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EASTERN WATER LAW™

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EWL

FEATURE ARTICLE

ACTIVISTS SUIT SEEKING TO CHALLENGE STATE WATER QUALITY CERTIFICATIONS LIKELY TO FALL SHORT

By Parker Moore and Richard Davis

The National Wildlife Federation and Minnesota Conservation Federation (collectively: NWF) have filed a lawsuit against the U.S. Environmental Protection Agency (EPA) to overturn EPA's longstanding rule that prevents challenges to state water quality certifications issued under § 401 of the Clean Water Act (CWA). In *National Wildlife Federation v. U.S. EPA*, Case No. 11-cv-1777 (D. D.C. Oct. 6, 2011), NWF asked the U.S. District Court for the District of Columbia to vacate 40 C.F.R. § 124.55(b), an EPA regulation that substantially limits a state's ability to modify a § 401 certification and EPA's ability to modify the terms of a CWA permit that has been issued in reliance on the state's original certification. If successful, the lawsuit would erode the regulatory certainty on which CWA permittees have long depended. Fortunately for them, the lawsuit likely has very little chance of success.

Background

The Vessel General Permit

In 2008, EPA issued the Vessel General Permit (VGP) for discharges incidental to the normal operation of vessels. The permit responded to a 2005 U.S. District Court *vacatur* of EPA's decades-old exclusion of those discharges from permitting under the CWA's National Pollutant Discharge Elimination System (NPDES) program. *Northwest Environmental Advocates v. EPA*, 2005 U.S. Dist. LEXIS 5373 (N.D. Cal. 2005). The VGP was designed to regulate vessels "operating in a capacity as a means of transportation," and its requirements apply to a broad array of discharges "incidental to the normal operation of a vessel"—including deck runoff, bilge water, and ballast water—into waters of the United States. To achieve the purposes underlying the permit, EPA imposed four different categories of requirements: (1) technology-based effluent limits applicable to all vessels; (2) technology-based effluent limits for specific discharges; (3) water quality based effluent limits; and (4) requirements applicable to specific classes of vessels. Then, additional requirements were incorporated into the VGP through the CWA's § 401 certification provision.

Section 401 of the Clean Water Act

Section 401 of the CWA, 33 U.S.C. § 1341, requires applicants for a federal permit that may result in a discharge to navigable waters to provide the federal permitting agency with a certification from the state where the discharge will originate. The certification must confirm that the proposed discharge will comply with all applicable effluent limitations, water quality standards, and standards of performance. The § 401 certification also must set forth any effluent limitations and other limitations, as well as any monitoring requirements, that the certifying state concludes are necessary to ensure that the permittee will comply with the limitations and standards identified in the certification. Those limitations and standards are then incorporated as conditions into the requested permit.

Because § 401 certifications impose additional requirements on CWA permits, EPA's regulations have long-provided a measure of regulatory certainty to permittees by limiting the effect that a state's modification of its certification can have on a CWA permit

that already has been issued. In particular, 40 C.F.R. § 124.55(b), which EPA promulgated in 1980, directs that a state may modify its certification if there is a change in the state law or regulation upon which the certification is based, or if a court of competent jurisdiction or an appropriate state board or agency stays, vacates, or remands the certification. And if EPA has not already issued the permit that is the subject of the certification, EPA may revise the permit to reflect the new conditions in the modified certification. But if EPA receives the modified certification after issuing the permit, EPA may modify the permit only at the request of the permittee, and then only to the extent necessary to delete a permit requirement that is based on an aspect of the certification that has been invalidated by a court or an appropriate state board or agency.

This regulatory safeguard became especially important when EPA developed the VGP, because state concern over vessel discharges, particularly ballast water, resulted in an exceptionally active use of § 401 certifications to impose additional conditions on permittees within the various states. But many environmental groups did not believe that those additional conditions went far enough. For example, and most relevant here, NWF criticized Minnesota's § 401 certification of the VGP because it believed that the permit, even with Minnesota's additional conditions, would not prevent non-indigenous species from being introduced to state waters through ballast water discharges or maintain the beneficial uses of the state's waters. As a result, NWF petitioned the Minnesota Court of Appeals to review the state's certification of the VGP.

The *National Wildlife Federation v. Minnesota Pollution Control Agency* 2009 Decision

In *National Wildlife Federation v. Minnesota Pollution Control Agency*, (Minn. Ct. of Appeals Dec. 17, 2009), NWF reiterated its objections to Minnesota's § 401 certification of the VGP. NWF argued that the state's certification would not prevent the introduction of invasive species, and therefore would cause violations of state water quality standards. NWF further argued that the state failed to consider evidence about alleged water quality impacts that NWF had submitted when commenting on Minnesota's draft certification and that the state had allegedly based its certification solely upon information provided by EPA and neighboring states. In addition, NWF asserted that the certification was affected by errors of law because the state unlawfully failed to find that VGP discharges would comply with state water quality standards or that the certification's conditions would assure that vessels will comply with those standards. Finally, NWF contended that the certification was arbitrary and capricious because the administrative record associated with it did not support the state's conclusion that biological performance standards would assure compliance with state water quality standards, Minnesota did not articulate a rational connection between the facts found and the certification, and the state failed to consider the effects of certifying the VGP on existing uses of waters and related water quality. For those reasons, NWF asked the court to overturn the state's § 401 certification and to instruct Minnesota to modify the certification to include new requirements that correct the alleged shortcomings.

On September 22, 2009, the Minnesota Court of Appeals dismissed NWF's petition as moot, citing EPA's § 401 certification regulations as the basis for the dismissal. The court explained that 40 C.F.R. § 124.55(b) prohibits EPA from revising an existing permit to add new conditions that are set forth in a § 401 certification that is modified after the permit has been issued. Because NWF sought to add new conditions to the certification, and thus to the permit, the court concluded that NWF had sought relief that could not be granted, rendering the petition moot.

Analysis

Following the Minnesota Court of Appeals' dismissal of its lawsuit seeking to overturn Minnesota's § 401 certification of the VGP, NWF began pursuing other strategies for attacking the state's certification. On May 2, 2011, NWF filed a petition for rulemaking with EPA asking EPA to rescind 40 C.F.R. § 124.55(b)—the regulation that had rendered its challenge to the certification moot in the Minnesota Court of Appeals. The petition alleged that the rule's ban on revising existing permits to incorporate new conditions set forth in a state's modified § 401 certification violates the CWA because it requires EPA to allow permittees to continue discharging pollutants into navigable waters within a state while knowing that those discharges may exceed the state's water quality standards.

Five months later, on October 6, 2011, NWF filed a lawsuit in the U.S. District Court for the District of Columbia challenging 40 C.F.R. § 124.55(b). NWF's complaint alleges that EPA's rule prohibiting revisions, without the permittee's request, to an existing permit to reflect more stringent conditions in a newly-modified § 401 certification violates the Administrative Procedure Act (APA) and the CWA. NWF states that:

> …[t]he ban on making a permit consistent with more stringent conditions after EPA has issued the permit, set forth in 40 C.F.R. § 124.55(b), which was applied to the Plaintiffs by the Minnesota Court of Appeals, is inconsistent with and in excess of EPA's statutory jurisdiction, authority, or limitations, or short of statutory right under the Clean Water Act, or arbitrary, capricious, or otherwise not in accordance with the Clean Water Act.

Thus, NWF asked the court to declare that 40 C.F.R. § 124.55(b) violates the APA and the CWA and to issue an order setting aside the rule's ban on making an existing CWA permit consistent with more stringent conditions that a state later identifies in a modified § 401 certification of the permit.

In its complaint, NWF acknowledges that it petitioned EPA to rescind 40 C.F.R. § 124.55(b) only five months before filing its judicial challenge to the rule, but it asserts that EPA has not yet taken action on the petition. NWF also acknowledges that "EPA may revise 40 C.F.R. § 124.55(b)." But it claims that any such revision is not expected to become effective "until perhaps the Spring of 2013, well after November 30, 2012, when EPA takes final action on a forthcoming proposal to issue the next VGP."

Conclusion and Implications

The NWF's judicial challenge to 40 C.F.R. § 124.55(b) represents another creative effort by environmental groups to effect executive policy change through the courts. On the smaller scale, if NWF is successful, it would get a rare second opportunity to challenge Minnesota's § 401 certification of the VGP and possibly influence the requirements of that permit. On the larger scale, if NWF is successful and EPA's regulation is vacated, the lawsuit would have an incalculable impact nationwide on permitting under the CWA. Absent EPA's regulatory bar on post-issuance permit revisions stemming from modified § 401 certifications, EPA would face continual efforts to vacate its permits—likely causing the CWA permitting programs to grind to a halt—and permittees would be unable to rely on the conditions of their permits to inform decisions about committing resources to carrying out permitted activities. Fortunately for EPA and for CWA permittees, NWF likely will not succeed.

NWF's challenge is plagued by serious jurisdictional infirmities that likely will prevent the D.C. District Court from considering the merits of the lawsuit. Most importantly, NWF's suit is a facial challenge to an EPA rule that took effect over 30 years ago. EPA issued 40 C.F.R. § 124.55(b) in 1980 and since that time has made only minor amendments to it, none of which affected the aspects of the rule NWF challenges. As a result, NWF's challenge is untimely. At worst, § 509(b)(1) of the CWA, 33 U.S.C. § 1369(b)(1), required NWF to challenge with rule within 120 days of promulgation, and even had that been done, the statute assigns jurisdiction over the challenge to the Circuit Courts of Appeals of the United States—not the U.S. District Court where NWF filed. At best, NWF was required by 28 U.S.C. § 2401(a) to challenge the rule in a federal district court within six years after the claim accrued. In this case, the claim likely accrued when EPA issued the rule in 1980, not when the Minnesota Court of Appeals dismissed NWF's challenge to Minnesota's § 401 certification, because the rule is sufficiently clear for NWF, or any other party, to understand how the rule would operate. As a result, NWF's suit likely will be dismissed for a lack of subject matter jurisdiction.

But even if the court makes the unlikely finding that NWF's complaint was timely filed, the court likely cannot adjudicate the suit in light of NWF's actions in the months before it filed. As NWF conceded in its complaint, EPA has not made a decision on NWF's petition to rescind 40 C.F.R. § 124.55(b), which was submitted only five months before the complaint was filed. If EPA grants the petition, the litigation challenging 40 C.F.R. § 124.55(b) would be moot. As a result, for practical reasons the court should not allow the suit to proceed: NWF's petition prevents its lawsuit from being ripe. Nor should the court allow litigation to proceed for legal reasons. Until EPA either grants or denies NWF's petition, there is no final agency action for the court to con-

sider, and NWF cannot base its lawsuit on a decision which EPA has not yet made—regardless of what it thinks that decision will be.

So, while NWF's challenge to 40 C.F.R. § 124.55(b) potentially could have extreme and far-reaching effects, and stakeholders should monitor any new developments in the litigation, they need not let their concerns interfere with Holiday festivities.

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Richard Davis has practiced almost exclusively under the federal Clean Water Act and its state analogues since he joined Beveridge & Diamond, P.C. in 1981. Chairing or co-chairing the firm's Clean Water Practice Group for more than 15 years, Mr. Davis helps to direct one of the most innovative and dynamic clean water practices in the United States. His individual practice includes active representation of major clean water agencies on issues including permitting, TMDLs, CSO and other enforcement defense, and regulatory planning to take advantage of innovations such as water quality trading and EPA's Green Infrastructure initiative. Mr. Davis also serves on the Editorial Board of the *Eastern Water Law & Policy Reporter*.

EASTERN WATER NEWS

AMERICAN SOCIETY OF CIVIL ENGINEERS COMMISSIONED REPORT PAINTS BLEAK ECONOMIC OUTLOOK OF AGING U.S. WATER INFRASTRUCTURE

Aside from water law practitioners, one may assume that many Americans rarely, if ever, think about water infrastructure. For most, all they know or care is that the water flows when the faucet is turned on and that their wastewater (shower water, toilet water, kitchen sink water, *etc.*) seamlessly exits the premises without backing up and causing problems. Water input and output are automatic and on demand—like operating a light switch—until one day it is not. That "day" may be approaching sooner than most think, and the potential impacts of unreliable water supply and wastewater treatment are many.

A recent study commissioned by the American Society of Civil Engineers (ASCE), and performed by Economic Research Development Group modeled the anticipated economic consequences of the nation's aging water infrastructure (both supply and wastewater handling infrastructure). The results are not encouraging as it is no secret that water infrastructure rehabilitation and replacement funding is not keeping pace with existing, on-the-ground rehabilitation and replacement needs. The projections contained within "Failure to Act: The Economic Impact of Current Investment Trends in Water and Wastewater Treatment Infrastructure" are sobering.

The ASCE Report on Water Infrastructure

According to the ASCE report, the useful life of water system component parts (whether they serve water supply, delivery, or treatment purposes) ranges from 15 to 95 years. Clearly, this observation is concerning for many of the nation's older cities, and there are the increasing instances of water main breaks and failures, and the corresponding water delivery interruptions and street flooding (if not sinkhole collapses) to prove it. However, newer, more recently developed areas of the country are not immune either. One of the ironies of the development boom of the mid 2000s was that while new development necessarily brought with it new, modern water supply and removal/treatment infrastructure, that shiny new infrastructure mostly just connected more distant and far flung water users to the same preexisting and aging (if not failing) centralized infrastructure located within the established population centers. This leads to two effects: (1) increasing demand and stress on the aged portions of the interconnected infrastructure than would not otherwise exist without the new development (thus accelerating the demise of the older existing infrastructure); and (2) compromising the efficiency and function of the new infrastructure because its capacity and function is otherwise limited by the older infrastructure to which it is connected.

EPA Findings

The U.S. Environmental Protection Agency (EPA) has been tracking the national capital investment that is needed to upgrade deteriorating drinking water and wastewater systems. The ASCE report cites EPA's findings that in 2010 alone, the necessary capital investment totaled $91 billion. Of that staggering sum, only $36 billion was funded, leaving a shortfall of $55 billion. If current trends continue (and in this economic climate that is probably a pretty safe assumption), the EPA projects that the capital investment needed just to maintain the status quo will amount to $126 billion by 2020, and $195 billion by 2040. Correspondingly, EPA projects the actual funding shortfalls to amount to $84 billion in 2020, and $144 billion in 2040. Pipes will leak more, more wastewater will go untreated, and funds used to address more urgent or emergency water supply and treatment problems will be diverted from other needed maintenance projects creating a cycle of escalating costs, increases in provider rates, and increased waste and pollution. While the problems presented by our aging water infrastructure may be out of sight for the vast majority of Americans, the problems should not remain out of mind.

It's Not Just about Less Water Delivered to the Tap

Water supply and delivery interruptions, and inadequate wastewater treatment will impact the economics of the home and of the nation alike. The ASCE report notes that water-borne illnesses in drinking water systems will likely increase, and they will exact a price at the local and national levels by increasing individual household medical expenses, decreasing household wages due to sick leave, and decreasing workforce productivity due to sick leave. EPA and the Centers for Disease Control support these outcomes. Both agencies recently completed tracking the 30-year incidence of water-borne illnesses across the United States. The study categorized illnesses by type, and extrapolated and distributed the financial burden attributable to the illnesses. The study found an overall economic burden of $255 million over the 30-year interval, and concluded that 29 percent of that burden was borne by households (medical costs and lost wages which leave less to spend on other household needs), while the remaining 71 percent of the burden was borne by employers (lost employee productivity due to absenteeism).

Economic Modelling

For purposes of the ASCE report, Economic Research Development Group further extrapolated the joint EPA/CDC data to project the likely economic burden in 2020, in part to correspond with EPA's nearest infrastructure capital investment gap interval. The economic modeling projects that by Year 2020 the total cost to households and businesses due to unreliable water delivery and treatment will be $206 billion ($147 billion shouldered by businesses, and $59 billion shouldered by households). For households in particular, these costs are projected to result in an $900 reduction in standard of living per household by 2020. The ASCE report also projects that these costs (the costs to businesses and households needed to manage unreliable water delivery and wastewater treatment services) could lead to the loss of 700,000 jobs nationally by 2020, and 1.4 million jobs by 2040. This further translates to a possible cumulative loss of $416 billion in GDP between now and 2020. In year 2040 alone, that lost GDP could amount to as much as $252 billion.

Efficiency Gains

One bright spot in the report is the acknowledgement that U.S. per capita water use today, is roughly equivalent with that of the 1950s after the same had peaked in the 1970s. This reduction in per capita water use is chiefly attributable to increases in water use efficiency, predominantly in industry and agriculture, but also in the home (low flow toilets, shower heads, and faucets, *etc*.). Unfortunately, efficiency gains have largely plateaued and water use in the home specifically has remained relatively constant/stable since the 1980s. Efficiency gains alone, however, will not solve the aging infrastructure problem because such gains are being outstripped by continuing population growth, particularly in the arid and mountainous West where there is greater domestic water use for outdoor irrigation purposes.

Conclusion and Implications

So, where do we go from here? The ASCE report does not offer any insights on that question. Nor does the report address related problems of the overall availability of dwindling water supplies and the costs associated with bolstering those supplies through the development of new water sources or the construction of additional reservoirs to capture more of what currently flows out to sea. Regardless, given the condition of the vast majority of the nation's water infrastructure, the days of turning on a faucet like flipping a light switch are likely numbered if current capital investment trends continue. (Andrew J. Waldera)

NEWS FROM THE WEST

This month's News from the West features cases from Utah, California, and Nevada. First, the Supreme Court of Utah found that the State Engineer may not declare a forfeiture of water rights when denying a change application. Next, in an effort to facilitate renewable energy development, California passed a new law that will exempt certain renewable energy projects from Water Supply Assessment requirements. Lastly, a Nevada District Court ruled that the federal government did not establish immunity for flood damages based on an unresolved issue of the character of the floodwater itself.

Utah State Engineer May Not Declare a Forfeiture of a Water Right as the Basis for Denying a Change Application

In *Jensen v. Jones*, 2011 UT 67 (Ut. 2011) the Utah Supreme Court determined that the Utah State Engineer lacked authority to declare a forfeiture of a water right as the basis for denying an application to change a water right's place of use and point of diversion.

According to the Court, the State Engineer is an executive officer with the duty of administering and supervising the appropriation of the waters of the state. However, the Court noted that the State Engineer acts only in an administrative capacity and lacks the authority to determine the rights of parties. Thus, the Court ruled that proceedings before the State Engineer do not constitute an adjudication of water rights because the state statute governing change applications left the adjudication of the rights to the courts. Further, the Court also noted that the State Engineer must follow a set of statutory guidelines when approving or denying a change application. However, the Court also noted that the State Engineer has other available options if it determines that an applicant's water rights have been forfeited through nonuse. Specifically, the State Engineer may bring suit to enjoin an unlawful appropriation and diversion, and may stay the pending application pending such a suit. Additionally, the State Engineer may grant a conditional approval.

Nevertheless, the Court ruled that the State Engineer may not simply declare a forfeiture of water rights when denying a change application. Accordingly, the Court did not consider whether the water right at issue had been forfeited, but simply ruled that the State Engineer exceeded the scope of his statutory authority and reversed the District Court's decision to affirm the State Engineer's decision.

California Exempts Certain Renewable Energy Projects from Water Supply Assessments

On October 8, 2011, in an effort to facilitate renewable energy development in California, Governor Brown signed Senate Bill 267 into law. Senate Bill 267 modifies the existing legal requirements for preparation of water supply assessment for projects that meet certain size thresholds. Further, Senate Bill 267 is intended to lessen the time and costs associated with proposed photovoltaic and wind energy generation facilities.

California's Water Supply Assessment (WSA) statute requires cities and counties to prepare a water supply assessment when reviewing certain "projects" under the California Environmental Quality Act (CEQA), a state statute similar to the National Environmental Policy Act. Typically, the WSA statute only applied to large projects with substantial water requirements. However, the California Court of Appeal had held in *Center for Biological Diversity v. County of San Bernardino*, 184 Cal.App.4th 1342 (2010), that a proposed open-air composting project on a 160-acre parcel, with minimal water requirements, was a "project" for the purposes of a water supply assessment. However, Senate Bill 267 now provides that photovoltaic and wind energy generation facilities that require no more than 75 acre-feet of water per year are exempt from the requirement of preparing a water supply assessment. Specifically, Senate Bill 267 modified the definition of "project" under the WSA statute to exclude these projects.

All water supply analyses must be carefully prepared as they are subject to challenge under the State's stringent CEQA water supply sufficiency standards. However, Senate Bill 267 will help to streamline the project approval process for many of California's proposed renewable energy facilities, as long as they use fairly minimal amounts of water.

Federal Immunity for Flooding Is Determined by the Character of the Damaging Water

In *Kroshus v. U.S.*, Case Nos. 3:08-cv-0246-LDG-RAM, 3:08-cv-0285-LDG-RAM, 3:08-cv-0621-LDG-RAM, 3:09-cv-0167-LDG-RAM,3:09-cv-0649-LDG-RAM,3:09-cv-0713-LDG-RAM, 3:09-cv-0715-LDG-RAM, 3:10-cv-0463-LDG-RAM (D. Nev. 2011) the U.S. District Court for Nevada denied defendant United States' motion for summary judgment, based on a claim of immunity under the Flood Control Act, for a breach of the Truckee Canal. The court reasoned that an issue of material fact existed as to the government's claim of immunity because the government did not show that the Truckee Canal had exceeded its ordinary capacity before the breach or that irrigation water was being diverted into the Truckee Canal.

The District Court noted that the Flood Control Act's immunity provision provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or floodwaters at any place." Further, the U.S. Supreme Court, in *Central Green Co. v. U.S.*, 531 U.S. 425, 437 (2001), clarified whether "flood or floodwaters" includes all water that flows through a federal flood control facility by instructing lower courts, in conducting a flood immunity analysis, to "consider the character of the waters that cause the relevant damage rather than the relation between the damage and a flood control project." Further, the court noted that the Ninth Circuit, in *Peterson v. U.S.*, 367 F.2d 271, 272, 276 (9th Cir. 1966), held that the government does not have immunity from damages for all types of floods. Finally, the court stated that the central inquiry in determining flood control immunity is whether the damaging water was related to flood control. Thus, whether the damage was caused by flood or non-floodwater, or whether the water was released for a purpose related to flood control, is significant.

With the above rules in mind, the court noted the government did not raise the issue of whether the breach was a result of a discrete flood or the result of a flood control project. Further, the court stated that engineering reports in the record showed that the water level at the breach did not exceed the canal's embankment crest and that there was no evidence of flooding in the area as a result of precipitation. Moreover, the government failed to raise the issue of whether water in the canal was released prior to the breach for purposes other than a deliberate diversion of irrigation water. Accordingly, the court rejected the government's motion for summary judgment, finding that an issue of material fact existed, and the case will proceed to trial. (Jill Willis)

FLOOD CONTROL DEVELOPMENTS

FLOOD CONTROL MANAGEMENT AND LIABILITY UPDATE

California Department of Fish and Game Joins Environmental Groups in Challenging Corps Levee Vegetation Removal Policy

In November 2011, the California Department of Fish and Game (CDFG) filed a motion to intervene in *Friends of the River v. U.S. Army Corps of Engineers*, a federal suit challenging a U.S. Army Corps of Engineers (Corps) vegetation removal policy for levees over which the Corps has responsibility. The challenged policy would create vegetation-free zones along levees and would require local levee agencies to remove trees and shrubs along their levees, or risk losing federal disaster aid. The policy could present particularly expensive challenges in California, where the state's Department of Water Resources (DWR) estimates that tree removal on the Central Valley's 1,600 miles of levees could cost as much as $7.5 billion. If the motion to intervene is granted, CDFG would join the suit on the side of plaintiffs Friends of the River, Defenders of Wildlife, and the Center for Biological Diversity.

The underlying lawsuit, *Friends of the River, et al. v. U.S. Army Corps of Engineers* (E.D. Cal. filed June 20, 2011) Case No. 2:11-cv-01650 (*Friends of the River*), was filed in the U. S. District Court for the Eastern District of California in June, 2011. In that suit, the plaintiffs allege that the Corps' institution of the vegetation policy is in violation of the Administrative Procedure Act (APA), the National Environmental Policy Act (NEPA), and the federal Endangered Species Act (ESA).

The challenges arise from the path the Corps followed in instituting the vegetation policy. In 2007, the Corps issued a draft white paper exploring the possibility of establishing a vegetation-free zone on levees over which the Corps had responsibility. Two years later, the federal agency issued an Engineering Technical Letter (ETL) that required levee operators to maintain a 15-foot vegetation free zone around the levee, unless they had procured a variance. In 2010, the Corps clarified the variance procedures via a policy guidance letter. The plaintiffs have taken the position that by issuing the ETL, the Corps engaged in a "final agency action" that could be challenged under the APA, and that it was required to take procedural steps under the NEPA and the federal ESA to complete an environmental review of its actions and to consult with environmental agencies prior to adopting the policy. The plaintiffs also take issue with the substance and effect of the policy, which they claim will result in significant habitat destruction for a number of endangered species.

In response, the Corps filed a motion to dismiss the lawsuit for lack of subject matter jurisdiction, arguing that its actions are not subject to review under the APA because the Corps has not engaged in rulemaking and none of the documents issued by the Corps constitute a "final agency action" under the APA. The Corps notes that a long-term management plan for the Central Valley levees is still in development, and that because the vegetation removal policy would work together with this plan, the plaintiffs' claims are not yet ripe. Some personnel within the Corps have suggested that a new, stand-alone document could be developed, which would provide for site-specific exceptions to the grass-only policy, based on the unique conditions on a particular levee site. Still, this document has yet to materialize.

CDFG moved to intervene in the suit on the grounds that it is the California agency tasked with overseeing the state's fish and wildlife resources, including protecting habitat for endangered and threatened species, and that it has a significant interest in the Corps' compliance with relevant environmental standards before the vegetation removal policy can be adopted. Though CDFG is the first entity to petition for intervention in the case on these grounds, other state and federal agencies have been involved in discussions on the policy, including the DWR, Central Valley Flood Protection Board, National Marine Fisheries Service and U.S. Fish and Wildlife Service. DWR is taking public comments on a proposed compromise that would allow mature vegeta-

tion to remain on the levees, but would require the removal of seedlings as they come up. According to DWR, this course of action would gradually clear the areas, but would allow trees and shrubs to continue to provide wildlife habitat on the levees.

Although the ultimate fate of CDFG's motion has yet to be determined, the environmental plaintiffs have filed a statement of non-opposition to the intervention. Regardless of the outcome, the policy will likely continue to be the subject of much debate. According to CDFG Director Charlton H. Bonham, CDFG:

> …along with many other local, state and federal agencies, has been in discussion with the Corps about this policy for several years…It's unfortunate that the discussions haven't led to a more agreeable outcome, but if adhered to, the policy will do incredible damage to California's remaining riparian and adjacent riverine ecosystem, especially in the Central Valley.

U.S. Senators Request Investigation of Army Corps over Missouri River Flooding

In early December 13 U.S. Senators from states along the Missouri River sent a letter to the federal government Accountability Office seeking an investigation into whether the Corps made mistakes that contributed to this year's historic flooding.

As reported in the July edition of *Eastern/Western Water Law Reporter*, the Corps released record amounts of water from six reservoirs in Montana and the Dakotas this spring in response to record rainfall in the Rockies and the Midwest. Typically, water from winter rain and snowmelt is held by the Corps behind reservoirs in order to provide water during summer months, but reservoir management must also account for spring precipitation and the need to capture that water to prevent flooding. When, as this spring, reservoirs are relatively full and there is high rainfall, the Corps must release water from the reservoirs to free up space for the increased flows expected from heavy rains. This year's releases put pressure on and in some cases breached local levees, impacting cities and towns along the Missouri River.

The senators have asked the Government Accountability Office to look into the whether the Corps followed its established management plan for the river and whether the timing of releases from river reservoirs made the flooding worse than it otherwise would have been. The senators also asked what roles assessment of on-the-ground and meteorological conditions and forecasts played in the 2011 flooding events, and whether endangered species or other environmental concerns factored into the Corps' flood control efforts.

The letter requesting the investigation was signed by senators from Montana, the Dakotas, Iowa, Kansas and Missouri. The Corps of Engineers has defended its actions, noting that the reservoirs were overwhelmed by heavy rains this spring on a reservoir system already swollen because of the winter snowpack. Critics of the Corps questioned whether it acted quickly enough to release water and that decisions may have been unduly influenced by a need to preserve wildlife habitat.

"Various parties have suggested that more water than necessary was being held back in the upstream reservoirs," the senators wrote.

Some lawmakers have also suggested that changes to the management of the river by the Corps are needed—stating that there are too many demands for the Corps to meet and that the manual for managing the river needs to be revised.

The Corps has told Congress it will aggressively release water from the river dams next spring if needed to prevent flooding downstream. (Andrea Clark)

REGULATORY DEVELOPMENTS

AT SEA: NEW VESSEL GENERAL PERMIT PROPOSED FOR SHIPS IN U.S. WATERS

The U.S. Environmental Protection Agency (EPA) announced that it will publish a new Vessel General Permit (VGP) for both large and small (less than 79 foot) vessels, to be effective in December 2013 for a four year period. The VGP will for the first time introduce numerical standards to various vessel discharges. Numerous ship operations are covered by the VGP proposal. Nevertheless, the EPA asserts that the typical per vessel compliance cost will be fairly low, but, as if to illustrate uncertainties that exist, it curiously states "the average per vessel cost ranges from $26 to $3,933." The EPA separately studies the cost of ballast water treatment system installation, and costs of the treatment systems are additional to the vaguely stated "average cost" of compliance. The "fact sheet" alone on the Vessel General Permit is 206 pages long. The small vessel general permit (sVGP) fact sheet is a "mere" 64 pages. The *Federal Register* of December 8, 2011 contains a lengthy explanation, notice of public hearings, and a request for comments on at least two-dozen issues with the VGP. Recreational vessels remain exempt due to congressional action.

The first promulgation of the VGP is in already in effect; it will expire on December 19, 2013. The final form of this proposed second version of the VGP will replace that permit. This action applies to vessels operating in a capacity as a means of transportation, that have discharges incidental to their normal operations into waters subject to this permit, except recreational vessels as defined in Clean Water Act §502(25), P.L. 110-288, and except sVGP permitted vessels. Unless otherwise excluded from coverage by terms of the permit, waters that are subject to this permit means waters of the U.S. as defined in 40 CFR§122.2. That provision defines "waters of the U.S." as the Great Lakes and certain other inland waters and the territorial sea, which extends seaward three nautical miles from the official low-water shore or inland water baseline.

Background

The legal backdrop for the VGP involves challenges to the exemption accorded to vessels from the National Pollutant Discharge Elimination System (NPDES) requirements of the Clean Water Act. Environmental groups challenged the blanket exemption in court, alleging it was arbitrary and contrary to the plain inclusion of "vessels" as point sources required to have NPDES permits by § 301 of the Clean Water Act. A U.S. District Court in California ordered the exemption removed. *Northwest Envtl. Advocates et al. v. U.S. EPA*, 2006 U.S. Dist. LEXIS 69476 (N.D. Cal. 2006); Affirmed, *Northwest Envtl. Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008). The initial VGP issuance was deemed deficient by environmental groups and the State of Michigan. A new suit was filed and settled in March 2011, and an industry challenge to the procedural and water quality provisions was rejected by the Court of Appeals, *Lake Carriers' Ass'n v. U.S. EPA*, 2011 U.S. App. LEXIS 14996, Page 20 (D.C. Cir. July 22, 2011).

Congress responded to the public outcry from recreational and small vessel owners. Recreational vessels were exempted from the NPDES requirement, but EPA was directed to develop less stringent regulations for them. Commercial fishing and small non-recreational vessels were temporarily exempted from NPDES coverage, and the December 8, 2011 proposal for sVGPs follows on EPA's analysis of what rules are appropriate for such smaller vessels, effective in December 2013.

A Broad Range of Shipboard Operations and Practices Covered by the VGP

The permit imposes limits and best management practices for material storage, toxic and hazardous materials, oily wastes, and fuel spills or overflows. It requires training of personnel and it includes a requirement of compliance with other laws and regulations, such as the Oil Pollution Act and the Federal

Insecticide, Fungicide and Rodenticide Act (FIFRA).

The pollutants limited by VGP regulations include invasive organisms, toxic or hazardous pollutants, nutrients, pathogens, metals and oil and grease. Numerous specific vessel operations will be subject to the VGP. These include specification of best management practices and some numerical limits for: deck and above waterline hull washing; bilgewater generation and treatment; anti-fouling coatings application; aqueous film forming coatings use; boiler blowdown; corrosion protection; controllable pitch and propeller thrusters; elevator pit effluent and some 20 additional and various discharges or potential discharges that may occur on a large vessel.

Ballast Water Treatment

A great deal of concern exists about the ballast water from large vessels. It can be the source of pollutants and also of invasive species or disease-causing organisms. Suffice it to say that shipping interests with existing vessels have their work cut out for them in deciding on compliance strategies. The EPA VGP will require vessels with more than eight cubic meters (2113 gal) of ballast water to employ a system that achieves compliance with numeric standards. The requirement is phased in over several years' time. The cost of compliance can be considerable, ranging from tens of thousands to millions of dollars, depending on the nature and size of the vessel. The subject is worthy of an article itself, as it serves as a microcosm of the nature of Clean Water Act permitting and regulatory development.

New Rules Require Notice of Intent Filing, Inspections and Reporting

As with all general permits, accepting a general permit must occur by express election and Notice of Intent to be governed. EPA will expect existing vessel owners or permittees to elect coverage no later than December 12, 2013. The VGP will impose inspection requirements and record keeping requirements, neglect of which can be a violation.

Small Non-Recreational Vessels

The vessels subject to the new sVGP will have a somewhat less rigorous version of the VGP. These vessels (most non-military, non- recreational vessels of less than 79 feet in length) will be required to register their vessel and comply with a reduced range of rules that typifies smaller vessels. Self-inspection frequency and recordkeeping are also reduced, but nevertheless required.

Enforcement of the VGP

Enforcement of the VGP will primarily be in the hands of the U.S. Coast Guard. Given the level of detail the new VGP will expect a ship to conform to, it is foreseeable that there will be an increase in violations, particularly with failures to make and log all activity in accordance with reporting requirements.

Opting Out is Permissive

Individual ships can seek permission to withdraw from the VGP and be governed by individually issued NPDES permits. Ships with peculiar uses or equipment may find it too onerous to comply with the VGP. However, they will need to undergo a rigorous EPA review of their individual operations and capabilities in order to be issued an individual NPDES vessel permit.

Challenge to Shipping Interests

Any ship owner that has not already reviewed the proposal should do so. Given the serious number of issues the EPA has itself raised, a comment to EPA could save expense and problems later on. The Lake Carrier's Association is involved on behalf of the Great Lakes shipping industry, and it is cosponsoring studies of ship economics in the face of environmental and other challenges. Owners and operators will need to employ qualified personnel that are familiar with the EPA and its regulatory regimes.

Conclusion and Implications

Among the issues being studied is possibly replacing steam driven propulsion with natural gas propulsion in some vessels, or having it become common in new ships. A sidelight example of some of the water law and compliance expense challenges is the story of the SS Badger, which began providing coal-fired ferry service in 1953 for railroad cars and passenger autos to cross Lake Michigan. The SS Badger still discharges coal ash to the Lake, the last ship to do so. The 410' ferry is designed specifically to handle the rough conditions encountered during all season service on Lake Michigan. It has been granted a conditional per-

mit by EPA. Badger ownership and industry, government and university researchers are exploring the feasibility of converting the *S.S. Badger* to run it engines on natural gas. The research team will be modeling the vessel's fuel consumption, routes, shore fueling station(s) and engineering to look at the viability of using natural gas. The demonstration project will also consider training needs and shipyard implications of the power conversion for vessels generally. (Harvey

U.S. EPA ANNOUNCES MULTI-SITE CLEAN WATER ACT SETTLEMENT AGAINST THE LARGEST DIVERSIFIED SUPPLIER OF CONSTRUCTION MATERIALS IN THE UNITED STATES

On November 29, 2011, the U.S. Environmental Protection Agency (EPA) announced a multi-site Clean Water Act (CWA) settlement with Lafarge North America Inc. and four of its U.S. subsidiaries. Notice of the settlement was published in the *Federal Register* on December 5, 2011. 76 *Fed. Reg* 75913. Best known for production of concrete, cement and aggregate, Lafarge is the largest diversified supplier of construction materials in the United States and Canada and operates at around 900 locations in North America. The settlement resolves allegations of unpermitted stormwater at 21 of those facilities and requires Lafarge to pay $740,000 in civil penalties and take responsive actions worth (according to EPA's estimates) nearly $11 million.

Background

The proposed Consent Decree, which is lodged with U.S. District Court for the District of Maryland, addresses allegations at 21 stone, gravel, sand, asphalt and ready-mix concrete facilities in Alabama, Colorado, Georgia, Maryland, and New York. *U.S. v. Lafarge North America, Inc., et al.*, Case No. 1:11-cv-03426-RDB (Bennett, J.). The violations resolved include violations of CWA §§ 301, 308, and 402, for failure failed to obtain and/or comply with applicable National Pollutant Discharge Elimination System (NPDES) permits. The alleged violations include discharges of wastewater without a permit, exceedances of NPDES effluent limits, the failure to apply for and have coverage under the Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP), and unpermitted discharges of stormwater. In its press release, EPA notes that stormwater flowing over concrete manufacturing facilities carries debris, sediment and pollutants, including pesticides, petroleum products, chemicals and solvents, which can have a significant impact on water quality. EPA estimates that Lafarge's efforts under the Consent Decree will result in the elimination of discharges of approximately 20 million pounds of total suspended solids and more than 122,000 pounds of nitrates.

Civil Penalties Implementation of Environmental Management System

In settlement of the alleged violations, Lafarge agreed to pay a total civil penalty of $740,000, with $524,361 going to the United States, $153,556 to Maryland, and $62,083 to Colorado. The Consent Decree also requires Lefarge to implement a corporate-wide environmental management system as well as a stormwater-specific program to be applied at 189 Lafarge facilities. The stormwater program is to include: training of all personnel with operational responsibilities; instituting a management structure with specified inspections and evaluations, reporting on stormwater issues, and conducting compliance assessments at all facilities that the company owns or operates. EPA estimates that Lafarge will spend approximately $8 million over five years to implement these management programs.

Implementation of Supplemental Environmental Projects

In addition, the consent obligates Lafarge to implement two Supplemental Environmental Projects, including the execution of two conservation easements to protect approximately 166 acres in Maryland and Colorado. The conservation easements will protect the subject properties from development and preserve them in their natural state. The company will also pay $10,000 to the Western States Project, which conducts environmental training for state inspectors.

The proposed settlement, lodged in the U.S. District Court for the District of Maryland, is subject to a 30-day comment period and final court approval. Information on submitting comments is available at the Department of Justice's website: http://www.justice.gov/enrd/Consent_Decrees.html

Conclusion and Implications

At nearly three-quarters of a million dollars, the civil penalty here is, in itself, significant, but the requirement that Lafarge institute corporate environmental programs will create self-policing mechanisms inside the company and will foster a culture of compliance. Environmental groups will no doubt appreciate having 190 acres set aside for preservation.

For those outside of Lafarge and the affected communities, the settlement indicates that EPA is still looking for opportunities for large-scale, multisite enforcement. EPA invests a substantial amount of staff time in settlements of this magnitude, and undertakes them strategically. In 2000 and 2004, EPA entered into similar, nationwide settlements with Walmart to force the retailer to adopt and implement stormwater control measures at its construction sites, which carried total civil penalties of $4.1 million. The Walmart settlements carried the message to retailers and big box developers.

The Lefarge settlement is likely meant to carry a similar message to primary industries, those that already bear heavy environmental compliance responsibilities in more complex regulatory arenas. Typically, multisite enforcement is hardly a surprise; having full-scale EPA inspection teams visit multiple sites in a short period of time is hard to ignore. The day before the EPA teams start showing up, however, companies rarely think that they may be the target of such exercises. Companies with many sites and larger potential stormwater impacts should pay heed to the Lefarge message. (Patrick Zaepfel)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

Civil Enforcement Actions and Settlements—Water Quality

•Lafarge North America Inc., one of the largest suppliers of construction materials in the United States and Canada, and four of its United States subsidiaries have agreed to resolve alleged Clean Water Act (CWA) violations involving unpermitted discharges of stormwater at twenty-one stone, gravel, sand, asphalt and ready-mix concrete facilities in Alabama, Colorado, Georgia, Maryland, and New York. The complaint alleges a pattern of violations since 2006 that were discovered after several federal inspections at the facilities. The alleged violations included unpermitted discharges, violations of effluent limitations, inadequate management practices, inadequate or missing records and practices regarding stormwater compliance and monitoring, inadequate discharge monitoring and reporting, inadequate stormwater pollution prevention plans, and inadequate stormwater training. Since being notified of the violations by EPA, the company has made significant improvements to its stormwater management systems.
As part of the settlement, Lafarge will implement a nationwide evaluation and compliance program at 189 of its similar facilities in the United States to ensure they meet CWA requirements. Lafarge will also pay a penalty of $740,000 and implement two supplemental environmental projects, in which the company will complete conservation easements to protect approximately 166 acres in Maryland and Colorado. The value of the land has been appraised at approximately $2.95 million. Lafarge will also implement one state environmentally beneficial project valued at $10,000 to support environmental training for state inspectors. In addition, Lafarge must identify an environmental vice president, responsible for coordinating oversight of compliance with stormwater requirements, at least two environmental directors, to oversee stormwater compliance at each operation, and an onsite operations manager at each facility. Lafarge will spend approximately $8 million over five years to develop and maintain this compliance program. The company will also develop and implement an extensive management, training, inspections, and reporting system to increase oversight of its operations and compliance with stormwater requirements at all facilities that it owns or operates.

•Wright Brothers Construction Co. and the Georgia Department of Transportation (GDOT) have agreed to pay a $1.5 million penalty and spend more than $1.3 million to offset environmental damages to resolve alleged violations of the CWA. The civil penalty is one of the largest ever under the CWA provisions prohibiting the unauthorized discharge of dredged or fill material into waters of the United States. The complaint alleges that between 2004 and 2007, Wright Brothers, with approval from GDOT, buried all or portions of seven primary trout streams in violation of the CWA. Wright Brothers was hired by GDOT to dispose of excess soil and rock generated during two GDOT highway expansion projects in northeast Georgia. The contracts between GDOT and Wright Brothers specifically required Wright Brothers to obtain written environmental clearance from GDOT prior to using any site as a fill site. GDOT approved sites that included streams considered to be waters of the United States. These actions resulted in the unauthorized disposal of more than one million cubic yards of excess rock and soil, impacting approximately 2,800 linear feet of stream. All of the streams that were filled are tributaries of either Lake Burton or Tallulah Falls Lake. Under the settlement, Wright Brothers and GDOT must perform injunctive relief measures, including purchasing 16,920 mitigation credits at an estimated cost of $1.35 million to offset the impacts to waters of the United States that cannot be restored. The credits must be purchased from mitigation banks servicing the area in which the violations occurred. Wright Brothers and GDOT will also remove the piping from and restore the bed and bank of a 150-foot stream channel that

was impacted from the disposal activities. The estimated cost of this work is $25,000. When complete, the restoration activities and injunctive relief measures will mitigate the 2,800 feet of stream impacted by the CWA violations.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•EPA ordered Jipangu International, Inc. to pay a $105,000 fine and correct reporting violations after the facility failed to correctly report toxic chemical releases and waste management activities at its Florida Canyon Mine and Standard Gold Mine processing facility near Imlay, Nevada. After a careful analysis of the mine's records, EPA inspectors determined that Jipangu failed to submit timely, complete and correct Toxic Release Inventory reports in 2005, 2006 and 2007 for toxic chemicals, such as cyanide compounds, used to extract gold from the ore mined at the facility, and other toxic chemicals, such as lead and mercury compounds, produced during the extraction process. Metal ore mining accounts for 97 percent of total toxic inventory releases reported to EPA in Nevada. This action is part of an ongoing effort began in 2008 to ensure compliance among this sector and to ensure the public has accurate and complete information about facilities in their communities. The Jipangu International Gold Mining facility produces 1.5 to 1.7 tons of gold annually. Within the next five years, the facility plans to increase production to 15.5 tons per year. Under the settlement, Jipangu revised its TRI reports for 2005 through 2010 and complied with the EPCRA. There is no evidence to suggest that the mine's violations posed any immediate danger to nearby communities or workers at the facility.

•Agrifos, a former phosphoric acid and phosphate fertilizer producer, has agreed to pay a $1.8 million dollar penalty and conduct an environmental project to resolve alleged violations of the Resource Conservation and Recovery Act (RCRA) and the Clean Air Act (CAA). Violations include processing and disposing of hazardous wastewater without a permit and the improper routing of effluent from a scrubber through a cooling tower. The settlement will protect public health and the environment by reducing possible releases of hazardous wastewater into area waterways. Agrifos currently produces sulfuric acid and ammonium sulfate fertilizers. Under the agreement, Agrifos will spend $600,000 to implement a supplemental environmental project. The project involves the construction of a stormwater collection and containment barrier around its fertilizer production unit to eliminate or minimize impact on the environment. The containment structure will contain all spills and leaks from the fertilizer production unit and collect contaminated stormwater runoff from wet weather events for reuse in the production process. Based on the average rainfall at the facility, the containment barrier is expected to capture more than one million gallons of contaminated stormwater annually for reuse. There have been four enforcement actions related to the Agrifos site in the last three years. In September 2010, Agrifos paid a $535,206 civil penalty to EPA for EPCRA, Superfund, and CAA violations at its facility. In November 2010, a settlement for $1.485 million was reached with Air Products, an adjacent chemical facility, to resolve violations, which included the exchange of contaminated waste acid from Air Products to Agrifos. In September 2010, a settlement with ExxonMobil requires ExxonMobil to conduct extensive closure and cleanup work on the phosphogypsum stacks system at the Agrifos facility, which was previously owned by ExxonMobil. ExxonMobil also agreed to pay a $100,000 civil penalty. Previously, in September of 2008, RCRA and Superfund orders were issued to ExxonMobil and Agrifos to address the release of contaminated wastewater from the gypsum stacks at the Agrifos site into the Houston Ship Channel. (Melissa Foster)

JUDICIAL DEVELOPMENTS

THIRD CIRCUIT FINDS WETLANDS FALL WITHIN THE CWA'S JURISDICTION IF THEY MEET EITHER THE 'PLURALITY' OR 'SIGNIFICANT NEXUS' TEST UNDER *RAPANOS*

U.S. v. Donovan, ___F.3d___, Case No. 10-4295 (3rd Cir. Oct. 21, 2011).

In the late 1980s, a Delaware property owner added fill to his four-acre parcel of land situated within a watershed. While the only source of water flow on the property is rainwater run-off, the United States deemed the land to be "wetlands" subject to the Clean Water Act (CWA). As a result, the government brought an action against him to force him to remove the fill and pay a $250,000 fine. The trial court granted the government's motion for summary judgment, and on appeal, the U.S. Third Circuit Court of Appeals was called to decide what test to apply in order to determine whether the land is "wetlands" subject to the CWA. The appellate court affirmed. It held that the property constitutes a wetland subject to the CWA jurisdiction if it meets either of the tests laid out in the U.S. Supreme Court's decision in *Rapanos v. U.S.*, 547 U.S. 715 (2006).

Background

Donovan owns a four-acre parcel of land in Delaware. The land is situated within the watershed of the Sawmill Branch, which flows into the Smyrna River, which in turn, flows into the Delaware Bay. In the late 1980s, the U.S. Army Corps of Engineers (Corps) inspected the land, categorized it as wetlands, and found that Donovan had filled in a small portion of the property. The Corps warned that federal law requires him to obtain a permit should he wish to fill more than one acre of the property. Donovan contended, however, that while his property was located within a watershed, there was no navigable water as defined by the CWA on the property (*i.e.* the only flowing water came from rain water runoff from a nearby highway).

Six years later the Corps again inspected Donovan's land and found that he had continued to fill in his property without a permit. The Corps sent a cease-and-desist notice and ordered him to remove .77 acres of fill material. Donovan rebuffed all notices and denied that the Corps had a right to regulate the use of his land.

The United States sued Donovan, alleging that he had violated the CWA. The District Court entered judgment against Donovan, imposed a $250,000 fine and required him to remove .77 acres of fill. Donovan appealed, arguing that the CWA did not give the Corps jurisdiction over his land. At the Government's request, the case was remanded to the District Court so that a record could be developed on the issue of the Corps' jurisdiction over Donovan's land. There, the government submitted two expert reports based on extensive analysis and testing of Donovan's property. Donovan, on the other hand, did not present any expert evidence in support of his position. The District Court granted the government's motion for summary judgment and found that federal authority can be asserted over wetlands that meet either of the two tests established in *Rapanos*—the "plurality test," of the Court's plurality decision, or the "significant nexus test" propounded by Justice Kennedy in his opinion.

The Third Circuit's Decision

Revisiting the *Rapanos* Decision

The Supreme Court in *Rapanos* addressed the issue of when the federal government can apply the CWA by determining when a wetland or tributary is a "water of the United States." In *Rapanos*, the Justices issued five separate opinions: a plurality opinion, two concurring opinions, and two dissenting opinions, with no single opinion commanding the Court's majority.

The plurality opinion rejected the argument that the term "waters of the United States" is limited to only those waters that are navigable-in-fact and their

abutting wetlands. Under the plurality opinion, CWA jurisdiction would extend only to "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters, and to "wetlands with a continuous surface connection to" such relatively permanent waters.

Justice Kennedy issued his own opinion agreeing with the plurality that the statutory term "waters of the United States" extends beyond water bodies that are traditionally considered navigable. Justice Kennedy did not agree with the plurality's interpretation regarding the scope of the CWA, and, instead, presented the "nexus standard" for evaluating federal jurisdiction over wetlands and other water bodies. Justice Kennedy interpreted the term "waters of the United States" to cover wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Rapanos v. U.S.* 547 U.S. 715, 779-80 (2006).

Under the Kennedy test, nexus exists if:

> …the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable…[conversely] [w]hen…wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory terms 'navigable waters.'

This standard must be met on a case-by-case basis.

Applying *Rapanos*

Here, the Third Circuit Court of Appeals examined both the *Rapanos* plurality's test and Justice Kennedy's test to determine whether the Corps has jurisdiction over Donovan's land and concluded that both tests were met. Donovan argued that since *Rapanos* fails to provide any governing standard (*i.e.* shared no common denominator), pre-*Rapanos* authority should govern. The appellate court, however disagreed. Instead, it found that while the courts of appeals are split on the proper interpretation of *Rapanos*, none have adopted Donovan's position.

Further, even though the *Rapanos* court failed to garner a majority of the Justices' votes, the disjunctive standard still yields a result with which a majority of the *Rapanos* Justices would agree. For example, if the wetlands have a continuous surface connection with "waters of the United States," the plurality and the dissenting Justices would combine to uphold the Corps' jurisdiction over the land, whether or not the wetlands have a "substantial nexus" with the covered waters.

If the wetlands significantly affect the chemical, physical, and biological integrity of "waters of the United States," then Justice Kennedy would join the four dissenting Justices from *Rapanos* to conclude that the wetlands are covered by the clean Water Act, regardless of whether the wetlands have a continuous surface connection with waters of the United States.

In sum, the Third Circuit found that *Rapanos* establishes two governing standards and Donovan's reliance on pre-*Rapanos* case law was improper. The court held that federal jurisdiction to regulate wetlands under the CWA exists if the wetlands meet either the plurality's test or Justice Kennedy's test from *Rapanos*.

Conclusion and Implicatins

The *Rapanos* case failed to garner a majority opinion—however, it did produce a point of agreement. Although the Justices in *Rapanos* disagreed about the appropriate test to be applied, the four dissenting Justices—with their broader view of the CWA's scope—would nonetheless support a finding of jurisdiction under either the plurality's or Justice Kennedy's test. The Third Circuit was able to conclude, therefore, that either standard in *Rapanos* could be utilized to establish the Corps' jurisdiction over wetlands. Therefore it appears to now be the case that the Corps' jurisdiction (within the Third Circuit's reach) should be upheld in all cases in which either test is satisfied. (Gregg Snarr, Thierry Montoya).

DISTRICT COURT DENIES PROTECTIVE ORDER REGARDING MEDICAL RECORDS IN MEDICAL MONITORING CASE INVOLVING HYDRAULIC FRACTURING OF NATURAL GAS WELLS

Fiorentino v. Cabot Oil & Gas Corporation, ___F.Supp.2d___, Case No. 09-2284 (M.D. Pa. Nov 1, 2011).

The U.S. District Court for the Middle District of Pennsylvania held that plaintiffs who filed claim for medical monitoring against the defendant related to the hydraulic fracturing operation of its natural gas wells, could not block the production of their medical records.

Factual and Procedural Background

The plaintiffs filed a toxic tort suit against Cabot Oil & Gas Corporation's (Cabot) related to its operation of natural gas wells. Some plaintiffs sought personal injury damages. However another group of plaintiffs instead filed a claim for medical monitoring (Medical Monitoring Plaintiffs). Cabot sought to obtain the medical records of the Medical Monitoring Plaintiffs. Those plaintiffs filed a motion for protective order to preclude the defendants from obtaining their medical records.

In response to the motion for protective order, Cabot argued that it needed the medical records to evaluate whether the Medical Monitoring Plaintiffs could meet the requirements for a claim for medical monitoring. In particular, Cabot sought to determine if those plaintiffs required monitoring beyond what they would have normally received, given their pre-existing medical conditions. This requirement went to the sixth element of a medical monitoring claim (Sixth Element).

The Medical Monitoring Plaintiffs claimed that their individual records were irrelevant because the Sixth Element was judged solely against what was normally prescribed for the general public. The defendants viewed the Sixth Element as requiring monitoring beyond that normally recommended for a particular plaintiff.

The District Court's Decision

The court's discussion of the motion for protective order with an explanation of the medical monitoring claim. Medical monitoring generally refers to claims for future medical testing in order to ensure early detection of a disease that a plaintiff fears he or she may be at increased risk of contracting due to an exposure to a toxic substance allegedly caused by the defendant. Under Pennsylvania law, in order to succeed on a medical monitoring claim, a plaintiff must establish the following seven elements: (1) exposure greater than normal background levels; (2) to a proven hazardous substance; (3) caused by the defendant's negligence; (4) as a proximate result of the exposure, plaintiff has a significantly increased risk of contracting a serious latent disease; (5) a monitoring procedure exists that makes early detection of the disease possible; (6) the prescribed monitoring regime is different from that normally recommended in the absence of the exposure; and (7) the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles.

The Sixth Element

The Medical Monitoring Plaintiffs' interpretation of the Sixth Element would read as follows:

> …the prescribed monitoring regime is different from that normally recommended [*for the general public*] in the absence of the exposure.

The Medical Monitoring Plaintiffs' theory, therefore, was that the individual medical health or health conditions of each plaintiff is completely irrelevant to establishing that, due to the alleged exposure, the plaintiff requires a monitoring regime different than that normally prescribed for the general public.

Alternatively, Cabot's interpretation of the Sixth Element would read:

> …the prescribed monitoring regime is different from that normally recommended [*for that particular plaintiff*] in the absence of the exposure.

Under Cabot's approach, individual plaintiffs with individualized medical conditions would be required to establish that the prescribed monitoring regime for

that plaintiff would be different than one normally recommended for that plaintiff absent the exposure, taking into account his or her medical history, genetic risk factors, occupational exposure to chemicals or other hazardous substances, *etc*.

Because there was no relevant Pennsylvania authority to address which of the two interpretations was correct, the court looked at a number of medical monitoring cases including *Redland Soccer Club, Inc. v. Dep't of the Army of the U.S.*, 55 F.3d 827 (3rd Cir. 1995), which addressed the issue of whether plaintiffs were entitled to "response costs" under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), including a health risk assessment (or medical monitoring). In the *Redland* case, the Third Circuit ultimately held that because the majority of the plaintiffs could not demonstrate that their exposure required a different medical monitoring regimen than that which would normally be recommended for them absent exposure, the plaintiffs could were not entitled to such medical monitoring.

Based upon the Third Circuit's decision, the court here reasoned that the fundamental principles of tort law and the evolution of the medical monitoring claim would require each plaintiff to demonstrate that the monitoring regime recommended for him/her is different from the monitoring regime recommended for him/her absent the alleged exposure. In other words, the court held that each plaintiff's individual medical condition/history was relevant to establishing the medical monitoring claim. Therefore, the court held that medical records of Medical Monitoring Plaintiffs were relevant to determining the Sixth Element and were therefore discoverable.

Conclusion and Implications

This decision clarifies that in medical monitoring claims, the individual plaintiff's medical condition and/or history is relevant to establishing the medical monitoring claim and therefore medical records of plaintiffs are relevant and discoverable. Many states that recognize a medical monitoring claim include a similar element as the Sixth Element. Thus, this case may be of some consequence to future medical monitoring cases. (Danielle Sakai, Beverly Bradshaw)

DISTRICT COURT AGREES THAT ALABAMA AND LOUISIANA'S CLAIMS FOR CIVIL PENALTIES UNDER STATE LAW ARE PREEMPTED BY THE CLEAN WATER ACT

In re Oil Spill by the Oil Rig 'Deepwater Horizon' in the Gulf of Mexico, on April 20, 2010, ___F.Supp.2d___, Case MDL 2179 (E.D. La. Nov. 14, 2011).

The States of Alabama and Louisiana brought suit against BP, its drilling contractors, and the non-operating investors (defendants) in the Macondo Prospect leasehold in the Gulf of Mexico, seeking damages and removal costs associated with the *Deepwater Horizon* oil spill, and asserting claims under the federal Oil Pollution Act (OPA), general maritime law, state law negligence, gross negligence, nuisance and products liability. Both states also sought to impose civil penalties on defendants under Louisiana and Alabama environmental protection laws. Defendants moved to dismiss the states' claims for damages and civil penalties under state law, asserting that the general maritime law, the Clean Water Act (CWA) and the Outer Continental Shelf Lands Act (OCSLA) preempt all claims under state law. Defendants further argued that OPA displaces general maritime law claims, thus the states' only viable cause of action is under OPA. The U.S. District Court agreed that all claims for damages under state law are preempted by the general maritime law, and all claims for civil penalties under state law are preempted by the CWA and OCSLA, and dismissed all of the states' claims for civil penalties. The District Court further held that OPA displaced claims under the general maritime law against OPA responsible parties, but did not displace general maritime law claims for negligence and gross negligence against non-responsible parties. The District Court held that the states had sufficiently alleged presentment of claims under OPA and punitive damages under general maritime law against BP and Transocean, and that the states had sufficiently al-

leged claims for damages and punitive damages under the general maritime law against non-responsible parties. The court further held that all general maritime law negligence claims against the non-operating investors in the Macondo Prospect, Anadarko and MOEX Offshore 2007 were dismissed, because the non-operating investors had no operational control over the activities on the leasehold.

Background

The *In re Oil Spill by the Oil Rig "Deepwater Horizon"* multi-district litigation (MDL) consists of hundreds of consolidated cases, arising from the April 20, 2010 explosion, fire, and sinking of the *DEEPWATER HORIZON* mobile offshore drilling unit (MODU), and the subsequent discharge of millions of gallons of oil into the Gulf of Mexico. In response to the defendants' preemption arguments, the states contended that general maritime law claims (including punitive damages under maritime law) were not displaced by OPA, because the case falls within the court's admiralty jurisdiction and OPA expressly preserved maritime law. The states further argued that OCSLA's provision adopting adjacent-state law did not apply, and thus the laws of all states are available to supplement the general maritime law. Finally, the states argued that they were not subject to OPA's presentment requirement, but even if they were, the states contended that they had sufficiently alleged presentment.

The District Court's Order

The District Court found that a number of the issues raised in defendants' motions to dismiss were identical to those addressed in an earlier order and that those conclusions resolved many of the arguments presented in the motions to dismiss the states' claims. The court adopted the following conclusions from its previous order: (1) the *Deepwater Horizon* was a vessel under maritime law and thus, the case falls within the court's admiralty jurisdiction; (2) claims of negligence, gross negligence and products liability under general maritime law against non-responsible parties are not preempted by OPA (consequently, punitive damages may be available to the states); and (3) all general maritime law negligence claims against OPA responsible parties were dismissed, however the OPA claims against those parties were preserved.

Only Federal Law Would Apply

The court had also previously held that state law claims for damages and removal costs were preempted by maritime law. However, the states' claims for civil penalties were not at issue in the previous order. The states argued that remedies under OPA and general maritime law did not vindicate their rights and duties as separate sovereigns to protect themselves from pollution, and that as sovereigns they possessed an inherent police power to punish those who polluted their territorial waters. The court disagreed. The court held that under the CWA and *International Paper Co. v. Oullette*, 479 U.S. 481 (1987), the only law available to the states is federal law. *Oullette* held that when a court considers a state-law claim concerning interstate water pollution that is subject to the CWA, the court must apply the law of the State in which the point source is located. Because the source of the *Deepwater Horizon* oil spill was from a federal enclave, the Outer Continental Shelf, federal law is the only available law.

The court also disagreed with the states' argument that without state penalties, the defendants would have no incentive to prevent an oil spill from entering state waters. Defendants argued that they are required to submit oil spill response plans and failure to comply with such plans in the event of a spill triggers CWA penalties. The court ruled that defendants have an incentive to comply with the CWA.

Combining Claims for Removal Costs and Damages

The court next considered defendants' argument that the states failed to sufficiently allege compliance with OPA's "presentment" requirement. OPA § 2713 states that "all claims for removal costs or damages shall be presented first to the responsible party…" The states argued that when a state seeks removal costs it is exempt from presentment, and that when a state combines a claim for removal costs with a claim for damages claim, both claims are exempt from pre-suit presentment. The court disagreed interpreting OPA to require states to present all OPA claims to the designated responsible party before commencing litigation.

Sufficient Pleading under the OPA

The court then held determined that the states had sufficiently alleged presentment under OPA. The court noted that the states' claims involve a very wide array of damages, some of which are not yet known. The court reasoned that requiring the states to amend their complaints each time the circumstances surrounding a particular presentment changed would be impracticable. Rather, the court allowed the complaints to stand as is, yet still required the states to ultimately present each claim to the responsible party in order to recover damages.

Conclusion and Implications

The court's holding that federal law preempts all state claims for civil penalties under state law for oil pollution that migrates into state territorial waters from the OCS is a precedent setting opinion with potentially wide-ranging impacts. Furthermore, the court's determination that, even for states, presentment of a claim under OPA to the designated responsible party is a mandatory condition precedent to filing suit, though not a jurisdictional requirement. Under this rule, a claim may not be dismissed for lack of subject matter jurisdiction on the grounds that a plaintiff did not adequately allege presentment, however a claim may be dismissed under Federal Rules of Civil Procedure § 12(b)(6) for failure to state a claim for which relief can be granted. The court also took note that the unique circumstances of the MDL often necessitate judges to employ special procedures in order to manage a case effectively, and that therefore the court may approach OPA presentment allegations with a measure of lenity, if it is practical under the circumstances. (Rebecca Couch, Randall Levine, Nima Javaherian)

DISTRICT COURT DENIES MOTION TO INTERVENE IN 34-YEAR OLD CLEAN WATER ACT CASE AS UNTIMELY

U.S. v. City of Detroit, ___F.Supp.2d___, Case No. 77-71100 (E.D. Mich. Nov. 18, 2011).

In 1977, the U.S. Environmental Protection Agency (EPA) initiated an action against the City of Detroit and the Detroit Water and Sewerage Department (DWSD) (collectively the city and the DWSD will be referred to as: Detroit), alleging violations of the Clean Water Act (CWA) at Detroit's wastewater treatment plant. The U.S. District Court granted numerous motions for intervention, which joined multiple governmental entities as parties. In September of 1977, the court entered a consent judgment establishing a compliance schedule for Detroit to address and correct the CWA violations, including provisions impacting staffing and employment conditions in the DWSD. Litigation to enforce and modify the consent judgment continued over the next three decades. On November 14, 2011, Michigan AFSCME Council 25 (AFSCME) moved to intervene as of right and requested the court to issue a preliminary injunction against the court's November 4, 2011 order, which related to staffing and employment conditions in the DWSD. AFSCME is a labor union whose members include employees of Detroit. The District Court denied the motion to intervene as untimely.

Background

After the initial consent judgment in 1977, the DWSD repeatedly violated the CWA. Beginning in 1978, the court hired an environmental expert to study operations at the wastewater treatment plant and make recommendations on how to best facilitate compliance. The 1978 report identified numerous staffing concerns in the DWSD. To address staffing issues, the court appointed the mayor of the city as special administrator of the DWSD, giving him broad powers, including all authority required for the complete management and control of the wastewater treatment plant such as the hiring, supervision, and dismissing of all employees.

When the DWSD fell into noncompliance again in 2000, the court appointed a committee to investigate the root causes of non-compliance. The report detailed several problems regarding staffing, includ-

ing failure to provide adequate programs for training, career development and succession planning. In response, the court again appointed the mayor as special administrator and gave him broad power over the DWSD to rewrite job descriptions, review existing union contracts and civil service rules and develop recruiting strategies to attract employees from outside the civil service. Despite improvements in staffing, Detroit again violated the CWA. The court ordered Detroit to submit a brief regarding its compliance. With its brief, the city submitted a report from a consultant stating that staffing elements including hiring, career development, succession planning, and compensation remain unresolved.

In September 2011, the court ordered the mayor, the city council president, president pro tem, and a current member of the board (Root Cause Committee) to meet and confer and propose a plan for addressing the root causes of noncompliance. In making recommendations, the court ordered that the Root Cause Committee was not to be constrained by any local charter, ordinance, or contract. The court also stated its intent to devise its own remedy if the Root Cause Committee failed to propose a workable solution to the recurrent violations. The Root Cause Committee solicited input from city council, the board of water commissioners, union representatives, industry professionals, regulatory agencies and others and submitted its plan on November 2, 2011. The court adopted the plan on November 4, 2011, and ordered its implementation (November 4, 2011 Order).

The Root Cause Committee was unable to formulate a remedy to collective bargaining issues. For this reason, the court issued its own remedy. The remedy prohibited current and future collective bargaining agreements from containing provisions threatening long term compliance with the CWA, including prohibiting employees from outside the DWSD to transfer into the DWSD based on seniority, allowing subcontracting and outsourcing, and requiring promotions within DWSD to be based on skill, knowledge and ability before considering seniority.

The AFSCME moved to intervene ten days after the November 4, 2011 Order. The court denied the motion.

The District Court's Decision

The District Court denied AFSCME's motion to intervene as untimely. Timeliness for a motion to intervene is determined by considering several factors, including: (1) the length of time preceding the application for intervention during which the proposed intervener knew or reasonably should have known of an interest in the case, (2) the prejudice to the original parties due to the proposed intervener's failure to intervene after knowing of an interest in the case, and (3) the point to which the suit has progressed.

Timeliness

AFSCME contended its motion was timely because it was filed less than two weeks after the November 4, 2011 Order.

In assessing the timeliness of AFSCME's motion in light of the factors above, the court reasoned that AFSCME was untimely because it had knowledge of an interest in the case beginning in 1977. It was apparent as early as 1977 that orders in the action could affect collective bargaining agreements and union work rules related to the department. The original and modified consent judgments and the studies filed with the court identified staffing policies and practices as an underlying cause of Detroit's violations of the CWA. Thus AFSCME knew for 34 years that the litigation created a risk that collective bargaining agreements and work rules could be affected. In addition, AFSCME had actual knowledge that its interests would likely be impacted by the Root Cause Committee's recommendations based on the court's order and wide media coverage of the Root Cause Committee's actions. AFSCME leaders were quoted in the media coverage of the Root Cause Committee's actions. AFSCME's decision to adopt a "wait and see" approach to the litigation made its motion to intervene untimely.

The court further reasoned that allowing AFSCME to intervene would cause prejudice to Detroit, the state and EPA, as well as to the public. The EPA's 1977 action was initiated to address violations of the CWA and Detroit's National Pollutant Discharge Elimination System (NPDES) permit. Violations present serious health, safety and environmental risks to the public and significant monetary fines to Detroit, which would ultimately be passed on to DWSD customers. The court had already concluded that certain collective bargaining provisions and work rules impeded the DWSD from achieving compliance with its NPDES Permit and had already enjoined those provisions. Failure to implement the court's order

would jeopardize the DWSD's ability to function in compliance with its NPDES Permit and CWA.

Finally, the court assessed the timeliness of AFSCME's motion based on the point to which the suit had progressed. AFSCME failed to intervene for more than 34 years, during which the court issued numerous orders, joined additional parties through intervention, and appointed special administrators, and during which the parties entered into settlement agreements and stipulated orders.

Conclusion and Implications

This case serves as a reminder to all interested parties of the risk of adopting a "wait and see" approach to intervening in a case in which their interests may be impacted. An argument that the delay caused by the intervention may risk public health and safety will justify denial of a motion to intervene. (Danielle Sakai, Rebecca Andrews)

NEW HAMPSHIRE SUPREME COURT FINDS TOWNS HAVE AUTHORITY TO REGULATE POND HEIGHT THROUGH BEAVER DAMS

Morrissey, et al. v. Town of Lyme, Case No. 2010-661 (NH 2011).

The Supreme Court of New Hampshire has ruled that a local municipality—the Town of Lyme, has the legal authority to regulate the height of a pond by use of local beaver dams, even if that deprives local residents of wetlands. Affected local residents had challenged the town's authority on the theory that regulating the depth of the pond would also impact the local environment. The Supreme Court of New Hampshire, however, found that the zoning authority of the town outweighed the interests of protecting local there are metal resources.

Background

In May 2009 ten plaintiffs, all of whom lived adjacent to Post Pond, filed a petition in equity and a writ of mandamus alleging that the Town of Lyme was adversely affecting their properties, property rights, and disrupting the entire Clay Brook wetlands echoes system. Plaintiffs requested that the town he enjoined from violating their rights under the public trust doctrine. Plaintiffs sought to have the town declared a trespasser and one that it created and maintained a private nuisance by unreasonably interfering the petitioners' use and enjoyment of their properties and, further, the town had committed taking. This has went on to demand that the town be required to comply with all relevant statutes, restore the water level in post-pond to its previous height, remediate erosion sources and cease its trespass and nuisance. The town moved to dismiss plaintiff's complaint and was successful at the trial court. The parties then appealed to the Supreme Court of New Hampshire.

The Supreme Court's Decision

The Supreme Court began review of the appeal by noting that it must determine whether the petitioner's pleadings are reasonably susceptible of a construction that would permit recovery. The Supreme Court assumed for the sake of argument that the petitioners pleadings were true and construed all reasonable inferences in the light most favorable to them. Having observed that all inferences would be construed in favor of the appealing party, the court then proceeded to address each argument one piece at a time.

Nuisance Claims

The first argument was that the trial court had erred in dismissing the private nuisance claims against the town. Under New Hampshire law, a private nuisance exists when an activity substantially and unreasonably interferes with the use and enjoyment of another's property. To constitute a nuisance the defendants activities must cause the harm that exceed the customary interferences a landowner suffers in an organized society and be an appreciable and tangible interference with that property interest. Plaintiffs argued that the towns action of lowering the water level of post pond constitute a nuisance because it converted over 1 acre of submerged wetlands into mud and further drained other wetlands adjacent to Post Pond.

The trial court found, however, that the petition did not show that the town had appreciably and tangibly interfered with the petitioner's property interest. Rather, the court found that the town is not legally obligated to maintain the pond a level above the natural low watermark. In short, plaintiffs failed to identify how the town's actions actually interfered with their property interests to a degree greater than that, which would be expected in an organized society. The Supreme Court similarly noted that the complaint that wetlands had been converted to mud was insufficient to state a private nuisance claim against the town. Specifically, the Supreme Court observed that plaintiffs had failed to state how this activity substantially and unreasonably interfered with the plaintiff's use and enjoyment of their property. Merely converting wetlands to mud and lowering the water level of the pond was insufficient to establish a private nuisance claim.

Constitutional Taking Claim

In addition to arguing a nuisance claim, plaintiffs also argued that the town's action constitute a taking. The Supreme Court of New Hampshire noted that it construes a takings claim as an inverse condemnation action. Inverse condemnation occurs when a governmental body takes property in fact but does not formally exercise the power of eminent domain. Under New Hampshire law, property refers to the right to use and enjoy a thing is not limited to the thing itself. Any governmental action, which substantially interferes with or deprives a person of the use of his property in whole or more in part may constitute a taking even if the land itself is not taken. As with the nuisance claim the interference must be more than a mere inconvenience or annoyance. Rather, the interference must be sufficiently direct, sufficiently peculiar, and of sufficient magnitude to cause the court to conclude that fairness and justice as between state and citizen require the burden imposed be borne by the public and not by the individual.

The Supreme Court reviewed the plaintiff's complaint and found that they were insufficient to state a claim for a taking against the town. The allegations failed to support a claim that lowering the water level of post pond substantially interfered with or deprived the petitioners of the use of their property. Merely alleging that the town lowered the water level and interfered with their enjoyment of the property was insufficient to demonstrate that a taking of constitutional dimension had occurred. The Supreme Court found the trial court had not erred in dismissing the petitioner's takings claim.

State Environmental Claims

Finally, plaintiffs argued that the town's actions violated several state environmental regulations. The Supreme Court disagreed and found that as a technical matter plaintiffs had failed to properly plead their case by way of seeking declaratory relief. Specifically, the Supreme Court noted that a person claiming that state law is being violated by governmental action must seek a declaratory action. In this case plaintiffs argued that they had done so but this up in court again disagreed. Specifically, the Supreme Court found that the petitioner's complaint was to bare and were conclusory. The plaintiff did not set forth an adequate basis for a judicial declaration regarding the interpretation and validity of a rule. Therefore, as a matter of law the petitioners have failed to plead a claim entitling them to declaratory relief against the state with respect to the interpretation and validity of the rule in question.

Conclusion and Implications

Although it is routine for a state or local governmental authority to be given deference in the interpretation of a state regulation were local varmint rule, this matter is somewhat different in that the town was regulating the height of the pond in order to reduce the expense to the town and, further, provide local residents with additional beach frontage. In short, this was a less protected activity then if the town were merely interpreting its own regulations. Moreover, here the town's actions were potentially inconsistent with state law. The Supreme Court was extremely deferential, however, to the town and it is readily apparent that no set of facts that plaintiffs could have plead would have persuaded the Supreme Court to find that the town had violated local citizens rights. (Jeffrey Pollock)

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