the conveyance described can be applied to two different subjects or as otherwise rendered unclear by the reference to another document. Turning to the documents before it and the history of the properties in question, the Court noted that no person could have an easement in their own lands. If the dominant and servient tenements are the property of the same owner, the dominant and servient tenements must, therefore, belong to different persons in order to establish differing interests or alternatively, the original owner must clearly state at the time of conveyance that one parcel as opposed to another has a clear right. The Court noted here that the initial conveying deed, as well as the deed that ultimately provided the property to defendant/respondent Silver, did not explicitly state that the right of way was reserved for the benefit of their lot. Rather, the deed merely stated that the right of way over Lot 4 (the appellant's lot) was to be used in common with others legally entitled thereto. Unfortunately, the document failed to state clearly what that statement intended. Appellants Austin and Guinto contended that the deeds in the chain of titles were unambiguous and reserved the right to the pond solely for their heirs and assigns, and that the phrase "others legally entitled thereto" did not create an ambiguity whether the right of way was reserved for the benefit of the Silver lot and, therefore, the trial court erred when it considered extrinsic evidence to construe the deeds. The Supreme Court in New Hampshire disagreed.

The Court found that the deeds at issue were ambiguous as to the littoral rights and that the trial court was correct to consider extrinsic evidence in order to interpret the meaning of the deeds. Finding of the trial court had acted appropriately in construing the deeds and in considering extrinsic evidence, the Court ruled to affirm the decision of the trial court below denying the action to quiet title filed by appellant Austin Guinto.

### Conclusion and Implications

The Supreme Court of New Hampshire clearly gave great deference to the trial court as the court best suited to judge the deed and hence, the nature and extent of the extrinsic evidence in light of the ambiguity. Perhaps what was most significant was the appearance of the witnesses or the pattern in historical practice of the users of the Silver lot gaining access to the pond. Notably, the Court made no observation of any such finding but it is unclear why the Court would otherwise have found that extrinsic evidence was meaningful in this case. (Jeffrey Pollock)

# TEXAS SUPREME COURT FINDS A CLAIM FOR TRESPASS MAY EXIST WITH SUBSURFACE MIGRATION OF WATER INJECTED IN WELL PERMITTED BY STATE ACT

*FPL Farming Ltd., Petitioner v. Environmental Processing Systems, L.C., Respondent*, Case No. 09-1010 (Tx. Aug. 2 6, 2011).

In *FPL Farming Ltd v. Environmental Processing Systems, L.C.*, the Texas Supreme Court, on appeal from the Court of Appeals For the Ninth District of Texas addressed whether a regulatory permit to drill an injection well absolves the holder from civil tort liability for conduct authorized by the permit. In particular, the Court was faced with a claim for tort damages for physical trespass based on alleged subsurface migration of water injected in the permitted well. The jury found no incidents of trespass. The Supreme Court ultimately held that the matter be remanded to resolve the issue of trespass in light of the state Injection Well Act and Texas Administrative Code, which together, the Court held, did not provide wastewater permit holders with immunity from civil tort liability.

## Background

FPL Farming Ltd (FPL) owns tracts of land in Liberty County, Texas, used primarily for rice farming. It owns all of the surface and subsurface rights to its parcels, except for the mineral rights. Environmental Processing Systems, L.C. (EPS) operates a wastewater injection well on land adjoining one of FPL's tracts. EPS obtained a permit to drill and operate the well from Texas Commission on Environmental Quality's (TCEQ) predecessor agency, the Texas Natural Resource Conservation Commission (TNRCC), in 1996. The wastewater injection wells are "non- hazardous," but were used to inject wastewater-containing substances such as acetone and naphthalene into salt water approximately a mile and a half below the surface, below any drinking water—typically found at a few hundred feet. Although FPL originally requested a contested case hearing to object to the issuance of the permits, FPL and EPS reached a settlement agreement in September 1996 and the permits were issued two days later.

Three years later, EPS sought to amend the permits to increase the allowed injection rate, and FPL once again requested a contested case hearing. After the hearing, the presiding administrative law judge recommended that the TCEQ grant the amendments, finding that the waste plume would radiate 3,021 feet from the well facility after ten years (a plume that would naturally extend into FPL's subsurface land) and concluding that FPL had no right to exclude others from the deep subsurface; FPL's rights would not be impaired by the amended permits; and that operation of the wells would not amount to an unconstitutional taking. The TCEQ approved the permits. FPL appealed to the state District Court, which affirmed the agency's decision, and then to the Austin Court of Appeals, which also affirmed. (*See, FPL Farming, Ltd. v. Tex. Nat. Res. Comm'n*, 2003 WL 247183, at *1–2). The Austin Court of Appeals assumed without deciding that FPL had property rights in the subsurface land and would have standing to sue for damages if the wastewater migrated into FPL's land.

FPL filed suit against EPS in Liberty County in 2006, alleging various causes of action, including trespass, negligence, and unjust enrichment, and requesting a permanent injunction and damages. The jury found for EPS, failing to find that a trespass had occurred, and the judge entered a take-nothing judgment against FPL. FPL appealed, arguing that the trial court should have granted FPL a directed verdict on the consent defense to the trespass claim; the jury charge erroneously shifted the burden of proof on consent to FPL; the jury instruction erroneously failed to instruct the jury that injury is not a required element of trespass; and the jury's findings were against the great weight and preponderance of the evidence on the trespass, negligence, and unjust enrichment claims.

On appeal, the Court of Appeals considered whether EPS was shielded from civil tort liability merely because it received a permit to operate its deep subsurface wastewater injection well. The Court of Appeals concluded that EPS was so shielded.

## The Texas Supreme Court's Decision

The Texas Supreme Court addressed, among other issues, the issue of trespass—summing up its review of

the Court of Appeal's decision, which it reversed and remanded from, as follows:

> The Court of Appeals concluded that, 'under the common law, when a state agency has authorized deep subsurface injections, no trespass occurs when fluids that were injected at deep levels are then alleged to have later migrated at those deep levels into the deep subsurface of nearby tracts'… under the Court of Appeals' opinion, a permit holder would be immunized from trespass liability by virtue of receiving a permit. As the Court of Appeals determined there could be no actionable trespass, it overruled FPL's issues concerning trespass.

## Trespass, Agency Permitting and Immunity

The Supreme Court found that:

> The Court of Appeals' reasoning is inconsistent with our general view of the legal effect of an agency's permitting process, the specific statute authorizing the TCEQ's process in this case, and our precedent regarding court review of agency actions.

The Court found that immunity, as general rule, doesn't flow from the permitting process:

> ... a permit granted by an agency does not act to immunize the permit holder from civil tort liability from private parties for actions arising out of the use of the permit. This is because a permit is a 'negative pronouncement' that 'grants no affirmative rights to the permittee. Citing *Magnolia Petroleum Co. v. R.R. Comm'n,* 170 S.W.2d 189, 191 (1943)…. '[O]btaining a permit simply means that the government's concerns and interests, at the time, have been addressed; so, it, as a regulatory body, will not stop the applicant from proceeding under the conditions imposed, if any. Citing *Berkley,* 282 S.W.3d at 243.

## The Injection Well Act

Having addressed state common and law and case precedent which generally rejects permittee immunity from tort liability, the Court addressed the relevant statute on the issue: The Injection Well Act (IWA).

The IWA appears as Chapter 27 of the Texas Water Code and governs the drilling and use of deep subsurface injection wells such as the one at issue in this case. The IWA's purpose is to:

> …maintain the quality of fresh water in the state to the extent consistent with the public health and welfare and the operation of existing industries, taking into consideration the economic development of the state, to prevent underground injection that may pollute fresh water, and to require the use of all reasonable methods to implement this policy. Absent from this policy determination is any intent, if permissible, to authorize an agency to determine ownership of the deep subsurface or determine whether authorized migration invades private property rights

In a nutshell, the IWA states:

> …no person may drill, use, continue using, or convert a well into an injection well without first obtaining a permit from the TCEQ, unless the well comes under the jurisdiction of the Railroad Commission.

But, as the Court quickly pointed out, the IWA does not expressly prevent civil liability of permittees; but on the contrary:

> …the text states just the opposite. Section 27.104 of the Act provides that '[t]he fact that a person has a permit issued under this chapter does not relieve him from any civil liability…'

## The Texas Administrative Code

The Court also noted that the Texas Administrative Code also would not accord the lower courts' view on immunity.

> …the Texas Administrative Code governing TCEQ permits is in discord with the court of Appeals' opinion. Section 305.122(c) states that: 'The issuance of a permit does not authorize any injury to persons or property or an inva-

sion of other property rights, or any infringement of state or local law or regulations…'

### Rejection of the Court of Appeals' Interpretation of Prior Supreme Court Precedent

Finally, the Supreme Court found that the Court of Appeals reliance on two Supreme Court decisions to justify the finding of immunity was misplaced.

In the case of *R.R. Comm'n of Tex. v. Manziel,* 361 S.W.2d 560, 562 (Tex. 1962), the Court held that:

> The Court of Appeals misinterpreted this Court's holding in *Manziel.* We stated there that we were 'not confronted with the tort aspects' of subsurface injected water migration, nor did we decide 'whether the [Railroad] Commission's authorization of such operations throws a protective cloak around the injecting operator who might otherwise be subjected to the risks of liability…' *Manziel,* 361 S.W.2d at 566. Instead, we held that Railroad Commission authorizations of secondary recovery projects are not subject to injunctive relief based on trespass claims…. We made the point in *Manziel* that we were not deciding whether a permit holder is immunized from trespass liability by virtue of the permit. (citations). The case is inapposite.

In addressing *Coastal Oil & Gas Corp. v. Garza Energy Trust,* 268 S.W.3d 4 (Tex. 2008), the Court found that:

> Our opinion in *Garza,* another opinion relied upon by the Court of Appeals, likewise did not hold that agency authorization or permission resulted in blanket immunity from trespass liability.

The Court found *Manziel* and *Garza* distinguishable from the case now before the Court:

> The issues in *Manziel* and *Garza* were factually similar. They dealt with injected substances per agency authorization that had possibly migrated underground across property lines. The case before us is distinguishable on several grounds. Both of those cases dealt with the extraction of minerals in the oil and gas industry, and thus the rule of capture… The rule of capture, and administrative deference to agency interpretations, was critical to our holding in *Garza.* And although the Act contains provisions governing both Railroad Commission and TCEQ permits, injecting substances to aid in the extraction of minerals serves a different purpose than does injecting wastewater. (Citing Tex. Water Code § 27.011).

The Court elaborated on distinguishing *Manziel* and *Garza* as follows:

> *Manziel* and *Garza* considered the justification for the rule of capture—greater oil and gas recovery—in their analyses. However, the rule of capture is not applicable to wastewater injection.

### Conclusion and Implications

In the end, the Court held that the permittees in the case before the court would not be entitled to any immunity in light of the provisions of the IWA and Texas Administrative Code:

> The language of the Injection Well Act and the portions of the Texas Administrative Code governing the TCEQ do not shield permit holders from civil tort liability that may result from actions governed by the permit.

The Supreme Court, however, made it clear that its decision here was in no way a factual or legal conclusion that a trespass had taken place. Its order for remand instructed the Court of Appeals to, among other relevant issues in its decision, permit jury instructions regarding the issue of trespass. (R. Schuster)

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