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EASTERN WATER LAW™

& POLICY REPORTER

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EASTERN WATER NEWS

EPA LOSES A STRONG ARM IN ITS FIGHT AGAINST 'CAFO' DISCHARGES: *NATIONAL PORK PRODUCERS COUNCIL V. EPA*

By Felix S. Yeung

Agriculture, despite tectonic and irreversible shifts in the U.S. economy, still holds a sacred place in the American imagination. That might explain why there are perhaps only a few other industries that stir up such passion, debate, and even vitriol when the government attempts to regulate its practices. Since 1999, when the U.S. Environmental Protection Agency (EPA) and the U.S. Department of Agriculture (USDA) issued the Unified National Animal Feeding Operations Strategy, parties on all sides of the issue have sought to define how aggressively Concentrated Animal Feeding Operations (CAFOs) should be regulated. The U.S. Court of Appeals for the Fifth Circuit staged the latest round of this struggle between regulator and the regulated. The results in *National Pork Producers Council v. U.S. Environmental Protection Agency*, 635 F.3d 738 (5th Cir. 2011), together with previous decisions issued by the Second and Eighth Circuits, limit EPA's Clean Water Act (CWA) permitting authority over CAFOs, and more broadly signal the defeat of EPA's attempt to impose a preemptive regulatory regime against these agricultural operations.

Background

The CWA prohibits any party from discharging pollutants into navigable waters from a point source without a National Pollutant Discharge Elimination System (NPDES) permit. The CWA unambiguously classifies CAFOs as point sources of pollution, 33 U.S.C. § 1362(14), and thus, CAFOs are subject to NPDES permit requirements when they discharge pollutants to navigable waters. The specific circumstances in which a CAFO must apply for an NPDES permit has long been in dispute, however.

The 2003 Rule

In 2003, EPA sought to clarify the issue by promulgating a rule that required every CAFO to apply for NPDES permits unless the CAFO could demonstrate affirmatively that its operation had no potential to discharge pollutants to navigable waters ("duty to apply" provision). This permitting requirement applied even if a CAFO did not actually discharge pollutants. 68 Fed. Reg. 7176 (Feb. 12, 2003) (2003 Rule). This 2003 Rule also required CAFOs to develop site-specific Nutrient Management Plans (NMPs), but these NMPs were not reviewed by EPA nor included in the terms of the CAFOs' NPDES permits. Not surprisingly, the 2003 Rule was challenged almost immediately. But the suit that ensued, and Second Circuit's resulting opinion in *Waterkeeper Alliance v. U.S. Environmental Protection Agency*, 399 F.3d 486 (2nd Cir. 2005), only set the stage for additional controversy in the years ahead. The Second Circuit held that the CWA does not authorize EPA to require CAFOs to apply for permits based on a mere "potential to discharge." In other words, the court found that the CWA permits EPA to regulate actual discharges only. The court also held that EPA's failure to review NMPs violated the statutory mandate that the agency must assure compliance with applicable effluent or discharge limitations. Additionally, the court ruled that NMPs are encompassed within CWA's definition of "effluent limitations" and therefore must be included in the NPDES permits. The court, therefore, struck down the 2003 Rule.

The 2008 Rule

In response to the *Waterkeeper* decision, EPA published a notice of proposed rulemaking that veered away from the 2003 Rule's duty to apply for potential discharges and instead, required CAFOs to apply for NPDES permits only if an operation "discharges or proposes to discharge pollutants." 71 Fed. Reg. 37,744 (June 30, 2006). Public confusion over the definition of "proposes to discharge" prompted EPA to issue a supplemental notice of proposed rulemaking in 2008 to clarify when a CAFO is discharging or proposing to discharge. 73 Fed. Reg. 12,339 (Mar. 7, 2008)

(2008 Rule). The final rule, published later that year, explained that a CAFO "proposes to discharge" when it is "designed, constructed, operated, or maintained such that a discharge would occur," and not simply when a discharge *might* occur. 73 Fed. Reg. 70,418, 70,423 (Nov. 20, 2008); 40 C.F.R. § 122.23(d). The 2008 Rule required CAFO operators to assess, on a case-by-case basis, whether they discharge or propose to discharge. And if a CAFO does not obtain a permit, and a discharge to navigable waters occurs, the rule provided that the operation could be liable both for failing to apply for a permit and for the unlawful discharge itself. The 2008 Rule also required NPDES permits for CAFOs to incorporate the requirement to develop and implement NMPs. Also, the NMPs must be reviewed by EPA and then incorporated into the permits as enforceable effluent limitations.

The final rule did not appease environmental advocates, however, who deemed the rule too permissive in allowing CAFOs, rather than a regulatory body, to determine whether they discharge or propose to discharge. To address those objections, EPA issued guidance outlining what the agency describes as an "objective assessment" of whether a CAFO discharges or proposes to discharge. EPA also established a voluntary certification procedure that includes an objective set of criteria by which CAFO owners and operators can determine if their CAFOs are subject to NPDES permitting requirements. While that mechanism ostensibly was voluntary, CAFOs that did not undertake the certification process had the burden in enforcement proceedings of proving that they did not discharge or propose to discharge. The other limitation of certification is that it does not exculpate actual discharge violations; it only removes the basis for a "duty to apply" violation.

A number of farming stakeholders disagreed with EPA's interpretation of the scope of its authority under the 2008 Rule, and filed petitions for review in the Fifth, Seventh, Eighth, Ninth, Tenth, and District of Columbia Circuit Courts of Appeals. The petitioners challenged EPA's "duty to apply" for an NPDES permit, as well as EPA's authority to create and impose liability for failure to apply for a permit. The Judicial Panel on Multi-District Litigation (JPML) consolidated all petitions and selected the Fifth Circuit to review the case.

The Fifth Circuit Court of Appeals' Decision in *National Pork Producers Council*

The Fifth Circuit focused the bulk of its ruling on the petitioners' challenges to the 2008 Rule, specifically addressing the conditions under which EPA can require CAFOs to apply for NPDES permits, and whether the CWA's penalty provisions can be imposed upon those who fail to apply for the permits.

'Proposes' to Discharge

The court first addressed the extension of NPDES regulatory authority to CAFOs that "propose" to discharge. It turned to the Second Circuit's holding that the 2003 Rule's "duty to apply" provision exceeded EPA's statutory authority because the CWA only allowed EPA to regulate the *discharge* of pollutants and that:

> ….in the absence of an actual addition of any pollutant…there is no point source discharge . . . and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance.

The Fifth Circuit, agreeing with Second Circuit's ruling in *Waterkeeper*, held that EPA's definition of "proposes to discharge" is unlawful because, under that definition, a CAFO "proposes" to discharge as long as it is found to have been "designed, constructed, operated, and maintained in a manner such that the CAFO will discharge." The court explained that the definition effectively requires a CAFO to obtain an NPDES permit regardless of whether it actually discharges to navigable waters. Citing precedent from the U.S. Supreme Court, the D.C. Circuit, and the Eighth Circuit, the Fifth Circuit affirmed that "there must be an actual discharge into navigable waters to trigger the CWA's requirements and the EPA's authority." Since EPA's definition for "proposes to discharge" did not require an actual discharge, the court held that the definition could not stand.

> The primary purpose of the NPDES permitting scheme is to control pollution through the regulation of discharges into navigable waters. *See* 33 U.S.C. § 1342. Therefore, it would be counter to congressional intent for the court to hold that requiring a discharging CAFO to obtain a

> permit is an unreasonable construction of the [CWA]. In fact, the text of the [CWA] indicates that a discharging CAFO must have a permit. The CWA explains that discharging without a permit is unlawful, 33 U.S.C. § 1311, and punishes such discharge with civil and criminal penalties, 33 U.S.C. § 1319. This has been the well-established statutory mandate since 1972. It logically follows that, at base, a discharging CAFO has a duty to apply for a permit.
>
> In summary, we conclude that the EPA cannot impose a duty to apply for a permit on a CAFO that 'proposes to discharge' or any CAFO before there is an *actual* discharge. However, it is within the EPA's province, as contemplated by the CWA, to impose a duty to apply on CAFOs that are discharging (emphasis in original text).

Since the petitioners broadly challenged the 2008 Rule, which EPA designed to apply to both CAFOs that discharge and those that propose to discharge, the Fifth Circuit also clarified whether EPA may impose a "duty to apply" on CAFOs that are discharging without a permit. While there is no express statutory provision that answers the question, the Fifth Circuit determined that stripping away that authority from EPA would undermine Congress's goal in the CWA of controlling pollution by regulating discharges of pollutants into navigable waters. The court, therefore, upheld the "duty to apply" with regard to discharging CAFOs.

EPA's Authority to Impose Liability for Failure to Apply for a Permit

The court then addressed the petitioners' second claim—the challenge to EPA's authority to create and impose liability when a CAFO fails to apply for a permit. The court found that "failure to apply" liability is "notably absent" from the CWA's detailed liability provisions, 33 U.S.C. § 1311. The court rejected the argument that "failure to apply" liability can be imposed pursuant to CWA's penalty provisions in Section 1319 because, the court reasoned, those penalties are reserved for specific violations of the statute, such as discharging without a permit, and not for "failing to apply for a permit."

EPA also argued that 33 U.S.C. § 1318(a) gives it authority to impose liability for failing to apply for a permit, because that section of the statute requires the owner or operator of any point source to not only record, monitor, and sample discharges, but also to "provide such other information as [the EPA Administrator] may reasonably require." The court disagreed. Taking a page from the Eighth Circuit's recent decision in *Service Oil, Inc. v. EPA*, 590 F.3d 545 (8th Cir. 2009), the court declared that "the agency's authority to assess monetary penalties by administrative proceeding is limited to unlawful discharges of pollutants," and that the authority does not encompass penalties for failing to apply for a permit. In striking down this provision, the court criticized EPA's action as an attempt "to create from whole cloth new liability provisions."

> In other words, an agency's authority is limited to what has been authorized by Congress… Here, the 'duty to apply,' as it applies to CAFOs that have not discharged, and the imposition of failure to apply liability is an attempt by the EPA to create from whole cloth new liability provisions. The CWA simply does not authorize this type of supplementation to its comprehensive liability scheme. Nor has Congress been compelled, since the creation of the NPDES permit program, to make any changes to the CWA, requiring a non-discharging CAFO to apply for an NPDES permit or imposing failure to apply liability.

Conclusion and Implications

The Fifth Circuit limited EPA's NPDES authority over CAFOs to those that have actually discharged or are discharging. CAFOs that are discharging have a duty to apply for NPDES permits, but EPA can impose liability only for actual unlawful discharges, and not for the failure to apply for a permit in the first place.

In effect, EPA has now lost a proactive and preemptive oversight mechanism for regulating CAFOs. The difficulty of proving actual discharges and connecting them back to a particular source would also mean fewer CAFOs being subjected to liability. While the court upheld EPA's requirement that a CAFO applying for an NPDES permit must submit an NMP that is incorporated into the permit as enforceable effluent limitations, the requirement is only ap-

plicable to those that apply for and receive a permit, and not to every CAFO.

The Fifth Circuit's decision leaves EPA to rely on enforcement actions to police CAFOs. As part of the case's settlement, EPA is currently developing a CAFO reporting rule, to be finalized by July 13, 2012, that would allow the Agency to gather data to determine which facilities are "actual" dischargers and must obtain NPDES permits.

Simultaneously, environmental organizations are exploring alternatives to keep up the pressure on CAFOs. The press has reported that environmentalists are urging EPA to regulate and enforce against not only open feedlots (EPA's focus to date) but also "full confinement" facilities (*i.e.*, roofed feedlots) which they contend are liable to discharge manure and other pollutants also. Industry argues that confined feedlots do not have contact with water, and that some states already prohibit *any* discharge from those facilities, thus those operations should not be subject to a NPDES permit overlay. Environmentalists acknowledge that proving "actual" discharge against confined feedlots will not be as easy as spotting violations at open feedlots, but they are looking towards EPA's proposed CAFO reporting rule as a mechanism by which confined feedlots can also be held accountable for their discharges. (*See,* Bridget DiCosmo, "Activists Push EPA to Expand CAFO Enforcement to Confined Feedlots," *Inside EPA*, Sept. 9, 2011).

Regardless of how the federal EPA proceeds, CAFOs will still need to be diligent in monitoring discharges, because states are allowed to operate CAFO programs that have more stringent requirements than the federal program. It is also likely that citizen groups, wary of the well-publicized public health and animal welfare concerns raised by CAFO practices, will step up monitoring to expose CAFOs with unpermitted discharges in order to curtail their operations. Even if EPA is not hovering over their shoulders, CAFOs should put in place adequate monitoring and treatment systems that meet both federal and state requirements, to ensure that actual discharges either do not occur or only occur pursuant to the terms of an NPDES permit.

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EASTERN WATER NEWS

NEWS FROM THE WEST

This month's News from the West includes cases from California, Texas and Montana. First, a U.S. District Court in California issued a decision in the ongoing Consolidated Salmonid Cases that should ease restrictions placed on the pumping and export of water from the Sacramento-San Joaquin River Delta to areas throughout California. Next, the Texas Supreme Court held that a company participating in wastewater injection activities permitted by a Texas regulatory agency is not shielded from tort liability simply because it received a permit. Lastly, the Supreme Court of Montana reaffirmed that an easement in water flow carries with it secondary easement rights to protect and maintain that flow, which cannot be unreasonably interfered with by the landowner even when that landowner is trying to assert their land ownership rights.

Federal Government's Failure to Use 'Best Available Science' May Loosen Pumping Restrictions for State and Federal Water Projects

Consolidated Salmonid Cases v. Locke, Case Nos. 1:09-CV-01053 OWW DLB, *et seq.* (E.D. Cal. Sept. 20, 2011).

In a decision that is likely to have a far-reaching effect on the California water supply and, in turn, the California people and economy, Judge Oliver W. Wanger of the U.S. District Court for the Eastern District of California evaluated a biological opinion prepared to determine and mitigate the impacts of ongoing operations of the State Water Project and federal Central Valley Project (Projects) water on certain salmonid species listed as endangered or threatened under the ESA. Ultimately, the court found that the defendant federal agencies had failed to use the "best available science" as required under the Endangered Species Act (ESA) in imposing restrictions on the Projects pursuant to the biological opinion. The court further held that the National Marine Fisheries Service (NMFS), which prepared the biological opinion, was required to clearly set forth and explain the rationale for such restrictions, especially when they result in such severe consequences as the significant diminishment of water deliveries to millions of Californians.

The salmonid biological opinion at issue in this case placed certain restrictions on the timing and volume of the water project's exports from California's Sacramento-San Joaquin Delta (Delta). These restrictions had the effect of directly diminishing the amount of water that the Projects could pump from the Delta and deliver to agricultural and urban areas in Southern and Central California. The plaintiffs, which consisted of representatives of water agencies and farmers, argued that NMFS acted unlawfully in imposing a reasonable and prudent alternative that placed significant pumping and other restrictions on the Projects, because the restrictions lacked sufficient scientific support and justification as to whether or how they were essential to avoid jeopardy to the salmonid species or avoid adverse modification to their critical habitat. The court agreed with several of the plaintiffs' arguments, found the biological opinion and its reasonable and prudent alternative arbitrary, capricious, and unlawful, and remanded it to NMFS for preparation of a new biological opinion. This decision marks Judge Wanger's last in the multi-year, multi-lawsuit challenge over ESA review of the Projects impacts on various listed species endemic to the Delta, as he has now retired to return to private practice.

Regulatory Permit to Drill Wastewater Injection Well Is Not 'Get Out of Tort Free Card'

FPL Farming Ltd. V. Environmental Processing Systems, L.C., Case No. 09-1010 (Tex. Aug. 26, 2011).

In *FPL Farming Ltd. v. Environmental Processing Systems, L.C.*, the Supreme Court of Texas overturned a Court of Appeals' decision that had the effect of immunizing a company, Environmental Processing Systems, L.C. (EPS), from tort liability for the trespass into, and contamination of, FPL Farming

Ltd.'s water supply resulting from EPS's injection of wastewater into the ground.

EPS had been injecting wastewater one mile below the surface, below any drinking water, pursuant to a permit issued by the Texas Commission on Environmental Quality, and that water had allegedly migrated onto FPL's property and contaminated its water supply. EPS asserted that the receipt of the permit to carry out the actions at issue in the case effectively immunized it from any tort liability arising from its permitted actions. The Court rejected EPS's argument, stating that a permit only removes the government-imposed barriers to a proposed action, it does not constitute a "get out of tort free card."

In reaching its conclusion, the Court distinguished this case from those concerning the extraction of oil or minerals from the ground. The Court noted that those who wish to protect their subsurface interests in minerals or oil need only pool or drill the material under the rule of capture, which protects the rights of the one who captures the material first. A landowner who is trying to protect their subsurface property from the migration of wastewater from elsewhere, however, cannot so easily protect their interest. Finally, the Court reiterated the general rule that a permit from an administrative agency does not shield one from the consequences stemming from the permitted activity, and permits issued to allow subsurface drilling and the injection of wastewater are no exception

Easement Rights in Water Flow Create Secondary Easement Rights to Enter onto Land to Inspect and Maintain Flow

Musselshell Ranch Company v. Seidel-Joukova, 362 Mont. 1 (Mt 2011).

In *Musselshell Ranch Co.*, the Montana Supreme Court affirmed the secondary easement rights of the owner of a prescriptive ditch easement to enter the land through which the ditch runs to maintain and repair the ditch. The appellee-landowner, Joukova, asserted that she was within her rights as the owner of the land to construct a bridge and culvert in the ditch in order to access a portion of her property. Joukova argued that doing so did not unreasonably interfere with Musselshell's easement rights in the flow of the water. Joukova further asserted that she had a right to access and use her land, which could not be obstructed by the appellant's easement rights. The Court disagreed, holding that the bridge and culvert did unreasonably interfere with Musselshell's easement rights.

A Montana statute, Annotated Code § 70-17-112, specifically prohibits interference with a ditch or canal easement, and this statute was enacted by the legislature in response to the perceived danger to ditch easement rights resulting from urban sprawl and developments that were unaware of the existence of the easements. The statute codified the common law recognition of secondary easement rights associated with a ditch or canal easement. These rights apply to both easements obtained by contract and those obtained by historical use, or prescription.

In reaching its decision, the Montana Supreme Court stated that the public policy behind this statute caused it to find that the construction of a culvert and rock bridge in the ditch by Joukova unreasonably interfered with Musselshell's *secondary* easement rights in the ditch on the landowner's property. The Court reiterated that secondary easement rights are "a mere incident of the easement" and, therefore, interference with these rights require the same analysis. In its analysis, the Court recognized that while Musselshell had easement rights in the flow of water that it had obtained by prescription, these rights necessarily entail certain secondary easement rights, as stated in the statute, and these include the right to enter onto the land to maintain the ditch that the water flows through.

To reach its decision, the Court balanced Joukova's rights as the landowner to have full access to her land against the rights of Musselshell to water from the ditch during a prescribed period of the year. The Court noted that the determination of whether an interference with the rights of an easement holder is reasonable must be done on a case-by-case basis. However, it stated that a permanent and immovable encroachment on the easement is more likely to unreasonably interfere with the rights associated with the easement. Thus, a court will order removable of that interference so long as the secondary easement rights are being exercised in a reasonable manner by the easement holder, and such that the burden upon the land is not needlessly increased.

In this instance, the Court found the placement of the bridge and culvert unreasonable after Musselshell testified regarding the inconvenient and hazardous new route that the culvert forced them to take when

performing maintenance on the ditch because the culvert and bridge were located in an uneven area with heavy growth, which made the maneuvering of heavy equipment within the ditch for maintenance and repairs difficult. While this difficulty did not impede or interfere with Musselshell's easement for the flow of water, the permanent and immovable nature of the encroachments did interfere with the secondary rights associated with the easement and, therefore, the Court ordered Joukova to remove the bridge and culvert and find another way to access that portion of her property. (Jill Willis)

FLOOD CONTROL DEVELOPMENTS

FLOOD CONTROL MANAGEMENT AND LIABILITY UPDATE

Updates on National Flood Insurance Program

The National Flood Insurance Program (NFIP), administered by the Federal Emergency Management Agency (FEMA), continues to exist due to a series of short-term extensions but is currently only funded through November 18. As reported in this reporter in August 2011, the House approved a bipartisan bill (HR 1309) that would have extended the program for five years and reformed it to give communities time to phase in insurance costs for homeowners or correct flood deficiencies before such requirements take effect. The Senate, however, did not pass its own version of the bill before funding for the program was set to expire in September.

The National Flood Insurance Program

The U.S. Congress established 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.

Senate Delays and Possible Amendments to Extension Bill

The Senate has its own version of an NFIP extension bill, which was approved by the Senate Banking Committee on September 8 but is not yet scheduled for consideration on the floor. In the meantime, two Senators have begun an effort to overturn a provision in the legislation that would require flood insurance coverage in areas already protected by levees or other flood control structures. Senators Thad Cochran (R-Miss) and Mark Pryor (D-Ark) are circulating a letter to the Senate Banking Committee requesting reconsideration of a provision that would expand required insurance coverage to "areas of residual risk" located behind levees or near dams or other flood control structures.

The Senate bill includes a section that mandates areas of "residual risk" (*i.e.*, areas protected by levees, dams, and other flood control structures) to purchase flood insurance. According to Senators Cochran and Pryor, this mandate will have significant implications for communities, property owners, lenders, and investors in river and coastal communities.

From FEMA's perspective, dealing with areas of residual risk is critical. Homeowners mistakenly believe that because they reside behind a certified levee, they are not subject to any flood risk. This is not always true, because a larger flood event could occur and result in significant losses. FEMA's concern is that property owners behind levees providing protection from the 100-year flood are not required to purchase flood insurance, but they may face significant losses in the event of a larger storm event. Part of the insurance requirement for areas of residual risk reflects FEMA's efforts to convey to homeowners that a certified levee does not completely eliminate risk.

Currently, when FEMA issues a new flood rate insurance map (FIRM) for a community protected by a levee, dam, or other flood control structure, the area, which would have been located in a "special flood hazard area" prior to levee improvements is

not mapped. Both the House and Senate versions of reauthorization would require some form of mapping of areas of residual risk, but only the Senate bill would require residual risk areas to be included within a "special flood hazard area," which triggers insurance requirements regardless of the certification status of the flood control structure. Failure to purchase a flood insurance policy would render the property ineligible for federal programs and financial assistance, including loan guarantee programs.

The concern is that communities that have invested heavily in flood control improvements will still be forced to pay for flood insurance even in areas that are protected by levees.

"The National Flood Insurance Program must be reformed, and I believe the Senate Banking Committee has done yeoman's work on crafting bipartisan reform legislation. I do, however, have grave concerns about some of the provisions in the bill, particularly ones that create new flood insurance coverage mandates on families and businesses that are already protected by strong levees and dams," Cochran said. "The blanket approach taken in the current bill should be changed in order to ensure fair treatment for those protected properties."

"Families and business owners in Arkansas understand the importance of sound flood protection, which is why they pay levee taxes," Pryor said. "In addition to expensive out-of-pocket insurance costs, this requirement will scare off new economic development opportunities. I am hopeful my colleagues will take a fresh look at this requirement and decide not put this enormous burden on our communities."

Conclusion

There is no scheduled date for consideration of the Senate's reauthorization act on the floor, but the program's funding is set to expire on November 18. (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 accused 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

•Lindsey Construction Company, Inc., of Fayetteville, Arkansas and one of its associated limited partnerships have agreed to pay a $430,000 civil penalty to the United States to settle a series of construction stormwater violations that occurred during development of The Links of Columbia, a nine-hole golf course and 64-building apartment project located in Columbia, Missouri. Through a stipulation of settlement with the U.S. Department of Justice (DOJ) and EPA Region 7, Lindsey Construction and The Links at Columbia, LP, agreed to pay the civil penalty for violations of the federal Clean Water Act (CWA) and terms of a construction stormwater permit issued by the State of Missouri. EPA Region 7 inspected the construction site in May 2007 and noted failures to implement and maintain practices to minimize runoff, failures to follow a stormwater pollution prevention plan, failure to comply with water quality standards, and failures to conduct site inspections. EPA determined that the construction site lacked proper erosion controls, leading to accumulation of silt and sediment in Hominy Branch, a tributary of Hinkson Creek. Previous inspections by the Missouri Department of Natural Resources (MDNR) in July 2006 and April 2007 also found the defendants were not complying with stormwater management requirements, resulting in a letter of warning and a notice of violation issued by MDNR. EPA issued a separate administrative compliance order to the defendants in August 2007, directing the companies to adhere to the requirements of the construction stormwater permit and take immediate actions to reduce runoff at the construction site.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•Waste Management LampTracker, Inc. has agreed to pay a $118,800 civil penalty to the United States to settle a series of violations of its Missouri Hazardous Waste Permit and the federal Resource Conservation and Recovery Act (RCRA) at its permitted Kaiser, Missouri facility and a nearby unpermitted materials staging area. Waste Management LampTracker collects and recycles universal waste lamps, mercury containing equipment and batteries. EPA Region 7 inspected the company's main Kaiser facility and an unpermitted materials staging area located less than a mile away in August 2010. After the inspection, EPA issued a notice of violation to the company, citing multiple issues with inadequate waste container management, inadequate facility management, and failures to comply with universal waste requirements. Specific violations included failure to maintain adequate aisle space in storage areas, failures to close and label hazardous waste containers, failure to close universal waste containers, failure to sample crushed glass to test for mercury levels, and issues with employee training documentation, job description documentation, and the facility's emergency contingency plan. By agreeing to the settlement with EPA, Waste Management LampTracker has certified that its Kaiser operations are now in compliance with all requirements of RCRA and its Missouri Hazardous Waste Permit.

•A chemical manufacturing and distribution facility in South Portland, Maine faces an EPA fine of up to $151,900 for improper storage of hazardous materials in violation of federal and state laws. Monson Companies Inc. of Leominster, Massachusetts, which operates a warehouse, distribution, repackaging and custom blending chemical manufacturing facility, was recently issued a complaint by EPA for its failure to meet the requirements of the CAA, the Maine Hazardous Waste Management Rules and the federal

Emergency Planning & Community Right-to-Know Act (EPCRA). According to EPA, Monson violated the CAA's chemical accident prevention provisions by not appropriately storing numerous chemicals that, alone or in combination, are extremely hazardous and can cause explosions or other violent reactions. The complaint alleges that the facility stored incompatible chemicals sufficiently close together that a spill or release of one chemical could result in a chemical reaction with other chemicals, creating toxic gases or causing a fire or explosion. The complaint also alleges that the facility violated the Clean Air Act by not leaving enough aisle space between piles of hazardous materials to allow personnel or other emergency responders access in the event of an accidental release. The "General Duty Clause" of the CAA aims to prevent accidental releases of substances that can cause serious harm to the public and the environment from short-term exposures and to reduce the severity of accidental releases that do occur. Further, Monson failed to submit a complete emergency and hazardous chemical inventory (Tier II) form for calendar year 2009 to local and state emergency planning officials and to the local fire department, in violation of the EPCRA. Monson filed a Tier II form for calendar year 2009, but failed to include more than twenty hazardous chemicals found at the facility in quantities that exceeded the regulatory threshold. Failure of a facility to file these forms leaves the community unaware of the presence of chemicals in the neighborhood that may affect public health and the environment. Also, these forms help federal, state and local authorities plan for emergency response actions and the cleanup of industrial pollution. Monson allegedly also failed to conduct hazardous waste determinations, as required by Maine Hazardous Waste Management Rules. EPA inspectors found several containers that were identified by facility personnel as waste, but without any determination of what kind of waste, as required by Maine Hazardous Waste Management Rules. The proper determination of wastes generated or stored on-site is fundamental to a facility's waste management program, and failure to determine the hazards associated with each waste and label them poses a substantial risk to employees, emergency responders, and the environment. Monson also failed to maintain an updated hazardous waste contingency plan, as required by Maine law. The facility had a contingency plan, but it was inaccurate and out-of-date in several key areas. Failure of a facility to maintain an adequate hazardous waste contingency plan puts employees, emergency responders, and the community at increased risk in the event of an unexpected incident. Monson has since submitted the required hazardous chemical inventory form and has addressed the CAA hazards identified by the EPA inspector. The company has also completed hazardous waste determinations and properly shipped certain wastes off site as hazardous wastes.

Indictments, Convictions, and Sentencing

•Robert P. Griffiths, a former executive at Bennett Environmental Inc. (BEI), a Canada-based company that treats and disposes of contaminated soil, was sentenced to 50 months in prison for participating in money-laundering and fraud conspiracies in connection with contracts at an EPA-designated Superfund site, Federal Creosote, in Manville, New Jersey, as well as impeding a proceeding before the U.S. Securities and Exchange Commission (SEC). Mr. Griffiths was also sentenced to pay a $15,000 criminal fine and to pay $4,644,378.56 in restitution, jointly and severally with co-conspirators to the victim, the EPA. On July 6, 2009, Griffiths plead guilty to defrauding the EPA with others by inflating the prices he charged to a prime contractor of the EPA and providing kickbacks to employees of that prime contractor from approximately December 2001 until approximately August 2004. Griffiths and his co-conspirators were given the bid prices of BEI's competitors, which allowed BEI to submit the highest possible bid prices and still be awarded the sub-contracts. On one occasion, Griffiths and his co-conspirators inflated the bid prices to cover approximately $1.3 million in kickbacks and amounts BEI kept for itself. The kickbacks were in the form of money transferred by wire to a co-conspirator's shell company, lavish cruises for senior officials of the prime contractor, various entertainment tickets, pharmaceuticals and home entertainment electronics. The department said that the co-conspirators were able to allocate at least $43 million in fraudulently awarded sub-contracts to BEI for the removal, treatment and disposal of contaminated soil and to fraudulently conceal that BEI had submitted false invoices for the disposal of approximately 20,000 tons of soil. According to court documents, Griffiths and his co-conspirators also conspired to commit international money laundering. From approximately

February 2003 through approximately September 2004, Griffiths and a co-conspirator who received more than $1 million in kickbacks through his shell company laundered approximately $207,000 of the kickback proceeds from the co-conspirator's bank account in New Jersey to a bank account controlled by Griffiths in Ontario, Canada. In addition, on or about November 3, 2005, Griffiths made false statements in response to questions asked by the SEC for the purpose of deceiving the SEC and concealing his conduct in the fraudulent scheme. At that time, the SEC was investigating whether Griffiths and others had obtained information not available to the public and relied upon that information to conduct certain securities transactions improperly. The cleanup at Federal Creosote is partly funded by the EPA. Under an interagency agreement between the EPA and the U.S. Army Corps of Engineers, prime contractors oversaw the removal, treatment and disposal of contaminated soil as well as other operations at the Federal Creosote site. Including Griffiths, a total of three companies and ten individuals have been charged as part of the investigation. More than $6 million in criminal fines and restitution have been imposed and five individuals have been sentenced to serve prison time. (Melissa Foster)

REGULATORY DEVELOPMENTS

EPA TO BEGIN ISSUING PERMITS TO COVER PESTICIDE APPLICATIONS UNDER THE CLEAN WATER ACT

After nearly three years of debate following a 2009 court order, the U.S. Environmental Protection Agency (EPA) is on the brink of finalizing a General Permit to cover many pesticide applications to U.S. waters under the Clean Water Act (CWA). Stakeholders have strongly resisted the need to obtain wastewater discharge permits for pesticide applications, calling such a requirement impracticable, unnecessary, and prohibitively expensive, and have lobbied Congress to take action. Despite initial movement in Congress to answer this call, the stay on the 2009 decision requiring permits for pesticide discharges into U.S. waters was set to expire on October 31, 2011 and EPA has stated that it will not seek another extension on that stay. EPA's statements are a reminder to Congress that it is running out of time to exempt to pesticide applications from the scope of the CWA.

Background—*National Cotton* and Development of Pesticide General Permit

In *National Cotton Council v. EPA*, 553 F.3d 927 (6th Cir. 2009), the Sixth Circuit invalidated EPA's long-standing exemption, embodied in a 2006 EPA rule, from the CWA's § 402 program for discharges of pesticides when those discharges occurred in compliance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The *National Cotton* decision, a consolidated case involving challenges in eleven circuit courts to EPA's rule, vacated the rule, holding that the CWA unambiguously includes biological and some chemical pesticides within its definition of "pollutant," and specified the circumstances where a permit would be necessary.

In June 2009, the Sixth Circuit granted EPA's request to stay the decision vacating the EPA rule until April 2011. By issuing the stay, the Sixth Circuit allowed EPA and the states time to develop and issue appropriate General Permits to authorize certain pesticide discharges to jurisdictional waters in accordance with CWA requirements. In March of this year, responding to a petition from EPA, the Sixth Circuit granted an extension on the deadline for compliance with the ruling to October 31, 2011.

In response to the *National Cotton* decision, EPA released a draft General Permit in June 2010, which covered dischargers of biological pesticides and chemical pesticides that leave a residue in four categories of pesticide uses. In April 2011, EPA released a pre-publication draft of the final General Permit to allow states and the regulated community to familiarize themselves with the forthcoming requirements. When final, the permit will apply to pesticide activities where EPA is the permitting authority under CWA § 402. It would also create a baseline for most states to follow in developing their own permitting programs for pesticide applications.

Congressional Action

Members of industry and other interested parties, including state water, agriculture, and other officials, have lobbied for a reversal of the Sixth Circuit's decision, following unsuccessful petitions for rehearing en banc in August 2009 and certiorari to the Supreme Court in February 2010. Accordingly, the House of Representatives passed the Reducing Regulatory Burdens Act of 2011 (HR 872) by a 292 to 130 vote in March 2011. The bill, sponsored by Rep. Gibbs, would amend the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), the federal law governing labeling and use of pesticides, and the CWA by exempting point source discharges of pesticides—or residue of pesticides resulting from the application—authorized for sale, distribution, or use under FIFRA, so long as the discharge does not result from a FIFRA violation.

On June 21, the Senate Committee on Agriculture, Nutrition, and Forestry passed HR 872, but the bill has been in stasis in the Senate since that time. In light of the impending deadline, members of the Senate Committee on Agriculture have recently urged a vote on HR 872 on the Senate floor and have made efforts to file amendments on other bills to move the legislation forward.

Conclusion and Implications

With Congress currently stalled, EPA has recently stated that it will finalize and release its General Permit covering a subset of pesticide discharges under the deadline set by the court. On October 31, 2011, a wide range of pesticide applicators, such as agriculture, forestland owners, land managers, and other public entities, will need to seek coverage under the pesticide General Permit or, if the General Permit is inapplicable, begin the potentially laborious process of obtaining individual permits. (Douglas MacDougal)

LAWSUITS FILED OR PENDING

U.S. SUPREME COURT POISED TO HEAR ARGUMENTS ON MONTANA STREAMBED OWNERSHIP

PPL Montana, LLC v. State of Montana, Case No. 10-218, *cert. granted*, U.S. Sup. Ct. June 20, 2011.

Students of the nation's highest court are looking forward to a December 7, 2011 showdown between two former Solicitors General, Paul Clement and Gregory Garre (both now in private practice), on legal issues involving the state ownership of riverbeds. On June 20, 2011, the U.S. Supreme Court granted a petition for a writ of *certiorari* in the case, which addresses a claim by the State of Montana to ownership of riverbed lands underlying hydroelectric dams on its rivers. The case pits Mr. Clement on behalf of PPL against his successor, Mr. Garre, on behalf of the State of Montana, over a $50 million claim by Montana for rental payments for the riverbed underneath several hydroelectric facilities.

Background

In 2003, two Montana citizens filed suit in federal court against PPL and two other companies, arguing that the riverbeds under their hydroelectric facilities were owned by the state and that rent was due for the use thereof. This claim originated in Montana's Hydroelectric Resources Act (HRA), which dates from 1931, and contains a competitive bidding process for the award of power site leases, limits leases to a 50-year lease-term term, and requires the state to charge rent for the use of state-owned lands for hydropower projects. Montana intervened as a plaintiff, but the Court then dismissed the case for lack of diversity jurisdiction. PPL and the two other defendants then filed suit in the Montana state courts seeking a declaration that federal law precludes or preempts any claim for compensation under the HRA, which resulted in Montana counterclaiming for compensation.

The trial court rejected the plaintiffs' argument that equitable doctrines prohibited the state from asserting title, despite over 100 years of practical concession of that point. After settling with the other two plaintiffs, Montana then moved for partial summary judgment against PPL, arguing that the upper Missouri, Madison, and Clark Fork rivers were navigable in 1889 when Montana entered the Union. The trial court agreed and granted Montana's motion for summary judgment, eventually awarding the state $40.9 million in rent for the riverbeds from 2000 to 2007, and rents as determined by the State Land Board from 2008 on.

Evidentiary and Constitutional Arguments Dominate

The two projects at issue—the Missouri-Madison and the Thompson Falls projects—date from as early as 1895 and 1915, respectively, and were purchased by PPL in 1999. In its petition for writ of *certiorari*, PPL argues that the state courts paid too little heed to the clear evidence, characterized as voluminous by PPL that supported its position that the relevant rivers were not navigable in 1899. Instead. PPL argues that the state relied on unreliable and questionable documents and studies, all of which paled in comparison to the evidence against navigability. In addition, with regard to the Clark Fork River, PPL noted that a federal district court had held in 1910 that the relevant stretch of the river was non-navigable and granted title to the riverbeds underlying the Thompson Falls project to PPL's predecessor.

Despite this heavy load of evidence, the Montana Supreme Court decided that the rivers were navigable for purposes of determining title. First, after noting that required portages in themselves would not defeat navigability, the Montana Supreme Court held that the relevant inquiry was whether the river as a whole was used, or was susceptible to being used, for navigation. This test, according to the Montana Supreme Court, was to be liberally construed in the state's favor. The Montana Supreme Court also looked favorably on modern methods of transport that were not commercially available when the state was admitted to the Union, reasoning that such advances made the rivers susceptible to navigation in the modern sense and such susceptibility conferred title upon the state,

even if retrospectively. The Montana Supreme Court dismissed PPL's arguments that any such susceptibility was, in fact, due to the development of the hydroelectric facilities themselves. The Montana Supreme Court affirmed the trial court's grant of summary judgment to the State of Montana. 2010 MT 64, 229 P.3d 421 (Mar. 30, 2010).

In its petition, PPL argues that the state has applied revisionist history to disregard long-settled legal precedent, in a massive land grab. PPL asks the U.S. Supreme Court to place a "meaningful check" on the states by reiterating a uniform federal standard and fixed set of rules to govern title navigability. Toward this end, PPL argues that: (1) title navigability should be determined on a segmented, not whole river, basis; (2) that navigability must be determined base don't he state of the river upon statehood; and (3) that the test should not be construed "very liberally" in favor of the state. Interestingly, after pointing out that these three points are its manifest goals, the petition then turns to first evidentiary considerations and then constitutional arguments to buttress its position. Under the Equal Footing Doctrine, new states admitted to the Union are presumed to have entered the Union with the same rights and powers as the original states, which had gained absolute sovereignty due to secession from England. According to PPL, this serves as the basis for Montana's claim to riverbed ownership, and also serves as a limitation on attempts by a state to enlarge its province.

Flavoring its argument with takings concerns, the fundamental argument underlying PPL's position is that the test for navigability depends on its context and, in this instance, draws upon constitutional precepts to limit the expansive reading of title navigability. Accordingly, PPL requests that the Court provide clear direction to the states.

Conclusion and Implications

Depending how this case fares before the U.S. Supreme Court, states may have an incentive to enact legislation mimicking that in place in Montana. In these days of large state budgetary deficits, a governor that is not inured to the interests of big power might be able to obtain significant funding through such a bill. The crucial part for those that study such matters, however, is more intellectual—it is a battle amongst well-respected professionals in a tribunal of peculiar style, over a cerebral subject of some financial significance. That battle of the giants aspect of this matter alone makes it worthy of attention. (Patrick Zaepfel)

JUDICIAL DEVELOPMENTS

THIRD CIRCUIT DENIES CLASS CERTIFICATION FOR MEDICAL MONITORING AND PROPERTY DAMAGE FROM CONTAMINATED WASTEWATER DUE TO PREDOMINATING INDIVIDUAL ISSUES

Gates v. Rohm and Haas Company, LLC, ___F.3d___, Case Nos. 10-2108 (3rd Cir. Aug. 25, 2011).

This case addresses class certification for medical monitoring and property damage claims under Federal Rules Civil Procedure, Rules 23(b)(2) and 23(b)(3). The plaintiffs/appellants are residences of McCullom Lake Village. The plaintiffs sought class certification for damages they contend emanated from exposure to toxic carcinogens. The District Court denied class certification on the basis that individual issues predominated on exposure, causation, and the need for medical monitoring and also found individual issues predominated as to a liability-only issue class from the property damage claims. The Third Circuit Court of Appeals affirmed the District Court's denial of class certification holding that it did not abuse its discretion.

Background

In this *Erin Brockovich*-type toxic tort lawsuit, the named plaintiffs are residents of McCullom Lake Village. The village lies in McHenry County, Illinois and is a primarily residential area with a population of approximately 2000 people and 400 homes. Defendants are chemical companies that owned and operated a facility in Ringwood, Illinois, one mile north of McCullom Lake Village. According to plaintiffs, the defendants dumped wastewater containing vinylidene chloride into a nearby lagoon that seeped into an underground aquifer where it degraded into vinyl chloride, a carcinogen. The plaintiffs contended that the vinyl chloride evaporated into the air from the shallow aquifer and was swept by the wind over McCullom Lake Village.

From 1951 to 2005, one of the defendants owned and operated a facility near the village. From 1960 to 1978, the defendant disposed wastewater containing vinylidene chloride into an on-site lagoon. In 1973, test of the shallow aquifer shoed elevated levels of ammonia and chloride. The shallow aquifer does not extend under the village. Further, in 1978, the defendant ceased using the on-site lagoon and covered it.

In 1984, the defendant conducted an environmental assessment of the facility and installed nineteen monitoring wells at the facility. Samples from these wells contained vinylidene chloride and vinyl chloride. Subsequently, more than 90 monitoring wells were installed in the area and the facility. To date, neither vinylidene chloride nor vinyl chloride has been detected in tests or residential wells in the village used to obtain drinking water. The plaintiffs, however, contend that these chemicals may be present at undetectable levels.

After contracting brain cancer, the plaintiffs filed suit against the defendants. By September 2010, there were approximately 33 plaintiffs. Of the first 23 plaintiffs, statistics indicate that 19 had or have brain or nerve cancer, nine had or have glioblastoma multiforme, five had or had oligodendroglioma, two had or have meningioma, and one had or had shwannoma and hemangioblastoma. Additionally, three had or have pituitary gland tumors and one had or has cryptogentic cirrhosis. At least seven of the plaintiffs have died, six from gliblastomaq multiforme. The defendants deny any connection between contamination and the illnesses.

Plaintiffs sought certification of two classes: (1) a class seeking medical monitoring for village residents exposed to the airborne vinyl chloride between 1968 and 2002, and (2) a liability only issue class seeking compensation for property damage from the exposure. In the Third Circuit Court of Appeals, the issue was whether the District Court erred in finding individual issues barred certification of the proposed trial classes under Fed. R. Civ. P. 23(b)(2) or 23(b)(2).

The Third Circuit's Decision

The Court of Appeals affirmed the District Court's denial of class certification under both proposed classes. Despite asserting several claims for relief in-

cluding medical monitoring, property damage claims, relief under CERCLA (42 U.S.C. § 9601 *et seq.*) the Illinois Environmental Protection Act, and state-law fraudulent misrepresentation and willful and wanton misconduct claims, the plaintiffs chose to proceed on a class basis only on the medical monitoring and property damage claims and solely with regard to vinyl chloride exposure.

Medical Monitoring Class

The proposed medical monitoring class included all individuals who lived for one year or more, within the village, from 1968 to 2002. Rule 23(b)(2) applies when:

> …the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.

In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class.

The problem for plaintiffs in this case was that medical monitoring cannot be easily categorized as injunctive or monetary relief. A medical monitoring cause of action allows those exposed to toxic substances to recover the costs of periodic medical appointments. The court found that if the plaintiffs were to prevail, medical screenings and corresponding costs would vary individual by individual. Because causation and medical necessity require individual proof and medical monitoring, the class lacks cohesion.

Further, each person's work travel, and recreational habits may have affected their level of exposure to the toxic substance. Therefore, there was no common proof that could establish the danger point for all class members. The court found that the plaintiffs failed to propose a method where exposure to vinyl chloride presented a significant risk of developing a serious latent disease for each class member. As a result, the plaintiffs proposed common evidence and trial plan could not be able to prove the medical necessity of plaintiffs' proposed monitoring regime without further individual proceedings to consider class members' individual characteristics and medical histories to weigh the benefits and safety of a monitoring program. In short, the plaintiffs failed to show the cohesiveness required for certification of a Rule 23(b)(2) class.

Property Damage Class

This class included all persons who presently own real property within the village, or who owned real property within the village as of the date plaintiffs filed their complaint. Under Rule 23(b)(3), a predominance inquiry test is performed to determine whether proposed classes are sufficiently cohesive to warrant adjudication by representation. Thus a plaintiff must prove that there are in fact sufficiently numerous parties, common questions of law or fact to certify a class.

The court found that common questions did not predominate over individual questions because a resolution of those questions would leave significant and complex questions unanswered, including questions relating to causation of contamination, extent of contamination, fact of damages and amount of damages. Further, a class action is only suited for situation when the cause of the disaster is a single course of conduct which is identical for each of the plaintiffs.

Here, the plaintiffs contended varied levels of vinylidene chloride at various times seeped into a shall aquifer. Given the potential difference in contamination on the properties, common issues did not predominate. The court's job is to treat common things in common and to distinguish the distinguishable. When certifying an issue class, the court should clearly enumerate the issues to be triad as a class. It should also explain how class resolution of the issues will fairly and efficiently advance the resolution of class members' claim. In this case, the court was unable to separate common issues from issues where individual characteristics may be determinative. Thus, the District Court properly refused to certify plaintiffs' liability-only property damage class.

Conclusion and Implications

In complex, mass, toxic tort accidents, class certification is improper where no one set of operative facts establishes liability, no single proximate cause equally applies to each potential class member and each defendant, and individual issues outnumber common issues. (Greg Snarr, Thierry Montoya)

SECOND CIRCUIT GRANTS NRDC'S PETITION INVOLVING PESTICIDE DICHLORVOS BECAUSE EPA DID NOT PROPERTY CONDUCT CERTAIN RISK ASSESSMENTS

Natural Resources Defense Council v. U.S. Environmental Protection Agency, ___F.3d___, Case No. 08-3771 (2nd Cir. Sep. 16, 2011).

In June 2006, the Natural Resources Defense Council (NRDC) petitioned the U.S. Environmental Protection Agency (EPA) to revoke all tolerances and cancel all registrations for the pesticide dicholorovinyl dimethyl phosphate (dichlorvos). The EPA denied the petition. In response, NRDC filed objections and requested a public evidentiary hearing. The EPA denied the objections and the hearing in its July 23, 2008 final order (Final Order). NRDC sought review of the Final Order in the Second Circuit. The court agreed with the NRDC in part and vacated the parts of the Final Order that it considered arbitrary and capricious.

Background

The EPA oversees a comprehensive scheme of pesticide regulation. In 1996, Congress passed the Food Quality Protection Act (FQPA) and made three changes to the pesticide regulation scheme: First, it established a new safety standard for pesticide tolerances which included a requirement that the EPA apply an additional tenfold safety factor to each scientifically determined "no observable adverse effect level" (NOAEL) when the level was extrapolated from animal studies. Second, it required the EPA to assess the risk of pesticide to infants and children and required the EPA to use an additional tenfold safety factor to take into account potential pre and postnatal toxicity and toxicity to infants and children. Congress, however, gave the EPA discretionary power to use a different margin of safety only if, on the basis of reliable data, the margin would be safe for infants and children. Lastly, Congress required the EPA to reassess the safety of all then-existing tolerances.

The pesticide regulation scheme allows a person to challenge an existing tolerance with the EPA by filing a petition proposing that the EPA modify or revoke any tolerance for a pesticide. The petitioner is required to furnish reasonable grounds for the action sought. If the EPA denies a petition, it must issue a regulation or order explaining its reasons. Within 60 days of that regulation or order, a person may file objections thereto with the EPA specifying with particularity the provisions deemed objectionable and reasonable grounds for it. Additionally, the objections may request a public evidentiary hearing and a party is entitled to a hearing if the EPA determines that it is necessary to receive factual evidence relevant to the material issues of fact raised by the objections. Afterwards, the EPA must issue a final order stating that the action taken on each objection and request for the hearing. Any person adversely affected by such order may obtain judicial review by filing an appeal with the appropriate circuit court of appeals.

In its initial petition, NRDC requested that the EPA revoke all tolerances and cancel all registrations for dichlorvos. NRDC argued that the EPA's reliance on a 1997 intentional human dosing study was not appropriate because it was not statistically significant and because ethical rules had been violated. Additionally, they argued that the EPA failed to provide a legally adequate rationale for their decision not to apply the tenfold childrens' safety factor. The EPA denied the petition. In its order, the EPA stated the human dosing study was statistically significant for the limited purpose for which it was used. The EPA also noted that the study had not violated ethical rules because the consent forms clearly advised subjects that the study involved consuming an insecticide. The EPA also stated that it found the childrens' safety factor unnecessary because risk assessments done on animal testing showed that there were no residual concerns for infants and children.

Within 60 days after the EPA issued an order denying the NRDC's petition, NRDC submitted its objections to EPA and additionally requested a public evidentiary hearing upon the objections. The NRDC included many of its earlier arguments and also argued that the EPA's failure to apply the tenfold childrens' safety factor was not valid because the EPA had failed to implement an endocrine disruptor screening program causing it to rely on incomplete

data in deciding to waive the tenfold childrens' safety factor.

Five months later, the EPA issued its Final Order denying NRDC's objections and request for an evidentiary hearing. In its Final Order, the EPA once again rejected NRDC's statistical significance arguments regarding the human dosing study as well as the argument that reliance on the study violated the EPA's ethical research rule. The EPA also rejected the objections regarding the decision not to implement the tenfold children's' safety factor without completing the endocrine seeing program. In its order, the EPA did note that it had voluntarily chosen to apply a threefold safety factor to account for the fact that the human dosing study was not able to identify the NOAEL and instead had relied on the LOAEL (lowest observed adverse effect level) in making many of its determinations. However, the EPA clarified that the threefold safety factor applied was not based on any risk to children or infants. Lastly, the EPA noted that even without completing the endocrine disruptor-screening program, it had sufficient data to waive or reduce the children's' safety factor.

On July 30, 2008, NRDC appealed to the Second Circuit and challenged the EPA's decisions to (1) waive or reduce FQPA's tenfold children's' safety factor when determining the safety of dichlorvos, and (2) deny NRDC's requests for an evidentiary hearing.

The Second Circuit's Decision

Waiving the Tenfold Children's Based on the Human Dosing Study

Under the FQPA, Congress charged the EPA with assessing the risk of any given pesticide. Unless it was found that any amount of the pesticide would cause harm, Congress required the EPA to make an additional tenfold margin for safety for infants and children. The EPA was given discretionary power to use a different margin of safety only if, on the basis of reliable data, such margin would be safe for infants and children. The NRDC argued that the EPA removed the tenfold safety factor without any rational explanation for doing so and as such, its decision was arbitrary and capricious.

The court agreed. The court noted that there was no rational explanation for the EPA's decision not to apply the tenfold childrens' safety factor test. The court took issue with the fact that the EPA, on assessments that relied on the human study, had not provided justification for not applying the childrens' safety factor. However, in assessments that relied on animal studies, the EPA justified its decision not to apply the tenfold factor because it had not found any evidence of increased susceptibility in the animal studies. In sum, the court the EPA's reasoning as an attempt to avoid applying the tenfold interspecies safety factor which the FQPA also requires when an assessment relies on animal studies. Instead, the EPA had relied entirely on the human dosing study and circumvented the tenfold interspecies safety factor but simultaneously noted that there was no risk to pre and post-natal exposure without providing any evidence. This, the court noted, was arbitrary and capricious.

As a result, the court vacated the portions of the EPA's July 23, 2008 order assessing the risk of dicholorvos based on the human dosing study as it was not reliable data on which EPA could base its decision to choose a lower childrens' safety factor.

Waiving Children's Safety Factor without Conducting Endocrine Testing

Under the FQPA, Congress noted that the EPA may apply a childrens' safety factor of less than tenfold if it determines on the basis of reliable data that the margin applied would be safe for infants and children. Under the standard set by Congress, the EPA could conclude even before completing its endocrine disruptor-screening program that it had reliable data for purposes of the childrens' safety factor. In its Final Order, the EPA did note that it had relied on other studies that provided information regarding endocrine disruption, including an animal study as well as other chronic data in which effects on reproductive organs were examined.

The court concluded that because the EPA had made a determination that it had reliable data for purposes of excluding the childrens' safety factor, it had complied with the standard. Additionally, because NRDC was not arguing that the data relied on was unreliable, the ended its assessment at determining whether the EPA had complied with the standard. As a result, the court determined that the EPA's denial of NRDC's request was not arbitrary and capricious based on this regard.

Denial of an Evidentiary Hearing

NRDC requested an evidentiary hearing under FQPA to determine whether the results of the human dosing study were statistically invalid and whether the EPA had complied with ethical rules. However, given the Court of Appeals' decision to vacate parts of the Final Order that were based on the human dosing study, the court saw no need to decide whether a public hearing was required on those matters.

Conclusion and Implications

EPA's order was vacated for its failure to explain why it did not employ a ten fold childrens' safety factor for dichlorvos risk assessments that relied on the Gledhill study; amounting to EPA's arbitrary and capricious conduct. (Greg Snarr, Thierry Montoya)

DISTRICT COURT FINDS ARMY CORPS' ARBITRARY ISSUANCE OF RESERVOIR CONSTRUCTION PERMIT ENTITLED PLAINTIFFS TO AN AWARD OF ATTORNEY'S FEES

Alliance to save the Mattaponi, et al. v. U.S. Army Corps of Engineers, et al., ___F.Supp.2d___, Case No. 06-01268 (D. D.C. Sept. 13, 2011).

Plaintiffs challenged a permit issued by the U.S. Army Corps of Engineers (Corps) to the City of Newport News, Virginia for the construction of a reservoir project, as well as the U.S. Environmental Protection Agency's (EPA) failure to veto the permit. In ruling on cross-motions for summary judgment, the U.S. District Court found in part for plaintiffs and in part for the federal defendants, holding that both the Corps and the EPA acted arbitrarily. The court ordered the case be remanded to the Corps and EPA for further proceedings. Plaintiffs then moved for attorney's fees and costs. The U.S. Magistrate ruled that plaintiffs were entitled to attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)(1)(A), but did not calculate the amount of fees owed. Instead, he asked the court to decide first whether it agreed with his determination that the federal defendants' positions were not substantially justified. The court largely adopted the magistrate's findings, granted plaintiffs' request for attorney's fees, and resubmitted the issue to the magistrate as to the amount of the fees and costs.

Background

The EAJA allows parties who prevail in civil actions against the United States to recover reasonable attorney's fees and costs, provided that the position of the United States is not substantially justified. *Am. Wrecking Corp. v. Sec'y of Labor*, 364 F.3d 321, 325 (D.C. Cir. 2004) (*per curiam*). The "position of the United States" refers both to "the position taken by the United States in the civil action," and to "the action or failure to act by the agency upon which the civil action is based." 28 U.S.C. § 2412(d)(1)(B).

The magistrate concluded that the Corps and EPA's (collectively: federal defendants) positions with respect to the permit were not substantially justified. In particular, he determined that: (1) the Corps' actions in analyzing alternatives to granting the permit under the relevant regulations were not substantially justified; (2) the Corps' conclusion that the construction of the reservoir would not cause significant degradation of the waters was not substantially justified; (3) the Corps' determination that the permit was in the public interest was not substantially justified; and (4) the EPA's failure to veto the permit and its defense of this failure were not substantially justified. The court agreed with the magistrate with respect to the first three issues, but disagreed with the magistrate as to whether the EPA's litigation position was substantially justified. In response, the federal defendants raised three specific objections, as discussed below.

The District Court's Decision

The Corps' Issuance of the Permit

With respect to the magistrate's first finding, § 404 of the Clean Water Act (CWA) authorizes the Sec-

retary of the Army to issue permits for the discharge of dredged or fill material into waters of the United States when certain conditions are met. 33 U.S.C. § 1311(a). One condition is that the party seeking the permit show that there are no alternatives that would have a less adverse impact on the aquatic ecosystem. 40 C.F.R. § 230.10(a). The federal defendants interpreted the magistrate's report and recommendation to state that the federal defendants did not consider any alternatives, and specifically objected to the report and recommendation to the extent that it is based on this assumption. The U.S. District Court disagreed with the federal defendants reading, holding that the magistrate's conclusion, when read in context, states that the Corps did not consider alternatives in the manner required by statute and regulations.

The federal defendants did not make any specific objections to findings (2) and (3) above, and because the court agreed with the magistrate's reasoning, the court adopted those portions of the report and recommendation.

EPA's Failure to Veto the Permit

Regarding the magistrate's fourth finding, § 404(c) of the CWA authorizes the EPA to veto permits that will "have an unacceptable adverse effect on [the aquatic environment]." 33 U.S.C. § 1344(c). Throughout the litigation, the federal defendants argued that the court lacked subject matter jurisdiction under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, to review the EPA's failure to veto. The magistrate held that neither the EPA's decision not to veto, or its litigation position regarding jurisdictional issues, were substantially justified. The court agreed with the magistrate regarding the decision not to veto, and disagreed regarding the EPA's litigation position. The court held that the EPA's jurisdictional arguments throughout the litigation were not so repetitive as to be unreasonable, and were therefore substantially justified.

The federal defendants objected to this finding, arguing that it suggests that the CWA contains a congressional demand that the agency has to do "something." However, the court disagreed with this reading of the report and recommendation, and interpreted the report and recommendation to require that the EPA base its decision whether to veto a permit on the factors identified in the statute.

Implications from the Previous Remand

Finally, the federal defendants argued that the fact that the court previously remanded the case to the Corps and the EPA for further proceedings and left the permit in place implies that the actions were justified and that the remand itself was a form of limited relief. Thus, plaintiffs were not entitled to recover under the EAJA. The magistrate and the court both rejected these arguments.

Conclusion and Implications

The District Court agreed with three of the magistrate's four findings regarding substantial justification. This opinion further solidifies the rule that, in actions to recover attorney's fees against the Unite States, the "position" of the United States refers to both the position taken by the United States in the civil action," and to "the action or failure to act by the agency upon which the civil action is based." 28 U.S.C. § 2412(d)(1)(B). More importantly, this decision evidences courts' willingness to examine, and even scrutinize, positions taken by the United States and not simply regard them with complete deference. (Rebecca Couch, Nima Javaherian)

DISTRICT COURT REQUIRES ARMY CORPS TO AMEND ITS EIS FOR FAILURE TO CONSIDER POST HURRICANE KATRINA CIRCUMSTANCES IN VIOLATION OF NEPA AND THE CLEAN WATER ACT

Holy Cross Neighborhood Association v. U.S. Army Corps of Engineers, ___F.Supp.2d___, Case No. 03-370 (E.D. La. Sept. 9, 2011).

Plaintiffs Holy Cross Neighborhood Association, Gulf Restoration Network, Louisiana Environmental Action Network, Citizens Against Widening the Industrial Canal, and Sierra Club's (Holy Cross) and defendants the U.S. Army Corps of Engineers (Corps) filed cross-motions for summary judgment in the U.S. District Court for the Eastern District of Louisiana. The court granted in part and denied in part both motions for summary judgment. Holy Cross' motion for summary judgment alleged that the Corps' decisions regarding the construction of a replacement lock for the Inner Harbor Navigation Canal (Industrial Canal) violated the court's 2006 order requiring the Corps to prepare a supplemental Environmental Impact Statement (SEIS), and that the Corps' actions violated the National Environmental Policy Act (NEPA) and the Clean Water Act (CWA). The District Court vacated and remanded the supplemental EIS and the Record of Decision (ROD) and enjoined the Corps from continuing with the project until it fully complies with NEPA and the CWA.

Background

The case stems the Corps' 1997 Environmental Impact Statement (EIS) and ROD regarding the construction of a replacement lock on the Industrial Canal in New Orleans. The Industrial Canal provides for navigation traffic by way of a lock that was built in 1923 near the Port of New Orleans. In 1956, Congress authorized construction of a replacement lock and studies began in 1960. The initial EIS was completed in 1997. Holy Cross filed its initial complaint in 2003 challenging the 1997 EIS, and in 2006, the Corps was enjoined from continuing with the project until a SEIS could be prepared.

According to the court, the Corps' 1997 EIS failed to consider reasonable dredging and disposal alternatives and did not adequately address the risks of flooding and hurricanes in general. The court found that the Corps' EIS did not take a "hard look" at the environmental impacts and consequences of dredging and disposing of the canal's contaminated sediment as required under NEPA. As a result of the court's 2006 order, the Corps drafted its SEIS, which was finalized in March 2009. The Corps' SEIS takes into account three deep draft lock alternatives, as well as a no-build/deauthorization alternative. The Corps issued a ROD in May 2009, which essentially adopted the SEIS' float-in-place plan, hydraulic dredging plan, and disposal of dredged material unsuitable for open water to be discharged in a closed disposal facility (CDF) and for material suitable for freshwater to be discharged into the Mississippi River.

On January 19, 2010, Holy Cross sent a notice of violation pursuant to the CWA to the Corps and when they did not receive a response, Holy Cross filed the present suit against the Corps on June 10, 2010. Holy Cross alleged that the Corps' SEIS and ROD violated the court's 2006 order, NEPA, and the CWA. On April 15, 2011 the Holy Cross filed a First Amended Complaint, removing its CWA citizen suit claims and adding a claim under the Administrative Procedure Act (APA) for violation of EPA's § 404(b)(1) guidelines of the CWA.

Holy Cross alleged that the Corps violated NEPA because the SEIS: (1) failed to consider the potential of shallow-draft alternative to reduce the volume of contaminated, dredged sediment; (2) the breadth of lock alternatives the Corps did consider were too narrow; (3) bucket dredging was rejected without considering its use for a shallow-draft lock project; (4) the Corps rejected landfill disposal of the contaminated sediment without considering its use for a shallow-draft project; (5) the Corps failed to quantify the risk of the CDF overtopping and releasing contaminated sediment into the Lake Pontchartrain Basin; and (6) the Corps incorporated most of its 1997 EIS's "faulty conclusions" about the project's environmental impacts.

With regard to the CWA's mandatory 404(b)(1) guidelines, Holy Cross alleged that (1) the Corps did not select the least environmentally damaging lock

size, dredging, and disposal alternatives that still meet the basic project purposes; (2) the Corps offered only arbitrary reasons for installing a deep-draft lock; and (3) the project's discharge of pollutants will violate an applicable Louisiana water quality standard. The Corps filed a cross-motion arguing that it did comply with NEPA and the CWA.

The District Court's Opinion

The U.S. District Court initially focused its review on the proper standard to be applied in considering motions for summary judgment. The court explained that NEPA was intended to assist public officials in making informed decisions that will "protect, restores, and enhance the environment." The court noted that the SEIS at issue was intended to evaluate and disclose environmental consequences of any "new circumstances or information" that may be significant and that were not the subject of the previous EIS. According to the court, the Fifth Circuit considers three factors in evaluating the EIS:

> …(1) whether the agency, in good faith and objectively, has taken a hard look at the environmental consequence of the proposed action and alternatives, (2) whether the EIS contains detail sufficient to allow parties, besides the preparing agency, to understand and consider the relevant environmental influences, and (3) whether the alternatives are sufficient to permit a reasoned selection therefrom.

'New Circumstances'—Closure of the Mississippi River Gulf Outlet

One of the most obvious and significant "new circumstances" that Holy Cross argued the Corps failed to consider in its SEIS were the changed conditions resulting from Hurricane Katrina, specifically the post-Katrina closure of the Mississippi River Gulf Outlet (MRGO) which closed the canal to deep-draft vessels. Holy Cross argued that the Corps should have considered shallow-draft lock alternatives in the SEIS. The court considered Holy Cross' contention that the Corps was obligated to explain why it failed to consider shallow-draft alternatives, when the Corps acknowledged deep-draft vessel traffic would not benefit from a deep-draft lock and a shallow-draft lock would produce the greatest net benefits over costs.

The court agreed that the closure of the MRGO to deep-draft traffic was a "significant new circumstance" with regard to the SEIS and that the Corps failure to consider the impact of this new circumstance violated NEPA. Significantly, the court pointed to a section of the SEIS entitled "Waterborne Transportation" which stated that the lock served primarily shallow-draft barge traffic, but that a "limited number of deep-draft vessels" were also to be accommodated. This blatant inconsistency led the court to hold that the Corps must amend the SEIS to clarify whether deep-draft traffic will utilize the lock and whether the draft alternatives should be reconsidered "in light of this utilization or in prohibition thereof." The court concluded that this was a NEPA violation due to the Corps' failure to consider the interests and alternatives in light of the MRGO's deep-draft traffic closure.

The court then considered whether the Corps improperly rejected bucket dredging in favor of hydraulic dredging which Holy Cross contended was more environmentally damaging. The court noted that the Corps had demonstrated that it considered efficiency, productivity, contractor preference, and turbidity in selecting hydraulic dredging and found that the Corps' decision was appropriate under the circumstances. The court did note, however, that if in the amended SEIS, the Corps finds that the MRGO closure to deep-draft traffic will have an impact on the dredging methods then any impact on its hydraulic dredging selection should be adequately addressed and revised if need be.

The third issue relevant to finding a NEPA violation was whether the Corps' decision to use a confined disposal facility (CDF) rather than landfill disposal was based on cost considerations alone. The court found that while the Corps' cost consciousness did not violate NEPA in of itself, the court had already concluded that the Corps must reconsider its draft alternatives analysis and that this may have an impact on the Corps' elected disposal procedures.

Clean Water Act Permitting Issues

Next, the court turned its attention to the alleged CWA violations related to the Corps' permitting program. The court observed that under the CWA

404(b)(1) guidelines, the Corps must consider "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem." Again, Holy Cross' CWA violation allegations were based on the SEIS' selection of the deep-draft lock, hydraulic dredging, and confined disposal facility. In concluding that there was a CWA violation, the court reiterated its NEPA analysis and held that the Corps' failure to consider that the MRGO is closed to deep-draft traffic violated the CWA guidelines. As a result, the court vacated and remanded the supplemental EIS and the ROD and enjoined the Corps from continuing with the project until it fully complies with NEPA and the CWA.

Conclusion and Implications

The court's opinion suggests that there is little tolerance for an agency's failure to consider certain circumstances in drafting an EIS or SEIS. While an agency's alternative selection may in itself be appropriate, if it can be shown that possible alternatives were completely ignored then the court must require the agency to begin its analysis afresh. Where there are clear inconsistencies or illogical conclusions in an EIS, the court will have no choice but to remand an EIS and the subsequent ROD in order to ensure that the most environmentally sound alternatives were considered and that the best possible course of action will be implemented. (Rebecca Couch, Kate Conard)

DISTRICT COURT FINDS STATE CLEANUP OBLIGATIONS INVOLVING ONGOING GROUNDWATER POLLUTION ARE NEVER DISCHARGEABLE IN BANKRUPTCY

Mark IV Indusustries, Inc. v. New Mexico Environment Department, ___F.Supp.2d___, Case No. 11 CIV 648 (S.D. N.Y. Sep. 28, 2011).

The U.S. District Court for the Southern District of New York has affirmed a Bankruptcy Court decision that held that ongoing cleanup obligations of debtor-plaintiff Mark IV Industries, Inc. (Mark IV) were not discharged by the Bankruptcy Court's confirmation order. The U.S. District Court held that the New Mexico Water Quality Act (WQA), under which the New Mexico Environment Department (NMED) chose to proceed to enforce Mark IV's cleanup obligations, did not offer NMED a right to payment for cleaning up the pollution itself. Accordingly, Mark IV's cleanup obligations under the WQA were not "claims" subject to discharge in bankruptcy. Moreover, the court held that, regardless of the enforcing statute, a cleanup obligation for ongoing pollution is never a "claim" dischargeable in bankruptcy. The reason is because such an obligation cannot be converted into a monetary sum, *i.e.* a debtor-polluter cannot pay to continue to pollute, but instead, must stop or abate the ongoing pollution.

Factual and Procedural History

The fabrication of electronic circuit boards by a company Mark IV acquired prior to the Bankruptcy petition caused groundwater pollution at the fabrication site, which violated federal and state environmental laws. Prior to Mark IV's bankruptcy filing, NMED investigated the fabrication site and found groundwater pollution which Mark IV subsequently took measures to remediate. By the time Mark IV entered bankruptcy, Mark IV's cleanup obligations were unfinished; however, Mark IV had no intention of continuing remediation.

Mark IV initiated an adversary proceeding against NMED to obtain a declaratory judgment that its cleanup obligations constituted claims under 28 U.S.C. § 2201(a) and were discharged pursuant to 11 U.S.C. § 1141 and the confirmation order, and any actions to enforce its cleanup obligations would violate 11 U.S.C. §§ 362(a)(1) and 1141. NMED counterclaimed seeking a declaration that its right to injunctive relief under the WQA was not a "claim" subject to discharge and an order against Mark IV to cleanup the groundwater pollution. Chant Family II Partnership (Chant), the fabrication site's property owner, and the U.S. Environmental Protection Agency (EPA) intervened.

On Mark IV and NMED's cross-motions for summary judgment, the Bankruptcy Court held that Mark IV's cleanup obligations were not dischargeable.

The Bankruptcy Court cited three factors in determining whether a cleanup obligation is a dischargeable "claim": (1) whether the debtor is capable of executing a cleanup order, or can he *only* comply by paying someone else to do it, *e.g.* where a debtor is dispossessed of the property as in appointment of receiver cases, it is impossible for the debtor to perform the cleanup himself; (2) whether the pollution is "ongoing," such that the debtor must stop or abate the ongoing pollution; and (3) if the pollution is not "ongoing" or if the cleanup order imposes discrete obligations to cleanup accumulated pollution, does the environmental agency have the statutory "option" to cleanup the pollution itself and seek reimbursement?

The Bankruptcy Court concluded from weighing all three factors that Mark IV's cleanup obligations were not dischargeable. First, even though Mark IV was not the owner of the site, Mark IV had access to the fabrication site, and therefore, had the ability to cleanup the groundwater pollution. Second, even though the parties disputed whether contaminants were migrating such that it was unclear whether pollution was "ongoing" and therefore not subject to discharge, the Bankruptcy Court focused very heavily instead on the fact that NMED sought relief under the WQA, which did not offer NMED the option to cleanup the pollution itself and seek reimbursement. On this basis, the Bankruptcy Court found Mark IV's cleanup obligations not dischargeable.

On appeal, the District Court focused on: (1) whether Mark IV's cleanup obligations were "claims" subject to discharge in bankruptcy; and (2) whether the Bankruptcy Court erred in considering whether the pollution was "ongoing."

The District Court's Decision

Whether a Cleanup Obligation Is a 'Claim' Is Determined by the Enforcing Statute

On appeal, Mark IV argued that its cleanup obligations were "claims" subject to discharge in bankruptcy because NMED had a right to payment for cleaning up the pollution itself under other statutes, such as CERCLA or the Hazardous Waste Act. Thus, the issue on appeal was whether the availability of other statutes under which NMED could proceed and had a right to payment was relevant.

The District Court affirmed the Bankruptcy Court's holding that the availability of the right to payment under other statutes was irrelevant. Instead, the statute under which a creditor chooses to enforce its rights is controlling.

Accordingly, as NMED chose to proceed under the WQA, it is the controlling statute as to whether the claim is dischargeable. Because the WQA provides no right to payment but only provided for injunctive relief requiring cleanup, Mark IV's cleanup obligations were not "claims" subject to discharge in bankruptcy.

Cleanup Obligation Involving Ongoing Pollution Is Never a Dischargeable 'Claim'

The other issue on appeal was whether the Bankruptcy Court erred in considering, as a distinct inquiry, whether there was ongoing pollution.

The District Court held that there was no error because as a matter of law, even if the enforcing statute provides a right to payment, a cleanup obligation involving ongoing pollution is never subject to discharge in bankruptcy. The reason is because a cleanup obligation for ongoing pollution cannot be converted to a monetary sum that is subject to discharge, i.e. a debtor-polluter cannot pay to continue to pollute, but instead, must stop or abate the ongoing pollution. The court further dismissed Mark IV's argument that ongoing pollution must be the result of current activities because "residual" waste (even if once cleaned up) can still cause ongoing pollution.

Conclusion and Implications

The statute under which a creditor chooses to proceed to enforce cleanup obligations of a debtor controls in determining whether such obligations are "claims" subject to discharge in bankruptcy. If the enforcing statute provides the creditor with the right to payment for cleaning up the pollution itself, then the cleanup obligations are dischargeable in bankruptcy. However, regardless of the enforcing statute, if cleanup obligations involve remedying ongoing pollution, such obligations are never dischargeable in bankruptcy. Instead, a debtor-polluter must stop or abate the ongoing pollution. This may limit the ability of responsible parties from filing bankruptcy to avoid responsibility for environmental contamination. (Danielle Sakai, Cathy Ta)

CITY OF NEW YORK FACES MASSIVE LIABILITY FOR FAILURE TO REMEDIATE SUPERFUND SITE AND IN EXPOSING BRONX RESIDENTS TO GROUNDWATER CONTAMINATION

Nonnan v. City of New York, 2011 *N.Y.Slip.Op.* 0643 (N.Y Supr. Ct App. Div. Sept. 15, 2011).

In a potentially groundbreaking case, plaintiffs in the area of the Pelham Bay Landfill in the Bronx have successfully pled a claim against the City of New York and will be able to proceed to summary judgment and potentially to trial. The city had previously succeeded in obtaining dismissal of earlier complaints, but the current complaint succeeded and notably relied upon epidemiology to establish the basis for causation.

Background

Plaintiff Patrician Nonnan and others filed suit against the city for their exposure to hazardous substances emanating from the Pelham Bay Landfill in the Bronx. Defendants moved for summary judgment of the nine plaintiffs claims asserting that the evidence failed to show that there was an increased cancer incidence caused by hazardous substances deriving from the landfill.

The 81-acre Pelham Bay Landfill is owned by the City of New York and was operated by the New York Department of Sanitation (NYDOS) beginning in 1963 for disposable of 2,600 tons of municipal solid waste per day. Plaintiffs in the surrounding area complained continuously about odors and improper and illegal dumping of hazardous materials, as well as industrial materials from corporations into the landfill. The landfill was ordered closed on December 31, 1978. Over 25 years ago, the City of New York commenced an action under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) against corporate defendants and in that action the city claimed that the corporations had illegally disposed of industrial and chemical waste containing hazardous substances at the landfill and that those corporations were liable to the city because the hazardous waste had contaminated the groundwater and threatened drinking water supplies. The Nonnan plaintiffs were well aware of the earlier pleading by the City of New York and relied upon that admission (namely that hazardous waste had been disposed of at the landfill during the time that NYDOS was operating the landfill) and that that hazardous waste had contaminated the local groundwater supply.

Later in the year in 1985, the NYDOS signed a consent decree with the New York State Department of Environmental Conservation (NYDEC) in which NYDOS admitted that it had allowed hazardous wastes to be illegally disposed of at the landfill and that it had allowed leachate to enter the surface and groundwater in violation of state and federal statutes. Between 1991 and 1993, nine separate causes of action were brought against the city by residents of the neighborhoods closet to the landfill and in those causes of action, plaintiffs, children, and adults alleged that the extended exposure to hazardous substances emanating from the landfill caused the development of acute lymphoid leukemia, as well as of Hodgkin's disease. In September of 2000, the city moved to dismiss the nine causes of action for failure to state a claim and asserted rather that plaintiffs had failed to allege or establish a viable causal connection between the landfill and their injuries. In 1994 the Department of Health had conducted a study noting the statistical elevation of lung cancer, colon cancer, and other problems such as leukemia, as well as kidney cancer, but the study by the United States Department of Health failed to note that the chemicals in the landfill were consistent with the types of cancers being detected and, therefore, did not serve as an adequate basis for plaintiff's cause of action against the city.

Subsequently, the plaintiffs retained Dr. Richard Neugebauer, am epidemiologist who opined that persons residing to close proximity to the landfill experienced higher incident rates of acute lymphoblastic leukemia as compared to persons residing farther away. Dr. Neugebauer's study was based upon a number of factors, such as the strain of association, consistency, specificity, temporality, biological gradient, biological plausibility, coherence, experiment and analogy. The city attacked each of these factors and stated that this was in essence "voodoo science," and that therefore, Dr. Neugebauer's determinations

should be disregarded. The Appellate Division of New York disagreed.

Analysis

Critically, in looking at the question of whether an expert is competent to testify, the court correctly noted that the Frye Test is not concerned with the reliability of a particular expert's conclusions, but rather with whether the expert's deductions are based on principals that are sufficiently established to have gained acceptance as reliable. General acceptance does not necessarily mean that a majority of the scientists involved subscribe to that conclusion but, that those espousing the theory or opinion have followed generally accepted scientific principals and methodologies in reaching their own conclusions. An expert on causation must set forth the plaintiff's exposure to a toxin and that the toxin is capable of causing the illness and, further, that plaintiff was exposed to levels of the toxin sufficient to cause the illness. In this case, however, plaintiffs had met that criteria because they have difficulty determining with specificity what toxins each were exposed to. The court found that this alternative route of using epidemiology was sufficient to create a triable issue of fact whether exposure to toxins emanating from the landfill caused plaintiffs' injuries. Epidemiology, as the court noted, is the study of disease patterns in human populations. Specifically, epidemiology observes the affects of the exposure to a single factor upon the incidence on a disease in otherwise identical populations. The City of New York Department of Sanitation argued in response that it is impossible to establish a specific causation because plaintiffs cannot quantify their exposure to any specific toxin. The city further insisted that in the absence of a specific dose response analysis plaintiffs could not establish that their current ailments were caused by toxins emanating from the landfill. The Appellate Division disagreed again. The court specifically noted that given that the city relied on the proximity analysis contained in the Department of Health's 1988 and 1994 studies of the landfill to argue its own CERCLA claim, the Appellate Division found that the city was estopped from denying that the proximity analysis is not a recognized substitute for a dose response analysis. In short, the Appellate Division found that the city's criticisms of Dr. Neugebauer's studies went to the weight of the evidence not the admissibility of that evidence.

Conclusion and Implications

This case has been working its way through the New York court system for a long period of time and, if in fact plaintiffs are successful at trial in relying upon epidemiology to prove exposure and injury from a landfill, this could change the course of Superfund litigation in the United States. Although there have been some outlier cases here and there regarding a plaintiff's exposure to a Superfund site as the basis for personal injury, those claims by in large have failed. Typically, they have failed because plaintiffs have been unable to show by a preponderance of the evidence that there specific ailment was caused by exposure to the landfill. The suit of epidemiology here would significantly reduce plaintiff's burden and therefore this case is worth watching. (Jeffrey Pollock)

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