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EASTERN WATER LAW™

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EWL

WATER NEWS

RECORD DROUGHT IN CALIFORNIA REQUIRES DESPERATE MEASURES: CALIFORNIA'S STATE WATER RESOURCES CONTROL BOARD ISSUES NOTICES OF 'CURTAILMENT' OF APPROPRIATIVE WATER RIGHTS AS TO MAJOR RIVER WATERSHEDS AND STREAMS

At a recent Water Law Conference held in San Francisco and put on by Argent Communications Group, state officials, water purveying districts and other experts came together to proclaim, what most observers have come to conclude on their own: the dire drought that California finds itself in for the remainder of 2014. Even forecasts for the winter of 2014-2015, as being very likely to experience *El Nino* conditions, still hold no promise for substantial rainfall for the parched state. Perhaps with some irony it was confirmed that some of the largest water purveyors in California's water-challenged south announced their readiness to weather the drought through the remainder of 2014—due to long range planning that dates back years. However, in much of the rest of the state—including in the north where virtually all the key river systems begin as snowmelt descends the mountains towards the valleys below—the nearly complete absence of snowpack has left the north and central state parched and scrambling to react.

What appears below is a summary of two recent events which underscore the measures that state officials have recently undertaken to react to the drought.

I. State Water Resources Control Board Issues Notice of Immediate Curtailment of Post-1914 Appropriative Rights For the Sacramento and San Joaquin River Watersheds

The ongoing drought continues to drive voluntary and involuntary conservation measures. On May 27, 2014, the California State Water Resources Control Board (SWRCB) issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the Sacramento and San Joaquin River Watersheds with a Post-1914 Appropriative Right." (Notice) The Notice refers to Governor Brown's January 17, 2014 State of Emergency Proclamation that included a directive to the SWRCB to issue a statewide notice of water shortages and the potential for curtailment of water right diversions.

Based upon recent reservoir storage and inflow projections plus forecasts of little or no precipitation, the SWRCB concluded that there is insufficient water supply in the Sacramento and San Joaquin River watersheds to meet the demands of all water rights holders, which led to a notice to all holders of post 1914 appropriative rights in those watersheds to immediately cease all diversions. The curtailment will remain in effect until water conditions change for the better.

Curtailment Details

Even if water is physically available at a diversion point or there is a healthy rainfall, diverters should not assume that it is permissible to divert. The SWRCB will post notices when and if it decides that water is legally available under a diverter's priority. Those diverters subject to the curtailment must complete a Curtailment Certification Form within seven days of receipt of the curtailment notice. The information provided by the appropriative rights holder is supposed to confirm cessation of the diversion under the specific post-1914 water right and to also identify the alternate water supply to be used in place of the curtailed right, if an alternate supply is available. The form can be found at: http://www.waterboards.ca.gov/waterrights/water_issues/programs/ewrims/curtailment/.

The SWRCB may post notices of permission to initiate diversions during or following significant rainfall events at: http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/index.shtml#notices. Interested parties can get immediate email updates from the SWRCB about the curtailment notices by subscribing to "Drought Updates" at: http://www.waterboards.ca.gov/resources/email_subscriptions/

The notice also warns that holders of riparian or pre-1914 appropriative rights should conserve water

and may be subject to curtailment if water supply conditions do not improve. Such water right holders located downstream of major reservoirs are not allowed to divert water being released from storage unless they have a contract or transfer order authorizing the diversion of the released water.

Curtailment Exceptions

There are some exceptions to the curtailment based upon water needs for human health and safety. The SWRCB must be supplied with information that the diverter has maximized conservation efforts and there is no other source of water. Non-consumptive diversions, such as for hydroelectric generation in which all the water is returned to the stream, are not curtailed but the Curtailment Form must be completed with factual supporting information.

Enforcement

Failure to honor the curtailment can be enforced by administrative fines, cease and desist orders or prosecution. Fines can be severe, up to $1000 per day of violation and $2500 for each acre-foot diverted or used in excess of a valid water right. Those who fail to abide by a cease and desist order can be fined up to $10,000 per day.

Extent of the Affected Water Users

According to the *Sacramento Bee*, the curtailment of the Sacramento watershed junior diverters will affect more than 2,600 water agencies and users with diversions on the Sacramento, American, Feather and Yuba rivers and their tributaries. (Matt Wiser, *Sacramento Bee*, May 29,2014.) Though the majority of those with curtailment notices are farmers and irrigation districts, urban users such as the City of Sacramento also rely on junior rights for part of their water supply. The city already had imposed mandatory conservation in January and has senior rights in the American river that will help it meet demand. The SWRCB has announced that it recognizes that the curtailments are challenging for junior water rights holders and the Board will quickly make adjustments based upon flows in rivers and streams.

The California Farm Bureau Federation in its June 4, 2014 weekly *Ag Alert* reported that the curtailments affect nearly 700 junior right holders in the Russian River watershed and about 1,600 in the San Joaquin River watershed and southern delta. The curtailments will affect the amount of agricultural production as many farmers will choose to reduce planted acreage due to lack of water.

Most junior right holders were not surprised at the curtailments. Senior right holders don't believe that the SWRCB has sufficient reason yet to curtail senior rights and feel that if such curtailments come to pass, the SWRCB will have to carefully consider methods for calculating supply and demand for agriculture, public trust uses, public health and safety needs and afford parties due process. According to the California Farm Bureau Federation *Ag Alert*, some senior right holders in the Sacramento watershed have already taken the position that they will not agree to curtailments of senior rights. Information about the SWRCB's drought activities, including curtailments, is at: http://www.swrcb.ca.gov/waterrights/water_issues/programs/drought/index.shtml .

Voluntary Agreements

The SWRCB will also consider honoring voluntary agreements already made by water rights holders in several watersheds in lieu of enforcing across-the-board curtailment. It is also considering agreements that are currently being negotiated. The National Marine Fisheries Service, the California Department of Fish and Wildlife and United States Fish and Wildlife Service have identified three Sacramento River tributaries (Mill, Deer and Antelope creeks) as priority watersheds for sustaining the Central Valley spring run chinook salmon and the California Central Valley steelhead. The Executive Director of the SWRCB has recommended that the Board consider adoption of emergency regulations at the June 17, 18 Board meeting to identify a minimum flow requirement for fisheries protection and health and safety requirements in these three watersheds because of the emergency drought conditions, the need for prompt action, and the unique attributes of these three tributaries. (http://www.swrcb.ca.gov/waterrights/water_issues/programs/drought/docs/mill_deer_antelope_creeks/doc2_finalregs.pdf.) The status of voluntary agreements versus the potential emergency regulations are discussed in another article in this issue.

Conclusion and Implications

The issuance of the curtailments lends credence to those who support new water storage projects, such

as the proposed Sites Reservoir. Those with previously stored water may use it despite the curtailments, but existing storage capacity is not enough to meet demand in a multiple drought situation such as California is now experiencing. The drought also seems to be focusing everyone on more local, reliable water supplies, such as above ground and underground storage projects, desalination of seawater and ground water, recycling of wastewater and stormwater, and more conservation, all of which would help augment our water supply. (Jan Driscoll)

II. State Water Resources Control Board Adopts Emergency Regulations to Curtail Water Users In Northern Streams

On May 22, 2014, the State Water Resources Control SWRCB (SWRCB) adopted Resolution No. 2014-0023, adopting emergency regulations for curtailment of diversions due to insufficient flow for specific fisheries in Deer, Mill and Antelope creeks in northern California. The regulation provides that diversions from Mill, Deer and Antelope creeks are unreasonable if those diversions would cause flows to drop below specified minimums.

Background

The SWRCB adopted the emergency regulation pursuant to Title 2, Division 3, Chapter 3.5 of the Government Code (commencing with § 11340). On April 25, 2014, Governor Brown suspended the review required by the California Environmental Quality Act to allow the SWRCB to adopt emergency regulations pursuant to Water Code § 1058.5 to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water, to promote water recycling or water conservation, and to require curtailment of diversions when water is not available under the diverter's priority of right.

The SWRCB regulations require curtailments on water diversions if minimum flows in the three Sacramento River tributaries are not met. The emergency regulations establish drought emergency minimum flow requirements for the protection of specific runs of federal- and state-listed anadromous fish in Mill Creek, Deer Creek and Antelope Creek.

Procedure

On March 1, 2014, Governor Brown signed a drought relief package, SB 104, which included changes to Water Code § 1058.5. Water Code § 1058.5 now grants the SWRCB the authority to adopt emergency regulations in certain drought years in order to:

> …prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, of water, to promote water recycling or water conservation, to require curtailment of diversions when water is not available under the diverter's priority of right, or in furtherance of any of the foregoing, to require reporting of diversion or use or the preparation of monitoring reports.

Pursuant to that authority, the SWRCB adopted §§ 877, 878, 878.1, 878.2, 879, 879.1 and 879.2 of title 23 of the California Code of Regulations to curtail diversions in Mill, Deer and Antelope Creeks, when insufficient flows are available to protect salmon and steelhead as emergency regulations. The Office of Administrative Law approved the emergency regulatory action effective June 2.

The SWRCB's Position

The SWRCB argued that the regulations provide it with a more streamlined process to curtail diversions of water to prevent unreasonable diversion or use of water so that water is available for: (1) senior water right users; (2) public trust needs for minimum flows for migration of state and federally listed anadromous fish; and (3) minimum health and safety needs. Under the emergency regulations, the SWRCB stated its intent to curtail water diversions on a water right priority basis except when water is needed for basic municipal and domestic health and safety needs, or other critical health and safety needs as determined on a case-by-case basis.

Concluding that immediate action was needed to prevent the waste and unreasonable use of water in Mill, Deer and Antelope creeks for threatened and endangered species in light of limited water availability during the drought, the SWRCB made a finding that an emergency exists due to severe drought conditions. The SWRCB asserted a need to curtail water

diversions when natural flows decrease so that water is available for: (1) senior water right users; (2) public trust needs for minimum flows for migration of state and federally listed fish in the three creeks; and (3) minimum health and safety needs.

The SWRCB admitted that the emergency regulations would make it much easier to enforce curtailments. Under existing law, the SWRCB may initiate administrative proceedings to prevent the waste or unreasonable use of water, but lacks authority to take direct enforcement action against the waste or unreasonable use of water. The SWRCB must first determine whether an individual diversion or use is unreasonable, and then direct the diverter or user to cease the unreasonable diversion or use through issuance of a cease and desist order. The emergency regulations streamline this process, as the SWRCB may issue a cease and desist order and simultaneously impose administrative civil liability in response to violations of the regulation.

The regulations set drought emergency minimum flows necessary to maintain fish passage in the three priority tributaries for protection of threatened and endangered chinook salmon and steelhead, and the SWRCB has curtailed diverters in these watersheds as necessary to maintain a reasonable assurance of meeting the established drought emergency minimum flows.

The requirement to curtail when water above drought emergency minimum flows is unavailable now constitutes both a regulatory requirement and a condition of all permits and licenses in the affected watersheds.

The SWRCB determined that the emergency regulation were needed to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, of water, to promote water recycling or water conservation, to require curtailment of diversions when water is not available under the diverter's priority of right.

Comments

Numerous water users in the watershed provided comments directly to the SWRCB, and also submitted comments on the emergency regulations to OAL:

(1) Pacific Legal Foundation submitted comments to OAL that the emergency regulations would violate the Water Code and the due process rights of water right holders. In particular, it noted that many of the water rights subject to curtailment are adjudicated rights, and that the SWRCB did not provide a right to hearing or appeal, require evidence or make findings.

(2) Comments by the California Farm Bureau Federation argued that the regulation did not meet the standards imposed by Government Code § 11349.1, that the SWRCB does not have authority to adopt the regulation without substantial evidence of an emergency, and due process right were violated.

(3) The Stanford Vina Ranch Irrigation Company asserts that the regulations constitute an inverse condemnation of adjudicated water rights, and violate due process.

Current Status

The emergency regulations also allow for local cooperative solutions as an alternative means of reducing water diversions to meet the minimum instream flow requirements or otherwise protect the identified fishery resources.

On Mill Creek the National Marine Fisheries Service (NMFS) and California Department of Fish and Wildlife (CDFW) have entered into Voluntary Drought Agreements (Mill Agreements) with water users on the creek covering substantially all of the water diverted in the watershed to provide minimum flows necessary to allow for adult and juvenile fish migration on lower Mill Creek. NMFS and CDFW determined the flows identified in the Mill Agreements provide watershed-wide protection for the fishery that is comparable to or greater than that required in the emergency regulations. SWRCB staff determined on June 4 that the emergency regulations would not go into effect on Mill Creek as long as the Mill Agreements remain in effect and their conditions are fully met.

Similarly, on Antelope Creek NMFS and CDFW entered into Voluntary Drought Agreements (Antelope Agreements) with several water users in the watershed to provide minimum flows necessary to allow for adult and juvenile fish migration on lower Antelope Creek. NMFS and CDFW determined that the flows identified in the Agreements provide watershed-wide protection for the fishery that is comparable to or greater than that provided in proposed in the

emergency regulations. SWRCB staff determined on June 4 that implementation of the Antelope Agreements cover substantially all of the water diverted in the watershed, and that the emergency regulations would not go into effect on Antelope Creek as long as the Antelope Agreements remain in effect and their conditions are fully met.

On Deer Creek the Deer Creek Irrigation District entered into a similar agreement with NMFS and CDFW, but they control only 33 percent of the flow of Deer Creek. As such, the agreement does not cover substantially all of the water diverted in the watershed, and the emergency regulations went into effect on June 4, 2014 on the Deer Creek watershed. Staff issued a curtailment order on Deer Creek on June 5, with an effective date of June 6. On June 12 staff issued a notice of a proposed Cease and Desist Order for unauthorized diversions from Deer Creek, allegedly in violation of the curtailment.

Conclusion and Implications

This is the first instance of the SWRCB adopting emergency regulations to implement water right curtailments. It is likely that such action will be challenged in court. In adopting the emergency regulations for Deer, Mill and Antelope creeks, the SWRCB identified the need for minimum flows during this drought period due to the lack of developed alternative water supplies to meet the emergency water supply conditions that exist during this drought period. In doing so, the SWRCB warned that:

> All water users should take measures this year and in future years to develop alternative water supplies, since it is likely more protective and appropriate minimum flows for similar future drought conditions will be established in the future.

The SWRCB has also noticed its intent to consider adopting similar emergency regulations to curtail water users on the Sacramento and San Joaquin River systems at its July meeting. (Jeanne Zolezzi, Robert Schuster)

NEWS FROM THE WEST

This month's News from the West involves cases from California, Texas, and Montana. First, a U.S. District Court in California rejected a request to dismiss a case attempting to hold a well operator responsible for groundwater contamination under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Next, the Montana Supreme Court rejected an objector's claim to a disputed well. Finally, a Texas appellate court upheld the grant of a temporary injunction preventing private residents from drilling water wells on their property.

U.S. District Court Rejects California Well Operator's Request to Dismiss CERCLA Suit

Coppola v. Smith, ___F.Supp.2d___, Case No. 1:11-CV-1257 (E.D. Cal. May 14, 2014).

Coppola v. Smith arose from the chemical contamination of property surrounding a dry cleaning business in Visalia, California. Plaintiff Coppola, the owner of the dry cleaning business, filed suit against California Water Service Company alleging that the Company's operation of a well located near the property caused contaminated surface groundwater to be pumped into and near the well. The Company filed a motion to dismiss the case in its entirety. The District Court of the Eastern District of California granted the Company's request to dismiss two claims—the claim that the Company was liable as a transporter of hazardous waste and that it was liable for past ownership of the surrounding area and the well. However, the court denied the Company's request to dismiss the claim that the Company was liable as a past owner or operator of the well itself.

Under CERCLA, "any person who accepts . . . hazardous substances for transport to disposal or treatment facilities . . . or sites selected by such person" can be liable for response (*i.e.*, cleanup) costs. 42 U.S.C. § 9607(a)(4). Coppola claimed that the Water Service Company was liable under this provision, but the court dismissed this claim because Coppola could not establish that the Water Service Company "accepted" contaminated water or "selected" a site for its disposal simply by operating the well.

The court also dismissed Coppola's claim that the Water Service Company might be liable as a past owner of the well *and the surrounding area*. Essentially, Coppola argued that the Company should be liable for contaminated water that was pumped toward the well, but never actually entered it. The court dismissed this claim because it was contrary to established law.

While the court granted the Company's motion to dismiss two of Coppola's claims, it rejected it as to another. Under CERCLA, "any person who . . . owned or operated any facility" that disposed of hazardous substances can be liable for response costs. 42 U.S.C. § 9607(a)(2). Coppola alleged that contaminated water entered the Company's well during the pumping process and exited the well when the pumps were cycled off. This process, the court noted, might fall under CERCLA's broad definition of "disposal." Accordingly, the court found that Coppola had alleged sufficient factual allegations for this claim which could establish the Company's liability as a "past owner or operator" of the well. As a result, the court found dismissal of this claim inappropriate, leaving it for litigation on the merits.

Montana Supreme Court Affirms Ownership of Rights to Disputed Well

Nelson v. Brooks, 375 Mont. 86 (Mt. 2014)

Nelson v. Brooks involves a dispute over water rights to a well located on U.S. Bureau of Land Management land in Beaverhead County, Montana. In 1982, a ranch owner filed a Statement of Claim for Existing Water Rights for an existing, unnamed well on a mill site that was adjacent to a mine owned by Minerals Engineering. Randall and Ila Mae Brooks later purchased the mill site and, in 1990, filed a claim to transfer the water rights. In the early 2000s, Ernest Nelson purchased some mine interests from a successor in interest to Minerals Engineering, then later filed an objection to Brooks' claim to transfer water rights, asserting that he owned the well in question. While the lawsuit was pending, the Brooks filed a motion to amend the 1982 Statement of Claim.

The Montana Supreme Court rejected the claims Nelson made to support his claim to the well. For example, Nelson argued that his interest in the well had been established by a prior Water Court decision granting his claims to two wells located in the general

vicinity of the disputed well. The Montana Supreme Court rejected this argument, affirming that neither of the wells to which Nelson's claims had been granted were the disputed well.

Nelson also argued that, because a prior mining company had operated on the property until 1976, the company must have had sole use of the well until that time. The Court rejected this argument because it was merely an inference without further evidence, which was insufficient to overcome the proof of Brooks' filed Statement of Claim.

Nelson also asserted that the Court should consider whether the Brooks' claimed right was a "use" right or "filed" right. The Court held that this issue was immaterial because, ultimately, the Brooks were the only individuals with a valid claim to the well.

Finally, Nelson argued that his ownership of the mining claim constituted ownership of the water rights to the wells on his property. The Court rejected this claim as well, noting that water rights are usufructory rights: a right to make use of the water, not a physical ownership right. Thus, the Court found that Nelson held no ownership of the water rights simply by owning the underlying property.

Texas Appellate Court Upholds Injunction Preventing Residents from Drilling Water Wells on Their Property

Becker v. BFE Development Corp, Case No. 02-13-00424 (Tx.App. May 8, 2014).

Becker v. BFE Development Corp. stemmed from a restrictive covenant prohibiting residents of a housing development from drilling water wells on their property. Under a covenant provision, the homeowners association created an "architectural control committee." This committee granted homeowners variances from the restrictive covenant, allowing them to drill wells on their property.

The Texas Court of Appeals approved the issuance of a temporary injunction preventing the homeowner's association committee from granting such variances. The court noted that the covenant language granting the committee powers limited it to permitting owners to construct, erect, or install improvements. Because it was unclear whether, under this language, the committee's authority extended beyond architectural decisions, the court held that a temporary injunction was appropriate until a trial on the merits could take place. The court held that:

> Because the language of the CC&Rs tends to support a reading a reading that the architectural committee variance granting power does not extend to the prohibition against drilling or operating a water well, the trial court did not abuse its discretion that [BFE] had a probable right to recovery…and did not abuse its discretion…by granting the temporary injunction…

A copy of the court's decision may be viewed online at: http://statecasefiles.justia.com/documents/texas/second-court-of-appeals/2014-02-13-00424-cv.pdf?ts=1399630974 (Melissa Cushman)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

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

Civil Enforcement Actions and Settlements—Water Quality

•EPA reached a settlement with Chevron Pipe Line Company resolving federal Clean Water Act (CWA) violations associated with two oil spills at the company's facilities in Utah. As part of the settlement, the Bellaire, Texas-based company will pay a civil penalty of $875,000. The penalty will be deposited into the Oil Spill Liability Trust Fund, a fund used by federal agencies to respond to oil spills. The agreement is associated with two spills from pipelines owned by Chevron Pipe Line. On June 11, 2010, a discharge of approximately 800 barrels of oil from the company's Rangely to Salt Lake Crude System No. 2 pipeline led to the Red Butte Creek Spill in Salt Lake City, Utah. The oil entered Red Butte Creek and flowed downstream to Liberty Lake, a centerpiece of Liberty Park in downtown Salt Lake City. The lake was closed for nearly a year while cleanup and restoration activities took place. On March 18, 2013, a discharge of approximately 499 barrels of diesel fuel from the company's Northwest Products System No. 1 Oil Line in Box Elder County impacted wetlands adjacent to Willard Bay, a reservoir connected to the Great Salt Lake. Soil, surface water, and groundwater contamination at the spill site required extensive containment and clean-up measures. The spill also affected wildlife and caused the temporary closure of Willard Bay State Park. Chevron Pipe Line no longer owns the Northwest Products System. The settlement follows several recent penalties and compliance actions associated with the Red Butte Creek spill, including agreements between Chevron Pipe Line and the State of Utah, Salt Lake City, and the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration. In December 2013, the company reached a settlement with the State of Utah which includes penalties and funds for specific damages and restoration and mitigation activities associated with the Willard Bay spill.

•EPA has reached an agreement with CEMEX Concretos, Inc. and Cemex de Puerto Rico, Inc. (CEMEX) to settle the companies' violations of requirements to control stormwater discharges under the CWA. The EPA inspected various CEMEX facilities and found that the companies violated the CWA at nearly all of their cement mixing facilities across the island. The agreement requires CEMEX to establish an environmental management structure that includes an Environmental Director, Environmental Coordinator and on-site managers to ensure compliance with stormwater requirements of the CWA. As part of the settlement, the companies will provide more than 400 acres of land, which will be turned over to the Puerto Rico Department of Natural Resources to manage and preserve. The land, which is located in the North Karst region of Puerto Rico at the Espinosa and Maricao Wards of the municipality of Vega Alta, is estimated to have a market value of over $2.3 million. The companies will also pay a penalty of $360,000. The complaint alleges violations at eighteen of the companies' facilities. The settlement requires measures to be taken to bring the companies' nine active facilities into compliance, and would require the companies' inactive facilities to be brought into compliance if they are brought back into operation. Between 2007 and 2010, the EPA conducted numerous inspections of CEMEX facilities to assess their compliance with their CWA permits that govern discharges into the water. Based on these inspections and requests for information sent to CEMEX, the EPA found numerous permit violations. The violations included CEMEX's failure to implement best management practices at its facilities to properly operate and maintain storm water control measures, conduct required inspections and keep up

to date stormwater pollution prevention plans as required by the general permit for stormwater discharges from industrial facilities. As part of the settlement agreement, EPA estimates that CEMEX will invest approximately $1.8 million to bring its facilities into compliance with the CWA.

•EPA has reached an agreement with the Atlantic Funding and Real Estate home building company and its owner, Alfred Spaziano, to address violations of federal rules that reduce pollution from contaminated stormwater runoff at its Gateway Landing construction site in Green and Gates, New York. Under the agreement, Atlantic Funding is required to comply with all stormwater control requirements and will pay a $50,000 penalty. The company will also invest nearly $70,000 to construct a bioswale—an area of vegetation or mulch that filters silt and pollution—to reduce pollution from contaminated stormwater discharges into the Erie Canal. The 20,204 square foot bioswale at Gateway Landing will contain a 7,800 square foot rain garden. Rain gardens are shallow, vegetated basins that collect and absorb runoff from rooftops, sidewalks, and streets. The bioswale is a project that benefits the environment and the community that would otherwise not have been required to bring the company into compliance. The EPA estimates that this project will reduce stormwater runoff into the Erie Canal by as much as 144,821 gallons a year. EPA inspected Atlantic Funding's Gateway Landing construction site in the towns of Greece and Gates, New York in September 2012 and February 2013. Those inspections, along with information provided by Atlantic Funding, revealed that the company was not properly following key parts of its stormwater pollution prevention plan. Violations found at the Gateway Landing site included failure to install a designated concrete washout area at the construction site and a perimeter silt fence prior to start of work and failure to construct sediment basins at the site and permanently stabilize drainage ditches with vegetation prior to road and building construction. In addition, Atlantic Funding violated provisions of its stormwater discharge permit, including the requirement to conduct site inspections according to the specified schedule and the requirement to properly amend its stormwater pollution prevention plan to minimize discharges of pollutants from the site. (Melissa Foster)

JUDICIAL DEVELOPMENTS

SEVENTH CIRCUIT CONCLUDES THAT COURTS MAY REVIEW COMPLETED STAGES OF CLEANUP AT A SITE EVEN IF EPA PLANS ADDITIONAL CLEANUP

Frey v. U.S. Environmental Protection Agency, ___F.3d___, Case No. 13-2142 (7th Cir. May 1, 2014).

In its third opinion addressing a citizen-suit challenge to the U.S. Environmental Protection Agency's (EPA) approval of cleanup plans for former landfill sites, the U.S. Court of Appeals for the Seventh Circuit concluded that review of a completed stage of cleanup was proper even though future additional remedial action was planned. At issue in the case was whether the plaintiffs' claims were barred by § 113(h)(4) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), which prohibits courts from considering Citizen Suits claims challenging a remedial action where the remedial action is pending or in progress. The Seventh Circuit concluded that review of completed cleanup actions was permissible notwithstanding new EPA plans for remedial action at the site as long as the completed action did not overlap with or affect the new plans for remedial action. Reaching the merits of plaintiffs' claims with respect to a single completed stage of the cleanup, the court affirmed the District Court's grant of summary judgment for the EPA.

Background

In 1983, the United States brought an enforcement action under CERCLA to require Westinghouse (now CBS) to clean up six landfills near Bloomington, Indiana at which its waste was allegedly disposed. After years of negotiation, the parties agreed on cleanup plans for three of the six sites. Because the parties were not able to reach a comprehensive agreement over the remaining three sites, they divided the cleanup into three stages—each of which would be negotiated and implemented separately. This meant that as soon as the parties agreed on the remedies for a given stage, Westinghouse could begin work on that stage while the parties continued to negotiate the terms of the remaining stages.

In 2000, after work on Stage 1 had commenced, plaintiffs filed a citizens suit under § 310 of CERCLA challenging the adequacy of the EPA's cleanup proposal. The District Court found the claim was barred by § 113(h)(4) of CERCLA, which states that Citizen Suits "may not be brought . . . where a remedial action is to be undertaken at the site." On appeal, the Seventh Circuit remanded the case for further development of the factual record. By this time, work on Stage 1 had finished. On remand, the District Court found, once again, that the plaintiffs' claims were barred by § 113(h)(4). On the second appeal, the Seventh Circuit found that § 113(h)(4) did not bar the suit. Even though the parties were contemplating future remedial action for Stages 2 and 3, the court found that the plans for subsequent stages were too vague and indefinite to bar judicial review. Specifically, the court found that, in order to delay a suit under § 113(h)(4), the EPA "must point to some objective referent that commits it" to a plan. Accordingly, the court remanded the case to the District Court so that the plaintiffs' objections to Stage 1 could be heard.

The plaintiffs filed their third amended complaint in July 2009. By this time, the defendants had finished negotiations for Stages 2 and 3 and had started implementing the cleanup procedures for those stages. In their amended complaint, the plaintiffs raised four arguments. First, the plaintiffs argued that the EPA violated CERCLA by failing to complete a Remedial Investigation/Feasibility Study prior to selecting the remedy for any of the stages. Second, the plaintiffs claimed that the EPA violated CERCLA's mandate to protect human health and the environment by adopting the plans in Stages 1, 2, and 3. Third, the plaintiffs alleged the EPA violated the requirement that all settlement agreements be entered as consent decrees. Finally, the plaintiffs argued that the judge should have recused himself because he had ruled on similar issues in the EPA's enforcement action against Westinghouse and was therefore biased.

The District Court held that it lacked jurisdiction

over claims pertaining to Stages 2 and 3, reasoning that because work on those stages was continuing, the claims were barred by CERCLA § 113(h)(4). The District Court declined to recuse himself and granted summary judgment for the EPA on all claims regarding Stage 1.

The Seventh Circuit's Decision

A New Understanding of CERCLA § 113(h)(4)

The court first considered whether § 113(h)(4) would prevent it from considering the plaintiffs' claims. The court affirmed the District Court's findings relating to Stages 2 and 3. Because remedial work for these stages was ongoing, the court found that § 113(h)(4) barred the claims. With respect to the plaintiffs' Stage 1 claims, the court found itself in a difficult position. Because the court had previously decided that § 113(h)(4) did not bar these claims, the court thought it would be unfair to reinstate the bar after years of litigation. At the same time, because remedial efforts were ongoing, § 113(h)(4) seemed to prohibit the court from deciding the claims.

This difficulty led the Seventh Circuit to consider a new question:

> …how does § 113(h)(4) apply if, after a judicial determination that no future action was planned (so that § 113(h)(4) did not bar consideration of the Citizen Suit), the EPA then makes new, concrete plans to conduct further remediation at a site?

The court considered three possible answers to this question. First, the court considered an approach where § 113(h)(4) would bar the review of any prior remediation as soon as the EPA announces new plans for remediation. The court rejected this view, recognizing that it would allow the EPA to evade judicial review by "proposing minor 'further actions' whenever a citizen files suit."

The court next considered an approach in which a prior completed action would remain subject to judicial review even if EPA announces new cleanup plans. The court rejected this approach as well, reasoning that, if the new action is not fully distinct from the old one, the court would "lack a meaningful way to review the completed action without also reviewing the new action."

Finally, the court considered and adopted a "middle path" approach. Under this approach, if the EPA adopts a new remediation plan after an old plan is complete, courts would retain authority to review any pending claims that are not "directly affected" by the new plan. That is, courts would retain authority to review the portions of the old plan that do not overlap with the new plan. As an example, if the completed action addressed soil and water contamination at a site, and a new plan addressed only soil contamination at the same site, the court would be free to review claims related to the old plan's water remedies, but not the soil remedies.

Applying its new rule to the plaintiffs' claims, the court found that Stage 1 was sufficiently distinct from Stages 2 and 3, such that § 113(h)(4) would not bar the plaintiffs' Stage 1 claims.

The Merits of Plaintiffs' Claims

In analyzing plaintiffs' Stage 1 claims, the court found that:

> …the substance of the EPA's decisions . . . is at least partly discretionary, and therefore beyond the scope" of a Citizen Suit, which is limited to claims that EPA failed to perform a non-discretionary act.

Cast in this light, the court limited its analysis to the EPA's compliance with applicable procedural requirements. Addressing each of plaintiffs claims in turn, the court found that the EPA had conducted the functional equivalent of an RI/FS before selecting Stage 1, that the EPA had determined the Stage 1 remedy was protective of human health and the environment, and that in light of amendments to the consent decree, plaintiffs' claim relating to the consent decree requirement was moot. Finally, the court noted the plaintiffs' motion to disqualify the district judge "ha[d] no merit" because, contrary to plaintiffs assertions, "information a judge has gleaned from prior judicial proceedings is not considered extrajudicial and does not require recusal."

Conclusion and Implications

The Seventh Circuit's decision is notable for its conclusion that a court may review a completed stage of cleanup at a site even if EPA plans future

additional remedial action at that site. The court was careful in its analysis to chart a path that it believed would avoid judicial review of planned future remedial actions, but the decision appears to break new ground in allowing review of EPA remedy decisions for a portion of a site before remediation is complete for the entire site. Together with the court's prior decision in *Frey II*, 403 F.3d 828 (7th Cir. 2005) and the D.C. Circuit's recent opinion in *El Paso Natural Gas Co. v. U.S.*, ___F.3d___, Case No. 12-5156 (D.C. Cir. Apr. 4, 2014), the court's opinion may be viewed as expressing a growing judicial reluctance to allow EPA's remedy decisions to escape review until the final completion of protracted environmental site cleanups. (Adam Adler, Duke K. McCall, III)

NINTH CIRCUIT REJECTS ENVIRONMENTAL CHALLENGE TO COLORADO RIVER WATER TRANSFERS

People of the State of California v. Jewell, ___F.3d___, Case No. 12-55956 (9th Cir. May 19, 2014).

The Ninth Circuit has upheld a challenge to an Environmental Impact Statement (EIS) prepared by the U.S. Department of the Interior (Interior) in connection with a set of proposed water transfers between agricultural water contractors subject to federal Colorado River water delivery contracts, and municipal and industrial water suppliers in southern California. The resulting decision, *People of the State of California v.* Jewell, affirms Interior's environmental analysis of the impacts of those transfers, and clears the way for the water deliveries to move forward.

Background

Water deliveries from the Colorado River are subject to a complex set of entitlements: the United States, Mexico, Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming all lay some claim to water from the river. In 1922, states within the Colorado Basin agreed to divide certain allocations of water between "lower basin" and "upper basin" states. California, Arizona, and Nevada are all lower-basin states. In turn, certain irrigation and water districts in Southern California agreed to a basic framework for distributing the California share of the river water. The terms of this agreement were then incorporated into water delivery contracts, which are administered by the Department of the Interior, and provide for water delivery to various water purveyors in the Imperial and Coachella valleys.

Run-off from some of the Colorado River contractors' boundaries has historically fed the Salton Sea in Southern California. The Salton Sea was created in 1905 when a breached irrigation canal flooded the formerly dry Salton Basin. The Salton Sea serves both recreational and environmental uses, and acts as habitat for a number of bird and other species. Because the Salton Sea has no natural outflow, salinity and water level management have been recurring concerns in the area for some time.

In 1998, Imperial Irrigation District and San Diego County Water Authority negotiated a preliminary transfer agreement, under which Imperial Irrigation District would transfer 300 thousand acre-feet of water to San Diego County Water Authority to supply the municipal and industrial demands of the authority's member agencies. As required by the National Environmental Policy Act (NEPA), the Secretary of the Interior prepared an environmental impact statement (Transfer EIS) analyzing the potential impacts of the transfers under NEPA. The following year, several water districts, including San Diego County Water Authority, Coachella Valley Water District and Imperial Irrigation District, negotiated preliminary "Quantification Settlement Agreements" to reduce Colorado River water usage, and to authorize transfers of water from Imperial Irrigation District to other districts in the area. The resulting changes to Imperial Irrigation District's Colorado River water entitlements necessitated the preparation of a second environmental impact statement (the Implementation Agreement EIS), which was the subject of the challenge in this lawsuit.

Water Transfer Agreements Challenged on Environmental Grounds

The Implementation Agreement EIS discussed the on-river environmental impacts of altering Colorado River delivery diversion points, the indirect effects of changing the amount of water received by the California districts, and potential mitigation measures to

reduce off-river ecological consequences. It also summarized and cross-referenced findings in the Transfer EIS related to the environmental impacts of the transfer generally, which included findings regarding the transfer's impacts on the Salton Sea. Although the Secretary's analysis concluded that some impacts could result from the transfer, the transfer agreements were ultimately approved by the Bureau of Reclamation.

Imperial County and the Imperial County Air Pollution Control District brought suit against the Secretary of the Interior, alleging that the Implementation Agreement EIS was in violation of both NEPA and the Clean Air Act, that the transfer would result in undesirable impacts on habitat and air quality standards in the Salton Sea, and that the Department had improperly incorporated other environmental analysis prepared under the California Environmental Quality Act (CEQA) for similar water-related activities in the area. The parties to the transfer agreements, Imperial Irrigation District, San Diego County Water Authority, Coachella Valley Water District, and Metropolitan Water District intervened in the suit as defendants.

The parties filed competing motions for summary judgment. After reviewing the motions, the District Court concluded that the plaintiffs lacked standing to bring the case, and in the alternative, reasoned that the plaintiffs' NEPA claims lacked merit. Defendants' motion for summary judgment was granted, and the plaintiffs appealed.

The Ninth Circuit's Opinion

On appeal, the Ninth Circuit determined that the plaintiffs did have standing to bring suit, but that the suit itself still must fail, because the plaintiffs had not established a violation of either NEPA or the Clean Air Act. As to standing, the Ninth Circuit observed that NEPA was intended to protect the plaintiffs' interests, and those interests were potentially threatened by the proposed transfers.

The Ninth Circuit held that the Implementation Agreement EIS adequately discussed, among other issues, mitigation measures for the potential environmental impacts, including air quality impacts, that could result from the transfers. The court went on to determine that the Secretary had sufficiently responded to comments and concerns regarding air quality, and that the Secretary's environmental review was consistent with the Clean Air Act. In light of plaintiffs' claims that the Implementation Agreement EIS improperly incorporated environmental documents prepared to meet other legal obligations related to Colorado River water transfers, including documents prepared under the California Environmental Quality Act, the court observed that other external documents may provide support and additional analysis for the EIS without side-stepping the agency's legal obligations under NEPA. Consistent with these determinations, the court concluded that the Implementation Agreement EIS appropriately considered the environmental effects that the transfers would have on the Salton Sea.

The court observed that while the Transfer EIS evaluated a separate, narrower water-transfer agreement and proposed habitat conservation program, the Implementation Agreement EIS was directed towards issues unique to the implementation of the Quantification Settlement Agreements, including the on-river effects of altering diversion points, and the secondary off-river consequences of reducing Imperial Irrigation District's water allocation. Recognizing these distinctions, the court found that the actions analyzed in these two documents had sufficient independent utility to support the Secretary's determination that two EIS's, rather than one, were appropriate, and the preparation of two documents did not improperly segment the environmental review of the Quantification Settlement Agreements. The court further found that the Secretary of the Interior did not abuse her discretion when she concluded that no supplemental EIS was required prior to approving the transfer agreements.

Conclusion and Implications

The Ninth Circuit panel's decision affirmed the District Court's summary judgment in favor of federal defendants and the intervenor water districts, and gave more certainty to the parties to the Quantification Settlement Agreements, which have been the subject of litigation for some time. Judgment was entered on May 19, 2014, and the deadline to petition for en banc rehearing has passed. Any petition for writ of *certiorari* to the U.S. Supreme Court must be filed within 90 days of the May 19 judgment. A full copy of the decision is available at: http://cdn.ca9.uscourts.gov/datastore/opinions/2014/05/19/12-55856.pdf (R. Anderson Smith, Meredith Nikkel)

DISTRICT COURT FINDS CITY LIABLE FOR THE ACTIONS OF OTHERS WHEN POLLUTANTS ARE PLACED INTO ITS MUNICIPAL SEWER SYSTEMS

KFD Enterprises, Inc. v. City of Eureka, et al.,
___F.Supp.2d___, Case No. 3:08-cv-04571 (N.D. Cal. May 9, 2014).

The U.S. District Court for the Northern District of California considered the issue of whether a city can be liable for contributing to soil and groundwater contamination from hazardous chemicals moving through municipal sewer systems. The court found that a publicly owned sewer system constitutes a "facility," allowing for liability under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

Background

Plaintiff, KFD Enterprises (KFD), operated a dry cleaning business in Eureka, California since 1980. Plaintiff used tetrachloroethylene (PCE) and disposed of wastewater containing the chemical through drains on its property, leading to the contamination of soil and groundwater surrounding the property. The North Coast Region, Regional Water Quality Control Board (RWQCB) was the lead agency investigating and overseeing the cleanup at the site. Plaintiff asserted that the defendant City of Eureka (Eureka) failed to properly maintain municipal sewers, causing the contamination when PCE leaked out of its sewer system. KFD brought this action under CERCLA, the California Hazardous Substance Account Act (HSAA), and the federal Resource Conservation and Recovery Act (RCRA). Eureka counterclaimed under CERCLA and HSAA seeking summary judgment on all of KFD's claims.

Legal Background

CERCLA §107(a) allows the recovery of response costs for the release of hazardous substances from four potentially responsible parties (PRPs): (1) the current owner and operator of a facility, (2) a past owner or operator of a facility, (3) a person who arranged for disposal, treatment, or transport of a hazardous substance, and (4) any person who accepts hazardous substances for transport to disposal or treatment facilities. In order to establish liability of one of these parties, the plaintiff must prove that: (1) the site at issue is a "facility" as defined under the provision, (2) a release of hazardous materials from the facility has occurred, and (3) the plaintiff incurred response costs consistent with the national contingency plan as a result of the release.

HSAA is the California equivalent to CERCLA designed to address hazardous waste sites within the state. RCRA authorizes suits against similar parties who contribute to the "handling, storage, treatment, transportation, or disposal of any solid or hazardous waste."

The District Court's Decision

The CERCLA Claims

KFD argued that Eureka is a PRP liable under the first element of CERCLA as an owner and operator of the sewer facility. The District Court agreed that the weight of authority allows the owner of a municipal sewer facility to be held liable under CERCLA. The court was persuaded by the logic of a similar case involving PCE contamination from a dry cleaning business that publicly owned sewers are classified as facilities under CERCLA—because the ownership of the sewer can be divided from the property above it. *Adobe lumber, Inc. v. Hellman*, 658 F.2d 1188 (E.D. Cal 2009). In this case, however, genuine issues of material fact still remained regarding the extent to which Eureka could be liable for the release of hazardous substances.

Eureka contended that KFD was not entitled to recovery under CERCLA because it did not satisfy the third element of incurring response costs consistent with the National Contingency Plan. Eureka also asserted that KFD was not entitled to recovery because the remediation plan was not approved by the RWQCB before KFD filed the CERCLA claim. KFD responded that its response costs were comprised of hiring two consultants to assess the contamination on its property. The court held that there was sufficient evidence demonstrating response costs incurred by

KFD, and that there was not a requirement of government approval of a remedial plan as an element of a CERCLA §107(a) claim.

In response, Eureka counterclaimed for the recovery of costs under CERCLA §107(a) and for contribution under §113(f) for its reimbursement of the RWQCB's costs associated with oversight of the cleanup. The District Court granted Eureka's claim for recovery of costs, but denied the counterclaim for contribution because the PRP cannot simultaneously recover expenses for the same claim under §107(a).

The court also denied Eureka's motion for summary judgment based on CERCLA preemption of KFD's state law claims because the Ninth Circuit has expressly held that CERCLA does not preempt state law claims. *City of Emeryville v. Robinson*, 621 F.3d 1251, 1262 (9th Cir. 2010).

The State Law Claims

Eureka also moved for summary judgment on KFD's HSAA claim because it incorporates CERCLA liability standards which, according to Eureka, already failed. Eureka argued in the alternative that CERCLA's prohibition on double recovery bars the HSAA claim. The court denied the motion noting that while KFD cannot recover the same costs under CERCLA and HSAA, the CERCLA prohibition on double recovery does not preclude concurrent liability under state law. The court also denied Eureka's motion for summary judgment on the ground that the statute of limitations had run on KFD's other state law claims, choosing to agree with KFD's assertion of the sewer's continuing leakage.

KFD then moved for summary judgment that Eureka's HSAA counterclaim must fail because HSAA limits recovery to costs actually incurred. Eureka only produced evidence that it might reimburse RWQCB's costs. The District Court granted this motion based on the Supreme Court's decision that the meaning of "incurred" in CERCLA §107(a) excludes payments to reimburse the costs of others. *U.S. v. Atl. Research Corp.*, 551 U.S. 128, 139 (2007).

The RCRA Claims

KFD further claimed, under RCRA, that Eureka contributed to the handling, storage, treatment, transportation, or disposal of hazardous waste. In support of this claim KFD produced evidence that the sewer was poorly designed, that Eureka had known of leaks since the 1980s, and had failed to fix the sewer. Following arguments from both parties regarding the meaning of "contribute" the court explained that some affirmative action was required. The District Court denied both parties' motions for summary judgment on the RCRA claim, choosing to leave whether these actions constitute affirmative acts as an unresolved question of fact.

Conclusion and Implications

Prior to *Adobe,* precedent discouraged plaintiffs from pursuing recovery cleanup costs from publicly owned sewer systems. *Fireman's Fund Ins. Co. v. City of Lodi,* 302 F.3d 928 (9th Cir. 2002) is one example where the court rejected the notion that a city could be considered responsible for contamination by simply owning and opening a municipal sewer system. The *Adobe* decision held otherwise, leading the trend to hold municipalities liable for the actions of others. This line of cases emphasizes the importance to sewer system owners to implement sewer system maintenance and replacement programs and to vigorously enforce discharge ordinances. (Thierry Montoya, M. McCullough)

DISTRICT COURT ADDRESSES STATE IMPLEMENTATION OF ITS NPDES PROGRAM—IGNORES STATE OPINION ON WATER QUALITY STANDARDS—INSTEAD RELYING ON INDEPENDENT EXPERT OPINION

Ohio Valley Environmental Coalition v. Elk Run Coal Company,
___F.Supp.2d___, Case 3:12-cv-00785 (S.D. W.Va. June 4, 2014).

A recent ruling in an environmental groups' citizen suit case against West Virginia coal mines has implications for the ability of companies with Clean Water Act National Pollutant Discharge Elimination System (NPDES) permits to rely on their terms in that state. The U.S. District Court for the Southern District of West Virginia has held that a state narrative water quality standard about maintenance of "the integrity of the waters of the State" is violated by inducing different ionic levels with sulfate and other discharges. In *Ohio Valley Environmental Coalition v. Elk Run Coal Company*, Case 3:12-cv-00785, the U.S. District Court held that changes in the ionic balance in a volume of water constitute a change in integrity that violates the standards. The court in so ruling declined to heed the defendants' argument that the West Virginia authorities had made a finding and issued guidance that ionic activity does not alone cause water quality violations. The court determined that water quality violations were proven based on the independent testimony of plaintiff's experts.

The court used a so-called "benchmark" publication from U.S. Environmental Protection Agency (EPA) in March 2011 to persuade itself that the water quality standards are violated, even though the use of EPA guidance based on this EPA's science related report was determined to be unenforceable in a case respecting very similar issues and similar permits, in *National Mining Association v Jackson* 880 F.Supp.2d 119 (D. D.C. 2012).

The decision of the District Court would seem to pay little or no deference to the findings or legislation of the State of West Virginia—at one point even finding that a specific provision concerning "materials in concentrations which are harmful, hazardous or toxic to man, animal or aquatic life" creates what the court labeled "an absurdity."

The case deserves attention on at least two levels: 1) does the orderly administration of a state's authorized NPDES program give the state discretion to adopt water quality standards and to reach water quality judgments based on the state's review of the science (as opposed to EPA's "guideline"); 2) should a U.S. District Court decide it should defer to an EPA guidance and review a state's permit decisions in the midst of a citizen suit permit enforcement case, especially where another U.S. District Court has ruled that EPA had no authority to impose the "guidance"?

The District Court's Decision

The plaintiffs were bringing a citizens suit under the federal Clean Water Act. Their witnesses were scientists that contributed to the EPA's benchmark study on "conductivity". The witnesses were found by the court to be well qualified. They apparently testified that the benchmark that EPA established was set with due weighing of factors that are in play in waters such as are involved in the case. The court, rather than determining if there is an actual permit violation shown by the testimony, says that the narrative standard citing harm to aquatic life is an absurdity and appears instead to say there is a violation of the benchmark established by EPA. Even though the benchmark is not included in the permit in question, the violation of the benchmark winds up being sufficient in the court's mind to determine that a violation occurred because the experts believe the benchmark a valid indicator of harm standing alone. The District Court effectively turned the enforcement action into a regulatory or permit issuance review case based on its belief that the court owes the benchmark deference.

The plaintiffs' experts testified that the streams impacted by the defendant coal companies' sulfate and other discharges were ionically impaired, *i.e.* could be shown to affect population densities of certain species (*e.g.* mayflies), and *ipso facto*, find water quality violations by the mines. A competent defense expert provided rebuttal testimony, but from what the court found, the defense expert's testimony did not challenge the basic thesis of ionic change equaling harm. Instead, per the court, the defense expert merely critiqued the plaintiff experts for ignoring some relevant

facts and factors that might affect whether harm actually was occurring.

Conclusion and Implications

Given the role of the EPA in the Clean Water Act NPDES permit review process, which includes EPA's ability to comment on permits proposed for issuance, it is curious that the District Court in the *Elk Run* seemingly neglected the concept that a state expert agency could take a view of what water quality harm is that is different from what unenforceable guidance seems to indicate. This decision illustrates that issues of fairness to states as well as due process for coal mining concerns are at stake in the ongoing efforts of the EPA to make coal mining and coal use very expensive, in keeping with the President's announced environmental policy preferences.

An attorney who has handled a number of coal mining cases, W. Blaine Early, III, of Lexington, Kentucky commented recently to the water quality subcommittee of the American Bar Association:

> This decision may have ramifications for the regulated community regarding which types of alleged permit violations may be subject to action by citizens suits and to what extent the courts may act as "super regulators" to impose obligations different from those imposed by the state agencies authorized to oversee the regulated activities. In addition, the court's evaluation of factual bases of general and specific causation of harm as measured by levels of conductivity and biotic index scores may affect interpretations of alleged harm caused by stormwater pollutants.

(Harvey Sheldon)

DISTRICT COURT UPHOLDS CWA CITIZEN SUIT FOR POLLUTING WITHOUT A PERMIT DESPITE PREVIOUS STATE AGENCY FINDING THAT NO PERMIT WAS REQUIRED

Soundkeeper, Inc. et al v. A&B Auto Salvage, Inc.,
___F.Supp.2d___, Case No. 3:12-CV-00841 (D. Conn. May 15, 2014).

Plaintiffs brought a Citizen Suit under the federal Clean Water Act (CWA) to address and abate the defendants' continued discharge of polluted water from their automobile salvage and scrap metal recycling facility in East Hartford, Connecticut into U.S. waters. The U.S. District Court declined to dismiss the CWA §505 Citizen Suit for polluting U.S. waters without proper permits, even where a state agency previously determined that such permits were unnecessary.

Background

The defendants' process of recycling and crushing vehicles released pollutants including paint, sediment, glass, metals, arsenic, mercury and other pollutants. The complaint alleged that the machinery used in this process releases fuel, oil, and lubricants. Plaintiffs asserted that these pollutants were carried by storm water into a nearby river, violating provisions of the CWA, and that the defendants failed to register for proper permits. Defendants alleged that the state Department of Energy and Environmental Protection (DEEP) inspection report concluded that they did not need to register for a Storm Water Permit. Plaintiffs opposed by highlighting a subsequent DEEP document stating that discharge from the property required a permit, and that the defendants should have the site evaluated. The defendants received such a letter from DEEP, and hired an engineering firm to evaluate their property. The inspection yielded "no indication of any drainage from the area of the property where industrial activity occurs." Defendants moved to dismiss the matter based on lack of standing and subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1).

Legal Background

The CWA's primary objective is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). In order to achieve this end, §301(a) prohibits the discharging of any pollutant into U.S. waters. The

U.S. Supreme Court recently noted that the CWA requires the securing of permits before discharging pollutants from any source into U.S. waters. *Decker v. Northwest Environmental Defense Center*, 133 S.Ct. 1326, 1331 (2013). CWA §505 allows citizens to bring suits for such violations of the act.

The District Court's Decision

The District Court declined to dismiss the suit based on a lack of standing and subject matter jurisdiction. The central question was whether CWA §505 Citizen Suits may be brought against entities that are allegedly discharging pollutants without a permit when the EPA, or equivalent state agency, in this case DEEP, had previously determined that a permit was not required.

Standing

Defendants contended that plaintiffs lacked standing because the DEEP inspection report stated that permit registration was not required. Plaintiffs countered that CWA §505 allows for Citizen Suits against those in violation of standards within the purview of the act, and that the discharge of polluted storm water into the waters of the United States constitutes a violation of these standards.

Subject Matter Jurisdiction

The assertion for the existence of subject matter jurisdiction was upheld by the court. In a similar case involving pesticide pollutants, the New York State Department of Environmental conservation advised defendants that as long as their pesticide spraying complied with its requirements, the CWA did not require the issuance of a permit prior to spraying. The plaintiffs in that case brought a Citizen Suit alleging the violation of the CWA by complying with the state agency's decision. *Peconic Baykeeper, Inc. v. Suffolk County,* 585 F.2d 377 (E.D. N.Y. 2008). The District Court noted that the *Peconic Baykeeper* decision did not turn on disputed subject matter jurisdiction. While this may seem off point, the District Court reasoned that the absence of a Rule 12(b)(1) discussion denotes an implicit acceptance that Citizen Suits may still be brought in circumstances where the agency has specifically determined that a CWA permit is not necessary. Additionally, the Ninth Circuit has repeatedly held that courts considering a Citizen Suit may determine whether the discharge of pollutants into waters violates the CWA even where an agency has determined a permit to be unnecessary. *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 706 (9th Cir. 2007). The Fifth Circuit similarly upheld Citizen Suits where a person was acting without a permit, even when an agency declined to issue a permit. *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 566 (5th Cir. 1996). Ultimately, the District Court was persuaded to uphold the assertion of subject matter jurisdiction to hear a Citizen Suit.

Defendants further argued that plaintiffs' action was barred under CWA §1319(g), which bars Citizen Suits when the state agency has already commenced proceedings against the polluter pursuant to state law. The argument for dismissal under §1319(g) was premised on an administrative order from 1982 that appeared to run with the land. In support of this assertion, defendants supplied evidence that both DEEP and the Town of East Hartford, Connecticut initiated proceedings against the predecessor to the defendants' auto recycling facility. The Court rejected this argument as it predated the plaintiffs' complaint by a quarter century. Furthermore, the EPA regulations requiring permits to discharge industrial pollutants were not promulgated until 1990, eight years after the administrative order. The District Court further clarified that the language of §1319(g)(6) applying to "any violation" makes evident that the legislation precluding future civil liability must concern the same alleged violation. The defendants did not provide sufficient evidence for the court to find that the violation referenced in the 1982 order and the present violations are sufficiently linked. Therefore, the District Court declined to dismiss plaintiffs' complaint under Rule 12(b)(1).

Conclusion and Implications

This case addresses the tension between the *Chevron, USA Inc. v. Natural Res. Def. Council,* 467 U.S. 837, 844 (1984) deference granted to regulatory agencies to determine the meaning of a statutory provision, and the purpose of a Citizen Suits—to enforce the CWA when responsible agencies fail or refuse to do so. In most instances, Citizen Suits are invoked to enforce limitations in an EPA issued permit.

On occasion, however, a citizen sues because of a discharge that the EPA has elected not to

regulate. If the decision of the EPA is given conclusive deference, the Citizen Suit would be defeated. Suit is therefore allowed despite the EPA's inaction, and a court may decide whether the offending substance is a pollutant even when the EPA has not decided that question. *Sierra Club, supra*, at 566-67.

The cases holding does not go so far as denying deference to the EPA or the Corps when, by formal regulation, "those agencies construe the meaning of a statutory term that establishes the reach of the CWA that they administer." *San Francisco Baykeeper, supra*, at 706-07. (Thierry Montoya, M. McCullough)

FEDERAL CLAIMS COURT FINDS THAT A REGULATORY TAKING CANNOT BE VIEWED AS A PERMANENT RESTRICTION ON LAND—ANALOGIZES DAMAGES TO LOSS OF USE

Bailey v. U.S., Case No. 02-10781 (Fed. Cl. May 29, 2014).

The United States filed a motion for reconsideration of the Court of Federal Claims prior ruling that a regulatory taking cannot be viewed as a permanent restriction on the land since the government can elect to cease regulating the use at any time. In its 2007 decision, the court rejected the United States' argument that plaintiff lacked standing to sue for the taking of lots sold by him prior to the date of the alleged taking and reacquired afterwards. In its decision, the court cited to *Wyatt v. U.S.* 271 F.3d 1090, 1096 (Fed. Cir. 2001), holding: "It is axiomatic that only persons with a valid property interest at the time of the taking are entitled to compensation." But this case did not pertain to a regulator taking and a post-taking acquirer. When the rule was subsequently applied in the context of a regulatory taking in *CRV Enterprises, Inc. v. U.S.* (*CRV*), 626 F.3d 1241 (Fed. Cir. 2010), the court requested briefing on the issue, resulting in this decision. The Claims Court held that reconsideration was not warranted as the *CRV Enterprises* decision was not inconsistent with the prior opinion.

Background

In 1989, plaintiff purchased property bordering the Lake of the Woods in Minnesota. Plaintiff originally intended on developing a marina, but never acted on that intention. In late 1996, plaintiff applied to the county to have 13.2-acres of his property platted into a subdivision. As a condition, plaintiff was to build a connection road tying his subdivision to an existing road.

The existing road at that time terminated just north of the western edge of the platted subdivision. Plaintiff hired a contractor to build the extension road, a process that took several months and involved land clearing activities. On June 15, 1998, an unspecified U.S. Army Corps of Engineers (Corps) representative visited the site and orally advised plaintiff to cease work on the access road until he obtained a Corps permit.

Plaintiff applied for an after-the-fact permit for the access road. Plaintiff's application was designed for applications to the state, county, and local government, as well as the Corps, and he signed on a specific line allowing it to be considered an application for a § 404 permit under the Clean Water Act. Plaintiff submitted this application to the county, along with a Wetland Replacement Plan Application pursuant to the Minnesota Wetland Conservation Act. After evaluating the application under the state act, the county forwarded it to the Corps. In September the Corps sent plaintiff a letter to stop work on the access road until a permit was obtained; however, plaintiff continued working on the road to obtain county approval.

In August 2000, the Corps conducted its own wetlands determination of the property concluding that a majority of the 13.2 acres was wetland. In October, the Minnesota Pollution Control Agency revoked its previously issued water quality certification and in June 2001, the Corps denied the after-the-fact permit for the access road. The Corps gave plaintiff three options: i) completely remove the road; ii) partially re-

move the road; or iii) mitigate. In October 2001, the Corps ordered that the road be completely removed.

By this time, plaintiff had sold some of the lots. When the permit was denied, plaintiff had repurchased four of the lots. In August 2002, plaintiff sued the Corps alleging that its restrictions imposed on the subdivision property deprived him of all economically beneficial and productive use of his land, or, in the alternative, substantially diminished the value of his property, resulting in a regulatory taking of his property requiring just compensation under the Fifth Amendment of the U.S. Constitution.

In a 2007 decision, the Court of Federal Claims held that a private property owner may seek compensation for a regulatory taking of property at any time the regulation continues to be enforced, even if the regulation existed prior to the purchase of the property or a previous owner had been awarded compensation for the same regulatory taking.

The Claims Court's Ruling

In *CRV*, the District Court rejected a takings claim based on the government's erection of a log boom that prevented the landowner from using a slough adjacent to the landowner's property. The log boom was placed in the slough to be used to remediate contamination at a nearby site. The court rejected the landowner's takings claim as they could not prove a physical invasion of their land. The log boom was anchored to the slough, and area that the landowner's did not own. Also, the landowners could not prove that they owned the water within the slough such that they could argue that the government's physically appropriated their rights to the water within the slough.

Here, the court held that *CRV* was not inconsistent with its earlier decision.

> As we recounted above, the 'owner at the time' rule turns on the presumed permanence of takings accomplished by the physical construction or roads, dams, landing fields and the like. Even when analyzed as a regulatory taking that ripened upon the issuance of a piece of paper, the ROD, the restriction on the property owners' use of water rights in *CRV Enterprises* was not any command governing their behavior, but the decision to install a log boom to protect a Superfund Site…This, then, would still come under the rule that when the government make physical use of property by building a structure, any property interests taken by this activity are permanently appropriated by the government at that time. *Id.*

The crux of this case concerned what property was taken by the Corps' permit denial; a regulatory takings issue. The Corps argued that plaintiff's case was limited to the property interests he held on the date of the alleged taking, and not on the interests he acquired after that date. *CRV* did not concern the issue of a regulatory taking.

Conclusion and Implications

This decision highlights the Supreme Court's ruling in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) in which the Court held that a property owner may base a takings claim on the application of a regulation to his property even if the regulation existed prior to his ownership. The Supreme Court held that the "claim is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction." *Id* at 630. In the underlying decision, the Claims Court explained that when a government restriction on the use of property is so severe as to result in a taking, the owner is suing for his loss of use, not for the loss of subsequent owners. *Bailey v. U.S.*, 78 Fed. Cl. 239 (Fed.Cl. 2007). As a regulatory taking cannot be viewed as a permanent restriction, like a log boom, on the land since the government may choose to stop regulating the use at any time, whoever owns the property while the regulation continues is entitled to compensation. (Thierry Montoya)

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