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CONTENTS

FEATURE ARTICLE

EASTERN WATER NEWS

JUDICIAL DEVELOPMENTS

Continued on next page

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EWL

FEATURE ARTICLE

THE FEDERAL CIRCUIT DECISION IN *CASITAS*: DOES THE TAKINGS CLAUSE APPLY TO WATER RIGHTS?

By Roderick E. Walston

In a highly anticipated decision involving the government's authority to regulate water rights, the Federal Circuit Court of Appeals recently held that the federal government was not required to pay compensation under the Takings Clause of the Constitution for restricting a water district's water rights in order to provide more water for the benefit of an endangered species. *Casitas Municipal Water District v. U.S.*, 708 F.3d 1340 (Fed. Cir. Feb. 27, 2013). The Federal Circuit held that water rights are "property" within the meaning of the Takings Clause, but that the property right is limited to "beneficial use" of water. The court then held that the government was not required to pay compensation for restricting the water district's right to divert and store water in its reservoir, because diversion and storage in a reservoir are not a "beneficial use" of water.

In the earlier trial proceeding in *Casitas*, the U.S. Court of Federal Claims held that the government's restriction of the water district's rights was not supported by "background principles" of California water law—specifically by the reasonable use doctrine and public trust doctrine—and therefore the government could not defeat the water district's taking claim under the Supreme Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); in *Lucas*, the Supreme Court held that a government restriction of property that is supported by "background principles" of state law is not an unconstitutional taking of the property. Since the government did not appeal this aspect of the trial court's decision, the trial court's decision establishes a significant precedent regarding the "background principles" of California water law.

The combined decisions of the Federal Circuit and the Court of Federal Claims in *Casitas* will have broad national effect and significance, both because of the importance of the issues and the stature of the courts. The Federal Circuit is the appellate body that hears appeals from the Court of Federal Claims, and the latter court has exclusive jurisdiction to hear claims for monetary relief against the United States. Thus, the Federal Circuit and the Court of Federal Claims decisions, unlike decisions of most other federal circuit and trial courts, apply throughout the nation rather than only in limited circuit areas.

Background

The Casitas Project

The Casitas Municipal Water District (Casitas) operates the Ventura River Project in southern California. The project diverts water from the Ventura River to a reservoir, Lake Casitas, where the water is stored for later use for Casitas' customers. The U.S. Bureau of Reclamation built the project and transferred it to Casitas after Casitas repaid the construction costs. In 1956, Casitas acquired an appropriative water right permit for the project from the State Water Resources Control Board (SWRCB), which was later replaced by a license. The license authorizes Casitas to divert 107,800 acre-feet of water annually from the Ventura River for storage in the reservoir, and to put 28,500 acre-feet of water each year to "beneficial use" by delivering it from storage to its customers.

In 1997, the National Marine Fisheries Service (NMFS) listed the west coast steelhead trout, which

is found in the Ventura River, as an endangered species under the Endangered Species Act (ESA). In 2003, NMFS issued a Biological Opinion that concluded that Casitas' project was jeopardizing the steelhead, and required Casitas to construct a fish ladder and divert a portion of its water supply to the fish ladder for the benefit of the steelhead.

The Litigation

Casitas brought an action against the United States in the U.S. Court of Federal Claims, seeking damages on the ground that NMFS' Biological Opinion resulted in an unconstitutional taking of its water rights by requiring that Casitas divert a portion of its water supply to the fish ladder.

In the first phase of the *Casitas* litigation, or "*Casitas I*," the trial court dismissed Casitas' taking claim. *Casitas Mun. Water Dist. v. U.S.*, 76 Fed. Cl. 100 (2007). The trial court held that Casitas' taking claim is governed by the "regulatory taking" doctrine rather than the "physical taking" doctrine, and Casitas had conceded that its taking claim could not succeed under a regulatory taking analysis. Under the regulatory taking doctrine, the reviewing court considers various factors in determining whether a taking has occurred; these factors are the economic impact of the regulation on the property owner, the extent to which the regulation interferes with the property owner's "investment-backed expectations," and the "character of the government action." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124-125 (1978). Under the physical taking doctrine, the government is categorically liable for an unconstitutional taking if its regulation constitutes a "physical invasion" of the property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 432 (1982).

On appeal, the Federal Circuit reversed the dismissal of Casitas' taking claim, holding that Casitas' taking claim must be analyzed under the physical taking doctrine rather than the regulatory taking doctrine. *Casitas Municipal Water District v. U.S.*, 543 F.3d 1276 (Fed. Cir. 2008). The physical taking doctrine applies, the appellate court stated, because the United States:

> …did not merely require some water to remain in stream, but instead actively caused the physical diversion of water away from the Robles-Casitas Canal . . . and towards the fish ladder, thus reducing Casitas' water supply. 543 F.3d at 1291-1292.

The appellate court remanded the matter to the trial court to determine whether, under the physical taking doctrine, Casitas has "property" that has been "taken." The full court by a divided vote denied the United States' petition for rehearing *en banc*. 556 F.3d 1229.

In the second phase of the litigation, or "*Casitas II*," the trial court, on remand, dismissed Casitas' taking claim without reaching the physical taking issue. *Casitas Mun. Water Dist. v. U.S.*, 102 Fed. Cl. 443 (2011). The court reasoned that—although Casitas has a "property" right in water—the right is limited to "beneficial use," and Casitas' diversion and storage of water in its reservoir are not a "beneficial use" of water. Casitas' "beneficial use" right, the court stated, is limited to delivery of water from storage to its customers, and Casitas had been able to deliver to its customers the full amount of water that they were contractually entitled to receive. Therefore, the trial court concluded, the United States did not "take" Casitas' water rights.

On appeal, the Federal Circuit affirmed the trial court's dismissal of Casitas' taking claim, for reasons that will be described in this article. *Casitas Mun. Water Dist. v. U.S.*, 708 F.3d 1340 (Fed. Cir. 2013).

Rather than provide a narrative discussion of the issues decided in the *Casitas* litigation as it progressed through the first and second phases in the trial and appellate courts, this article will instead provide a topical discussion of the issues decided by the Federal Circuit, and, where appropriate, by the trial court as well. As shall be seen, the Federal Circuit and trial court decisions cumulatively result in a significant clarification of takings jurisprudence in the context of water rights regulation.

Is a Water Right 'Property'?

The first, and potentially most significant, issue decided by the Federal Circuit is whether a water right is a cognizable form of "property" within the meaning of the Taking Clause.

The Federal Circuit held that under California law a water user does not have a "possessor property interest" in the actual "corpus or molecules" of the water, but instead has the right to *use* the water, which is generally referred to as a "usufructuary" right. *Casitas*

II, 708 F.3d at 2013 U.S. App. Lexis 4067, *35-36. The right to use water, the court stated, is a form of "property" within the meaning of the Taking Clause, because the right has "long been recognized by California courts as private property subject to ownership and disposition." *Id.* at *36-37. The court cited the California Court of Appeal's highly-regarded decision in *U.S. v. State Water Res. Control Bd.*, 82 Cal. App.3d 82, 100 (1986)—often referred to by the name of its author, Justice Racanelli—in which the California court stated that "once rights to use water are acquired, they become vested property rights" and "cannot be infringed by others or taken by government without due process and just compensation." *Id.* Thus, the Federal Circuit concluded, the holder of a water right has a compensable property right under the Taking Clause.

The Federal Circuit also held, however, that the right to use water, *i.e.*, the "usufructuary" right, is limited to "beneficial use." *Casitas II*, 2013 U.S. App. Lexis 4067, *37-38. As the court recognized, the beneficial use limitation is a well-recognized principle of the doctrine of prior appropriation that applies in California and other western states. In 1928, the people of California adopted a constitutional amendment establishing California's basic water law, which provides that a water right exists only to the extent that the water to which the right attaches is put to "reasonable and beneficial" use. Cal. Const., Art. X, § 2; Cal. Water Code § 100; *Joslin v. Marin Muni. Water Dist.*, 67 Cal.2d 132, 145 (1967). The principle established by the constitutional amendment—often referred to as the reasonable use doctrine or beneficial use doctrine—applies to all water rights, whether appropriative, riparian or other. *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 443 (1983). The California Supreme Court has held that this constitutional standard is not static, because a water use that is reasonable and beneficial under some circumstances may not be so considered under other circumstances. *Joslin*, 67 Cal.2d at 140.

The Federal Circuit's decision is highly significant in holding that a water right, assuming that it meets the beneficial use standard, is a compensable "property" interest within the meaning of the Taking Clause. Indeed, this holding, over time, may prove to be the most significant aspect of the court's decision. Many commentators have argued that a water right is not a compensable form of property under the Takings Clause, because the "property" in water belongs to the people rather than the user. California law provides, for example, that "[a]ll water within the State is the property of the people of the State," although "the right to the use of water may be acquired by appropriation in the manner provided by law." Cal. Water Code § 102. Since water belongs to the people, it is argued, water cannot belong to the user. The Federal Circuit concluded, however, that regardless of what rights the public may have in water, the right of an individual to *use* water, assuming that the right is recognized under state law, is a compensable property interest under the Takings Clause.

The Federal Circuit's conclusion that a water right is a compensable "property" interest under the Takings Clause seems unassailably correct. Although the state has sovereign interests in water under the equal footing doctrine and other principles of law, the holder of a state-recognized water right has a right to *use* water that is paramount to the rights of others to use the water, and thus has the right to exclude others from using the water to which his right attaches. The Supreme Court has held that "the right to exclude " is a "fundamental element of the property right." *Kaiser Aetna v. U.S.*, 444 U.S. 164, 179-180 (1979). A water right, like other forms of property, has economic value, and the holder of the right has a reasonable expectation of the right of continued use. Since a water right has the indicia of a compensable property right, it is properly regarded as such a right.

Does the 'Property' Right In Water Include Diversion and Storage of Water?

The Federal Circuit held that the right to "beneficial use" of water—as applied to a project that, like Casitas', diverts and stores water in a reservoir for later use by project customers—includes only the right to take the water from storage and deliver it to the customers, and not the right to divert the water from the river and store it in the reservoir. *Casitas II*, 2013 U.S. App. Lexis 4067, *41. The Federal Circuit cited the California Supreme Court's decision in *Lindblom v. Round Valley Water Co.*, 178 Cal. 450, 456 (1918), which held that "[s]torage of water in a reservoir is not itself a beneficial use" but "is a mere means to the end of applying the water to such use." *Id.* The Federal Circuit also stated that Casitas' license itself "clearly identify[ies] only 'withdrawal from storage'—

in contrast to 'collection to storage'—as a beneficial use." *Id.* at *41-42. The court thus distinguished between the right to put water *into* storage and the right to take water *from* storage for customer use, holding that the latter is a compensable "property" right and the former is not. Under the court's analysis, Casitas only has a compensable property right in the water that Casitas delivers from its reservoir to its customers, and not the water that Casitas diverts and stores in the reservoir itself.

Under its license, Casitas has the right to annually divert and store 107,800 acre-feet of water in its reservoir, and to annually deliver 28,500 acre-feet of water from the reservoir to its customers for their use. Therefore, the court concluded, Casitas only has a compensable property interest in 28,500 acre-feet of water per year, not the 107,800 acre-feet per year claimed by Casitas. *Id.* at *43.

The Federal Circuit held that Casitas had not shown that it was unable to deliver to its customers the full amount of water that they were contractually entitled to receive, *i.e.*, 28,500 acre-feet per year, during the time that NMFS' Biological Opinion was in effect. *Id.* at *49. On the contrary, Casitas apparently had been able to fully meet its customers' contractual demands during this period. *Id.* Therefore, the court concluded, NMFS' Biological Opinion has not caused Casitas to fail to meet its customers' contractual requirements, and Casitas cannot assert its taking claim against the government. *Id.* Casitas can only demonstrate a "compensable injury," the court stated, when it is forced to "reduce the water project's safe yield to the point when deliveries are affected," and this has not occurred. *Id.* at *48.

The Federal Circuit held that—since NMFS' Biological Opinion had not caused Casitas to fail to meet its contractual obligations to its customers—Casitas' taking claim was not ripe, and therefore the federal courts lack jurisdiction to hear its taking claim. Under the Tucker Act, the Court of Federal Claims has jurisdiction only over taking claims that have "accrued," and such claims have not "accrued" until the events causing the government's liability have "occurred," or at least until the plaintiff was or should have been "aware" of their existence. 28 U.S.C. § 1491(a)(1); *Casitas II*, 2103 U.S. App. Lexis 4067, *50. Casitas' claims have not "accrued," the court stated, because Casitas was able to fully meet its customers' needs, and therefore Casitas' taking claim was not ripe for review under the Tucker Act. Casitas would be able to assert a ripe taking claim only if it has "sufficient evidence to file a complaint alleging a compensable injury." *Id.* at *53.

The Federal Circuit's conclusion that a water right does not include the right of diversion and storage has a superficial appeal but appears problematical on closer examination. Although diversion and storage are a means to an end rather than an end themselves, they are an essential and integral part of the process of providing water supplies for the benefit of the project customers. The storage of water that is available today but may not be available tomorrow would seem to be a prudent and necessary—and hence "beneficial"—use of the water. If a state authorizes a water project to divert and store water in its reservoir in order to meet its customers' future needs—which is the reason that water is diverted and stored—the state presumably determines that diversion and storage serve an essential rather than incidental project purpose, which means that the use must be beneficial rather than non-beneficial. Indeed, the state cannot approve any water use—whether for diversion, storage, release, actual use or other—unless it determines that the use is "beneficial" under California law. Cal. Water Code § 1240 (the appropriation of water "must be for some useful or beneficial purpose"). Thus, if California's water rights agency approves diversion and storage, it presumably determines that diversion and storage serve a "beneficial use" and thus are part of the water right.

The Federal Circuit's decision seemingly allows the United States to take water stored in public and private reservoirs throughout the nation in order to serve federal goals and objectives, such as those in the ESA, without having to pay for the water, as long as the United States does not prevent the project from meeting its customers' immediate needs. This is a very broad constitutional power, and it is not clear that the United States has this broad power under the Commerce Clause and Takings Clause of the Constitution. Perhaps this question may, someday, receive judicial scrutiny by a higher judicial body.

Do 'Background Principles' of State Law Preclude the Assertion of a Taking Claim?

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Supreme Court held that the government is not liable for an unconstitutional tak-

ing of property if it imposes a restriction on property use that is consistent with "background principles of the state's law of property and nuisance," such that the restriction "inhere[s] in the title itself." *Lucas*, 505 U.S. at 1027, 1029. In *Casitas*, the United States argued at the trial level that its restriction of Casitas' water right—which effectively required Casitas to allocate a portion of its water supply for the benefit of an endangered fish species—is consistent with "background principles" of California law, principally the public trust doctrine and the constitutional "reasonable and beneficial use" doctrine, and thus Casitas could not assert its taking claim. The trial court rejected the United States' argument, holding that the United States' restriction of Casitas' rights is not supported by these "background principles." Since the United States did not appeal this aspect of the trial court decision, the trial court's decision establishes a significant precedent concerning the "background principles" of California water law.

First, the trial court held that the United States' restriction of Casitas' rights is not supported by California's public trust doctrine. The court stated that the public trust doctrine, as described by the California Supreme Court in *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 433-434 (1983), requires a balancing of competing needs and uses dependent on a particular water supply, and does not require the protection of fish needs over other competing needs, such as Casitas' need to develop water supplies for agricultural and other purposes. *Casitas II*, 102 Fed. Cl. at 459. The public trust doctrine, the court stated:

> …is concerned not only with fish and other environmental values, but also with human navigation and commerce. *Id.* at 459.

Second, the trial court held that the United States' restriction of Casitas' rights is not supported by California's "reasonable and beneficial use" doctrine. This doctrine, the court stated, "requires a balancing and consideration of all interests," and does not necessarily require protection of fish over other beneficial uses of water. *Id.* at 459-460. As noted earlier, California's basic water law, as established in the California Constitution, is that a water right exists only to the extent that the water is put to "reasonable and beneficial use." Cal. Const., Art. X, § 2; *Joslin v. Marin Mun. Water Dist.*, 67 Cal.2d 132, 145 (1967). As the trial court explained, both the reasonable use doctrine and public trust doctrine require that consideration be given:

> …not only [to] relevant environmental concerns, but also [to] the beneficial uses served by Casitas's operations, the longevity and history of those operations, and the state policy favoring delivery and use of domestic water. 102 Fed. Cl. at 459.

The court held that both doctrines require a balancing of competing needs, and do not require protection of fish needs over consumptive or other kinds of needs.

Notably, the California Supreme Court has never conclusively established the relationship between the reasonable use and public trust doctrines, on the one hand, and the Takings Clause, on the other, in the context of regulation of water rights. The Court has held in some cases that a water right is a "vested" property right that is entitled to the full protection of the Takings Clause and the Due Process Clause. *E.g., Ivanhoe Irrig. Dist. v. All Parties*, 47 Cal.2d 597, 623 (1957). The Court has held in other cases that there is no "vested" right to "unreasonable use" of water, and that a water use may be "unreasonable" if it can be prohibited by an exercise of the state police power. *E.g., Joslin v. Marin Muni. Water Dist.*, 67 Cal.2d 132, 144-146 (1967). While the *Ivanhoe* line suggests that the Takings Clause significantly limits the state's authority to regulate water rights, the *Joslin* line suggests the opposite. The Federal Circuit and Court of Federal Claims in *Casitas* did not address this constitutional question, because the case did not involve state regulation of water rights. Both courts made clear, however, that—regardless of whether the Takings Clause limits *state* authority to regulate water rights—the Clause does limit *federal* regulation of such rights. Under the courts' decisions, regardless of whether the state has authority to restrict water rights by application of state law principles, such as the reasonable use and public trust doctrines, the federal government does not have equivalent authority to restrict water rights by application of these state law principles. Instead, the federal government must take the water right as it stands under state law, and cannot claim that it has the right to restrict the right simply because the state has the right to restrict it.

The Takings Clause thus applies differently to the federal government and the states concerning their authority to restrict water rights, by placing greater constraints on federal authority than state authority.

Conclusion and Implications

The Federal Circuit and Court of Federal Claims decisions in the *Casitas* litigation established several significant principles concerning the applicability of the Takings Clause in the water rights context. The Federal Circuit held that a water right is a compensable form of "property" under the Takings Clause, although the right is limited by the "beneficial use" standard. The Federal Circuit also held that the right to divert and store water in a reservoir, as opposed to the right to deliver water from the reservoir to project customers, are not a "beneficial use" and thus not part of the water user's "property" in water. The Court of Federal Claims held, in an earlier trial ruling that has precedential effect, that "background principles" of California water law do not establish a priority for fish over consumptive water uses, such as Casitas' need to develop water supplies for agricultural and urban uses.

The issues on which Casitas prevailed—concerning whether a water right is "property" and the "background principles" of California law—may be more consequential and have longer-lasting significance than the issue on which Casitas did *not* prevail, that is, whether diversion and storage are part of the "property" right. The United States, in restricting water rights in pursuing federal goals and objectives in the ESA and other statutes, more often restricts the right to *use* water than it restricts the right to *store* water. Thus, the Federal Circuit decision concerning the right of *use* may have longer-term significance than its decision concerning the right to *store*. Although Casitas may have lost its battle concerning its taking claim against the United States, Casitas may have advanced the position of those who wage continuing war to limit the United States' authority to restrict water rights in pursuit of federal goals and objectives. Regardless of how one views these battles and wars, they are part of the continuing, never-ending saga of western water law.

Roderick E. Walston is of counsel in Best Best & Krieger's litigation practice group in the firm's Walnut Creek office. He specializes in environmental law & natural resources, water law, and in appellate practice. During his long career in the California Attorney General's office, Mr. Walston litigated many of the State of California's most important natural resources and environmental cases, particularly at the appellate level. He has served as the top lawyer for the U.S. Department of the Interior, and as head of the California Attorney General's Public Rights Division, which handles all litigation in the natural resources, environmental and water law areas.

Mr. Walston has argued several cases in the U.S. Supreme Court.

EASTERN WATER NEWS

U.S. FISH AND WILDLIFE SERVICE ANNOUNCES FIVE-YEAR PLAN TO LIST HUNDREDS OF NEW ENDANGERED SPECIES UNDER THE FEDERAL ENDANGERED SPECIES ACT

The U.S. Fish and Wildlife Service (FWS) released a proposed work plan for erasing its decades-old backlog of listing decisions under the federal Endangered Species Act (ESA). The work plan implements a 2011 settlement of two lawsuits by conservation activists. The list of proposed actions would affect hundreds of species over the span of five years and has the potential to place significant limits on land use and development, particularly in some of California's most productive agricultural counties.

Regulatory Background

The FWS is the division within the Department of the Interior that is responsible for listing non-marine endangered or threatened species and critical habitat under the ESA. A decision to list a species as threatened or endangered triggers several protections, most notably prohibiting a "take" of the species. The term "take" is defined in the ESA as "harass, harm, pursue, hunt, shoot, wound, kill trap, capture, or collect, or to attempt to engage in any such conduct." A listing decision also prohibits interfering in vital breeding and behavioral activities or disturbing areas designated as critical habitat.

For projects with a federal component (for example, where a federal permit or funding is required), § 7 of the ESA requires that the federal agency consult with the FWS regarding what effect, if any, the project is likely to have on listed species. The product of such consultation is a Biological Opinion, which typically contains regulatory conditions that the FWS imposes on the project. The Biological Opinion may also allow a certain number of incidental "takes" of species, so long as regulatory conditions are met. For projects without a federal component, § 9 of the ESA prohibits take of listed fish and wildlife species, and the FWS sometimes provides protocols instructing the public about how to avoid a take of certain listed species where they exist. Section 9 also applies to plants, but applies only in regard to affecting plant species from areas under federal jurisdiction or in knowing violation of state law. 16 USC § 1538(a)(2)(B).

Economic impacts are excluded from Service decisions to list a species as threatened or endangered. The FWS may rely on economic factors to exclude certain areas from a critical habitat designation. However, if the FWS fails to exclude an economically important area from critical habitat, there may be no remedy available as several courts have ruled that a person cannot sue to challenge that omission.

A Backlog of Listing Petitions

By statute, the listing process is designed to take one to two years from the time the FWS receives the petition to when the FWS issues a final rule. In practice, however, the FWS has taken as long as several years to even initiate action on citizen petitions for listing species or critical habitat. Over the past two decades, such delays have resulted in a backlog of hundreds of candidates for listing. The backlog worsened between 2007 and 2011, when the FWS received an annual average of over 300 petitions for listing (compared with an annual average of 20 petitions before then).

After submitting hundreds of petitions for listing over the course of several years, conservation groups—led by Center for Biological Diversity and WildEarth Guardians—sued the Department of the Interior to force action on the backlogged petitions. (The suits were consolidated into a multi-district action styled *In re Endangered Species Act Section 4 Deadline Litigation*, Case No. 10-377 (D. D.C.).) The FWS settled with the conservation groups in 2011, agreeing to finally act on petitions for over 800 species by 2018. In accordance with the terms of that settlement, last month the FWS released a schedule for each required species or critical habitat listing decision. The work plan is available at: http://www.fws.gov/endangered/improving_ESA/listing_workplan_FY13-18.html.

A Significant Impact on California Landowners

Based on the species and proposed actions listed in the FWS' work plan, rural California communities are likely to bear some of the greatest impacts from FWS actions over the next five years. The work plan lists "packages" of species for each proposed decision, each of which can include several individual species. Cross-referencing the FWS' work plan with publicly available FWS data showing where the affected packages of species are believed to inhabit reveals that nearly every California county will be impacted by one or more new FWS designations under the Endangered Species Act. For example, just over the next two years, Fresno, Madera, and Ventura counties will each be affected by three listing decisions and/or critical habitat designations. Siskiyou and Riverside counties will each be affected by five such decisions during the same time period. Mendocino County will be affected by six. Statewide, the FWS has identified at least 34 new species groups that it proposes to list as threatened or endangered; 14 of these are plants.

Of course, the number of listing decisions, alone, is not necessarily indicative of their impact. The full impact of each FWS action in the work plan cannot be fully known until the FWS proposes and elaborates on its decision in the Federal Register. Indeed, California communities' experience with the threatened Valley Elderberry longhorn beetle (VELB) has shown that even one species designation can have serious logistical and economic consequences for projects and landowners. Nonetheless, the sheer number and geographic reach of these anticipated designations suggests that land use and development in California—in particular agriculture—are likely to face significant restrictions in the near future.

Conclusion and Implications

Census data and other reporting have revealed that California's rural communities have been some of the hardest hit by the recession. The fact that economic factors do not enter into species listing decisions means the new wildlife and plant protections will not be tempered by concern for their impacts on already economically stressed areas. Therefore, if landowners and public entities in affected counties want to attempt to blunt the effect of potential new listings, their only practical recourse is to keep abreast of the listing decisions affecting their region and participate in the listing process. Federal Register notices announcing the FWS' proposed listings or critical habitat designations will provide instructions for members of the public wishing to submit scientific studies and comments regarding the proposed rule, whether electronically or by mail. (Andrew Deeringer, Joe Schofield)

NENWS FROM THE WEST

This month's News from the West covers cases from California, Montana, and Utah. First, a California appellate court found an Environmental Impact Report (EIR) for a project to expand a college campus deficient because it failed to analyze any alternatives that would lessen the project's significant impacts on water supply. Next, the Montana Supreme Court held that the Department of Natural Resources and Conservation should have issued a beneficial use permit to a developer whose mitigation plan adequately offset the surface water depletion caused by groundwater pumping. Finally, a Utah District Court ruled that the state had met its burden to prove the elevation of Utah Lake by a preponderance of the evidence, thus establishing the boundary for a quiet title action.

California Appellate Court Finds EIR for Proposed Expansion of College Campus Inadequate for Failing to Discuss Project Alternatives That Reduce Significant Impacts on Water Supply

Habitat and Watershed Caretakers v. City of Santa Cruz, 213 Cal.App.4th 1277 (Cal.App. 2013).

Plaintiff Habitat and Watershed Caretakers brought suit challenging the EIR for a project to expand the University of California, Santa Cruz campus. The project was designed to extend University facilities beyond the City of Santa Cruz, with the city still providing water and sewer services. In order to supply the campus, however, the city would have to enlarge its water service area, which it could only

do by amending its sphere of influence. Any such amendment required approval from a local agency formation commission (LAFCO). In 2008, the Regents of the University of California promised to restrict enrollment and provide additional on-campus housing if the LAFCO approved the application for extension of its sphere of influence, and The Regents would be excused from the housing commitment if LAFCO denied the application. While that application was pending, the city approved an EIR for the project. Habitat and Watershed Caretakers challenged the EIR, claiming that the city had failed to consider any feasible alternatives that would lessen the significant impacts on water supply. The court agreed that the EIR was deficient in this area.

The California Environmental Quality Act (CEQA) requires that lead agencies analyze project alternatives that may feasibly reduce significant environmental impacts. The only significant impact the EIR identified for the project was to water supplies. The court found that the city did not have to establish a certain or even "likely" source of water in the EIR, but the city was required to identify and discuss any potentially feasible alternatives that could reduce the project's significant impact to water supplies. In the EIR, the city analyzed only two alternatives to the project, a no project alternative and a modified sphere of influence, the latter of which would not reduce the significant impacts to water supplies.

The EIR also identified two other potential alternatives: (1) the reduction of the development of the project area and (2) limited water service to the campus. The EIR did not analyze these alternatives, however, because the city concluded they would not meet project objectives. Habitat and Watershed Caretakers argued that the city failure to fully analyze both of these alternatives in the EIR violated CEQA. The court disagreed that the city had to consider the first alternative because the agency first had to approve the application before the city could pursue the project. Because the agency could not impose any conditions that would directly restrict the development of the campus, reducing development was not a feasible option. The court agreed with Habitat and Watershed Caretakers as to the limited-water alternative, however, and found that it should have been analyzed in the EIR. The city had rejected additional analysis of the limited-water alternative on the grounds that it would not meet the project objective of providing water service and holding the Regents to their housing commitment, but the court disagreed. The court found that a limited-water alternative would partially meet the project objectives by allowing some development of the campus and conditioning the provision of service on available water supply. Although the agency could not directly limit development, it could condition its approval on restricting water service to the campus. For example, the agency could impose a water supply ceiling or require that the city establish "decreased demand" through conservation, increased supply, or use of a new water source. The city could not dismiss the option just because it would somewhat impede the project's objectives. Based on these facts, the court concluded that the EIR was insufficient for failing to analyze this feasible alternative.

Montana Supreme Court Finds Agency Should Have Issued Beneficial Use Permit Based on Developer's Plan to Mitigate Surface Water Depletion and Adverse Effects

Bostwick Properties v. Montana Dept. of Natural Resources and Conservation, 369 Mont. 150 (MT. 2013).

In *Bostwick*, the Montana Supreme Court reviewed the denial of a beneficial use permit that would have allowed a property developer to pump water from a new well for its subdivision in Gallatin County, Montana. However, the area in question is part of a closed basin, with groundwater providing the base flows to the nearby Gallatin River. A large well could deplete these flows, shorting senior water rights. To prevent this from happening, Montana law requires that new applicants prove that their intended use will result in "no net depletion" of surface water. Even if the proposed groundwater usage would result in net depletion of surface water, however, the Department of Natural Resources and Conservation (Department) must still approve the application if the applicant develops a plan that fully mitigates the depletion.

The facts demonstrated that the proposed new well would result in a small net depletion of the Gallatin River. The Department argued that even a minimal depletion such as would result from the developer's well would adversely affect senior appropriators, and the court agreed that any depletion, however slight, would cause an adverse impact. However, the developer also had a mitigation plan and had obtained a water right above the intersection of Interstate 90

and the Gallatin River to mitigate the subdivision's planned water usage. The mitigation water would be withdrawn upstream of the crossing and would flow into the Canyon Ferry Dam for storage, protecting all downstream users, except, potentially, for one. With the acquired water right, the dam guaranteed sufficient flow to fulfill the rights of all appropriators during irrigation season. The only party whose water rights would potentially be threatened during the non-irrigation season had entered a settlement acknowledging that it would suffer no adverse effects under the plan. For these reasons, the Supreme Court found that the developer's mitigation plan offset the well's effects on the senior appropriators, and, on that basis, found that the Department had improperly denied the water use permit.

District Court in Utah Finds State Proved Utah Lake Boundary Elevation by a Preponderance of the Evidence

Utah v. U.S., ___F.Supp.2d___, Case No. 2:2013-cv-00315 (D. Utah Mar. 15, 2013).

As part of a quiet title action between the state of Utah and several landowners, a federal District Court in Utah had to determine the lake-wide boundary elevation for Utah Lake. This required the parties to provide evidence of their claimed boundary based on the historic use of land. The parties agreed that the controlling test put the burden on the plaintiff, the state, to prove its claimed boundary by a preponderance of the evidence. To meet this burden, the state must demonstrate the historic water levels based on the "vegetative boundary" or the water mark impressed upon soil over several years by certain agricultural plants. Below this boundary, vegetation could not grow.

In 2006, a judge found that the state had presented substantial evidence of monthly lake levels and the water's effects on soil. The judge had rejected the landowners' evidence of 1930 water levels, finding them too low and remote in time to show the "statehood-era" levels required under the test. However, the judge was not able to make a ruling before his death. In 2010, the parties asked the court to delay ruling while they attempted to settle the disputes. After three years, the parties resumed trial before another judge.

The state relied upon the same evidence presented at the initial trial. According to the state, the ground suitable for agricultural cultivation extended no lower than 0.2 feet below the elevation set by compromise in 1885. The state had even agreed to use a lower level for the 1885 compromise elevation, requesting a boundary within 4488.95 feet above sea level. The property owners disagreed with this level, claiming that they should have the benefit of using the lowest elevation of the water's edge during those years. The court found that the test required evidence of *averages* over several years, not the lowest monthly reading. Proof that land was used "to the water's edge" could not be used to determine the boundary, especially when the state presented far more persuasive testimony showing significant monthly fluctuations in lake levels. Based on the comprehensive and overwhelming evidence provided by the state, the court concluded that the lake-wide boundary should be set at the state's requested level and applied to boundary to all parcels still in question in the case. (Jill Willis)

JUDICIAL DEVELOPMENTS

D.C. CIRCUIT UPHOLDS U.S. FISH AND WILDLIFE'S LISTING OF THE POLAR BEAR AS 'THREATENED'

In re Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation, ___F.3d___, Case No. 11-5219 (D.C. Cir Mar. 1, 2013).

The U.S. Court of Appeals for the D.C. Circuit unanimously rejected challenges from industry and environmental groups and the State of Alaska to the U.S. Fish and Wildlife Service's (FWS) decision to list the polar as a "threatened" species under the federal Endangered Species Act (ESA). The court stated that the task before it was a "narrow" one: to determine whether the Listing Rule is the result of reasoned decisionmaking in light of the record. Applying a highly deferential standard of review, the court answered in the affirmative.

The court found that the underlying premises for FWS' determination were adequately explained and supported by a wide majority of scientific experts. In important part, the appellants did not point to any scientific evidence that the FWS failed to consider. For these reasons, the court concluded that it was bound to uphold the FWS' determination.

Background

In February 2005, the Center for Biological Diversity petitioned the Secretary of the Interior and FWS to list the polar bear under the ESA because of global climate change effects on bear habitat. Under the ESA, a "threatened" species is defined as "any species, which is likely to become an endangered species within the foreseeable future." According to FWS, the total bear population worldwide is estimated to be 20,000 to 25,000.

After a three-year rulemaking process, FWS determined in May 2008 that the polar was threatened, but not endangered. FWS concluded that because of global climate change effects, the polar bear is likely to become an endangered species and face the threat of extinction in the foreseeable future. FWS cited three main findings to support its statutory listing: (1) polar bears rely on sea ice in the Arctic for their survival, (2) sea ice is declining, and (3) climate changes have and will diminish Arctic sea ice. The Listing Rule anticipates that the projected loss of sea ice will affect the abundance of ice seals, the bears' primary prey base. A decrease in sea ice would also affect traditional denning areas according to the rule. FWS' determination was supported by a number of published studies and reports, including those of the Intergovernmental Panel of Climate Change.

Publication of the Listing Rule was met by nearly a dozen legal challenges. Industry groups, environmental organizations, and states challenged the Listing Rule as either overly or insufficiently protective. All challenges were consolidated into a multidistrict litigation before the D.C. District Court. The challengers argued the listing was arbitrary and capricious under the Administrative Procedure Act and that FWS' action should be reversed. The litigants filed cross-motions for summary judgment. The District Court granted summary judgment in favor of FWS, concluding that FWS' listing decision was not arbitrary and capricious.

The D.C. Circuit's Ruling

On appeal, the appellants claimed that FWS misapplied and misinterpreted the record before it, and thus failed to adequately support its listing determination. The three main findings serving the basis for the Listing Rule were not in dispute, however. The court rejected all of the appellants' claims.

The appellants argued that FWS inadequately explained how the predicted decrease in habitat would likely lead to population decline causing the species to become endangered. The court rejected this claim, finding that FWS had paved a "discernible path" of decisionmaking. FWS had considered and explained how the loss of sea ice harms the polar bear and that numerous experts anticipated that sea ice loss in the Artic due to climate changes will dangerously affect reproduction.

The appellants next took issue with FWS' reliance

on polar bear population models developed by the U.S. Geological Survey. The appellants inconsistently argued that FWS erred in relying on the models, yet at the same time, that FWS did not rely on the models enough. The court sided with FWS and found the agency's narrow reliance on the models—which was for the limited purpose of confirming the general direction and magnitude of population trends—was not arbitrary and capricious.

Next, the appellants contended that FWS failed to justify its definition of "foreseeable" as a 45-year period. In particular, the appellants disagreed with FWS' case-by-case assessment of what constitutes the "foreseeable" future for purposes of determining whether a species is threatened. The court disagreed and found FWS' definition was reasonable and based on the conclusions of widely accepted climate models.

The court also rejected the appellants' remaining claims. The court did not find that FWS failed to properly consider conservation efforts of other states or foreign nations—here, Canada's—in determining whether to list the polar bear. The court was further unconvinced that FWS should have divided the species into Distinct Population Segments (DPS) for the purposes of the Listing Rule. The court also rejected the State of Alaska's separate claim that FWS failed to sufficiently justify why FWS did not adopt regulations consistent with the state's comments as required under ESA § 4(i). The court found that FWS' 45-page letter in response to Alaska's comment letter was sufficient. Section 4(i), according to the court, is meant to preserve a state's ability to air its concerns and not to ensure that the state will be satisfied with the agency's response.

Conclusion and Implications

Ultimately, the D.C. Circuit reaffirmed the U.S. District Court's conclusion that appellants' challenges "amount to nothing more than competing views about policy and science." It was significant, in the opinion of the court that the appellants neither pointed to flaws in FWS' reasoning nor asserted that FWS failed to consider any data or studies.

Prior to the court's opinion, on February 20, 2013, FWS reissued its ESA § 4(d) rule, which reinstated the regulatory parameters for the polar bear under its previous 2008 rule, which had been legally challenged. Under the 4(d) rule, an activity that is authorized or exempted under the Marine Mammal Protection Act is not prohibited by the ESA's take prohibition. The 4(d) rule further provides that any incidental take of polar bears due to activities occurring outside of the species' current range is not prohibited under the ESA. Because of the reissued 4(d) rule, some wonder what benefit the Listing Rule offers the polar bear. Regardless, the court's ruling is a favorable decision for agencies that base administrative decisions on scientific data and modeling as a matter of course. A copy of the court's ruling may be viewed online at: http://www.cadc.uscourts.gov/internet/opinions.nsf/27B0BE9562811E2485257B2100550BFF/$file/11-5219.pdf (Jeannie Lee)

EIGHTH CIRCUIT'S DECISION IN *IOWA LEAGUE OF CITIES* WILL PUT SOME EPA LETTERS UNDER APPELLATE REVIEW SCRUTINY

Iowa League of Cities v. U.S. Environmental Protection Agency,
___F.3d___, Case No. 11-3412 (8th Cir. Mar. 25, 2013).

The Eighth Circuit Court of Appeals has invalidated pronouncements of the U.S. Environmental Protection Agency (EPA) made in two letters to Iowa Senator Charles Grassley on the grounds that the letters constituted a promulgation of a "legislative" type rule, that the rules announced exceeded Agency authority under the Clean Water Act, and that the method of promulgation evaded the required notice and comment under the Administrative Procedure Act. This holding will have importance beyond the issues of water law it covers, because anyone involved for very long with federal environmental or other subject area policies knows that the interface between a federal agency and Congress is important and active.

Background

The Iowa cities were involved in the treatment of municipal and other sewage on a daily basis. They were concerned that the EPA was imposing restrictions on their permits and internal treatment plant management that were inconsistent with the actual rules. EPA was allegedly doing this by means of its ability to discourage certain practices through supposed policy or best practices pronouncements and through its programmatic and financial influence over the Iowa environmental agency charged with running the State water pollution program. The controversy involves two issues: the use of mixing zones for biological contaminants in Clean Water Act National Pollutant Discharge Elimination System (NPDES) permit terms, and the ability of treatment plant operators to "blend" treatment streams, *i.e.* to use an internal bypass of an otherwise overloaded biological (or other) system and apply alternative treatment of some wastewater that is of high volume during wet weather events. The alternative technology of popular choice was an ACTIFLO system that would apply secondary treatment to the internally bypassed waters during wet weather flows.

The Letters…Back and Forth

The League attempted to bring the current controversy before the Court of Appeals in an earlier petition filed in 2010. However, that petition, based on some internal EPA documents and a federal register document, was dismissed as not being the formal promulgation of a rule from which an appeal could be taken under the Clean Water Act. In 2011, the League enlisted the attention of Iowa Senator Charles Grassley, who wrote a letter or letters of inquiry to the EPA about the controversy. EPA responded to the Senator in two letters, dated in June and September 2011, respectively.

The June 2011 letter, after acknowledging that the codified rules allow mixing zones, went on to whittle that idea away, especially for biological contamination. As the court explained:

Citing a 2008 memorandum from the Director of the EPA's Office of Science and Technology to a regional EPA director (King memorandum), however, the June 2011 letter then recites "the EPA's long-standing policy" that all bacteria mixing zones in waters designated for "primary contact recreation" carry potential health risks and flatly states that they "should not be permitted." The letter further acknowledges that the EPA "does not have additional regulations specific to mixing zones," but it then refers the reader to the additional "recommendations regarding the use of mixing zones" in policy guidance such as the Handbook. The Handbook encourages states to incorporate a "definitive statement" into their water quality standards regarding "whether or not mixing zones are allowed" and, if they are, to "utilize a holistic approach to determine whether a mixing zone is tolerable." Ch. 5.1, 5.1.1. The Handbook cautions, however, that mixing zones must be utilized in ways that "ensure . . . there are no significant health risks, considering likely pathways of exposure." Ch. 5.1. Additionally, mixing zones "should not be permitted where they may endanger critical areas," such as "recreational areas." Id. From the League's perspective, states are able to approve bacteria mixing zones, even in waters designated as "primary contact recreation," so long as site-specific factors create scenarios in which there are no health risks and recreational areas are not endangered. The EPA

argues that the June 2011 letter is consistent with the Handbook, which explicitly envisioned limitations on mixing zones in recreational areas.

The Court of Appeals' Decision

With respect to the subject of blending within a treatment works, the Eighth Circuit Court of Appeals details the history of EPA's vacillation on the subject of what is or is not an illegal bypass. In its September 2011 letter to Senator Grassley, the EPA stated that internal bypass and use of ACTIFLO type non-biologic secondary treatment could only occur when there was not a feasible alternative, i.e. only in high water volume wet weather events.

The court plainly grasped the import of the EPA letters as stating the effective scheme of regulation to be other than what was in the codified rules. It nevertheless proceeded with a very careful and stepwise discussion of whether the letters to Senator Grassley were susceptible to challenge via the Clean Water Act or the Administrative Procedure Act (APA). Its analysis is worth reading for the explication of what is or is not a "legislative" type rule, as opposed to non-reviewable interpretation or guidance. It explained:

> We are persuaded that it would be more appropriate to interpret 'promulgating' to include agency actions that are 'functionally similar' to a formal promulgation. *See*, Modine *Mfg. Corp. v. Kay*, 791 F.2d 267, 271 (3rd Cir. 1986) (finding jurisdiction to review directly 'the agency's interpretation of pretreatment standards applicable to indirect dischargers' because they constituted an action 'promulgating any effluent . . . pretreatment standard' under CWA section 509(b)(1)(C)); *see also*, *NRDC v. EPA*, 673 F.2d 400, 405 (D.C. Cir. 1982)…Our decision . . . follows the lead of the Supreme Court in according section 509(b)(1) a practical rather than a cramped construction….

Conclusion and Implications

Utilizing its power to vacate rules that are promulgated without adherence to required notice and hearing procedure, the court invalidated the pronouncements against use of mixing zones or internal blending to the extent they are not prohibited by existing codified regulations. They were cautious in so doing, as the court went through an analysis of the ripeness of the issues and the question of standing and justiciability, which are not discussed here since they reach beyond the purpose of this water law article.

If this decision stands, it broadens the practical avenues of relief from overbearing agency action. Overbearing action may occur through the agency's power to dictate interpretations of otherwise unclear rules, or to limit the application of perfectly clear rules more than the rules allow. Certainly, only occasionally will a letter to a Congressperson trigger review rights. However, given the complexity of the federal laws on subjects such as air and water pollution, this holding of the Eighth Circuit is helpful to the fairness of the overall regulatory scheme. (Harvey Sheldon)

FIRST CIRCUIT HOLDS PLAINTIFFS' PRE-SUIT NOTICE MET THE CLEAN WATER ACT'S 'REASONABLY SPECIFIC' REQUIREMENT

Paolino v. JF Realty, LLC, ___F.3d___, Case No. 12-2031 (1st Cir. Mar. 13, 2013).

Prior to filing a complaint alleging Clean Water Act, (CWA) violations, plaintiffs served all relevant parties with its 60-day Notice of Intent to Sue. Defendants filed a timely motion to dismiss the complaint arguing that plaintiffs failed to describe the alleged CWA violations with the specificity required under 40 C.F.R. § 135.3(a), and that plaintiffs' service on one of the required parties was deficient; this service was not the primary issue on appeal. The lower court granted defendant's motion to dismiss with prejudice based upon plaintiffs' previous failures to comply with CWA's notice requirements. Plaintiffs filed a timely appeal and the Court of Appeals considered the primary issue of whether the lower court erred in finding that the contents of plaintiffs' pre-suit notice were sufficiently specific to satisfy the CWA's implementing regulations. The court reversed the lower court holding that plaintiffs' notice served the supplementary role Congress envisioned for citizen enforcement actions—providing the defendants with sufficient information regarding the type, mechanism, and date[s] of discharge to place defendants in the position to remedy the violations alleged.

Background

Plaintiffs own a five-acre property that is downhill from and abuts defendants' larger thirty-nine-acre parcel. Since 1984, defendant Joseph Ferreira used or permitted others to use the property as an automobile salvage and recycling facility. At the time of the complaint, there were some 2,000 automobiles on defendants' property in various stages of recycling.

On October 7, 2011, 90-days before filing their complaint, plaintiffs served notice of the alleged violations on all relevant parties, including each of the defendants. The notice was 15 pages in long, and incorporated by reference an additional 15-page report prepared by an environmental consulting firm retained on plaintiffs' behalf.

Plaintiffs' notice described the mechanisms through which they alleged defendants' property was discharging pollutants into navigable waters. Specifically:

> ...in 1994 defendant Ferreira relocated a drainage ditch from the Property onto the plaintiffs' land, creating a 'Intermittent Stream.' This Intermittent Stream flows through the plaintiffs' property into the Curran Brook, which eventually discharges into the Robin Hollow Reservoir—a source of drinking water for the City of Pawtucket, Rhode Island.

Plaintiffs' notice also alleged that defendants':

> …..use of the Intermittent Stream to drain a contaminated pond on the rear of the Property and to divert otherwise hazardous storm water runoff from the Property into the pathway leading to the Reservoir, was the mechanism for contamination.

The Supreme Court explained that the pre-suit notice requirements serve two purposes, each tied to the supplementary role Congress envisioned for citizen enforcement actions. *Gwaltney of Smithfiled, Ltd. v. Chesapeake Bay Foundation Inc.*, 484 U.S. 49 (1987):

> First, pre-suit notice allows federal and state agencies to initiate their own enforcement action against an alleged violator, obviating the need for a citizen suit...Similarly, the second purpose of notice 'is to give [the alleged violator] an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit. *Id.* at 59-60.

Congress did not define the factors that would define a sufficient pre-suit notice, entrusting this task to the U.S. Environmental Protection Agency, (EPA). 33 U.S.C. § 1365(b). Pursuant to Congressional directive, EPA's implementing regulations, 40 C.F.R. § 135.3 requires that pre-suit notice:

> …shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violat-

> ed, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.

Although the sufficiency of a pre-suit notice is a matter of first impression in the First Circuit, sister jurisdictions have agreed that the key language in § 135.3(a) is whether:

> …the notice's contents place the defendant in a position *to remedy* the violations alleged. *Id.*, citing to S.F. *BayKeeper, Inc. v. Tosco Corp.*, 309 F.3d 1153, 1158 (9th Cir. 2002)...notice is sufficient is it is specific enough to 'give the accused company the opportunity to correct the problem.' (Quoting *Atl. States Legal Found, Inc. . Stroh Die Casting Co.*, 116 F.3d 814, 819 (7th cir. 1997).

The Court of Appeals' Decision

Agreeing with its sister circuits, the First Circuit held that:

> ...the adequacy of the information contained in pre-suit notice will depend upon, inter alia, the nature of the purported violations, the prior regulatory history of the site, and the actions or inactions of the particular defendants.

Here, for example, defendants' alleged violations concern the unlawful discharge of pollutants, thereby requiring plaintiffs to provide notice "identifying a particular pollutant to withstand a sufficiency challenge."

Defendants challenged plaintiffs' notice on an "omnibus" basis, asserting that the notice did not contain sufficient information to:

> …identify: (1) the specific standard or limitation at issue, (2) the activity alleged to have caused a violation of that standard or limitation, and (3) the particular defendant responsible for that violative activity.

The lower court granted defendants' motion to dismiss on the first ground, holding that the notice "fail[ed] to provide sufficient specific information for the recipients to identify which CWA standard is being violated."

Defendants were not arguing the appropriate legal standard to determine the sufficiency of a CWA notice. Congress did not intend that implementing regulations:

> …require notice that places impossible or unnecessary burdens on citizens but rather should be confined to requiring information necessary to give a clear indication of the citizens' intent. *Id.*, quoting from S. Rep. No. 92-413, at 80 (1971).

The CWA does not require, therefore, a citizen plaintiff to "list every specific aspect or detail of every violation," or "describe every ramification of a violation." *Id.*, quoting from Pub. Interest *Research Grp. of N.J., Inc. v. Hercules, Inc.*, (Hercules), 50 F.3d 1239, 1248 (3rd Cir. 1995).

> This is so because, 'in investigating one aspect' of an alleged violation, 'the other aspects of that violation ...will of necessity come under scrutiny' by the putative defendant. *Id.*, quoting Hercules.

All that is required of a noticing party, therefore, is to provide "reasonable specificity." Plaintiffs' notice met these requirements. The notice, on a bare level, was sufficient to allow defendants to identify and remedy several of the alleged CWA violations. But more so, the notice goes into some detail to address the mechanisms through which the Property is continually discharging pollutants into United States waters—continual discharge via the Intermittent Stream, the Curran Brook, and the Robin Hollow Reservoir. The notice also contains a three-page list of individual dates, from November 2002 through September 2011, on which sampling or observations detected hazardous materials on the Property or in its runoff. For instance, the notice identifies the results of water sampling taken on March 11, 2004, in which high levels of MTBE were detected:

> From this information alone, defendants can identify the pollutant at issue [MTBE], the pur-

ported standard under Rhode Island law (zero micrograms per liter), and the alleged violation (an amount of MTBE in excess of 0 ug/l).

In concluding that the notice was sufficiently specific, the District Court noted that:

> …not one of the listed items identifies 'the specific standard [or] limitation' of the CWA that has allegedly been violated...But given the other information which was provided, 40 C.F.R. § 135.3(a) did not require such identification. The information contained in the list permitted the defendants to identify these standards themselves and to remedy the alleged violations if accurate. Id., citation omitted.

Conclusion and Implications

The First Circuit held that the notice had to provide enough information for the defendants to find out for themselves what the alleged CWA violations were. The court ruled that plaintiffs were not obligated to detail every violation at length. "The information in plaintiffs' Oct. 7 pre-suit notice was at least adequate to allow the defendants to identify and remedy several of the alleged CWA violations," Chief Judge Sandra L. Lynch wrote in the opinion:

> At the outset of the notice, plaintiffs restate the basic allegations in the complaint, namely that defendants are in continuing violations of CWA because their [pollutant discharge] permit is not in the name of the property's current owner and the property is continually discharging pollutants into United States waters.

Some could argue that this decision compromised the CWA's notice requirements. (Thierry Montoya)

DISTRICT COURT FINDS RELEASE OF PCBS FROM GENERAL ELECTRIC'S TRANSFORMERS EXPOSED COMPANY TO CERCLA OPERATOR LIABILITY

American Premier Underwriters, Inc. v. General Electric Company, ___F.Supp.2d___, Case No. 1:05cv437 (S.D. Ohio Mar. 15, 2013).

Plaintiff American Premier Underwriters (APU), the successor to Penn Central Company, filed a action under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) against General Electric, (GE), arising out of GE's manufacture of transformers used on Penn Central's rail cars at four rail yards in the 1970s. APU alleged that the GE transformers contaminated the rail yards by leaking PCBs. GE filed a Motion for Summary Judgment on the merits alleging that: (i) it was entitled to summary judgment on the issue of whether GE is an "arranger" or "operator" under CERCLA; (ii) APU's recovery from collateral sources barred APU's claims for contractual indemnification; and (iii) APU's state-law tort and statutory claims were preempted by the Locomotive Inspection Act. The U.S. District Court for the Southern District of Ohio granted GE's motion as to the issue of whether GE was an arranger under CERCLA and on preemption grounds, but denied the motion as to GE's operator liability status under CERCLA, and on the allocation issue.

Background

On the issue of GE's arranger liability, the decision just scantly notes that the court applied the legal standards set forth by the Supreme Court in *Burlington N. & Santa Fe Ry. Co. v. U.S.*, 556 U.S. 599 (2009). A further analysis of arranger liability is useful.

§ 107(a) (3) of CERCLA, 42 U.S.C. § 9607(a)(3), provides that arranger liability arises when:

> …any person who by contract, agreement, or otherwise arranged for disposal or treatment ... of hazardous substances owned or possessed by

> such person, by any other party or entity, at any facility ... owned or operated by another party or entity and containing such hazardous substances. 42 U.S.C. § 9607(a)(3).

While the term "arranged for" is not defined in CERCLA, courts have analyzed the concept. For example, one court determined that the issues involved in determining arranger liability under CERCLA are distinct from those involved in determining owner or operator liability. *Basic Management Inc. v. U.S.*, 569 F.Supp.2d 1106, 1116 (D. Nev. 2008). Indeed, arranger liability:

> …requires active involvement in the arrangements of disposal of hazardous substances. However, control is not a necessary factor in every arranger case. The court must consider the totality of the circumstances ... to determine whether the facts fit within CERCLA's remedial scheme.... [T]here must be a 'nexus, that allows one to be an arranger. Id., quoting *Coeur D'Alene Tribe v. Asarco, Inc.*, 280 F.Supp.2d 1094, 1130-31 (D. Idaho 2003).

There are two lines of cases in the area of direct arranger liability: (1) "traditional" arranger liability cases in which "the sole purpose of the transaction is to arrange for the treatment or disposal of the hazardous wastes," *U.S. v. Shell Oil.* Co, 294 F.3d 1045, 1054 (9th Cir. 2002) (citations omitted), and (2) "broader" arranger liability, in which "control is a crucial element of the determination of whether a party is an arranger." With respect to the broader arranger liability, the court noted that: "[t]here is no bright-line test, either in the statute or in the case law, for a broad theory of arranger liability under § 9607(a)(3)." After evaluating the cases identified by the *Shell Oil* court, the applicable standard was identified by one district court as follows:

> Arranger liability requires a person to: (1) own or possess waste and arrange for its disposal; or (2) have the authority to control and to exercise some actual control over the disposal of waste. *Coeur D'Alene Tribe*, 2890 F.Supp.2d at 1132.

In *Burlington Northern*, supra, the Supreme Court stated that interpreting the language of CERCLA required giving it its "ordinary meaning" and concluded that:

> …under the plain language of the statute, an entity may qualify as an arranger under § 9607(a)(3) when it takes intentional steps to dispose of a hazardous substance. Id. at 1879.

The liability standard for determining whether a parent corporation is liable as an operator is significantly different from what is considered when applying arranger liability. The critical distinction between operator liability under § 9607(a)(2) and arranger liability under § 9607(a)(3) for purposes of this parent corporation liability analysis, is that subsection (a)(2) requires only that the person operate the facility where disposal occurs at the time of the disposal; by contrast, subsection (a)(3) requires that the person arrange for the disposal, treatment, or transportation for disposal or treatment. Operator liability, therefore, only requires evidence that a parent corporation had the authority to control, and exercised actual or substantial control, over the operations of its subsidiary.

The District Court's Decision

In previously ruling on APU's Motion for Partial Summary Judgment on the issue of GE's arranger liability, the court held that GE's arranger liability was disputed—lack of sufficient evidence that GE arranged for the disposal of PCBs. Here, the court applied the same principle to grant GE it's motion as to arranger liability, but also held that there were triable issues of material fact as to whether GE was an operator.

Collateral Recoveries

Regarding APU's collateral recoveries, those did not constitute double recovery:

> The parties are in agreement that the collateral source rule does not apply to CERCLA claims or contractual indemnification claims. The parties also agree that APU is not permitted to recover the same response costs and damages twice: once under its CERCLA claim from GE, and twice from its insurers...GE argues that APU seeks response costs from GE in the amount of

> $50,425,074, even though APU has recovered $59,941,977 from its insurers in settlement of litigation for response costs.

However, there were undisputed material facts concerning whether APU's recovery includes response costs for sites other than the sites at issue in this case.

The Sixth Circuit has held that:

> …recovery of response costs by a private party under CERCLA is a two-step process. Initially, a plaintiff must prove that the defendant is liable under CERCLA. Once that is accomplished, the defendant's share of liability is apportioned in an equitable manner. *Kalamazoo River Study Group v. Menasha Corp.*, 228 F.3d 648, 656-57 (6th Cir.2000).

The District Court denied GE's motion to the extent that it sought to allocate the amounts APU received from its insurers.

State Law Claims

The court addressed GE's argument that APU's state-law tort claims and statutory claims were preempted by the Locomotive Inspection Act, (LIA). The Supreme Court addressed this issue in *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 611, holding that the LIA preempted:

> …the entire field of regulating locomotive equipment. The Plaintiffs attempted to argue that their claims did not fall within the LIA's pre-empted field because the claims arose out of the repair and maintenance of locomotives, not the use of locomotives on a railroad line.

However, the *Napier*, infra, case rejected that argument holding that:

> ..the court did not distinguish between hazards arising from repair and maintenance as opposed to those arising from use on the line.

APU's claims of defective transformer design and a failure to warn are similarly preempted under *Napier*, infra.

Conclusion and Implications

APU filed its action against GE on June 24, 2005. This case has since generated considerable Law and Motion with some useful rulings, including the court's analysis of cost recovery statute of limitations issues. (Thierry Montoya)

DISTRICT COURT HOLDS '9-11' CLAIMS ARE SUBJECT TO DISMISSAL UNDER THE 'ACT OF WAR' DEFENSE TO CERCLA LIABILITY

In re September 11 Litigation: *Cedar & Washington Associates v. The Port Authority of New York and New Jersey, et al.*, ___F.Supp.2d___, Case Nos. 21 MC 101 (AKH), 08 Civ. 9146 (AKH) (S.D. NY Mar. 20, 2013).

On remand from the U.S. Court of Appeals for the Second Circuit, the U.S. District Court for the Southern District of New York has held that the claims of plaintiff Cedar & Washington Associates, LLC under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) for expenses incurred to remove pulverized dust from its building after the collapse of World Trade Center towers on the September 11, 2001 (World Trade Center attacks) are subject to dismissal under CERCLA's "act of war" defense. In an initial decision issued in September 2010, the District Court held that plaintiff's complaint against various entities, including the airlines involved and companies that owned, leased or otherwise were affiliated with the World Trade Center (collectively, defendants) should be dismissed because: (1) the six-year statute of limitations had expired; (2) there was no "release" caused or permitted by the defendants as required by CERCLA § 101(22); and (3) the materials that constituted the World Trade Center were not "solid waste or hazardous waste." After the plaintiff appealed, the court of appeals remanded the case to the District Court to determine, in the first instance, the "threshold question" of whether the attack on the World Trade Center was an "act-of-war" within the meaning

of CERCLA. Addressing this issue on remand, the District Court holds that the act-of-war exception to CERCLA liability is a defense to plaintiff's claims and provides an additional basis to dismiss plaintiff's complaint.

Background

CERCLA imposes strict liability for releases of hazardous substances from a facility on various parties, including current owners and operators, past owners and operators, those who arranged for the disposal of hazardous substances and those who transported the hazardous substances for disposal. 42 U.S.C. § 9607(a). Such parties are liable "for necessary costs of response incurred by any other person consistent with the national contingency plan." *Id.* at § 9607(a)(4)(B). An otherwise liable party is not liable for such costs if it establishes by a preponderance of evidence that the "release of a hazardous substances and the damages resulting therefrom were caused solely by . . . an act of war." *Id.* at §9607(b).

The District Court's Opinion

The court began its analysis of whether the defendants were exempted from liability under CERCLA's act-of-war defense with a review the events of September 11, adopting for purposes of the issue before it, the facts set forth in *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* (2004). The court reviewed the history of "al Qaeda" as an extra-national terrorist organization founded and led by Osama Bin Laden and cleric Abdul Aziz and comprised of the mujahedeen fighters to continue the "holy war" which started during the Soviet occupation of Afghanistan. The court noted that from the beginning Bin Laden focused on attacking the United States. The initial planning for the 9/11 attacks began in late 1998 or early 1999. Terrorists were trained to become pilots to fly the planes and to storm the cockpits and control the passengers. Nineteen men were divided into four teams to hijack and fly Boeing 757 and 767 super-jets into the World Trade Center and the Pentagon. The goal of the attacks was to kill hundreds of people, embarrass the United States, and paralyze its leadership.

The planned attacks unfolded on the morning of September 11th, with American Airlines flight 11 crashing into the North Tower of the World Trade Center and United flight 175 crashing into the South Tower of the World Trade Center. Approximately 2,600 people were killed in the World Trade Center attacks. By that afternoon, Al Qaeda was considered the primary suspect, and President Bush informed his advisors: "We're at war." Three days later, Congress passed the Authorization for Use of Military Force (AUMF), which authorized the President to use force against those who committed or aided in the terrorist attacks. By early December, all of Afghanistan's major cities were under U.S. coalition control and by March 2002, Afghan and U.S. and allied forces were engaged in combat with Al Qaeda. To date, over 66,000 U.S. soldiers have been deployed in Afghanistan and over 2,000 have been killed.

Turning to the language of the statute, the court noted that CERCLA, which was enacted to deal with "the serious environmental and health risks posed by industrial pollution," does not define an "act of war." The plaintiff argued the prior refusal of Congress to amend CERCLA to add "acts of terrorism" as a defense to CERCLA liability supported the plaintiff's contention that the defendants should not be permitted to escape liability for the World Trade Center attacks. The court concluded, however, that it was required to consider whether acts of terror could constitute an act of war.

Applicable Case Law

In reviewing applicable case law, the court found that CERCLA's act-of-war defense had been infrequently raised and never successfully asserted. The court found instructive, however, the one case, *United States v. Shell Oil Co.*, 294 F.3d 1045 (9th Cir. 2002), in which the act-of-war defense was discussed in detail. *Shell Oil Co.* involved oil companies engaged in the production of high-octane aviation fuel during World War II that dumped acid waste byproducts at a site in Fullerton, California. When the federal government sought to recover the cost of cleaning up those wastes, the companies argued that the dumping "occurred in response to an 'act of war' against the United States." The Ninth Circuit affirmed the lower court's rejection of the act-of-war defense, explaining that industrial activities collateral to the war effort were not caused by "acts of war" and that, even if the federal government's involvement in wartime refin-

ing activities could be considered and "act of war," the companies failed to prove that the government's involvement was the sole cause of the pollution. The court distinguished the case here from *Shell* Oil, explaining that, unlike *Shell Oil*, the claims before it did not arise from consequences of a response to an act of war. Rather, plaintiff's claims arose directly from a catastrophe involving massive violence that was intended as an attack against a perceived enemy, recognized as an act of war by the President, and for which Congress authorized the use of retaliatory force.

Looking to the Actions of the U.S.

After reviewing traditional and current definitions of an "act of war" in treatises, insurance contracts, the Anti-Terrorism Act of 1992 (ATA), and cases interpreting the ATA, which in many instances define "acts of war" as involving acts by one nation-state against another, the court examined the U.S. response to the World Trade Center attacks, which the court found to be "unique in our history." The court noted that President Bush declared the events of September 11 as an "act of war," and President Obama described the U.S. response to September 11 as "a war against Al Qaeda." Although the AUMF passed by Congress did not explicitly state it was a declaration of war, it authorized the use of "all necessary and appropriate force." The court concluded that the U.S. response was a "war" against Al Qaeda in response to "an act of war" on September 11. The court found this conclusion to be supported by the decisions of the U.S. Supreme Court in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) and *Hamdan v. Rumsfeld*, 548 U.S. 557, 594 (2006), in which the U.S. Supreme Court found that the AUMF triggered the Preseident's war powers, including the power to detain "enemy combatants." Based on this precedent, the court held that the World Trade Center attacks were "acts of war" against the United States

Standing

The court next considered whether all or only some of the moving defendants could invoke the "act of war" defense to CERCLA liability. The court noted that the requirement to prove that an act of war was the sole cause of a release of hazardous materials is formidable and has been characterized as requiring proof that external events greatly exceeded any contributions of the CERCLA defendant. Notwithstanding this high burden, the court concluded that those defendants, which owned, leased, or operated businesses in the World Trade Center qualified for the defense. The court reasoned that the plaintiff did not allege the World Trade Center itself created a pollution hazard, and there would be no CERCLA claim absent the collision of the hijacked jets into the World Trade Center, which constituted the act of war to which the President and Congress responded.

The court explained that the claims asserted against the aviation defendants were different because they arose from an alleged release of hazardous substances from the airplanes that crashed into the World Trade Center, rather than the World Trade Center itself. The court reiterated its prior holding that the aviation defendants do not qualify as liable parties under CERLCA and noted that no case has held that an airplane crash constitutes a "release" of hazardous substances under CERCLA. However, to address the issue presented by the Court of Appeals, the court assumed that plaintiff could sustain a CERCLA claim against the aviation defendants. Because the hazardous material plaintiff cleaned up and for which it sought recovery arose from the collisions of the hijacked airplanes with the World Trade Center towers, the court concluded that the aviation defendants also were entitled to a complete defense against liability under CERCLA's act of war defense.

Conclusion and Implications

In its conclusion, the court counseled its holding—that the World Trade Center attacks constituted an "act of war" and a complete defense to CERCLA liability for the named defendants—should be read narrowly. The court warned that its decision should not be viewed as precedent in other areas such as insurance, claims for monetary damages arising from other terrorist attacks, or even with respect to other claims related to the World Trade Center attacks. But the court's decision likely will be read as precluding other CERCLA claims arising from clean up related to the World Trade Center attacks and may be viewed as persuasive by courts confronted with other claims related to the events of September 11. (Duke McCall, Kate Conrad)

DISTRICT COURT HOLDS STATE LAW CLAIMS INVOLVING PCB CONTAMINATION ARE NOT PREEMPTED BY CERCLA SECTION 107(A)

MPM Silicones, LLC v. Union Carbide Corporation, ___F.Supp2d___,
Case No. 1:11-CV-1542 (N.D. NY Mar. 18, 2013).

MPM Silicones, (plaintiff) purchased a West Virginia site that was formerly owned by Union Carbide, (defendant) which used the site to produce silanes and silicones, necessitating the use of hundreds of thousands of pounds of polychlorinated biphenyls, (PCBs). Defendant disposed of the PCBs on site, including in unlined lagoons. Plaintiff incurred significant costs to address the PCBs on site, including environmental sampling and the installation and operation of a wastewater treatment plant. Plaintiff also contributed to the cost of closing a local landfill that accepted some of defendant's hazardous wastes. Defendant refused to contribute to any of these costs resulting in defendant's December 30, 2011 complaint pursing liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) §§ 113 and 107, and state law claims. Defendant moved to dismiss plaintiff's § 113 and its state law claims. The U.S. District Court for the Northern District of New York dismissed plaintiff's § 113 claim as plaintiff had not been the subject of a CERCLA §§ 106 or 107 action. The court did not dismiss plaintiff's state law claims on grounds that they were preempted by CERCLA § 107.

Background

In 1953, defendant developed a former farm into a chemical manufacturing facility. From the 1950s through the 1970s, defendant disposed of hundreds of thousands of pounds of PCBs on this site. In the late 1970s and early 1980s, defendant conducted investigations of its historical waste-handling practices and of its reporting obligations under the newly enacted Resource Conservation and Recovery Act of 1976, the Toxic Substances Control Act, and CERCLA. Defendant's testing confirmed the presence of PCBs on site, raising an obligation on its part to notify the federal regulators of its use of PCBs, which defendant did not do.

Defendant was granted a Part B Permit requiring it to perform periodic groundwater maintenance, and to develop several Solid Waste Management Units (Units). Defendant deposited most of the hazardous waste within these Units. From 1979 until 1993, defendant deposited solid waste from its facility into a landfill. This landfill was to be "closed in the near future."

Plaintiff purchased this site in 2006; it sampled soil in the vicinity of the unlined lagoons and discovered high concentrations of PCBs. Plaintiff incurred considerable costs just on sampling alone, but such were not undertaken under any governmental order or pursuant to any environmental action.

The District Court's Decision

Plaintiff's motion to dismiss argued that plaintiff's CERCLA claims preempted defendant's state law restitution, indemnification, and contribution claims. Plaintiff's complaint alleged CERCLA claims under both §§ 113 and 107. The U.S. District Court first addressed the viability of plaintiff's § 113 contribution claim.

The Contribution Claim

Plaintiff's complaint failed to allege that it was subject to any action under §§ 106 or 107(a), or that plaintiff had settled its CERCLA liability. Section 113(f) claims are limited to circumstances "...when liability for CERCLA claims, rather than some broader category of legal claims, is resolved." *W.R. Grace & Co.-Conn v. Zotos International Inc.*, 559 F.3d 85, 89 (2009). Thus, unless a PRP has settled its CERCLA liability with the federal or a state government, it has no § 113 (f) contribution claim. By contrast, § 107(a) is available to a PRP to recover CERCLA costs that it has incurred voluntarily. *U.S. v. Atlantic Research Corp.* (*Atlantic Research*), 551 U.S. 128 (2007). The rationale for the distinction between §§ 113(f) and 107(a) was nicely stated in *Atlantic Research:*

> Hence, a PRP that pays money to satisfy a settlement agreement or a court judgment may

> pursue § 113(f) contribution. But by reimbursing response costs paid by other parties, the PRP has not incurred its own costs of response and therefore cannot recover under § 107(a). As a result, though eligible to seek contribution under § 113(f), the PRP cannot *simultaneously* seek to recover the same expenses under § 107(a)... For similar reasons, a PRP [cannot] avoid § 113(f)'s equitable distribution of reimbursement costs among PRPs by instead choosing to impose joint and several liability on another PRP in an action under § 107(a). *The choice of remedies simply does not exist*. [emphasis added].

Plaintiff had not been sued by the federal or state government under §§ 106 or 107, and had not settled its CERCLA liability with any federal or state regulator. The court dismissed plaintiff's § 113(f) claim *sua sponte* despite plaintiff's argument that the court should allow this claim to proceed on the *possibility* that a federal or state CERCLA action could arise naming plaintiff as a PRP during the pendency of this action. However:

> …[a]llowing an admittedly untenable claim to proceed on the mere possibility that it might become viable in the future does little to promote efficiency.

The Preemption Arguments

The court turned to defendant's preemption arguments arising from plaintiff's § 107(a) claims. Congress's power to enact laws that preempt state and local law is derived from the Supremacy Clause of the U.S. Constitution. Preemption may occur in three ways: (i) expressly when Congress declares its intention to preclude state *regulation*; (ii) through field preemption arising when federal law is so comprehensive to make a reasonable inference that Congress intended to occupy the field, leaving no room for state regulation; and, (iii) conflict preemption when "compliance with both federal and state regulations is a physical impossibility," *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *id.* (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941).

CERCLA does not expressly preempt state law, but does prohibit recovering the same costs under both CERLCA and other federal or state laws—under the "double recovery" bar. *New York v. Shore Realty,* 763 F.2d 49 (1985). The Second Circuit has also rejected the notion that CERCLA preempts state law under field preemption. It was not:

> ...the legislative purpose that CERCLA be a comprehensive regulatory scheme occupying the entire field of hazardous wastes, nor does CERCLA prevent the states from enacting laws to supplement federal measures relating to the cleanup of such wastes. *Bedford Affiliates v. Sills*, 156 F.3d 416, 426-427(2nd Cir. 1998).

However, CERCLA may preempt state law restitution and indemnification causes of action under a theory of conflict preemption.

While *Bedford* addressed a § 113(f) claim, the Second Circuit holdings in *New York v. Hickey Carting,* 380 F.Supp.2d 108 (E.D. N.Y2005), and *New York v. West Side*, 790 F.Supp.2d 13 (E.D. N.Y.2011), analyzed whether state law claims were preempted within the context of § 107(a):

> In *Hickey's Carting*, the State of New York brought suit under § 107(a) seeking to recover CERCLA cleanup costs from the PRP defendants...New York also brought concurrent state-law claims...which the defendants in turn sought to dismiss as preempted. *Id.* at 110-111.

The *Hinkey Carting* court rejected the preemption argument holding that *Bedford's* broad holding was limited to § 113(f) claims, that the double-recovery bar was premature as there had been no double recovery, and "the potential that [New York] may not be able to recover all of its costs from each cause of action" remained. *Id.* at 112-113, 115. Finally, the *Hinkey Carting* court allowed New York to recover on its state-law claims if its § 107(a) claim failed, because it did not meet CERCLA's statute of limitations or National Contingencies Plan requirements.

The *West Side* case also involved the State of New York's pursuit of a § 107(a) claim concurrently with

state-law claims. The *West Side* court's analysis was similar to that of the District Court in *Hickey Carting*.

Conclusion and Implications

The court did allow defendant the opportunity to make a "renewed attack at a later, more informed and factually developed point in the litigation." The possibility of dismissing plaintiff's state law claims still persists. (Thierry Montoya)

FEDERAL COURT JURY FINDS STATE FARM LIABLE UNDER FEDERAL FALSE CLAIMS ACT FOR CLAIMS SUBMITTED TO THE NATIONAL FLOOD INSURANCE PROGRAM

Rigsby v. State Farm, Case No. 1:06-CV-433-HSO-RHW (SD Miss. April 8, 2013).

A federal jury in Mississippi has found that State Farm committed fraud against the government's National Flood Insurance Program in a flood claim that it submitted following Hurricane Katrina. The jury found that the insurance company avoided covering a policyholder's wind losses by blaming the damage on storm surge, which is covered by federal flood insurance, despite evidence that the losses were due to wind, rather than water damage.

Background

The Federal Emergency Management Agency (FEMA) is the agency tasked with disaster mitigation, preparedness, response and recovery planning, and administers the National Flood Insurance Program (NFIP) as part of that mission. The NFIP was created to cover damages caused by floods associated with hurricanes, heavy rains, and tropical storms, in areas where homeowners might otherwise struggle to obtain private insurance coverage. Communities eligible for NFIP must comply with FEMA guidelines to reduce flooding risks. NFIP then works cooperatively with insurance companies to cover flood-related damages.

The home at the center of this controversy was located in North Biloxi, Mississippi, and sustained catastrophic damage in the wake of Hurricane Katrina. The home was covered both by the NFIP, and by a separate private insurance policy serviced by State Farm. After the homeowners submitted a claim for damages, they received a notice from State Farm that only $36,000 worth of wind-related damage would be covered under their private policy, which included total coverage for damage far in excess of that amount. An additional $250,000 (the NFIP policy limit) in water-related damage would be covered by the NFIP, in a payment that would be funded by the federal program and directed through State Farm to the homeowners.

In 2006, former independent insurance adjusters Cori and Kerri Rigsby leveled behalf of the North Biloxi homeowners and several others. The False Claims Act (FCA; (31 U.S.C. §§ 3729–3733) imposes liability on persons or companies that defraud government programs, and includes specific provisions to allow persons who are not affiliated with the government to bring a claim under the FCA. Under these whistle-blower provisions, third parties that bring an enforcement action under the FCA may receive a portion of any damages awarded as a result of the claim they brought. Although original complaint considered multiple homeowners, the court ultimately limited the case to a single home—that of

The core premise of the Rigsbys' complaint was that State Farm had provided false and misleading information to the NFIP, and wrongly concluded that the damage to the home was a result of water during a storm surge (NFIP-eligible damage), rather than from wind associated with the storm (which would have required State Farm to pay out of the private policy).

The Legal Challenge

During the course of the trial, former NFIP acting administrator David Maurstad testified that he and others had conferred with State Farm managers and other insurance companies to draft a streamlined NFIP claims-handling process after facing pressure to respond to claims more quickly in wake of widespread Hurricane Katrina damage. Under the prior

NFIP rules, insurance companies had assigned one adjuster to assess both wind and water damage. Before Katrina, each adjuster, in order to calculate the total loss, had to identify and price each item or construction component damaged by flood. To streamline the process, the NFIP permitted adjusters to do away with line-by-line estimates for homes washed away by water when the losses clearly exceeded policy limits. State Farm applied the NFIP's streamlined adjusting process to the McIntosh home, though the Rigsbys' attorney argued that it did not meet NFIP's criteria.

The Rigsbys were former employees of a company that State Farm contracted with to provide damages assessments after the hurricane, and claimed that State Farm had ordered them to submit fraudulent reports to the federal government's NFIP, which allowed State Farm to retrieve federal funds for damages inflicted by high winds. In particular, the Rigsbys claimed that State Farm had manipulated reports and bullied engineers in order to reach a conclusion that flooding, and not wind damage, had destroyed the McIntosh home. As a result of this conclusion, State Farm was able to deflect responsibility for payment onto the NFIP, rather than paying out the McIntoshes' private insurance policy.

The Rigsbys presented testimony that engineering reports which formed the basis of the adjustment had been altered to indicate that the damage on the site was primarily the result of water damage, rather than wind. The Rigsbys additionally claimed that adjusters were trained to see Katrina as a "water storm" and were encouraged to come to the conclusion that wind, rather than water, had caused damage to the homes in question.

State Farm called witnesses to dispute these allegations, including several other adjusters, who testified they were not trained to reach any premature conclusions about Katrina's damage and never heard it referred to as a "water storm." Other witnesses opined that the damage to the McIntosh home was clearly a result of water, rather than wind, damage, and that the adjustment was correct. David Maurstad, a former administrator at NFIP, bolstered this argument, and testified that he did not believe State Farm committed fraud against the flood program while adjusting NFIP claims.

Ultimately, an eight-member jury sided with the Rigsbys. State Farm will be required to repay the $250,000 in NFIP funds that were issued as a result of its determinations, and may be subject to additional damages.

Conclusion and Implications

The dispute over these post-Katrina adjustments is far from over. State Farm is expected to appeal the court's determination, and has a counter-claim pending against the Rigsbys over insurance documents that the company claims were stolen during the Rigsbys' investigation. Moreover, this case may set a precedent for future suits against the company: In 2007, State Farm Fire and Casualty Co. settled with 600 Mississippi homeowners impacted by Hurricane Katrina who filed lawsuits against the company for coverage refusal. At that point, the company paid out $80 million, in addition to $50 million the insurance giant agreed to pay to policyholders with similar claims, but who had yet to file lawsuits. With this case now decided, the door may be open for other, similar, challenges. (Andrea Clark)

DISTRICT COURT FINDS APPOINTMENT OF EXPERT TO REVIEW A CONSENT DECREE IS PROPER WHEN THAT APPOINTMENT IS REASONABLE AND NECESSARY

U.S. v. City of Akron, ___F.Supp.2d___, Case No. 5:09CV272 (N.D. Ohio Mar. 13, 2013).

On March 13, 2013, the U.S. District Court for the Northern District of Ohio considered whether to appoint an expert to help consider a Consent Decree. The District Court determined that, appointment of an expert was necessary and reasonable because the court could not adequately review the Consent Decree absent an expert.

Factual and Procedural Background

In this case, the government filed an unopposed motion for entry of the parties' proposed Consent Decree. This case arose from the government's allegation that the City of Akron (City) had discharged pollutants in violation of its National Pollutant Discharge Elimination System permit. Specifically, the government alleged that the City's discharges affect sensitive areas, including the Cuyahoga River and the Cuyahoga National Park. The initial Consent Decree was lodged with the court in 2009. The court rejected that decree, finding that the timeline in the decree was too lengthy, too uncertain, and too dependant upon future agreements amongst the parties. The decree required the City to submit an updated Long-Term Control Plan (LTCP) which would ultimately be the decree's centerpiece. The LTCP would detail the construction schedule for nearly every project required under the decree. Under the decree, the government was permitted to review the proposed LTCP and accept or reject the City's proposal. Accordingly, the initial decree required further negotiations and the decree did not establish a complete schedule. The court held a renewed fairness hearing on the motion in 2012 and received nearly six hours of testimony. The testimony presented included a financial review and added significant engineering testimony to the court record.

The District Court's Decision

As an initial matter, the District Court first determined the standard for reviewing a Consent Decree. The court noted that, it must review whether the decree is fair, adequate, reasonable, and consistent with the public interest when deciding whether to approve and enter a proposed Consent Decree. Additionally, the court acknowledged that, it must give deference to the agency's expertise but also must ensure that the agency considered all relevant evidence and acted in the public interest. Furthermore, the court recognized the presumption in favor of voluntary settlement, especially where a decree has been negotiated on behalf of the EPA which enjoys substantial expertise in the environmental field.

EPA Guidelines

In rejecting the parties' proposed decree during an initial review, the court reviewed the EPA's guidelines. One guidance document stated that, "if physically possible and economically achievable, existing overflows to sensitive areas should be eliminated or relocated." The court explained that it did not appear that the EPA had been entirely faithful to its own internal policies. Therefore, the court was forced to examine the proper level of deference in that matter. Here, the court again noted that it appeared that the EPA had further strayed from its own guidance in reaching the current decree. Thus, the court would need to examine the appropriate amount of deference that should be given.

Federal Rules of Evidence on Experts

Next, the court found it necessary to utilize Federal Rule of Evidence 706 (Rule 706) which provides:

> On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing.

In assessing the need for an expert, the court noted that it had received voluminous filings from the par-

ties, ranging from financial reviews to highly technical water quality surveys. The court attempted to synthesize that data in its initial decision, rejecting the decree. However, further developments only added to the complexity of the record before the court.

Additional testimony was provided to the court in an attempt to eliminate concerns expressed in the court's prior order. Specifically, engineering testimony was presented in an attempt to demonstrate that the LTCP update had a reasonable construction schedule. However, the court noted that the testimony only scratched the surface of the type of review necessary to properly evaluate the LTCP update. In the court's view, a true understanding of the underlying data and engineering process was required to adequately review the LTCP update. Unfortunately, this type of engineering knowledge was beyond the record and beyond the court's ability to obtain without expert assistance.

Similarly, the parties submitted financial testimony in support of the decree. Much of the argument that the decree is proper focused on the financial capability of the City to pay for the improvements. The court inquired various times about the efforts to review funding sources other than rate increases. The court noted that the witnesses failed to explore other funding alternatives and failed to take steps to independently verify the City's available funds. Thus, the court was left to somehow evaluate whether the City's finances were fully reviewed and/or vetted prior to utilizing them in the EPA's review. The court determined that these issues warrant the court employing its own expert to review the matter because the issues must be synthesized into an overall review of the decree and then balanced with whatever deference is due to the EPA.

The parties objected to the court's position that an expert is necessary in this matter because neither party opposed the decree. The parties argued that the proper use of experts is in complex matters involving conflicting testimony. Additionally, the parties argued that, the court must honor the presumption in favor of settlement and grant deference to the EPA's expertise in resolving these issues. Further, the parties contended that, the appointment of an expert would unduly delay and add substantial expense to the matter.

Conflict in Evidence is Not a Prerequisite

The court noted that Rule 706 contains no requirement that there be conflicting evidence in order to justify the appointment of an expert. Moreover, the court argued that an expert was needed because of the very fact that an opposition did not exist in this litigation. Furthermore, the court's role was to ensure the decree was fair and in the public's interest.

The Issues of Undue Delay and Expense

The court also strongly rejected the parties' contention that the appointment of an expert would unduly delay the matter because the matter was filed over four years ago and the parties had already engaged in negotiations for over a decade. Lastly, the court determined that the added expense would not be prejudicial to the parties because the costs would be nominal compared to the costs of sewer updates and the benefit to the court and the public would be substantial. Thus, the court determined that there was an overriding interest in preserving the Cuyahoga Valley National Park and the interest in protecting this sensitive area substantially overwhelmed any alleged delay or expense related to the appointment of an expert.

Conclusion and Implications

Even though neither party opposed the decree, the court determined that it could not adequately review the decree without an expert. This decision reinforces the court's ability to utilize Rule 706 to appoint an expert when that appointment is reasonable and necessary to review the decree. (Danielle Sakai, Marco Verdugo)

Eastern Water Law & Policy Reporter
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