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FEATURE ARTICLE

CHALLENGES TO PERMITTING DESALINATION PLANTS—THE CALIFORNIA EXAMPLE

By Joe Monaco and Scott Birkey

It's generally well accepted by now that much of the Coastal United States, especially in areas like the Southeast, and West Coast, face a number of challenges related to water supply shortages and unreliability. A growing population and the effects of climate change are likely to make the situation worse. Policy makers have long considered a number of options to address these problems, from local efforts to increase water conservation to statewide designs to increase water conveyance efficiencies throughout the state. These approaches may or not be sufficient. Most likely, they're only pieces of a larger jigsaw puzzle.

Desalination is another potential piece in this puzzle. As a concept, desalination to provide potable water is not new. Looking to California as a case study—to date, however, only one fully entitled, regional-scale desalination facility exists in the state—the Poseidon Resources facility that is currently under construction in Carlsbad. Other facilities of this size are either currently engaged in, or waiting in the wings for, the gauntlet run that is California and federal environmental review and permitting. While the process to obtain the necessary approvals is not the only consideration in bringing seawater desalination to fruition, it can present some of the most challenging hurdles, resulting in planning and approval processes that can take years.

Not surprisingly, the delay in desalination is largely because of constraints related to the protection of sensitive biological resources and the weight of multiple and complex regulatory requirements. This article explores another key issue that is equally problematic, but perhaps less obvious. Permitting regulations for desalination facilities are too "siloed." Statutory and regulatory controls apply only to discrete aspects of the typical overall desalination plant, for example, water supply, coastal development, water quality, air quality, and special-status species protection. The reality is that there is significant interplay between and among these aspects.

Other large-scale projects suffer from the same problem, but we believe the problem is particularly acute for desalination projects. These projects are at the very heart of water supply and reliability, climate change, energy consumption, protection of sensitive species and habitat, and a whole host of other pressing concerns. Failing to see the forest for the trees contributes to the permitting delay, and possibly the eventual economic infeasibility of desalination projects. The future of desalination may depend on a more coordinated and comprehensive approach to permitting.

We begin with a short primer on how a desalination facility operates, and then discuss the primary biological constraints to constructing and operating those facilities. We then summarize the key permitting regimes and environmental review requirements that apply to these facilities. We conclude by arguing that desalination facilities are particularly sensitive to "siloed" regulatory requirements, a significant contributor to permitting delays for desalination facilities.

The Nuts and Bolts of a Desalination Facility

There are three basic functional components of a seawater desalination facility: (1) seawater intake; (2) pretreatment and salt removal (typically through reverse osmosis filtration); and (3) disposal of by-products including a brine stream and solids that are removed in the pretreatment process.

Seawater Intake System

A desalination facility intake system may involve subsurface (various types of wells) or surface intakes (screened and unscreened). Advantages of subsurface intakes include avoidance of impingement and entrainment effects—effects that are discussed in more detail below—and reduced need for pre-treatment. However, subsurface intakes may not be suitable in every application, due to variables such as capacity yield and geophysical constraints.

Pretreatment Filtration and Reverse Osmosis Membrane Systems

Pretreatment of source water is needed generally to remove suspended solids, and may involve media filtration, addition of coagulants, such as ferric chloride and polymers, membrane filtration, or other filtration technologies. Although a variety of methods are available to remove dissolved salts and minerals from the pretreated water, reverse osmosis is favored in most desalination plants based on its efficiency and practicality. Reverse osmosis filtration involves forcing water at very high pressures through a series of membranes with pore sizes small enough to exclude salts and other minerals, resulting in highly purified product water.

Product Water Treatment and Brine Disposal

Product water from the reverse osmosis process requires chemical conditioning prior to delivery to a domestic water distribution system to increase hardness and protect distribution systems against corrosion. Limestone and carbon dioxide are often used for post-treatment stabilization of the reverse osmosis water as a source for pH and alkalinity adjustment. In addition, the final product water is disinfected prior to delivery to the distribution system in order to meet the California Department of Public Health water quality standards for potable water disinfection. The byproduct of the reverse osmosis process is concentrated seawater that is typically twice as salty as ambient seawater, and as a result is denser than the receiving waters, causing it to be negatively buoyant. This can cause the discharge to settle on the ocean floor if not properly diluted or dispersed.

The primary environmental and regulatory issues related to these operations are centered on three basic processes: (1) impingement and entrainment of marine organisms (in the case of an open or screened intake); (2) energy use in the pumping and filtration processes; and (3) elevated salinity in the receiving waters of the brine discharge. These issues are discussed below in the context of biological constraints associated with desalination facilities.

Primary Biological Constraints to Desalination Facilities

By their very nature, desalination facilities typically are located along the coastline, often near or within sensitive landside coastal habitats. They're also often located near productive coastal waters. These environmental settings can create significant biological constraints for the siting of these facilities.

Although the actual footprint of a typical desalination facility is relatively small (on the order of several acres), its location on the coast could pose constraints related to sensitive habitats and rare coastal species, as well as breeding areas for sensitive shorebirds. In addition, pipelines to convey the treated water to demand centers may traverse sensitive upland and wetland areas, and construction of these lines may result in adverse impacts.

Potential effects on marine biological resources from seawater intake systems are related to impingement and entrainment of marine organisms in the source water withdrawal. Pressure and turbulence created from pumping and filtration processes results in impacts on marine organisms that inhabit the source water from open ocean intake systems. Impingement occurs when larger fishes and invertebrates are trapped against a source water intake screen, while entrainment occurs when small planktonic organisms are drawn through the intake screens and through the water filtration system.

Modeling of impacts typically involves the same methodology used in permitting of power plant cooling water intake systems under § 316(b) of the Clean Water Act, which applies to cooling water intake structures for power plants. However, while the methodology for analysis of effects may be similar, it is important to distinguish seawater intake for purposes of cooling a power plant, from intake as source water for desalination from a regulatory perspective, because in power generation, seawater intake is secondary to the primary function of a power plant, whereas the use of ocean water is essential to the function of desalinated water production.

Key Permitting Regimes Governing Desalination Facilities

Permitting a desalination plant is a complex endeavor. Numerous statutes administered by a number of federal, state, and local agencies may play a role. These statutes could include, for example, the Marine Mammal Protection Act (16 U.S.C. § 1361 *et seq.*), Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. § 1801 *et seq.*), and Clean Water Act (33 U.S.C. § 1251 *et seq.*). The Public Trust Doctrine—administered by the State Lands Commission for public trust lands in California—may also apply to the construction or operation of a desalination facility.

We discuss four key permitting regimes particularly relevant to developing and operating a desalination facility: the California Coastal Act, Porter-Cologne Water Quality Control Act, and California and federal Endangered Species Acts. Each act bears on only a narrow slice of the overall permitting and approvals needed for a desalination facility.

The California Coastal Act

The California Coastal Act of 1976 (Pub. Res. Code § 30000 *et seq.*) is intended to protect, maintain, enhance, and restore the state's natural and scenic coastal resources. By their very nature, desalination facilities are located along coastlines and in areas where coastal resources may be an issue. As such, the California Coastal Act is often a key statutory driver for these facilities.

The act's primary regulatory tool is the coastal development permit, which generally authorizes development within the state's coastal zone. If the local government within which the desalination project is located has a certified Local Coastal Program pursuant to the Coastal Act, then that jurisdiction must determine whether the project is consistent with the program before issuing the permit. For those areas within the coastal zone that do not have certified Local Coastal Programs, the California Coastal Commission itself must determine whether the project complies with the Coastal Act before issuing the coastal development permit.

Two provisions in the Coastal Act are particularly relevant to desalination facilities: § 30230, which requires that marine resources be "maintained, enhanced, and, where feasible, restored"; and § 30231, which pertains to the protection of "the biological productivity and the quality of coastal waters."

The Porter-Cologne Water Quality Control Act

The Porter-Cologne Water Quality Control Act (Water Code § 13000 *et seq.*) authorizes the State Water Resources Control Board and the state's nine Regional Water Quality Control Boards to regulate and protect water quality. By design, desalination facilities must intake seawater to produce potable water. A byproduct of this design however, are discharges back to the water source or other disposal location. These discharges may contain higher salt concentrations, water with increased temperatures, or other such characteristics as a result of the desalination process, and could be regulated as pollutants pursuant to the Porter-Cologne Act. In addition, the discharge of liquid brine waste from desalination operations is regulated under the 1987 amendments to the Clean Water Act through the National Pollutant Discharge Elimination System administrated by the Regional Boards.

In addition to regulating water quality and discharges to water, in some instances the Porter-Cologne Act governs the intake of water. For example, § 13142.5(b) specifically governs facilities that use seawater:

> For each new or expanded coastal powerplant or other industrial installation using seawater for cooling, heating, or industrial processing, the best available site, design, technology, and mitigation measures feasible shall be used to minimize the intake and mortality of all forms of marine life.

The California Court of Appeal for the Fourth Judicial District recently considered § 13142.5(b) in the context of a desalination facility. In *Surfrider Foundation v. California Regional Water Quality Control Board*, ___Cal.App.4th___, Case No. D060382 (4th Dist. Nov. 30, 2012), the court found that a "Flow, Entrainment and Impingement Minimization Plan" designed to minimize a desalination facility's intake and mortality of marine life during a certain operation scenario met all of the requirements of § 13142.5(b). This finding was largely based on the court's view that the plan included substantive site,

design, and technology measures. *Surfrider Foundation* thus provides a kind of blueprint for what measures may satisfy § 13142.5(b).

California and Federal Endangered Species Acts

Because of their typical locations and nature of operations, desalination facilities have the potential to affect both marine and terrestrial species, some of which may be protected under the California Endangered Species Act or the federal Endangered Species Act.

The California Endangered Species Act (CESA) (Cal. Fish & Game Code § 2050 *et seq.*) protects state-listed endangered and threatened species and is administered by the California Department of Fish and Wildlife. (Legislation in 2012 renamed the California Department of Fish and Game effective January 1, 2013.) CESA prohibits the "take" of these species, which is defined as to "hunt, pursue, catch, capture, or kill." Similarly, the federal Endangered Species Act (ESA) (16 U.S.C. § 1531 *et seq.*), administered by the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service, protects federally-listed endangered and threatened species. Like CESA, ESA also prohibits "take," but defines the term somewhat more broadly to include "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect."

Take incidental to an otherwise lawful activity can be authorized pursuant to CESA, typically through a Fish and Game Code § 2081 incidental take permit. Generally, incidental take is authorized under ESA through either an ESA § 10(a)(1)(B) incidental take permit or the ESA § 7 consultation process. Given the potential for sensitive biological resources often typical of California's coastline, and depending upon the environmental setting of the facility, it's possible that some kind of take authorization under either or both of these statutes may be required for the construction or operation of the facility. Notably, currently available entrainment studies conducted for projects proposing open or screened intake facilities in California have not demonstrated any significant impacts to terrestrial or marine special status species.

Environmental Review Requirements

Before issuing any discretionary permits or approvals for the construction or operation of a desalination facility, permitting agencies must conduct an environmental review of the project pursuant to either the California Environmental Quality Act (CEQA) (Cal. Pub. Res. Code § 21000 *et seq.*) for a state or local agency approval, or the National Environmental Policy Act (NEPA) (42 U.S.C. § 4321 *et seq.*) for a federal agency approval.

Review under California's Mini-NEPA Statute

A state or local agency's consideration of a discretionary project triggers CEQA review. As most California land use practitioners know, the CEQA process can be long and quite comprehensive for a complex, industrial-scale project. Desalination facilities are no exception. Project proponents can expect a full-blown Environmental Impact Report (EIR) (rather than the EIR's more concise sibling, the negative declaration) for these kinds of projects.

The typical scope of an EIR for a desalination facility reflects the complexity of such a project. The three main topical areas treated at length in an EIR for a desalination plant may include: (1) effects on marine organisms from both impingement and entrainment from ocean water intake; (2) effects on marine habitats from exposure to elevated salinities of the brine discharge; and (3) effects related to energy use and greenhouse gas emissions. In addition to these considerations, other issues would include a project's relationship to land use and planning, aesthetic impacts, and construction-related impacts. The EIR likely will need to evaluate the project's potential for growth-inducing impacts to the extent that an additional supply of water resulting from the facility can be seen as removing barriers to growth.

Review under the National Environmental Policy Act

If a desalination facility requires any federal approval, funding, or other federal action, the project will require some form of NEPA review. NEPA is the federal counterpart to CEQA, and the federal equivalent to an EIR is an Environmental Impact Statement (EIS). Like an EIR, preparation of an EIS can be time-consuming. To the extent a project shares both state and federal elements, an EIS is often paired with an EIR with the primary state and federal agencies issuing approvals for the project serving as the "co-lead agencies" for a joint "EIR/EIS." Depending upon the

extent to which federal approvals are involved in a desalination facility, the environmental review for the project may require some form of NEPA review, and possibly in the form of this type of CEQA/NEPA hybrid document.

Typical Mitigation and Best Management Practices for Desalination Facilities

Lead agencies for CEQA or NEPA review and permitting agencies are authorized to impose mitigation and best management practices for project impacts. Typical measures might include:

(1) Construction-related impacts, such as air quality, noise and traffic are typically mitigated through measures that restrict the hours of construction activity, and that require dust control and traffic control measures.

(2) Greenhouse gas emissions are typically mitigated through efficiency and energy recovery measures on project-related equipment, as well as through purchased offsets.

(3) Brine disposal requires management to ensure that adequate mixing and dilution is achieved and that concentrated salinity does not accumulate on the ocean floor.

(4) Measures to avoid, minimize and/or mitigate impingement and entrainment effects may include subsurface intakes, intake velocity control, intake screening, and habitat restoration.

Siloed Regulatory Requirements Miss the Big Picture, and Contribute to Permitting Delays for Desalination Projects

As the various agencies view a desalination project through their specific regulatory lens, broader considerations related to water and the environment can be overlooked, possibly contributing to delays in permitting these projects. Some examples of these considerations follow:

•*Native Freshwater Fisheries*—California's water supply procurement has the potential for existing and ongoing adverse effects on fisheries that depend on surface waters, such as streams, lakes, and rivers. Moreover, as surface water sources become scarcer, the conflict between water supply and fisheries is likely to increase. The regulatory framework applied to ocean seawater desalination addresses project-related effects on marine species, but does not consider how seawater desalination can serve to reduce reliance on surface waters, and thereby reduce pressures on native fisheries.

•*Reliability*—California's existing water storage and conveyance systems currently face risks of damage and failure due to the age and condition of the systems, as well as threats posed by natural disasters. Risks are also related to the extensive geographic range of these systems that convey water for hundreds of miles from one end of the state to the other. Some of these risks can be mitigated with a locally produced supply that reduces the extent of infrastructure needed between water supply and point of delivery.

•*Climate Change Adaptation*—Despite efforts to reduce greenhouse gas emissions in California, prudent public policy should include adaptation measures for the potential effects of climate change. Seawater desalination has a role to play in the overall strategy of coping with the effects of climate change on water supply, such as reduced snowpack storage, accelerated runoff, prolonged or recurrent drought, and other factors that may affect overall water supply quantities and cyclical availability. In addition to enhancing reliability of water delivery systems, desalination also has a role in long-term supply source reliability, and could be integrated with state regulation and policy on climate change.

•*Population Growth*—Even without in-migration, we can expect substantial population growth in California that may outpace existing water supplies, conservation or recycling alone. Seawater desalination provides a new water supply sources that is unlimited, and not affected by climate cycles, jurisdictional allocations, or other such constraints.

•*Conservation*—Critics of desalination often point to conservation as a superior alternative to augment existing water supplies, and one that should be fully exhausted before seawater desalination is considered. This issue raises the important policy question: how

much conservation is enough? More specifically, what are the quality of life and economic implications associated with adjusting to reduced consumption? For example, if economic incentives or penalties are used, they can involve socio-economic disparities that may not be politically acceptable.

In sum, because of disparate conditions—such as those listed above—permitting approaches to desalination risk losing sight of the forest for the trees. In many instances, agencies charged with providing water to their service populations must consider a number of interests. However, agencies with permitting authority over desalination facilities, which represent a single component of supply source, do not have, or are not afforded the ability to consider such issues that are outside of the laws, regulations or policies within their purview. An inability to compromise on certain issues can lead to extended and iterative analyses, data requests, project revisions, extensive costs, and other factors that contribute to delays in the permitting process.

Conclusion and Implications

A key challenge of permitting desalination facilities—like other complex, industrial scale projects—can be chalked up to the "siloed" approach of the myriad statutes and regulations that apply to that particular project. Other considerations, such as those discussed above, can be lost in the shuffle, particularly where there's conflict or tension among policy mandates. Clarifying and prioritizing goals and objectives may be one way to resolve this issue.

The California Coastal Act serves as an example. In drafting the California Coastal Act, the California Legislature recognized that conflicts may occur between one or more policies. Public Resources Code § 30007.5 includes legislative findings specifying that broader policies regarding development or land uses may on balance be more protective overall "than specific wildlife habitat and other similar resource policies."

While such a provision is focused on coastal resource protection, an expansion of that concept to water supply and delivery could broaden considerations on how to reconcile water supply and reliability concerns with land use planning and environmental protection issues. New or amended laws or regulations that would bridge conflicting provisions of existing laws could be a mechanism to clarify and prioritize the state's objectives in balancing the complex issues surrounding water supply and reliability.

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EASTERN WATER NEWS

LEGISLATION AND LAWSUIT ATTEMPT TO DELAY HIGHER NATIONAL FLOOD INSURANCE PROGRAM RATES

Flood insurance rates remain a critical issue among floodplain managers and state representatives, as legislators scramble to pass legislation postponing higher insurance rates and states such as Mississippi and Florida file lawsuits against the Federal Emergency Management Agency to stop the new rates, which are designed to reflect the true risk of flooding.

Background

The Federal Emergency Management Agency (FEMA) administers the National Flood Insurance Program (NFIP), which offers flood insurance to homeowners, renters, and business owners if their community participates in the NFIP. Participating communities agree to adopt and enforce ordinances that meet or exceed FEMA requirements to reduce the risk of flooding.

As part of the NFIP, FEMA maps areas of the country into Special Flood Hazard Zones, which are areas with more than a 1 percent chance of flooding annually. In these zones, property owners with federally backed mortgages must purchase flood insurance. Because FEMA's understanding of flood risks has improved over time, the NFIP incorporates subsidies and grandfathering to prevent rate increases for properties in existence with flood risks in their area were increased through FEMA mapping. As a result, approximately 20 percent of all flood insurance policies do not accurately reflect the flood risk.

The NFIP was never designed to be actuarially sound. Moreover, Hurricanes Katrina and Sandy resulted in huge payouts, putting the NFIP into about $24 billion in debt. To address this financial instability, the Biggert-Waters Flood Insurance Reform Act (BW12) was easily passed by Congress and signed by the President in July 2012.

BW12 extends the NFIP for five years and provides for insurance rate increases that are tied to properties' flood risk. The rate increases are focused on properties that: (a) are located within a Special Flood Hazard Area; (b) were constructed before the community adopted its first Flood Insurance Rate Map; and (c) have not yet been elevated. The rates will increase upon renewal or, in some cases, upon the sale of the property.

Outcry on the Effects of BW12

As the effective date of BW12 approached for many property owners (October 1, 2013), some members of Congress heard from their constituents about the significant negative impact that drastically increased insurance rates could have in certain communities. In some cases, insurance rates could go from a few hundred dollars per year to a few thousand, for properties whose base floors are well below the base flood elevation (the elevation that would be reached during a storm that has 1 percent chance of occurring each year).

A bipartisan proposal from legislators from Florida, New Jersey, Louisiana, Massachusetts and Hawaii would delay implementation of BW12 until next year. These legislators have expressed concern that the rate increases could destabilize a real estate market that has just started to recover following the recession. The proposal was put on hold during the government shutdown in early October.

The Federal Lawsuit

Just before many provisions of BW12 were to take effect, the State of Mississippi, through its Insurance Department, filed a lawsuit against the U.S. Department of Homeland Security, which houses FEMA. The lawsuit, which has now been joined by Florida and OTHER, aims to halt the rate hikes altogether on the theory that the BW12-mandated study on affordability issues has not yet been completed, so FEMA lacked the information necessary to avoid an "arbitrary and capricious" decision. Moreover, FEMA's failure to complete the study by October 1 constitutes "action unreasonably withheld or delayed" under the Administrative Procedure Act.

FEMA's director, Craig Fugate, testified before the Senate Banking Committee that the study will not be completed until 2015. The lawsuit asks the Mississip-

pi state court to force FEMA to complete the report prior to implementing rate increases.

Within days the State of Florida announced that it would file an *amicus* brief in the Mississippi case, and the State of Louisiana has indicated that it will either do the same or file its own case in Louisiana courts. (*See, Mississippi Insurance Dept. v. U.S. Dept of Homeland Security, et al.*, Case No. 1:2013cv00379, *filed* Sept. 26, 2013 (S.D. Miss).)

Conclusion and Implications

BW12 was enacted in July 2012, and significant portions of it had already taken effect before this fall when a significant number of property owners began to be impacted by increasing rates. Sixteen months after its enactment, floodplain managers and state officials in coastal and flood-prone states are realizing the true impacts of financial stability for the NFIP. Many states are considering their own insurance programs to protect property owners of insurance payments that could force them out of their homes. FEMA itself has deferred the release of details about a particular section of BW12, seemingly because of complaints by flood-prone areas about rates that could cripple entire communities. It is a fascinating struggle between the Federal government's need to balance its books and the policy implications on property owners grandfathered into rates that do not—and never did—reflect the true risk of flooding. At some point it appears that either FEMA will increase rates very slowly and remain in debt for decades to come, or states will figure out a different way to provide insurance for flood losses at a reasonable cost. (Andrea Clark)

EPA AND U.S. ARMY CORPS PROPOSE NEW REGULATIONS DEFINING FEDERAL JURISDICTION UNDER SECTIONS 402 AND 404 OF THE CLEAN WATER ACT

The U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps)—the federal agencies charged with administration of §§ 402 and 404 of the federal Clean Water Act—have submitted a proposed set of draft rules to the Office of Management and Budget that would transform the way those agencies assert jurisdiction over small streams and wetlands. The proposed rules were accompanied by a publicly released scientific report that provides a review of more than a thousand scientific studies, and concludes that many small or intermittent water features have significant effects on downstream navigable waters. While the details of the proposed rules have not been publicly released, it seems likely that the rules seek an expansion of the jurisdiction of those agencies under the Clean Water Act.

Evolution of Jurisdiction under Clean Water Act Sections 402 and 404

The Clean Water Act broadly prohibits the "discharge of any pollutant," into "navigable waters" except with a permit under §§ 404 (for wetlands) or 402 (for most other "navigable waters"). 33 U.S.C. § 1311 (1972). "Navigable waters" is unhelpfully defined by the statute as "waters of the United States." *Id.* at § 1362(7). Since shortly after the Clean Water Act was enacted, the EPA and the Corps have applied broad regulatory definitions to the term "waters of the United States," often claiming jurisdiction over small, intermittent streams, wetlands, and ponds. *See*, 33 C.F.R. § 328.3(a) (1986). Those broad regulatory definitions were for a long time largely upheld by the U.S. Supreme Court. For instance, in *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Supreme Court stated that Congress intended the Clean Water Act to:

> …regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term. *Id.* at 133.

The Court unanimously ruled that the Clean Water Act does give the Corps authority to regulate intrastate, non-navigable wetlands adjacent to traditional navigable waterways. *Id.*

In 2006, a plurality of the Supreme Court began to narrow federal jurisdiction under the Clean Water

Act by its ruling in *Rapanos v. U.S.*, *547 U.S.* 715 (2006). In that case, a landowner and developer sought to fill wetlands that sat some 11-20 miles from the nearest body of navigable water. The Corps denied the landowner a permit under § 404 of the Clean Water Act, and the landowner challenged the Corps' jurisdiction over the isolated wetlands. Four conservative Justices concluded that for purposes of determining federal regulatory jurisdiction under the Clean Water Act, the phrase "waters of the United States" includes only:

> …relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] ... oceans, rivers, [or] lakes.' Rapanos, *547 U.S.* at 739.

In contrast, according to the conservative Justices, "ordinarily dry channels through which water occasionally or intermittently flows" are not covered. *Id.* at 733. Justice Kennedy, who represented the fifth vote in the plurality and wrote a separate opinion, took a middle view, finding that non-navigable waters having a "significant nexus" to traditional navigable waters are within federal jurisdiction under the Clean Water Act. *Id.* at 767. Because Justice Kennedy represented the critical vote in *Rapanos*, his "significant nexus" test has become the lodestone for determining jurisdiction under §§ 402 and 404 of the Clean Water Act.

EPA and the Corps Propose New Rules Clarifying Jurisdiction

The *Rapanos* decision caused a great deal of uncertainty among lower courts, agencies, property owners and industry actors over which non-navigable waters have a "significant nexus" to traditional navigable waters. In September 2013, EPA and the Corps submitted new proposed rules in an attempt to clarify this confusion. The proposed rules seek to more clearly identify which non-navigable waters fall under the purview of the Clean Water Act by providing a more detailed regulatory definition of the statutory phrase "waters of the United States." *See*, EPA Web Notice, *available at* http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm.

The details of the proposed rules are unknown, as they have not yet been released to the public. Presumably though, the rules will seek to identify which non-navigable waters, such as intermittent creeks and streams, wetlands, and other small or isolated bodies of water, have a "significant nexus" to larger, traditionally navigable bodies of water. Those non-navigable waters that do have a "significant nexus" to traditionally navigable waters will meet the *Rapanos* standard for jurisdiction under the Clean Water Act, and so may be regulated by the EPA and Corps under existing caselaw.

A Scientific Basis For the Proposed Rules

Along with the proposed rules, the EPA and Corps have released a draft of an extensive scientific report titled "Connectivity of Streams and Wetland to Downstream Waters," which purports to provide "a review and synthesis of more than 1,000 pieces of relevant, peer reviewed scientific research about the influence of small bodies of water on larger navigable rivers and lakes." *See*, EPA Web Notice of Scientific Report (Sept. 24, 2013), available at: http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=238345.

The draft scientific report draws three main conclusions:

> (1) Streams, regardless of their size or how frequently they flow, are connected to and have important effects on downstream waters.
>
> (2) Wetlands and open-waters in floodplains of streams and rivers and in riparian areas are integrated with streams and rivers. They strongly influence downstream waters by affecting the flow of water, trapping and reducing nonpoint source pollution, and exchanging biological species.
>
> (3) There is insufficient information to generalize about wetlands and open-waters located outside of riparian areas and floodplains, and their connectivity to downstream waters.

The report has been released for public review and comment. *See*, Notification of a Public Meeting of the Science Advisory Board Panel, 78 Fed. Reg. 185, 58536 (Sept. 24, 2013), available at: https://federalregister.gov/a/2013-23198.

Public comments on the report will be accepted until November 6, 2013. The EPA's independent Scientific Advisory Board will meet on December 16,

2013 in Washington, D.C. to discuss the draft report, and will at that time address some of the public comments.

The Likely Scope of the Proposed Rules

The overall effect of the proposed rules will likely be an expansion of the scope of the agencies' claims of jurisdiction. While the details of the proposed rules are unknown, given the conclusions drawn by the draft scientific report it seems very likely that EPA and the Corps will claim jurisdiction over most streams, regardless of their size or how frequently they flow, and most wetlands and ponds within the flood plain of streams and rivers. Wetlands and ponds outside of floodplains may also be considered jurisdictional on a case-by-case basis. The proposed rules will probably not affect persons who are already operating under a Clean Water Act permit.

EPA and the Corps have indicated that the proposed rules submitted to the Office of Management and Budget will exclude from Clean Water Act jurisdiction certain categories of water features, including non-tidal drainage (*e.g.* tiles and ditches excavated on dry land), artificially irrigated areas that would be dry if irrigation were to cease, artificial lakes or ponds used for stock watering, irrigation, or ornamental and aesthetic purposes, areas artificially flooded for rice growing, water filled depressions created as a result of construction, and "upland" pits excavated for fill, sand, or gravel. *See*, EPA Web Notice of Scientific Report (html link *supra*). Many of these jurisdictional "exemptions" under the proposed rules will exempt features that are arguably not subject to Clean Water Act jurisdiction under current judicial and/or agency interpretation. This tends to indicate that most features currently subject to Clean Water Act jurisdiction will likely remain regulated under the proposed rules.

The proposed rules will continue many Clean Water Act exemptions that are currently in place, including exemptions for agricultural stormwater discharges, return flows from agricultural irrigation, and other agricultural and silvicultural-related discharges. Most agricultural and silvicultural operators will therefore probably not be affected by the proposed rules.

Conclusion and Implications

While it is impossible to divine the exact parameters of the joint EPA/ Corps proposed rules, it seems likely that, should the rules be adopted, they will expand the scope of the agencies' claims of jurisdiction under Clean Water Act §§ 402 and 404. Developers, manufacturers, and others whose activities result in discharges into, or the dredging or filling of small, intermittent, or impermanent bodies of water that are currently not regulated under the Clean Water Act should be aware that those federal agencies may soon view their activities as subject to regulation. (Andrew Mayer, Jan Driscoll)

NEWS FROM THE WEST

This month's News from the West involves cases from California, Texas, and Arizona. First, the Texas Supreme Court upheld an agency decision to deny the City of Waco a contested case hearing on a dairy's amended water quality permit. Next, the Arizona Supreme Court ruled that there were no implied federal reserved water rights on lands granted to the state of Arizona for education and other public institutions. Finally, a California Court of Appeal determined that actions taken exclusively by the state and regional water boards could not be imputed to the state.

Texas Supreme Court Finds Environmental Quality Commission Appropriately Denied Request for Contested Case Hearing on Dairy's Amended Water Quality Permit Application

Texas Commission on Environmental Quality v. City of Waco, Case No. 11-0729 (Tex. Aug. 23, 2013).

The Texas Supreme Court reversed a decision by the Court of Appeals holding that the Texas Environmental Quality Commission (Commission) had abused its discretion in denying the City of Waco a contested case hearing on a dairy operation's amended water quality permit. Because there was evidence to support the Commission's determination that the proposed amendment would not significantly increase or materially change the authorized discharge of waste, the court found that the Commission could approve the application at a regular meeting rather than after a contested hearing.

The Commission has primary authority under the federal Clean Water Act to set effluent limitations and regulate waste water discharges through National Pollutant Discharge Elimination System (NPDES) permits. In recent decades, the city had raised concerns about water quality in the North Bosque watershed, which saw a significant increase in dairies feeding large numbers of cattle for extended periods in confined areas. The city believed that these "concentrated animal feeding operations" further "impaired" water quality in the watershed, which flowed into Lake Waco, the city's municipal water supply.

In 2002, the city imposed new environmental restrictions on the permits required to dispose of wastewater and manure into the watershed. Under the restrictions, the O-Kee Dairy—located upstream from Lake Waco in the North Bosque watershed—had to apply for an amended permit to expand its herd size by 309 cows and its total waste application by 24.4 acres. The Commission prepared a draft permit granting the request. The city submitted comments in a public meeting. The Commission agreed to some changes but rejected the city's complaints.

The city then requested a contested case hearing, which the Commission denied. Before granting a trial-like proceeding, the city had to show that it was an "affected person" with standing to intervene in the permit process. The city argued that it was entitled to a hearing because the dairy's operations under the amended permit would adversely affect the quality of the municipal water supply. However, the Texas Supreme Court rejected its analysis, noting that a hearing request could be decided through a less formal proceeding before the Commission. Chapter 26 of the Texas Water Code gave the Commission discretion to deny the request when the proposed permit—similar to the amendment sought by the dairy—did not seek to "significantly increase" the quantity of discharge and authorized activity that would "maintain or improve" the quality of the discharged waste.

The Court found that the proposed modifications to the dairy's management of manure and wastewater would, in fact, reduce the pollutants discharged into the watershed. The changes would also increase oversight of the dairy's activities and strengthen the overall water-quality protections at the facility, even with more cows. Because the proposed permit did not seek to significantly increase the authorized discharge of waste, rather, it would improve water quality, the Commission had discretion to deny a hearing, even if the city qualified as an "affected person."

Arizona Supreme Court Finds No Reserved Water Rights for State Trust Lands

In re General Adjudication of All Rights to Use Water in the Gila River System, 231 Ariz. 8 (Az. Sept. 12, 2013).

The Arizona Supreme Court recently ruled that there were no implied federal reserved water rights on lands granted to the state of Arizona to support education and other public institutions. Because the granted land did not fall into the special category of

"federally reserved" land owned by the government and withheld from disposition, federal reserved water rights did not apply.

In 1787, the federal government established a policy to support public schools in new territories by granting the states land to be used for educational purposes. The Organic Act reserved land for schools in the New Mexico Territory, which included present-day Arizona. In 1910, the Arizona-New Mexico Enabling Act required Arizona to hold lands in trust but gave the state exclusive control of beneficiary schools, colleges, and universities. The state received almost 11 million acres of state trust land for the benefit of public institutions, including 1.4 million acres in the Little Colorado River Basin and 5.1 million acres in the Gila River Basin.

The adjudication of water claims in the basins began in the 1970s and continues today. To date, more than 96,000 claims have been made in the two water systems. The State of Arizona sought review of a lower court decision finding no federal reserved water rights for state trust lands in the Little Colorado and Gila River adjudications. The Arizona Supreme Court rejected the state's claims, noting that water rights were generally obtained under state law, even on federal lands. In Arizona, prior appropriation gave priority to the first to divert water and put it to beneficial use.

Federal reserved water rights have priority only when Congress intends to "reserve" appurtenant water rights by "withdrawing" the land from the public domain. This did not apply to the state trust lands because they were never removed or segregated from disposal under general land laws to serve a federal purpose. Although the statutes imposed federally enforceable trust obligations, they did not authorize the federal government to decide how the beneficiary institutions were administered; the schools, colleges, and universities remained under Arizona's exclusive control. Thus, the lands did not include federal reserved water rights.

California Appellate Court Holds State of California and California Environmental Protection Agency Were Not Proper Parties in Action Against State and Regional Water Boards

Lavine v. State of California, ___Cal.App.4th___, Case No. B238030 (Cal.App. Aug. 20, 2013).

A California Court of Appeal rejected a challenge brought by Malibu property owner Joan C. Lavine alleging that the State of California and California Environmental Protection Agency (Cal/EPA) were jointly liable for a septic system ban imposed by their subsidiary agencies, the Regional Water Quality Control Board and State Water Resources Control Board. Because the state and Cal/EPA played no role in the challenged water plan, the alleged wrongful actions taken by the water boards could not be imputed to them. The court concluded that the "supervisorial" relationship with the agencies was an insufficient factual basis for a claim.

Lavine has owned property in the Malibu Civic Center area since 1971. Zoned for single-family residential use, Lavine's property and other residences in the area have no available public sewer system. The only means of waste disposal is an on-site septic system. In 2009, the Regional and State Boards banned septic waste disposal in the area, including on Lavine's property. Lavine sued the water boards, claiming that, without other residential sewage options, the ban deprived her of substantially all beneficial, economic and practical use of her property. She later added the state and Cal/EPA as defendants and sought compensation for the taking of her property and a declaration of her rights.

The state and Cal/EPA argued that because Lavine alleged no wrongful conduct on their part, they should not be named in her action. The appellate court agreed, finding that the Regional and State Boards were the only two agencies authorized to adopt, amend, approve, or review water quality regulations in the Los Angeles area. The court reasoned that Lavine could not maintain claims against the state and Cal/EPA without alleging that they engaged in improper conduct. The ban that "harmed" Lavine's property was imposed exclusively by the water boards and was not related to any action by the state or Cal/EPA. Thus, the court concluded that their hierarchical position above the water boards was insufficient to make the state and Cal/EPA defendants in Lavine's action. (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

•The U.S. Department of Justice (DOJ), Environmental Protection Agency (EPA), and South Carolina Department of Health and Environmental Control (SCDHEC) announced a proposed settlement with the City of Columbia, South Carolina, to resolve violations of the federal Clean Water Act (CWA), including unauthorized overflows of untreated raw sewage. Columbia has agreed to undertake a thorough assessment of, and implement extensive improvements to, its sanitary sewer system at an estimated cost of $750 million. In addition, Columbia will implement a $1 million supplemental environmental project to restore streams, reduce flooding, and improve water quality in segments of Rocky Branch, Smith Branch and Gills Creek, waterways that run through historically low income and minority neighborhoods. The proposed consent decree requires Columbia to implement a comprehensive sewer system assessment and rehabilitation program to address the existing problems of raw sewage overflows. Based on the sewer system assessment, the city will develop and implement remedial projects and infrastructure upgrades to address conditions causing sewer overflows. These remedial projects will be in addition to infrastructure upgrades already underway or planned by Columbia, which the consent decree also requires to be completed. Lastly, the city will develop and implement specific programs designed to ensure proper management, operation, and maintenance of its sewer system over the long-term to prevent future sewer overflows.

•EPA and the South Carolina Department of Health and Environmental Control (SCDHEC) announced a settlement with the Town of Timmonsville and the City of Florence, South Carolina, to resolve drinking water and sewer problems. The proposed settlement will resolve Timmonsville's liability for violations of the CWA, South Carolina Pollution Control Act (SCPCA), and South Carolina Safe Drinking Water Act (SCSDWA). Timmonsville has indicated that it has no capital to contribute to the short- and long-term fixes of the drinking water and sewer systems, estimated to cost approximately $12 million. On June 25, 2013, the citizens of Timmonsville approved a referendum measure authorizing the transfer of the systems to Florence. The proposed consent decree facilitates the transfer, and requires that Florence implement measures to bring the systems into compliance. Timmonsville has had unauthorized overflows of untreated raw sewage and discharges of partially-treated wastewater, and has failed to properly operate and maintain its drinking water and sewer systems. Timmonsville has also failed to fully comply with numerous federal and state orders to correct deficiencies and, since 2012, has experienced increasing difficulty operating, maintaining and, in some instances, undertaking needed repairs. Though not responsible for the compliance failures, Florence has agreed under the Consent Decree to accept the transfer of the drinking water and sewer systems from Timmonsville and bring them into compliance with all applicable environmental regulations, which includes implementing capital projects designed to remediate known defects in Timmonsville's drinking water system, sewer system and wastewater treatment plant.

Indictments, Convictions, and Sentencing

•A New Jersey jury convicted a former project manager for his central role in conspiracies that spanned seven years and involved kickbacks in excess of $1.5 million at two EPA Superfund sites in New Jersey. The jury returned guilty verdicts on ten counts charged in the indictment filed on August 31, 2009 against Gordon D. McDonald. In addi-

tion to the conviction, as of September 30, 2013, eight individuals and three companies have pleaded guilty to charges arising out of the investigation. After a two-week trial, McDonald, a former project manager for a prime contractor, was convicted of engaging in separate bid-rigging, kickback, and/or fraud conspiracies with three subcontractors at two New Jersey Superfund sites—Federal Creosote in Manville and Diamond Alkali in Newark. He was also convicted of engaging in an international money laundering scheme, major fraud against the United States, accepting illegal kickbacks, committing two tax violations, and obstruction of justice. The various conspiracies took place at different time periods from approximately December 2000 until approximately April 2007. McDonald was acquitted on two counts involving certain fraud and kickback charges. As part of the conspiracies, McDonald and co-conspirators at his former company accepted kickbacks from sub-contractors in exchange for the award of sub-contracts at Federal Creosote. McDonald provided co-conspirators at Bennett Environmental Inc., a Canadian-based company that treats and disposes of contaminated soil, with bid prices of their competitors, which allowed them to submit higher bid prices and still be awarded the sub-contracts. In exchange for McDonald's assistance, Bennett Environmental, Inc. provided him with over $1.5 million in kickback payments. According to court documents, McDonald also accepted kickbacks in exchange for the award of sub-contracts at the Federal Creosote and Diamond Alkali sites from the owner of JMJ Environmental Inc., a wastewater treatment and chemical supply company, and the co-owner of National Industrial Supply LLC, an industrial pipes supplier. McDonald participated in a conspiracy with the owner of JMJ and co-conspirators to rig bids and allocate sub-contracts at inflated prices for wastewater treatment supplies and services at Federal Creosote. An interagency agreement between the EPA and the U.S. Army Corps of Engineers designated that the U.S. Army Corps of Engineers hire the prime contractors at Federal Creosote. According to a settlement with the EPA and the New Jersey Department of Environmental Protection, Tierra Solutions was required to fund remedial action and maintenance of Diamond Alkali. Tierra Solutions hired the prime contractor for the remedial action and maintenance of Diamond Alkali. Sentencing is scheduled for January 6, 2014. To date, more than $6 million in criminal fines and restitution have been imposed and five individuals have been sentenced to serve more than ten years in total prison time for charges associated with these sites.

•On September 19, 2013, Halliburton Energy Services Inc. (Halliburton) pleaded guilty to destroying evidence pertaining to the 2010 Deepwater Horizon disaster and was sentenced to the statutory maximum fine. In addition, a criminal information was filed charging a former Halliburton manager, Anthony Badalamenti, 61, of Katy, Texas, with one count of destruction of evidence. During the guilty plea and sentencing proceeding, the presiding judge found, among other things, that the sentence appropriately reflects Halliburton's offensive conduct. Judge Milazzo also noted that the statutory maximum fine and three-year probationary period provide just punishment and appropriate deterrence, and noted Halliburton's self-reporting of the misconduct, substantial and valuable cooperation in the government's investigation, and substantial efforts to recover the deleted data. According to court documents, on April 20, 2010, while stationed at the Macondo well site in the Gulf of Mexico, the Deepwater Horizon rig experienced an uncontrolled blowout and related explosions and fire, which resulted in the deaths of eleven rig workers and the largest oil spill in United States history. Following the blowout, Halliburton conducted its own review of various technical aspects of the well's design and construction. On or about May 3, 2010, Halliburton established an internal working group to examine the Macondo well blowout, including whether the number of centralizers used on the final production casing could have contributed to the blowout. Prior to the blowout, Halliburton had recommended to BP the use of 21 centralizers in the Macondo well. Contrary to Halliburton's recommendation, BP opted to use six centralizers. As detailed throughout the charges filed against Halliburton and Badalamenti, during the relevant time period Badalamenti was Halliburton's cementing technology director. In May 2010, in connection with Halliburton's internal post-incident examination of the Macondo well, Badalamenti directed a senior program manager for Halliburton's Cement Product Line (Program Manager) to run two computer simulations of the Macondo well final cementing job using Halliburton's Displace 3D simulation program. The modeling

sought to compare the 21 centralizers Halliburton had recommended to BP versus the six centralizers BP ultimately used. As detailed in the charging documents, the simulations indicated to those present that there was little difference between using six and 21 centralizers on the Macondo well. Badalamenti directed Program Manager to destroy such results and Program Manager did so. In or about June 2010, similar evidence was also destroyed. Badalamenti asked another, more experienced, employee (Employee 1) to run simulations again comparing six versus 21 centralizers. Employee 1 reached the same conclusion as Program Manager previously reached. Badalamenti then directed Employee 1 to "get rid of" the simulations, and, after a period of delay, Employee 1 deleted them from his computer. Efforts to forensically recover the original destroyed Displace 3D computer simulations during ensuing civil litigation and federal criminal investigation by the Deepwater Horizon Task Force were unsuccessful. Halliburton's guilty plea and sentence, and the criminal charge announced against Badalamenti, are part of the ongoing criminal investigation by the Deepwater Horizon Task Force into matters related to the April 2010 Gulf oil spill. (Melissa Foster)

LAWSUITS FILED OR PENDING

ENVIRONMENTAL GROUPS SUE TO PROTECT DELAWARE RIVER FISH POPULATIONS

On October 1, 2013, multiple environmental groups in both New Jersey and Delaware filed lawsuits to force power facilities in those states to reduce their impact on Delaware River fish populations. Particularly, the actions seek to compel the relevant state departments to begin the discharge permit renewal process for the facilities. (See, *Delaware RiverKeeper Network v. O'Mara* (D. Super. Ct); *Delaware RiverKeper Network v. Martin* (N.J. Super. Ct.).

Background

On October 1, 2013, two actions were filed by environmental groups seeking to compel state departments in Delaware and New Jersey to act on permit renewals for power facilities in the two states.

The Delaware action was filed against the state's Department of Natural Resources and Environmental Control (DNREC) and its Secretary, Collin O'Mara, in his official capacity. The plaintiffs in the Delaware suit include the Delaware Riverkeeper Network, the Delaware Audubon Society, and the Sierra Club. The action relates to the permits for the Delaware City Refinery, a petroleum refinery located on the banks of the Delaware River in Delaware City, Delaware.

The New Jersey action was filed against the New Jersey Department of Environmental Protection (NJDEP) and its Commissioner, Bob Martin, in his official capacity. The plaintiffs in the New Jersey suit include the Delaware Riverkeeper Network, the Sierra Club, and Clean Water Action. The action relates to the Salem Generating Station, a nuclear power plant operated by Public Service Energy Group Nuclear LLP (PSEG).

Both actions demand the respective state agencies take action on the renewal of discharge permits for the facilities. Particularly, the groups are seeking a determination of what constitutes the best technology available for minimizing the adverse environmental impact of the facilities (BTA determination).

The Delaware Lawsuit

The Delaware lawsuit seeks a court order compelling the Secretary of DNREC to issue a draft Clean Water Act National Pollutant Discharge Elimination System (NPDES) permit and, within one year, a final decision including a BTA determination for the Delaware City Refinery.

The complaint alleges that the refinery withdraws approximately 350 million gallons of water per day from the Delaware River in order to cool process equipment during the refining process. The water is then discharged back into the river at an elevated temperature. Based on an analysis of just four species of fish, the groups estimate that the refinery's cooling water intake facility kills approximately 46 million fish each year. The groups contend that alternative technologies, such as a closed-cycle or recirculating cooling system, could significantly reduce the fish kills by over 90 percent.

The active NPDES permit for the refinery was issued in 1997 and was set to expire in 2002. In 2002, the operator of the facility applied for a renewal of the permit. In the 11 years since 2002, DNREC has failed to take action on the permit but has administratively extended the permit to enable the refinery to continue operating. DNREC has already issued a preliminary BTA determination, which is supported by the environmental groups. However, the groups allege that DNREC has not fulfilled its duty to issue a draft permit and to act on the 2002 application. This failure has left environmental groups without an action to challenge, effectively immunizing the refinery from challenge and undermining the central goals of the Clean Water Act.

The New Jersey Lawsuit

Plaintiffs in the New Jersey action, like those in the Delaware action, seek a court order commanding the Commissioner and NJDEP to take action on the NPDES permit, including a BTA determination, and the New Jersey Pollutant Discharge Elimination System (NJPDES) permit for the Salem Nuclear Plant.

According to the complaint, the Salem Nuclear Plant is situated on the Delaware River Estuary, a

vital ecosystem supporting an abundance of aquatic wildlife. Through its utilization of a "once through cooling" system, the plant withdraws over three billion gallons of water from the estuary each day, killing one billion fish each year. The system affects five federally listed aquatic species.The Salem Nuclear Plant continues to operate on a permit issued in 2001 that was set to expire in 2006. The operators, PSEG, applied for a renewal of the permit at that time, but NJDEP has not acted on the application. In the past, the permit was approved with a condition that the plant undertake local wetland restoration efforts. However, in the complaint, the plaintiffs allege that this is a 'special condition' incompatible with the Clean Water Act. Instead, the environmental groups urge a BTA determination that includes a requirement to install a "closed-cycle recycling system" to reduce fish kills by over 90 percent. Although there are forthcoming regulations expected from the U.S. Environmental Protection Agency, those regulations have been delayed by multiple civil suits and the government shutdown. The environmental groups urge NJDEP to use its best professional judgment in adopting its own standards for the time being.

Conclusion and Implications

The actions described above are noteworthy for a number of reasons. First, they indicate an increasing unwillingness of environmental groups to permit state environmental agencies to delay making tough decisions on permit renewals. Second, in the wake of the federal government shutdown, the actions indicate that environmental groups will not simply wait around for EPA guidance to be issued before taking action themselves. (Mala Subramanian)

JUDICIAL DEVELOPMENTS

EIGHTH CIRCUIT FINDS COSTS AND EXPENSES TO CLEAN UP AN INSURED'S OWN PROPERTY ARE NOT COVERED UNDER THE 'OWNED-PROPERTY' EXCLUSION

Land O'Lakes, Inc. v. Employers Insurance Company of Wausau, ___F.3d___, Case No. 12-1752 (8th Cir. Aug. 29, 2013).

Land O'Lakes, Inc. (Land) filed a breach of contract action against Employers Mutual Liability Insurance Company of Wausau (Wausau) and The Travelers Indemnity Company (Travelers) (collectively: Insurers) for the costs of cleaning up contamination on a refinery site in Oklahoma. Midland operated an oil refinery in Cushing, Oklahoma, from 1943 until 1977, when it was sold to Hudson Oil Refinery Company (Hudson). Hudson, Midland's successor, went bankrupt in 1984. Land acquired Midland in 1982, including the dormant refinery and the obligation to clean up this site pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The U.S. Environmental Protection Agency (EPA) served Land with a potentially responsible party (PRP) letter in 2001, to which Land denied responsibility while still tendering defense and liability coverage to Wausau and Travelers in 2001. However, Land did not file suit following Insurers' 2001 denials until 2009. The U.S. District Court granted Insurers' motion for summary judgment holding that EPA's 2001 PRP letter was a "suit" within the policies' meaning and following the Insureds' denial of coverage, Land had a six-year statute of limitations to file suit; this time limit expired. The District Court also held that the owned-property exclusion in the Wausau and Travelers policies precluded any indemnity obligation as the clean up obligation was limited to the Midland property, and none of the contamination was causally related to any exisiting injury to third-party property. The Eighth Circuit affirmed.

Background

In July 1999, EPA placed the Midland site on its National Priorities List under CERCLA. In 1998 and 1999, EPA took several removal actions to eliminate any immediate hazards on the Midland site. Later in 2002 and 2003, EPA addressed less immediate remedial actions relating to the clean up of contamination on the Midland Site itself.

On January 18, 2001, EPA sent Land a "Special Notice Letter" (2001 Letter) informing Land that it was a PRP based on Midland's past ownership of the refinery site and of Land's later acquisition of Midland. The 2001 Letter demanded that Land pay to EPA $8.9 million in costs it incurred in cleaning up the refinery in the emergency and non-time-critical stages, and further invited Land to enter into negotiations with EPA for the performance of a Remedial Investigation and Feasibility Study (RI/FS). The 2001 Letter also attached a draft Administrative Order on Consent. On March 26, 2001, Land responded to the 2001 Letter stating that it bore no responsibility for the $8.9 million in past cleanup costs that Land alleged was caused by Hudson--not Midland.

In response to the 2001 Letter, Land sought a defense and indemnification from Wausau and Travelers. In November 2001, Wausau declined to defend Land concluding that the 2001 Letter was not a policy-defined "suit." Land challenged this determination in a January 2002 letter, but took no further action to challenge Wausau's denial of defense and indemnification until its 2009 breach of contract action.

Travelers also declined to defend and indemnify Land as a result of the 2001 Letter. Travelers argued that because its Commercial General Liability (CGL) policies had been issued to Land prior to its acquisition of Midland in January of 1982, those CGL policies would not provide coverage to Midland before Land acquired it. Land took no further action in response to Traveler's denial until its 2009 breach of contract lawsuit.

In response to Land's denial of responsibility, EPA and Oklahoma regulators conducted an RI/FS, followed by EPA's 2007 Record of Decision (ROD). The ROD identified the contamination at the Midland

site and set forth EPA's selected remediation actions.

In February 2008, EPA sent Land a second PRP letter demanding reimbursement for $21 million in prior cleanup costs and including a draft Remedial Design/Remedial Action plan for implementing EPA's cleanup remedy. In May 2008, Land reiterated its prior denial of responsibility.

In January 2009, EPA rejected Land's denial of responsibility and issued a Unilateral Administrative Order directing Land to implement EPA's ROD cleanup remedy. In February 2009, Land advised EPA that it would comply with the ROD, hiring contractors in November 2010 to implement EPA's cleanup remedy. After initiating cleanup, Land filed its breach of contract action against the Insurers.

The Eighth Circuit's Decision

The 2001 Letter, Duty to Defend and Statute of Limitations

Land first argued that the District Court erred in holding that the 2001 Letter triggered the Insurers' duty to defend thereby triggering the state's six-year statute of limitations. Under Minnesota law, a cause of action for breach of an insurance contract accrues, and the six-year limitations period begins to run upon an insurer's declination of coverage. *See, Herrmann v. McMenomy & Severson*, 590 N.W.2d 641, 643 (Minn. 1999). Land argued that the 2001 Letter did not trigger the Insured's duty to defend because the Letter:

> …was not a suit for arguably-covered damages... [r]ather,...the 2001 Letter was nothing more than an 'invitation to participate in an investigation' into whether remediation would be necessary at the refinery site.

The Eighth Circuit disagreed and found that the District Court had carefully examined the 2001 Letter and appropriately based its ruling on the facts that the Letter named Land as a "Potentially Responsible Party" under CERCLA to which EPA thereby demanded payment for past removal costs as well a future expenditures to clean up the Midland site. The 2001 Letter also stressed that Land would be liable for the RI/FS, the RD/RA, and any other follow-up response activities. The 2001 Letter advised Land that it could be held liable for the costs incurred by EPA and state regulators, for dealing with the release or threatened release. Finally, the 2001 Letter requested that Land enter into negotiations with EPA, attaching a draft Administrative Order on Consent, stressing Land's liability and the need for it's response.

The District Court—which the Eighth Circuit affirmed, found:

> In sum, the 2001 Letter put [Land] on notice that additional investigation that the Letter mandated might reveal injury to property that would arguably be covered by the CGL policies that the Insurers issued. It did not matter that, in 2001, no one knew the full nature and extent of the contamination at the refinery site.

The Eighth Circuit affirmed that Land's 2009 duty-to-defend claims had expired.

The Owned-Property Exclusion

Following the lead of the District Court, the Eighth Circuit affirmed that these exclusions applied to bar any indemnity obligations to the Insurers:

> …on the fact that the costs to comply with EPA-mandated cleanup relate solely to remediation on [Lands] property and not to remediation on property that others owned (citing the lower court).

The Eighth Circuit also found that the CGL policies provide that the Insurers will pay:

> …on behalf of [Land] all sums [Land becomes] legally obligated to pay as damages *because of* ...property damage to third party property on account of a covered occurrence. (Again citying the lower court. In *Minnesota Mining & Mfg. Co. v. Travelers Indem. Co.* 457 N.W.2d 175, 182 (Minn. 1990), the Minnesota Supreme Court held that only those "[d]amages which are causally related to covered 'property damage' are covered under such policies." Under Minnesota law, this exclusion precludes coverage for costs incurred by an insured to remediate contamination that is "confined to the insured's property and unrelated to preventing off-site contamination." *Id.*, (quoting from *Domtar Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 734 (Minn.1997).

The Eighth Circuit found that EPA took initial actions to address emergency and immediate hazards, concluding that no third-party property damage arose from contamination on the Midland site. Therefore, EPA's on-site remedy, identified in the ROD, had no bearing on any historic off-site releases—that the District Court had properly held that the owned-property exclusion applied because none of Land's cleanup costs were causally releated to any third-party property damage.

Conclusion and Implications

The causation requirement imposed under the Insurers' policies provided that coverage for damages that are causally related to third-party property damage. This precluded Land from successfully arguing around this exclusion by alleging the existence of past third-party property damage unrelated to the present cleanup. The missing crucial element was causation. (Thierry Montoya)

FOURTH CIRCUIT HOLDS THAT CERCLA PRE-EMPTS STATE STATUTES OF REPOSE

Waldburger, et al. v. CTS Corporation, ___F.3d___, Case No. 12-1290 (4th Cir. 2013).

In a decision consistent with the Ninth Circuit, but opposing the Fifth, the U.S. Court of Appeals for the Fourth Circuit has held that the discovery rule articulated in § 9658 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), preempts North Carolina's ten-year limitation on the accrual of actions for damage to real property. The court reasoned that although § 9658 literally preempts statutes of limitation, and does not specifically refer to statutes of repose, the language of § 9658 is ambiguous. To hold that § 9658 applies only to statutes of limitation, not statutes of repose, the court held, would frustrate the overall intent of Congress.

Background

Between 1959 and 1985, defendant CTS operated a 54-acre plant in Asheville, North Carolina, in which it manufactured and disposed of electronics equipment. In 1987, it sold the property. At the time of sale, it represented that the site presented no threat to human health or the environment. Ultimately, a portion of the land was sold to the plaintiffs, who allegedly discovered that the property was contaminated with hazardous substances. Plaintiffs and neighbors filed a complaint against CTS in 2011, alleging that the contamination constitutes a nuisance, resulting in diminution of property values and fear for future health and safety.

The U.S. District Court dismissed the complaint under Federal Rule 12(b)(6). The court based its decision on N.C. Gen. Stat. § 1-52(16), which prohibits a:

> …cause of action [from] . . . accru[ing] more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

The court reasoned that since CTS had sold the property in 1987, the last act or omission occurred no later than that year, and the statute of repose expired ten years later. Since the complaint was not filed until 2011, the court held, the action was subject to dismissal.

Plaintiffs appealed the District Court's decision.

The Fourth Circuit's Decision

The Fourth Circuit reversed the District Court. CERCLA § 9658, the court noted, provides that in the case of any action brought under state law for property damage which is caused, or contributed to, by exposure to any hazardous substance, pollutant, or contaminant, if the applicable "limitations period" for such action as specified in the state law provides a commencement date which is earlier than the federally required commencement date, the commencement date shall commence at the "federally required commencement date in lieu of the date specified"

in the state law. "Federally required commencement date" is defined in § 9658 as the "date the plaintiff knew (or reasonably should have known) that the personal injury or property damages" were caused, or contributed to, by the hazardous substance or pollutant. Thus, the court said, if a state statute of limitations provides that the period in which an action may be brought begins to run prior to a plaintiff's actual or constructive knowledge of the injury, § 9658 preempts the state law and allows the period to run from the time of the plaintiff's actual or constructive knowledge.

While § 9658 applies by its terms to statutes of limitation, it does not directly address statutes of repose such as N.C. Gen. Stat. § 1-52(16). A statute of repose, the court said, in contrast to a statute of limitations, is a statute that bars any suit brought after a specified time after the defendant acted, even if the period ends before the plaintiff has suffered a resulting injury. The issue on appeal, therefore, was whether CERCLA § 9658 preempts not only statutes of limitation, but also statutes of repose.

Section 9658 Preempts Both Statutes of Limitations and Repose

Holding that § 9658 preempts both statutes of limitation and statutes of repose, the court reasoned, first, that the North Carolina statute of repose is a "limitations period" as that phrase is used in § 9658. The North Carolina statute of repose is located in the North Carolina statutes within the same section as statutes of limitation, thus allowing the court to interpret it as a "limitations period." Second, the court observed that the legislative history of CERCLA provided indications that Congress intended to preempt both statutes of limitation and statutes of repose, and further indications that Congress intended CERCLA to be broadly remedial in nature. "Refusing to apply § 9658 to statutes of repose," the court reasoned:

> …allows states to obliterate legitimate causes of action before they exist. Because this is precisely the barrier that Congress intended § 9658 to address, we will not read the statute in a manner that makes it inapplicable in such a circumstance.

Since § 9658 preempts both statutes of limitation and statutes of repose, the court concluded, the District Court erred by dismissing the complaint. The case was remanded to the District Court for further proceedings.

Conclusion and Implications

The Fourth Circuit's decision in *Waldburger v. CTS Corporation* is consistent with the Ninth Circuit's ruling in *McDonald v. Sun Oil Co.*, 548 F.3d 774, 777-783 (9th Cir. 2008), which also held that § 9658 preempts both statutes of limitation and statutes of repose. The Fifth Circuit, on the other hand, has articulated the opposing view in *Burlington Northern & Santa Fe Railway Co. v. Poole Chemical Co.*, 419 F.3d 355 (5th Cir. 2005). The split within the Circuits is clear and sharp. The split may ultimately need to be resolved by the U.S. Supreme Court so that a single rule applies across the country. (Chris Berka, Duke McCall III)

DISTRICT COURT FINDS CLEAN WATER ACT CITIZEN SUIT IS MOOT WHEN AGENCY ENFORCEMENT ACTION EXISTS

Benham v. Ozark Materials River Rock, LLC, ___F.Supp.2d___,
Case No. 11-CV-339-JED-FHM (N.D. Okl. Sep. 24, 2013).

The U.S. District Court for the Northern District of Oklahoma has considered whether to dismiss a citizen suit under §§ 402 and 404 of the federal Clean Water Act, 33 U.S.C. § 1251 (CWA), based on a lack of standing and mootness. The U.S. District Court granted Ozark Materials River Rock, LLC's (Ozark) motion to dismiss David Benham's (Benham) § 402 claim as moot because the Oklahoma Department of Environmental Quality (ODEQ) initiated enforcement action and resolved the § 402 issues shortly after Benham filed the citizen suit.

Factual and Procedural Background

In this case, the plaintiff, Benham, filed a citizen suit seeking injunctive relief and civil penalties under §§ 402 and 404 of the CWA. This case arose from Benham's claim that defendant Ozark's mining activities along Saline Creek adversely affected the environmental health of the creek and surrounding land. Ozark is engaged in the business of gravel mining and excavates rock from the bed of Saline Creek and washes and sorts those materials on nearby land. Specifically, Benham alleged that Ozark operated its mining activities in violation of the CWA by discharging dredge and fill materials into the creek and surrounding wetlands without a permit.

On November 15, 2010, Benham sent Ozark and ODEQ the required Notice of Intent to Sue (Notice Letter) which explained the basis of his claims under §§ 402 and 404. In response to Benham's Notice Letter, ODEQ inspected Ozark's operations and issued a Notice of Violation, which detailed the abatement necessary to bring Ozark into compliance. In response, Ozark took the steps required of it and ultimately obtained a discharge permit on December 30, 2010. Benham filed suit on June 1, 2011, alleging both claims. After the lawsuit had been filed, Ozark entered into a Consent Order with ODEQ. The Consent Order required Ozark to pay a $10,000 fine for past violations, indicated that no continuing violations had occurred, and stated that it resolved all § 402 issues raised in Benham's Notice Letter. Ozark subsequently filed a motion to dismiss Benham's complaint pursuant to Federal Rules of Civil Procedure §§ 12(b)(1) and (6), arguing that Benham lacked standing to bring his claims, that Benham's claims were moot, and that Benham otherwise failed to state a claim.

The District Court's Decision

Standing—Injury, Causation and Redressability

As an initial matter, the District Court first determined that Benham had standing to bring the lawsuit because he suffered an injury in fact, the injury was fairly traceable to the challenged action of the defendant, and it was likely that the injury would be redressed by the relief requested. The court noted that, the plaintiff must be suffering a continuing injury or be under a real and immediate threat of being injured in the future to seek prospective injunctive relief. Additionally, the court acknowledged that, the threatened injury must be impending and not merely speculative. Furthermore, the court recognized that environmental plaintiffs adequately allege injury in fact if they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.

In rejecting Ozark's claim that Benham was not injured by Ozark's operations because Benham does not own the damaged land, the court noted that Benham's status as a frequent user of the creek was sufficient to constitute an injury in fact for standing purposes. Benham visits Saline Creek many times throughout the year to fish, raft, and swim. Benham contended that Ozark was causing the banks of the creek to erode, the gravel within the stream to erode, riparian vegetation to erode, an increase in water temperature, and a reduced quality of the water. Accordingly, the court found that Benham's allegations supported a concrete and particularized injury.

Additionally, the court determined the injury was traceable and redressable. An injury is fairly traceable to the challenged action of a defendant where

there is a causal connection between the injury and the conduct complained of. Redressability requires that the court be able to afford relief through the exercise of its power. The court found that the alleged harm was directly caused by Ozark's operations in and around Saline Creek and was thus fairly traceable to Ozark's actions. Similarly, the court determined that Benham's alleged injury would be redressable were the court to grant the relief he requested.

Mootness Doctrine

Next, the court assessed Ozark's argument that the Consent Order, entered into by Ozark and ODEQ, renders Benham's § 402 claim moot. The court noted that while a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice, the voluntary cessation standard is not applied where the defendant's cessation results from the actions of a third party. Ozark's abatement actions and permit applications were not voluntary because ODEQ had inspected Ozark's property and issued notice of violations, which culminated in the Consent Order. Thus, the court determined that ODEQ's initiation of enforcement action and implementation of the Consent Order moots all aspects of Benham's § 402 claim.

In regards to Benham's § 404 claim, the court disagreed with Ozark's contention that dredge and fill activities cannot be a violation under § 404 of the CWA. Section 404 authorizes the U.S. Army Corps of Engineers (Corps) to regulate discharges in wetlands throughout the United Stated and issue permits for the discharge of dredged or fill material into navigable waters. Ozark, relying on *National Mining Assn. v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), maintained that the Corps does not issue permits for the type of operation Ozark's is engaged in because such activity is not regulated under § 404. However, the court found that *National Mining* simply stands for the proposition that a discharge does not include the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back. Further, the court found that Benham's complaints involved more than incidental fallback. Benham alleged that Ozark is engaged in sidecasting and other regulated dredging and filling of wetlands without a permit. Accordingly, the court determined that Benham's complaint constitutes an injury in fact. In addition, the court found that an agency's decision to not take action does not render a citizen suit moot.

Conclusion and Implications

The court dismissed Benham's § 402 claim as moot but determined the § 404 claim is not subject to dismissal under any of the theories advanced by Ozark. The court reasoned that, permitting a claim to go forward based on the same conduct which has already been penalized by an agency in an enforcement action would undermine the goals of ensuring that agencies remain the primary enforcers of the Clean Water Act. This decision reinforces the proposition that citizen suits are meant to supplement rather than supplant government enforcement action and that citizen suits are proper only if the federal, state, and local agencies fail to exercise their enforcement responsibility. (Danielle Sakai, Marco Verdugo)

DISTRICT COURT IMPOSES CERCLA LIABILITY ON A SUPPLIER AND A RECYCLER OF PCB-LADEN WASTEPAPER

Georgia-Pacific Consumer Products LP v. NCR Corporation, ___F.Supp.2d___, Case No. 1:11-CV-483 (W.D. Mich. Sept. 26, 2013).

The U.S. District Court for the Western District of Michigan has held both a supplier and a recycler of scrap carbonless copy paper containing polychlorinated biphenyls (PCBs) liable under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). After a two-week bench trial which resulted in a record of thousands of pages, the court found that the supplier had known the hazards of PCBs yet continued to sell the wastepaper to recyclers and was therefore unable to avail itself of the "useful product" exemption to arranger liability under CERCLA. As for the recycler, the court found liability even though a lessee operated the facility. The recycler owned the property and facility, and the court was not convinced that the "secured creditor exemption" to owner liability should be applied because the recycler's primary purpose in leasing the operation was not to protect a security interest but rather to shed its operational and ownership responsibilities in a typical lessor-lessee transaction.

Background

In 1990, an area of the Kalamazoo River and its tributary, Portage Creek, located in Southwestern Michigan (Site), was placed on the National Priority List (NPL) and on a list of contaminated sites under the Michigan Environmental Response Act because of extensive PCB contamination. The PCB contamination is due to discharge by paper mills in the Kalamazoo River Valley.

Georgia-Pacific currently has subsidiaries that own property at the Site and has expended millions of dollars cleaning up the PCB contamination. In 2010, Georgia Pacific brought a CERCLA contribution action against International Paper Company, Weyerhaeuser Company, and NCR Corporation to share in these cleanup costs. Weyerhaeuser admitted liability, but NCR and International Paper denied liability. Georgia Pacific asserted that NCR is liable under CERCLA as an arranger for arranging, directly or through affiliates, the disposal of PCBs at the Site. In particular, Georgia Pacific argued that NCR arranged for scraps of its manufactured carbonless copy paper to be recycled by paper mills as a way to avoid more costly disposal of the PCBs it knew were contained in these scraps. As for International Paper, Georgia Pacific asserted that it has liability for cleanup as a corporate successor to St. Regis Corporation, which operated a mill that recycled carbonless copy paper scraps and discharged PCBs at the Site.

NCR began manufacturing carbonless copy paper in the 1940s. From 1954 to 1971, NCR used a solvent containing PCBs in the production of the carbonless copy paper. The production of this paper generated scraps that NCR sold to paper recyclers to use in the manufacture of new paper. These recyclers used the fiber portion of the scraps for the production of commercial paper and disposed of the rest as waste. The recyclers' effluent, if generated during the recycling of carbonless copy paper, necessarily included PCBs; and that effluent it was argued, reached the Site.

The Bryant Mill was one such recycler that used carbonless copy paper in its manufacturing of new paper. St Regis, a predecessor to International Paper, acquired the Bryant Mill in 1946. St. Regis manufactured paper at the Bryant Mill until July 1, 1956 when Allied Paper Corporation took over operations at the Mill pursuant to an agreement under which St. Regis conveyed its paper business to Allied, but maintained ownership of International Paper of the Mill. A lease provision contained in the Agreement allowed Allied to purchase the Mill after ten or 13 years, and after ten years, Allied exercised this option.

The District Court's Decision

The U.S. District Court, after laying out the framework for arranger and owner liability under CERCLA, applied the relevant law to the facts ascertained over a two-week bench trial including 25 expert and lay witnesses and hundreds of exhibits. The court found NCR directly liable as an arranger because the court concluded that NCR planned the disposal of carbonless copy paper scraps at a time when it knew those scraps could no longer be useful

to a fully informed recycler. International Paper was also found liable because it owned the Bryant Mill at a time when the Mill was recycling scraps containing PCBs.

Analysis of Arranger Liability under CERCLA—NCR

At the trial, both NCR and International Paper conceded that Georgia Pacific had met the first three elements to prove their liability and did not dispute that: (1) a release of hazardous substances occurred, (2) the release occurred at a facility, and (3) the released caused Georgia Pacific to incur response costs. Therefore, the dispute centered on whether, under the law, NCR qualified as an arranger and International Paper qualified as an owner or operator.

With regard to NCR, the court made three findings: (1) NCR learned that carbonless copy paper scraps were hazardous, (2) NCR continued to sell carbonless copy paper scraps after discovering they were a legal and environmental liability, and (3) PCBs in the carbonless copy paper scraps reached the Site. Specifically, the court found that Georgia Pacific had met its burden and presented considerable evidence, including internal NCR memoranda, that NRC understood that carbonless copy paper scraps generated hazardous PCB-waste as part of the normal recycling process. And, NCR continued to sell those scraps after it knew about these hazards. Moreover, NCR actively attempted to conceal the hazards associated with carbonless copy paper scraps from the recyclers, the public and governmental entities. Thus, the fact that recyclers were willing to pay for the scraps they thought were a safe and viable source of pulp had no bearing on the court's determination that NCR was attempting to "divest itself of a product that it knew to be hazardous and a legal liability." In the end, the court found that NCR's sales of CCP broke were not attempts to sell a genuinely useful product, and it was unwilling to extend that exemption from arranger liability to NCR.

Analysis of Owner/Operator Liability under CERCLA—International Paper and GP

With regard to International Paper, Georgia Pacific was unable to meet its evidentiary burden to show that hazardous materials were disposed of at the Mill prior to July 1, 1956, the last day International Paper's predecessor, St. Regis, actually operated the Mill. This conclusion was based in part on the lack of direct evidence that established a shipment of carbonless copy wastepaper to the Bryant Mill before this date. After this date, however, the court said there was "no question" that Georgia Pacific had met its burden to show that International Paper was an owner or operator, even though Allied actually operated the Mill. First, the court found that there was no dispute that St. Regis held legal title to the Mill after July 1, 1956 until it was sold to Allied in 1966. Further, the court was unconvinced by International Paper's argument that it should be exempt from liability under the "secured creditor exemption." To reach this conclusion, the court noted that the transactional documents treated the transaction as a lease, not a sale. For example, the Agreement authorized St. Regis to enter the Mill, to inspect the premises, and to perform repairs, and it required St. Regis approval for substantial changes or improvements to the Mill. The court found that these "sorts of requirements" are more consistent with a lessor-lessee relationship than one of buyer-seller. As a result, the court concluded that International Paper's primary purpose was not to protect a security interest in the Mill but rather to ultimately shed its operational and ownership responsibilities at the Mill.

Conclusion and Implications

The U.S. District Court's decision is most notable for its finding that a product that was sold for recycling and actually incorporated into a new product does not qualify for the useful product exemption to CERCLA liability. The result appears to have been driven by the facts presented to the court, but the decision may provide a basis for others to argue that a party that arranges for the re-use or recycling of material is not exempt from CERCLA liability. (Duke McCall III)

DISTRICT COURT OPENS THE DOOR FOR ANOTHER COURT TO REQUIRE EPA TO PROMULGATE RULES ON THE GULF OF MEXICO'S 'DEAD ZONE'

Gulf Restoration Network v. Jackson, ___F. Supp.2d___,
Case No.12-6772013 (E.D. La. Sept. 20, 2013).

In a case that has major implications for the scope of U.S. Environmental Protection Agency (EPA) discretion to make decisions on how best to regulate interstate water quality issues, U.S. District Court Judge Jay C. Zainey ruled that the federal courts have jurisdiction under the Administrative Procedure Act (APA) to review whether EPA's refusal to make a determination of the necessity for water quality rules about eutrophication of the lower Mississippi River Basin and the so-called related "dead zone" in the Gulf of Mexico is lawful.

Background

In *Gulf Restoration Network v. Jackson*, various environmental groups brought an action under the APA concerning how EPA handled their July 30, 2008 Petition for Rulemaking (Petition). The Petition claimed that nitrogen and phosphorus pollution was devastating the Gulf of Mexico, and that this was in part due to lack of numerical water quality standards in the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) programs of the states along the Mississippi River. The Petition requested that EPA promulgate federal rules on these pollutants for the Mississippi and/or the Gulf. The APA provides that interested persons have a right to petition for the issuance, amendment or repeal of a rule. (APA, § 553, 5 USCA § 553(e).

The plaintiffs had invoked § 303(c)(4)(B) of the Clean Water Act to justify their Petition. That section of the CWA directs the EPA to promulgate water quality standards:

> …in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter [of the CWA].

EPA denied the Petition and gave an explanation that essentially said it did not believe federal rulemaking was the best approach to solving the problem of nutrient pollution. EPA's ruling did not question need for nutrient rules, but it did not make a formal ruling on that need. EPA indicated it was continuing to work with states and providing technical assistance to get them to promulgate numeric criteria. EPA reserved its rights to later utilize federal rulemaking authority at a time it might deem it appropriate.

The District Court's Ruling

The EPA contended that judicial review of its denial of the Petition was not proper under the APA, since it considers the issue of whether to utilize federal rules a decision or action "committed to agency discretion" and thus not reviewable, per § 701(a)(2) of the APA. However, in the District Court's analysis, the EPA was taking an overly broad view of its discretion. The opinion cites two U.S. Supreme Court cases in support of its holding that it has subject matter jurisdiction. In *Massachusetts v. U.S. EPA*, 549 U.S. 497 (2007) the courts exercised jurisdiction of a state petition for rulemaking on carbon dioxide as a greenhouse gas under the Clean Air Act. In *Heckler v. Chaney*, 470 U.S. 821 (1985), the Supreme Court provided an analysis of the question of courts' ability to deal with a decision arguably committed to agency discretion. In the *Heckler* case, the presence or not of factors or standards against which a court could assess the reasonableness of an agency's action is weighed, and if there is "no law to apply" then courts should decline jurisdiction on the grounds there is no standard against which to measure the agency.

Denial of Motion to Dismiss for Lack of Subject Matter Jurisdiction

The District Court denied EPA's motion to dismiss for lack of subject matter jurisdiction because it sees itself as having ability to determine whether EPA's reliance on factors (*e.g.* practicability, cost, agency resource allocation, federalism) arguably not statutory was lawful when EPA declined to make a determina-

tion either yea or nay on whether numeric nutrient regulations are necessary for the Mississippi and Gulf.

Denial of the Petition—and District Court Jurisdiction

Having assumed jurisdiction of the case, the court then turned to analysis of the legal question of whether the denial of the Petition for the reasons given by EPA would be lawful. In heavy reliance on the Supreme Court's majority and dissenting opinions in *Massachusetts v. U.S. EPA*, the Court found that the EPA was not able to duck a decision on whether to make a determination of necessity (or not) of the numeric nutrient rules petitioned for.

Conclusion and Implications

In so ruling, Judge Zainey evidenced a sophisticated understanding of the differences between exclusive federal EPA regulation of motor vehicles (as in the Clean Air Act) and a federal system of joint regulation responsibility between EPA and the various states (as in the Clean Water Act). The implication of its discussion is that the Clean Water Act's regulatory scheme may provide sufficient support for the EPA to fashion a decision that makes a yea or nay ruling on necessity, yet does not require federal numerical nutrient water quality regulation to be promulgated. The District Court has remanded the case and Petition back to the EPA in order for the agency to make a necessity determination within 180 days. (Harvey M. Sheldon)

DISTRICT COURT FINDS NMFS ABUSED ITS DISCRETION IN AUTHORIZING THE INCIDENTAL TAKE OF MARINE MAMMALS DURING ANTI-SUBMARINE WARFARE EXERCISES

InterTribal Sinkyone Wilderness Council v. National Marine Fisheries Service, ___F.Supp.2d___, Case No 1:12-cv-00420 (N.D. Cal. Sept. 26, 2013).

Environmental groups brought an action against the National Marine Fisheries Service (NMFS) seeking review of NMFS' authorization of the U.S. Navy under the Marine Mammal Protection Act (MMPA) and the federal Endangered Species Act (ESA) to incidentally "take" marine mammals during anti-submarine warfare training exercises. In an order addressing cross motions for summary judgment, the U.S. District Court for the Northern District of California granted in part the environmental groups' motion for summary judgment, finding that NMFS abused its discretion by failing to use the best scientific data available to reaffirm a previous no jeopardy conclusion and prepare its incidental take statement as well as by limiting its analysis of the effects of the Navy's anti-submarine warfare training to a five-year period. The District Court set a briefing schedule to determine the appropriate scope and duration of remand to NMFS for the purpose of requiring the agency to attain compliance with the ESA and MMPA.

Background

The Endangered Species Act

ESA § 7(a)(2) requires a government agency, in consultation with the U.S. Fish and Wildlife Service or NMFS, to insure that proposed agency action is not likely to jeopardize the continued existence of any listed species or to destroy or adversely modify critical habitat. At the conclusion of any formal consultation, NMFS issues its "biological opinion" evaluating the proposed action. The biological opinion must be based on the "best scientific and commercial data available."

Section 9 of the ESA generally prohibits the "take" of members of a listed species without prior authorization. Under the ESA, the term "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Where a proposed action will not violate § 7(a)(2) of the ESA, but will result in the taking of some species incidental to that action, NMFS must

issue an incidental take statement specifying the amount or extent of anticipated take, any reasonable measures to minimize the impact of the take, and mandatory terms and conditions to implement such measures.

The Marine Mammal Protection Act

The MMPA generally prohibits the "take" of marine mammals. In 2003, Congress amended the MMPA to exempt, for periods of not more than five years, certain military readiness activities. To implement these amendments, NMFS must promulgate regulations specifying permissible methods of take and other means of ensuring the "least practicable adverse impact" to affected species and its habitat. NMFS is required to promulgate these regulations based on the best available information. Finally, a Letter of Authorization, specifying the period of validity and any additional terms and conditions, is required to conduct activities pursuant to any such regulations.

Approval of Navy Training Exercises

In 2008, the Navy applied to NMFS for authorization under the MMPA and ESA to incidentally take marine mammals during training exercises to be conducted over a five-year period along the coast of Washington, Oregon, and Northern California. The exercises were to include that use of active sonar, which is harmful to certain marine mammals. In November 2010, NMFS granted the Navy's application and issued regulations under the MMPA governing the take of marine mammals incidental to the training exercises for a period of five years (Final MMPA Rule). On June 15, 2010, after a formal consultation, NMFS issued its Final Biological Opinion, concluding that the authorized take and associated training activities were not likely to jeopardize the continued existence of any species listed as threatened or endangered under the ESA. In October 2012, NMFS issued the final Letter of Authorization under the MMPA regulations, along with a new Biological Opinion under the ESA reaffirming its no jeopardy conclusion. NMFS relied on the same information for its 2012 Biological Opinion that it had relied on for its 2010 Biological Opinion. Environmental groups filed suit challenging these agency actions on various grounds. Both the plaintiff environmental groups and NMFS moved for summary judgment.

The District Court's Order

The U.S. District Court focused its analysis on the question of whether, based on the evidence in the administrative record, NMFS properly approved the proposed Navy action. The court explained that under the Administrative Procedure Act, judicial review of agency action occurs under the highly deferential arbitrary and capricious standard whereby the District Court will presume agency action to be valid so long as a reasonable basis exists for the agency's decision.

The Use of Best Available Scientific Data

The court first examined plaintiffs' claim that NMFS failed to use the best scientific data available when issuing the 2012 Biological Opinion. Plaintiffs alleged that NMFS failed to consider several new peer-reviewed studies published after the 2010 Biological Opinion that demonstrated the previously-adopted levels of marine mammal hearing loss (both temporary and permanent) attributable to sonar were inaccurate and likely underestimated both the total number of instances when sonar will negatively affect marine mammals and the severity of such exposures. The District Court agreed, rejecting NMFS' argument that the best available data requirement should not apply because NMFS' evaluation of these studies was ongoing and incomplete. To the contrary, the court concluded that it was an abuse of discretion for NMFS to disregard its duty to use the best available scientific data in preparation of the 2012 Biological Opinion.

The Incidental Take Statement

The District Court next considered whether NMFS' estimates of the amount of take in the incidental take statements were not based on the best scientific data available and, therefore, insufficient. The court determined that NMFS' failure to consider the best scientific information available meant that its estimates did not accurately and adequately quantify take and, thus, NMFS violated the ESA. Accordingly, the District Court determined that NMFS abused its discretion when it issued the incidental take statement.

Evaluation of Full Effects of Agency Action

Third, the court evaluated whether, despite the indefinite nature of the Navy's proposed training activities, NMFS erred by limiting its ESA analysis to the initial five-year period permitted by the MMPA. Plaintiffs alleged that NMFS ignored its obligation to evaluate all effects of the proposed naval action, including those that might extend beyond the initial five-year time period. NMFS argued that it appropriately defined the relevant "agency action" subject to ESA consultation as the Final MMPA Rule, the Letter of Authorization, and the specified training activities covered by the Final MMPA Rule and the Letter of Authorization, which were limited to distinct five-year actions. The District Court concluded that the appropriate scope of analysis was "the effect of the entire agency action." The court then explained that a series of short-term analyses can mask the long-term impact of an agency action and that NMFS' segmented analysis was inadequate to address long-term effects of the Navy's acknowledged continuing activities in the NWTRC. Thus, the District Court found that it was an abuse of discretion for NMFS to define the "agency action" to be reviewed under the ESA as the five-year period permitted under the MMPA.

Additional Challenges Raised

Plaintiffs additionally argued: (i) that NMFS improperly based its no jeopardy and no adverse modification conclusions on inadequate and ineffectual mitigation measures specified in the Final MMPA Rule; (ii) that NMFS's analysis of the impacts of the Navy's activities failed to account for whether the cumulative impacts to marine mammals of repeated sonar exposures over the five-year term would jeopardize any listed species; (iii) that NMFS' Letter of Authorization allowed the Navy to conduct activities that would result in more takes than analyzed and authorized in the Final MMPA Rule; and (iv) that NMFS failed to protect essential habitats in issuing the Final MMPA Rule. The court considered and addressed each argument in detail in its decision, ultimately finding that NMFS had not abused its discretion in these instances.

Conclusion and Implications

The District Court's decision is notable because the District Court found that the plaintiffs had met the high bar of proving that NMFS abused its discretion in approving the Navy's proposed action. Of perhaps greater significance, however, is the court's conclusion that NMFS abused its discretion in failing to consider recently published studies before issuing its 2012 Biological Opinion. This interpretation of the requirement to consider the best scientific data available may prove difficult to satisfy in practice and could delay the issuance of future Biological Opinions, pending a review of new information. (David K. Brown, Duke K. McCall, III)

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