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FOR LAWYERS, CONSULTANTS, AND LENDERS WHO COUNSEL BUSINESS, COMMERCIAL, AND REAL ESTATE CLIENTS

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ENVIRONMENTAL NEWS

EPA ISSUES PROPOSED RULES TO CURB METHANE EMISSIONS FROM THE OIL AND GAS INDUSTRY

On August 18, 2015, the U.S. Environmental Protection Agency (EPA) announced a suite of proposed regulations aimed at reducing emissions from the oil and gas sector. Chief among the proposed regulations are new standards that would be the first mandatory national methane controls for oil and gas operations. In addition to the new methane rules, EPA's proposal also includes actions to reduce volatile organic compounds (VOCs) and to clarify permitting requirements for the oil and gas industry. EPA's announcement states that the "commonsense" requirements included in the proposal will help combat climate change, reduce air pollution that harms public health, and provide greater certainty about Clean Air Act permitting requirements for the oil and natural gas industry.

Background

As noted in EPA's announcement, methane is the primary component of natural gas and is also a potent greenhouse gas with a global warming potential more than 25 times greater than carbon dioxide. It is also the second most prevalent greenhouse gas emitted in the U.S. from human activities and nearly 30 percent of those emission come from oil production and the production, transmission, and distribution of natural gas. In announcing the new regulations, EPA noted that while methane emissions from the oil and gas sector have declined 16 percent since 1990, they are projected to significantly increase over the next decade without additional actions to lower them.

The Proposed Regulations

The proposed regulations include several actions to cut methane emissions from the oil and gas sector. EPA's proposal also includes actions to reduce VOCs and to clarify Clean Air Act permitting requirements for the oil and gas industry.

Proposed Updates to New Source Performance Standards

The primary rules aimed at reducing methane emissions include updates to the EPA's New Source Performance Standards (NSPS) that would set methane and VOC requirements for additional new and modified sources in the oil and gas industry. Building on its 2012 New Source Performance Standards for VOC emissions for the oil and natural gas industry, EPA's proposed updates would require that the industry also reduce methane. Sources already subject to the 2012 NSPS requirements for VOC reductions that also would be covered by the proposed 2015 methane requirements would not have to install additional controls, because the controls to reduce VOCs reduce both pollutants.

The proposed updates also add emissions reduction requirements for sources of methane and VOC pollution that were not covered in the 2012 rules. These include requirements that owners/operators find and repair leaks, which can be a significant source of both methane and VOCs. The proposal also includes incentives to spur the oil and gas industry to minimize leaks.

Another requirement is that owners/operators capture natural gas from the completion of hydraulically fractured oil wells. Many hydraulically fractured wells that are drilled primarily for oil also contain natural gas. This gas contains methane, VOCs, and a number of air toxics. Owners/operators of hydraulically fractured and re-fractured oil wells would be required to capture the gas using a proven process known as a "reduced emissions completion" or "green completion." In a green completion, special equipment separates gas and liquid hydrocarbons from the flowback that comes from the well as it is being prepared for production. The gas and hydrocarbons can then be treated and used or sold, avoiding the waste of natural resources that cannot be renewed.

Further, owners/operators would be required limit emissions from new and modified pneumatic pumps, which are used throughout the industry from well sites to transmission compressor stations, and to limit emissions from several types of equipment used at natural gas transmission compressor stations and at gas storage facilities, including compressors and pneumatic controllers. Thus, the proposal is expected to result in methane and VOC reductions "downstream" from wells and production sites, covering equipment in the natural gas transmission segment of the industry that was not regulated in the agency's 2012 oil and natural gas rules.

EPA expects these new requirements will reduce methane emissions by 340,000 to 400,000 short tons in 2025.

Proposed Updates to Draft Control Techniques Guidelines

EPA also issued draft Control Techniques Guidelines (CTGs) for reducing VOC emissions from existing equipment and processes in the oil and natural gas industry. CTGs are not regulations and do not impose legal requirements on sources; rather, they provide recommendations for state and local air agencies to consider in determining reasonably available control technology (RACT) for reducing emissions from covered processes and equipment. States may use different technology and approaches, subject to EPA approval and provided they achieve the required pollution reductions. The draft CTGs include information on cost-effective control technologies to help states in making their RACT determinations.

Clarifying Permitting Requirements

EPA issued two proposals to clarify permitting requirements in the states and in Indian country. First, the proposed Source Determination Rule seeks broad public feedback on options for determining when multiple pieces of equipment and activities in the oil and gas industry must be deemed a single source that is subject to requirements under Clean Air Act air permitting programs. Second, a proposed Federal Implementation Plan (FIP) would implement the Minor New Source Review Program in Indian country for oil and natural gas production. The proposed plan would limit emissions of harmful air pollution while making the preconstruction permitting process more efficient for this rapidly growing industry.

Conclusion and Implications

The proposed rules are a clear indication that EPA has ramped up its efforts to limit methane emissions from the rapidly growing oil and gas industry and are a critical part of EPA's broader effort to reduce methane emissions from the oil and gas sector by 40 to 45 percent from 2012 levels by 2025. While the oil and gas sector may oppose the regulations as too onerous, environmentalists and other groups have suggested the regulations do not go far enough. In any event, the proposal marks an important first step in addressing harmful methane pollution from the oil and gas industry that contributes significantly to climate change. While additional actions may be needed to achieve the county's stated methane reduction goals, any action that reduces methane emissions will be beneficial.

EPA will accept comments on the proposals for 60 days after they are published in the *Federal Register* and will hold hearings on the proposals in the months ahead. Additional information on the proposals and information on how to submit comments can be found here: http://www.epa.gov/airquality/oilandgas/actions.html
(Chris Stiles)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD APPROVES GENERAL WASTE DISCHARGE REQUIREMENTS FOR COMPOSTING OPERATIONS

On August 4, the California State Water Resources Control Board (SWRCB) adopted an order approving General Waste Discharge Requirements for Composting Operations (Composting WDR). The SWRCB said this action will streamline the permitting process and protect water quality at composting operations while supporting California's goals to increase organic waste diversion and promote healthy soils.

Background

Composting is the biological decomposition of organic materials by microorganisms under controlled aerobic conditions to create products, such as soil amendments and fertilizers. Composting operations use a variety of organic materials as feedstock that would otherwise be disposed at a landfill including grass, leaves, wood waste, agricultural waste, food, and biosolids. At a typical composting operation, organics are sorted and screened to remove trash and other inorganics; shredded and ground to homogenize; placed in windrows or static piles where the organics breakdown; and screened to make a finished product.

Currently, approximately 5.9 million tons of organic materials are processed by composting facilities in California. The state estimates, however, that an additional 11 million tons of compostable organic waste is still disposed in landfills. It is expected that the number of composting facilities in California will double in the coming years in order to process more of these materials to meet the statewide mandated goal of diverting 75 percent of waste from landfills. Cal. Pub. Res. Code § 41780.01(a).

While essential to the state's recycling goals, composting operations may also release pollutants to surface and groundwater. Composting feedstocks often contain nutrients, metals, salts, pathogens, and oxygen-reducing compounds. These potential pollutants may be released from composting operations as biological decomposition occurs or in runoff from rainfall.

To protect waters surrounding composting facilities, in the 1990s Regional Water Quality Control Boards began issuing Green Waste Conditional Waivers approving operation without waste discharge requirements (WDRs) if certain standard conditions to protect water quality were met. In 1999, the California Water Code was amended to require existing Green Waste Conditional Waivers to be terminated and replaced with individually issued WDRs. Cal. Water Code §§ 13269, 13350. In 2009, the SWRCB began a process to develop standardized requirements and a general WDR for composting operations.

Details of the Composting WDR

The Composting WDR recently adopted by the SWRCB will apply to new and existing composting operations that process more than 500 cubic yards of materials per year. Certain operations that the SWRCB has determined do not affect the waters of the state are exempt including agricultural composting; chipping and grinding; fully enclosed activities; and operations processing less than 5,000 cubic yards per year that completely cover all materials during rain events and mange water to prevent leachate. Operations currently covered by an individual WDR will continue to be covered by that existing WDR until it expires or comes up for renewal, at which time the facility must file a notice of intent for coverage under the new Composting WDR. Regional boards may determine, on a case-by-case basis that the Composting WDR will not be protective of water quality and may issue individual WDRs.

Under the Composting WDR, operations are separated into two tiers (Tier I and Tier II) based on the types of feedstock materials used; the volume of materials received, stored, and processed; and hydrogeological siting. Feedstocks at Tier I facilities are limited to agricultural, green, paper, vegetative food, and co-collected residential food and green materials. In addition, Tier I facilities may not receive, process or store more than 25,000 cubic yards of material on-site at any given time and must meet certain water percolation rates and depths to groundwater. Tier II facilities may use additional feedstocks including non-vegetative food materials, biosolids, and manure; are not restricted on the amount of material on-site; and must only be setback at least 100 feet from the nearest surface water or water supply well.

The Composting WDR includes several uniform design and operation standards including requirements for "pads" under the facilities, ponds used for discharge collection, wastewater handling systems, and compost amendments. The Composting WDR also prescribes maintenance requirements, site closure requirements, detention pond and groundwater monitoring (where necessary), and reporting requirements.

Conclusion and Implications

Members of the composting industry and recycling advocates have expressed concern that the new requirements in the Composting WDR may discourage the development of new composting facilities that are necessary to meet the state's goal of 75 percent waste-diversion by the year 2020. Growth in the composting industry is also a key component identified by the California Air Resources Board's (CARB) Short-Lived Climate Pollutant reduction strategy to reduce methane producing organic waste disposal in landfills.

In response to these concerns, the SWRCB has directed its staff to work with the Regional Water Quality Control Boards, CalRecycle, CARB, California Department of Food and Agriculture, representatives of the composting industry, and other stakeholders to review the environmental and process outcomes of the Composting WDR. Staff is directed to report back within two years the results of this work as well as the number of facilities enrolled in the program and any issues these facilities are facing.

The Composting WDR is available at: http://www.swrcb.ca.gov/board_decisions/adopted_orders/water_quality/2015/wqo2015_0121_dwq.pdf
(Meredith Nikkel)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

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

Civil Enforcement Actions and Settlements—Air Quality

•In a settlement agreement with EPA Region 7 filed July 16, 2015, Wilbur-Ellis Company agreed to pay a $67,404 civil penalty to settle alleged violations of the federal Clean Air Act (CAA) at its fertilizer facilities in White Cloud, Troy, and Silver Lake, Kansas. The company is also required to spend an additional $113,121 on emergency response equipment to complete a Supplemental Environmental Project, benefitting the Sedgwick Fire Department and Doniphan County. Inspections by the U.S. Environmental Protection Agency (EPA) revealed the company exceeded the threshold quantity of anhydrous ammonia in processes at each of the three facilities. This requires each facility to file a Risk Management Plan with EPA and implement a risk management program. Anhydrous ammonia is used in fertilizers, and can cause rapid dehydration and severe burns if inhaled. Short-term exposure at high concentrations can cause death. The threshold quantity of anhydrous ammonia in a process is 10,000 pounds. Facilities holding more than 10,000 pounds of anhydrous ammonia in a process are required to comply with EPA's Risk Management Program regulations.

•The EPA entered into agreements with the Port Authority of New York & New Jersey and port terminal operators that will cut harmful air pollution from the Port of New York and New Jersey. Under the agreements, the Port Authority, APM Terminals North America, Maher Terminals and Port Newark Container Terminals will reduce truck idling at the port of Newark and take other actions to reduce harmful air pollution from diesel exhaust. Among other things, the Port Authority will provide funding up to $1.5 million (if approved by its Board of Commissioners) for terminal operators who connect their cargo handling equipment to alternative sources of power such as electricity. The three major terminal operators will also will provide a total of $600,000 to the City of Newark, to be used to pay for green infrastructure projects in areas that are most impacts by air pollution from port operations.

•In an agreement with the New England office of the US Environmental Protection Agency, Pioneer Valley Refrigerated Warehouse (aka Pioneer Cold) agreed to pay $41,000 in penalties and to spend $322,100 on environmental projects meant to improve the safety of the surrounding community. The company has already spent more than $158,000 to bring its facility into compliance with the Risk Management Program (RMP) regulations under the Clean Air Act. The environmental projects are designed to reduce the likelihood of a release of anhydrous ammonia occurring, and to limit the severity of any ammonia release that might occur from Pioneer's facility.

•Cargill, Inc., a Delaware corporation, has reached an administrative civil settlement with EPA over alleged violations of the Clean Air Act at its Vitamin E manufacturing facility in Eddyville, Iowa. Under terms of an administrative civil settlement, Cargill will pay a $110,000 civil penalty to the United States, and will perform an Enhanced Leak Detection and Repair project. Additionally, Cargill has agreed to spend at least $155,000 on a supplemental environmental project to incorporate sealless pump technology at its facility.

•EPA and the DOJ announced a settlement with Duke Energy Corporation to resolve Clean Air Act violations at five coal-fired power plants across North Carolina. The settlement resolves long-standing claims that Duke violated the federal Clean Air Act by unlawfully modifying 13 coal-fired electricity generating units located at the Allen, Buck, Cliffside,

Dan River, and Riverbend plants, without obtaining air permits and installing and operating the required air pollution control technologies. Duke recently shut down 11 of the 13 units, and under the settlement those shutdowns also become a permanent. At the remaining two units, Duke must continuously operate pollution controls and meet interim emission limits before permanently retiring them. Duke must also retire another unit at the Allen plant, spend a total of $4.4 million on environmental mitigation projects, and pay a civil penalty of $975,000.

•EPA is issuing a notice of violation (NOV) of the Clean Air Act (CAA) to Volkswagen AG, Audi AG, and Volkswagen Group of America, Inc. (collectively referred to as Volkswagen). The NOV alleges that four-cylinder Volkswagen and Audi diesel cars from model years 2009-2015 include software that circumvents EPA emissions standards for certain air pollutants. Volkswagen allegedly used a sophisticated software algorithm on certain Volkswagen vehicles detects when the car is undergoing official emissions testing, and turns full emissions controls on only during the test. The effectiveness of these vehicles' pollution emissions control devices is greatly reduced during all normal driving situations. This results in cars that meet emissions standards in the laboratory or testing station, but during normal operation, emit nitrogen oxides, or NOx, at up to 40 times the standard. The software produced by Volkswagen is a "defeat device," as defined by the Clean Air Act.

The allegations cover roughly 482,000-diesel passenger cars sold in the United States since 2008. Affected diesel models include:

Jetta (Model Years 2009 – 2015)
Beetle (Model Years 2009 – 2015)
Audi A3 (Model Years 2009 – 2015)
Golf (Model Years 2009 – 2015)
Passat (Model Years 2014-2015)

Civil Enforcement Actions and Settlements—Water Quality

•On July 15, 2015, the EPA announced a settlement with Enid, Oklahoma-based Cottonwood Creek, Inc. in which the company has agreed to pay a $170,000 penalty to resolve violations of the federal Clean Water Act (CWA) related to oil pollution at the Bonanza Station in Big Horn County, Wyoming. The alleged violations included a March 8, 2010, pipeline discharge of approximately 162 barrels of crude oil into a tributary of the Nowood River. The agreement also resolves allegations that Cottonwood Creek, Inc. violated EPA regulations regarding the preparation and implementation of a Spill Prevention, Control, and Countermeasure (SPCC) Plan and a Facility Response Plan (FRP). The company cleaned up the oil release and ultimately submitted an acceptable FRP.

•On July 21, 2015, EPA announced a settlement with Pan Am Railways covering allegations that Pan Am violated the federal Clean Water Act at two of its railyards in Waterville, Maine, and East Deerfield, Massachusetts. The company agreed to pay a fine of $152,000 to resolve the violations. EPA alleged that Pan Am violated the conditions of the Maine "Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity," as well as federal Oil Pollution Prevention Regulations. According to EPA's complaint, Pan Am's stormwater pollution prevention plan (SWPPP) did not adequately describe control measures necessary to minimize the impact of stormwater running offsite. EPA alleged similar violations at the company's East Deerfield, Massachusetts facility.

•Arch Coal Inc., entered into a settlement with EPA and the DOJ under which it agreed to conduct comprehensive upgrades to their operations to ensure compliance with the Clean Water Act. The settlement resolves Clean Water Act violations at the companies' coal mines in Kentucky, Pennsylvania, Maryland, Virginia and West Virginia. Arch will pay a civil penalty of $2 million for the Clean Water Act violations; half of that amount will go to the United States, with the remainder divided among the states based roughly on the percentage of violations that occurred in each state: $895,000 to West Virginia, $20,000 to Virginia, and $85,000 to Pennsylvania.

•On August 17, 2015, EPA and the DOJ announced a settlement with the Delaware County Regional Water Quality Control Authority (DELCORA) resolving Clean Water Act violations involving combined sewer overflows (CSOs) to the Delaware River and its tributaries. DELCORA has agreed to

develop and implement a plan to control and significantly reduce overflows from its sewer system. DELCORA will also pay a civil penalty of $1,375,000, which will be split between the United States and the Pennsylvania Department of Environmental Protection.

•EPA reached settlement with Coastal Energy Corporation of Willow Springs, Missouri, recently reached a proposed settlement valued at more than $200,000 to resolve violations of the Clean Water Act and the Emergency Planning and Community Right-to-Know Act (EPCRA). The settlement requires Coastal to pay $25,000 in cash penalties and complete more than $175,000 in supplemental environmental projects. Coastal Energy manufactures asphalt oil and stores approximately 2.8 million gallons of liquid asphalt, ethanol, and diesel fuel at this facility, which is directly adjacent to the Eleven Point River. EPA inspected the facility in early 2014. Coastal lacked a facility response plan and did not have an adequate spill prevention, control and countermeasure plan. It also failed to provide required secondary containment for oil storage.

•Ardagh Glass Inc. agreed to pay a $103,440 penalty and to fund three environmental projects costing a total of about $121,700 to settle claims it was discharging wastewater in violation of its permits. In the settlement with EPA's New England office, Ardagh agreed to install equipment that will enhance the treatment of stormwater before it is discharged. In addition, the company will buy firefighting equipment and materials for the Town of Milford Fire Department. EPA alleged that Ardagh, which makes glass bottles, jars, and other containers, was in violation of its permits issued under the Clean Water Act to discharge stormwater and cooling water, which both flow into wetlands adjacent to the Charles River.

•The Iowa Fertilizer Company and Orascom E&C USA have agreed to pay a $80,689 civil penalty to settle alleged violations of the Clean Water Act associated with the construction of a new fertilizer plant in Wever, Iowa. Orascom is Iowa Fertilizer's construction contractor for the site and is jointly responsible for compliance under a National Pollutant Discharge Elimination System permit with the Iowa Department of Natural Resources. EPA Region 7 inspected the facility in June 2014 to evaluate the site's compliance with its stormwater permit. Of the 369-acre site, construction-related activity had occurred on nearly 323 acres. The EPA identified violations at the site, including the failure to install or implement adequate stormwater control measures, failure to update or amend the Stormwater Pollution Prevention Plan (SWPPP), and failure to perform adequate stormwater self-inspections. The violations resulted in sediment-laden stormwater leaving the site and entering a tributary of the Mississippi River.

•EPA and DOJ entered into a Consent Decree with the City of Bangor, Maine, that requires the City to take action to prevent sewer overflows and contaminated stormwater from entering the Penobscot River and Kenduskeag Stream. The city complied fully with the terms of an earlier consent decree with EPA but had not fully achieved the goals set forth in the Clean Water Act or in a federal discharge permit issued by the State of Maine. The Consent Decree imposes a schedule for the city to, among other things, institute operations and maintenance programs, conduct sewer system evaluations studies, construct capital improvement projects, and implement sewer system remedial measures and a more thorough program to eliminate stormwater contamination in the city's storm drains.

•EPA announced a settlement with the City of Jerome, Idaho requiring the city to upgrade its wastewater treatment plant to ensure the facility has the capacity to handle future discharges. The city will also make approximately $43 million in improvements to the wastewater treatment facility over the next six years. These upgrades will include adding two basins and increasing blower capacity in the membrane treatment area, adding a new sludge dewatering building, adding an additional aeration basin, pump station and blower building, new yard piping and increased biotower ventilation. In addition, the City of Jerome will pay an $86,000 civil penalty to settle claims it was discharging wastewater in violation of its permits.

•Repsol E&P USA, Inc. agreed to pay a penalty for alleged Clean Water Act violations at an oil exploration well pad on the North Slope, Alaska. The company's exploration well drilling equipment leaked

well testing fluids onto the frozen, snow-covered arctic tundra in April of 2013. Additionally, on April 9, 2013, a hose ruptured at Qugruk Well Pad #6, on the Colville River Delta. Well testing fluids from the ruptured hose were mostly collected in a secondary containment system. Up to 500 gallons of fluid sprayed beyond the containment area, and covered over an acre of frozen, snow-covered tundra. Within four days, the company completed a cleanup of the most impacted contaminated snow. Repsol agreed to pay a penalty of $30,500 to settle the allegations.

•Under a settlement with the DOJ and EPA, the Puerto Rico Aqueduct and Sewer Authority (PRASA) has agreed to make major upgrades, improve inspections and cleaning of existing facilities within the Puerto Nuevo system and continue improvements to its systems island-wide. The Puerto Nuevo sewer system serves the municipalities of San Juan, Trujillo Alto, and portions of Bayamón, Guaynabo and Carolina. The settlement updates and expands upon legal settlement agreements reached with PRASA in 2004, 2006 and 2010. Under the agreement, PRASA will spend approximately $1.5 billion to make necessary improvements. PRASA has also agreed to invest $120 million to construct sanitary sewers that will serve communities surrounding the Martín Peña Canal, a project that will benefit approximately 20,000 people.

•The Town of Swampscott, Massachusetts entered into a Consent Decree with EPA agreeing to pay a $65,000 civil penalty and to take critical remedial measures to address pollution the Town discharged into the ocean near local beaches. The Consent Decree imposes a schedule for the Town to screen and monitor its storm water outfalls during dry and wet weather. Where pollutants are found, the Town must eliminate the flows conveying the pollutants. In addition, the Town must take action to control runoff from land redevelopment projects. The Consent Decree also assesses a $65,000 civil penalty against the Town for its Clean Water Act violations. Swampscott is subject to vigorous reporting requirements to ensure compliance with the terms of the Consent Decree. If it fails to comply, it may be subject to additional penalties as high as $2,500 per each day of violation.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•In an agreement with the US Environmental Protection Agency, PetEdge Inc. agreed to pay $75,900 to resolve EPA allegations that it violated federal pesticide regulations. EPA alleged that in 2012 and 2013, PetEdge Inc. was involved in numerous violations of the Federal Insecticide, Fungicide, and Rodenticide Act, including inaccurate labelling and distribution of unregistered products that contain pesticides. PetEdge did not admit to the allegations by EPA but agreed in the settlement to pay the fine and that PetEdge and products supplied by its vendors will come into compliance with the law within 30 days. The company also agreed not to distribute or sell any product that is in violation with federal regulations.

•Rego Realty Corp. and six associated property-owning companies, and one individual, will pay a penalty to settle EPA claims that they failed to follow federal lead-based paint disclosure requirements when renting nineteen housing units in Hartford, Connecticut. Under the settlement, Rego Realty Corp., along with Mancora LLC, Mochica LLC, Nazca LLC, Paracas LLC, Rosario LLC, and Stephanie LLC (all of which are affiliated corporate entities headquartered in Hartford), and an individual owner of a residential unit managed by Rego, will pay a $48,000 penalty and provide documentation of their compliance with the Residential Lead-Based Paint Hazard Reduction Act and the Lead-based Paint Disclosure Rule.

•Specialty Minerals Inc. and Minteq International Inc. will pay a civil penalty of $76,500, settling EPA claims that the facilities violated the federal Emergency Planning and Community Right-to-Know Act by failing to complete and submit timely toxic release inventory (TRI) reports for lead compounds, manganese, antimony and propylene. The Toxics Release Inventory is a public right-to-know requirement that tracks the management of certain toxic chemicals that may pose a threat to human health and the environment.

•EPA entered into a settlement with Piini Realty, Inc. for failing to notify its tenants about the potential presence of lead-based paint at 12 rental units

located in Salinas, California As part of the settlement, windows, doors, and kitchen cabinets that contain lead-based paint will be removed at various apartments managed by the firm. Any replacement windows will be Energy Star qualified. Under the settlement, the firm is required to pay a $4,250 penalty and must spend a minimum of $38,255 removing lead-based paint at its properties. The project must be completed within 18 months and every six months Piini Realty must report back to EPA on its progress.

•Zippo Manufacturing Company will pay a $186,000 penalty to settle alleged violations of hazardous waste regulations at its manufacturing facility in Bradford, Pennsylvania. EPA cited Zippo for violating the Resource Conservation and Recovery Act (RCRA), the federal law governing the treatment, storage, and disposal of hazardous waste. RCRA is designed to protect public health and the environment, and avoid costly cleanups, by requiring the safe, environmentally sound storage and disposal of hazardous waste. The alleged RCRA violations included storage of hazardous waste without interim status or a permit, operation of an unpermitted thermal treatment unit, failure to properly manage hazardous waste containers, and failure to maintain job descriptions of personnel managing hazardous waste.

•Goodrich Corporation in Spokane, Washington failed to immediately report the release of hydrogen cyanide to the National Response Center, the State Emergency Response Commission, and the Local Emergency Planning Committee, as required by § 103 of the Comprehensive Environmental Response, Compensation and Liability Act and § 304 of the Emergency Planning and Community Right to Know Act. Goodrich has agreed to pay a penalty of $52,000.

•Partner's Produce, Inc. in Payette, Idaho failed to immediately report the release of anhydrous ammonia to the National Response Center, State Emergency Response Commission, and the Local Emergency Planning Committee, as required by § 103 of CERCLA and § 304 of EPCRA. EPA alleges that Partner's Produce released approximately 378 pounds of anhydrous ammonia on February 14, 2014, from its Payette, Idaho facility. Partner's Produce agreed to pay a penalty of $67,392.

•The U.S. Environmental Protection Agency reached a settlement with Lynx Enterprises, a metal finishing firm in Tracy, California, for its failure to comply with federal hazardous waste management regulations. The company agreed to pay a total of $28,750 in civil penalty and spend an additional $108,000 to develop hazardous waste training materials. In October 2010, an EPA inspection discovered that the facility was in violation of the Resource Conservation and Recovery Act. In addition to paying the penalty, Lynx has agreed to develop a hazardous waste management training program designed to assist at least 20 metal finishing companies to understand hazardous waste management compliance requirements.

•EPA approved a proposed settlement with Dunbar Asphalt Products, Inc., to clean up a 29-acre portion of the Sharon Steel Corporation Superfund Site in Hermitage, Pennsylvania. Under the proposed settlement, Dunbar will pay the costs to cover exposed slag with asphalt or clean fill to prevent releases of heavy metals and polyaromatic hydrocarbons (PAHs), and ensure there is no exposed waste. Dunbar will also reimburse EPA for future costs related to the cleanup of this 29-acre portion of the site. EPA estimates that it would have cost the agency $1.7 million to clean up this portion of the site if a settlement had not been reached with Dunbar.

•EPA Region 7 announced a settlement with the current and former owners of the former Townsend Industries Facility, a chemical storage and handling site in Pleasant Hill, Iowa, to address hazardous waste contamination in groundwater resulting from business operations in the 1970s and 1980s. An administrative order on consent, proposed by EPA Region 7 in Lenexa, Kansas, requires the operation and maintenance of on-site containment and remediation systems to reduce contamination in groundwater at, and coming from, the site. The site includes approximately 12 acres of land and a 45,000-square-foot industrial building at 4400 Vandalia Road in Pleasant Hill.

Indictments Convictions and Sentencing

•On August 5, 2015, James Jariv, 64, of Las Vegas, Nevada, was sentenced in federal court in Las Vegas to ten years in prison for his role in illegal schemes

to generate fraudulent biodiesel credits and to export biodiesel without providing biodiesel credits to the United States. Jariv was also ordered to make restitution in the amount of $6,345,830.91 and to forfeit between $4 to $6 million in cash and other assets.

Jariv was the second defendant to be sentenced for the scheme. Nathan Stoliar, 64, of Australia, was sentenced to two years in prison in April for his role in the conspiracy and ordered to pay more than $1.4 million in restitution and to forfeit of $4 million in cash. In addition, in court papers unsealed last week, Alex Jariv, 28, also of Las Vegas, pleaded guilty in the scheme and his sentencing was scheduled for Aug. 18, 2015. James Jariv and Stoliar both pleaded guilty to one count of conspiracy, one count of conspiracy to engage in money laundering, two counts of wire fraud and one count of making false statements under the Clean Air Act. Alex Jariv pleaded guilty to one count of conspiracy to commit wire fraud, make false statements and launder monetary instruments.

•Mississippi Phosphates Corp. (MPC), a Mississippi corporation, which owned and operated a fertilizer manufacturing facility located on Bayou Casotte in Pascagoula, Mississippi, pleaded guilty to a felony information charging the company with a criminal violation of the Clean Water Act. As part of the guilty plea, MPC admitted discharging more than 38 million gallons of acidic wastewater in August 2013. The discharge contained pollutants in amounts greatly exceeding MPC's permit limits, resulting in the death of more than 47,000 fish and the closing of Bayou Casotte. MPC also admitted that, in February 2014, MPC discharged oily wastewater from an open gate on a storm water culvert into Bayou Casotte, creating an oily sheen that extended approximately one mile down the bayou from MPC. MPC entered its guilty plea before Chief Judge Louis Guirola Jr. of the U.S. District Court for the Southern District of Mississippi. Because MPC is in bankruptcy and is obligated to assist in funding the estimated $120 million cleanup of its site, the court accepted the parties' agreement for MPCto transfer 320 acres of property near to its Pascagoula plant to become a part of the Grand Bay National Estuarine Research Reserve, which is managed by the Mississippi Department of Marine Resources as part of the National Oceanic and Atmospheric Administration's National Estuarine Research Reserve System.

•Jason A. Halek, 41, of Southlake, Texas, was indicted in federal court in Bismarck, North Dakota, on 13 felony charges stemming from the operation of a saltwater disposal well near Dickinson, in Stark County, North Dakota. Halek was charged with one count of conspiracy to violate the Safe Drinking Water Act and defraud the United States. He was also charged with four counts of violating the Safe Drinking Water Act, four counts of making false statements and four counts of obstructing grand jury proceedings. The well, named the Halek 5-22, received "produced water" constituting "brine and other wastes" commonly and generically referred to as "saltwater." "Saltwater" in this context covers a wide array of drilling waste fluids, including hydraulic fracturing fluid, which is water combined with chemical additives such as biocides, polymers and "weak acids." The Environmental Protection Agency (EPA) has stressed that this water is often saltier than seawater and can "contain toxic metals and radioactive substances."

•Petr Babenko, 45, of Vineland, New Jersey, was found guilty of participating in a conspiracy to illegally buy and sell paddlefish and one count of illegally trafficking in paddlefish in violation of the Lacey Act. Babenko owned European International Foods, a specialty grocery business in Vineland. Codefendant Bogdan Nahapetyan, 37, an Armenian citizen residing in Lake Ozark, Missouri, pleaded guilty on Nov. 12, 2013, to illegally trafficking in paddlefish. The American paddlefish (Polydon spathula), also called the Mississippi paddlefish or the "spoonbill," is a freshwater fish that is primarily found in the Mississippi River drainage system. Paddlefish eggs are marketed as caviar. The retail value of the caviar is estimated to be between $30,000 and $50,000. Paddlefish were once common in waters throughout the Midwest. However, the global decline in other caviar sources, such as sturgeon, has led to an increased demand for paddlefish caviar. This increased demand has led to over-fishing of paddlefish and consequent decline of the paddlefish population.

•On August 21, 2015, Lumsden W. Quan, 47, an art dealer from San Francisco, California, pleaded guilty today to conspiracy to violate the Lacey and Endangered Species Act and to a violation of the Lacey Act for knowingly selling black rhinoceros horns to an undercover agent from the U.S. Fish and Wildlife Service (FWS).

•On August 27, 2015, Dean Daniels, 52, Richard Smith, 57, Brenda Daniels, 45 and William Bradley, 58, all of Florida, pleaded guilty and were sentenced in U.S. district court for charges related to a scheme involving the false production of biodiesel. Dean Daniels was sentenced to 63 months incarceration, Bradley was sentenced to 51 months incarceration, Smith was sentenced to 41 months incarceration and Brenda Daniels was sentenced to 366 days incarceration. In addition, the court sentenced the defendants to pay $23 million in restitution.
(Andre Monette)

RECENT FEDERAL DECISIONS

SECOND CIRCUIT AFFIRMS NARROW READING OF *FORCE MAJEURE* CLAUSE IN NEW YORK OIL AND GAS LEASES IN CONNECTION WITH FRACKING MORATORIUM

Beardslee v. Inflection Energy, LLC, ___F.3d___, Case No. 12-4897 (2nd Cir. Aug. 19, 2015).

The Second Circuit has dealt another blow to the oil and gas industry, affirming a 2012 New York District Court holding that a number of oil and gas leases had expired at the conclusion of the subject leases' primary terms because no oil and gas operations occurred on the properties during that time. The Second Circuit held that the *force majeure* clauses of the subject leases did not modify the primary term of those leases' *habendum* clauses. Taking its lead from the New York State Court of Appeals, the Second Circuit concluded that even if New York's moratorium on high volume hydraulic fracturing and horizontal drilling could be considered as unforeseeable and beyond the lessee energy companies' control as to trigger the leases' *force majeure* clauses, the leases' *force majeure* clauses did not apply to the expired five-year primary terms of the leases.

Background

Beginning in 2001, Walter and Elizabeth Beardslee, along with more than 30 other Tioga County landowners (collectively: landowners) entered into certain oil and gases leases with Victory Energy Corporation (Victory), each separately conferring rights to extract oil and gas resources underlying their respective properties. Megaenergy, Inc. (Mega) shared an interest in the leases with Victory and, as of July 2010, Inflection Energy, LLC (Inflection) (collectively: energy companies or lessees) assumed from Mega the operational rights and responsibilities under a majority of the leases:

> The leases each contained an identical habendum clause, stating:…[i]t is agreed that the lease shall remain in force for a primary term of FIVE (5) years from the date hereof and as long thereafter as the said land is operated by Lessee in the production of oil or gas.

Thus, the primary terms of the leases were five years and, at the conclusion of which, the leases expired if the land had not been operated by the energy companies in the production of oil or gas.

The leases also all contained the same *force majeure* clauses, providing, in part:

> If and when drilling ... [is] delayed or interrupted ... as a result of some order, rule, regulation ... or necessity of the government, or as the result of any other cause whatsoever beyond the control of Lessee, the time of such delay or interruption shall not be counted against Lessee, anything in this lease to the contrary notwithstanding.

In 2008, then-Governor of New York George Paterson directed the New York Department of Environmental Conservation to update its generic environmental impact statement on conventional drilling and to consider the potential impacts of newer extraction techniques such as hydraulic fracturing. After that directive, New York ceased issuing hydraulic fracturing permits. Inflection subsequently provided the landowners with notices claiming that New York's regulatory actions constituted a *force majeure* event under the leases, thus, extending the lease terms.

At the District Court

In 2012, the landowners filed a declaratory judgment action in the District Court of New York arguing that the leases essentially rendered their properties unmarketable and sought a declaration that the leases had expired. Landowners moved for summary judgment, contending that because the energy companies had not drilled any wells nor undertook any related actions on the properties, the leases expired after five years. The energy companies cross-moved, primarily arguing that the Governor's 2008 directive was a *de facto* moratorium on fracking which prevented them from exercising the only "commer-

cially viable" method of drilling. They argued that this qualified as a *force majeure* event, which modified the habendum clause and resulted in extending the leases' primary terms until the statewide moratorium was lifted.

The District Court disagreed and granted the landowners' motion for summary judgment and declared that the leases expired at the end of the five-year primary term. Notably the court did not rule on whether a *force majeure* event occurred. Instead, the court concluded that even though the energy companies could not use hydraulic fracturing techniques, the purpose of the leases had not been frustrated and that the energy companies could have drilled using conventional methods. Likewise, the court noted that the leases simply provided the energy companies with an option to drill, rather than obligation to do so. The District Court found the moratorium to be a "mere impracticality" that was not sufficient to trigger the *force majeure* clause.

The Second Circuit's Decision

Certification of Questions to the New York Court of Appeals

The energy companies timely appealed and, in review, the Second Circuit found the matter turned on significant and novel issues of New York law concerning the interpretation of oil and gas leases. The Second Circuit certified two questions to the New York Court of Appeals:

> 1. Under New York law, and in the context of oil and gas lease, did the State's Moratorium amount to a *force majeure* event?
>
> 2. If so, does the *force majeure* clause modify the habendum clause and extend the primary terms of the leases?

In review of the leases, New York's highest court answered the second question in the negative. The Court of Appeals opined that the habendum clauses of the leases did not incorporate the *force majeure* clauses either explicitly or by reference. The court was also not persuaded by the energy companies' contention that the habendum clauses were modified by the provision of the *force majeure* clauses that "anything in this lease to the contrary notwithstanding." The court concluded that, under New York law, such language only supersedes conflicting language. Therefore, because the *force majeure* clauses did not "conflict" with the primary term of the habendum clauses, it had no bearing on that term (*i.e.*, five years). As a result of having addressed the second question, the court found it unnecessary to confront the first question of whether the state's moratorium constituted a *force majeure* event, terming it as only "academic."

Second Circuit Affirms the State Court Decision Granting the Motion for Summary Judgment

Armed with this interpretation of the leases from the New York Court of Appeals, the Second Circuit affirmed the 2012 District Court decision granting the landowners' motion for summary judgment. In so doing, the Second Circuit recognized the New York Court of Appeals' decision that, under New York law, the specific *force majeure* clause did not modify the habendum clause and, noting no perceived disputed issues of fact, the Second Circuit concluded that the leases expired at the end of the five-year primary term. The Second Circuit noted that it will "not second-guess the [New York Court of Appeals'] interpretation and application of New York law" in this regard.

Conclusion and Implications

Taking guidance from the New York State Court of Appeals, the Second Circuit affirmed that the leases did not provide a *force majeure* clause that implicated the leases' primary terms, but instead only covered the leases' secondary terms and, therefore, even if New York's moratorium on fracking qualified as a *force majeure* event, this was of no matter. While this decision is an important development in New York law concerning the drafting and subsequent interpretation of oil and gas leases, *Beardslee* may be more significant for the question left unanswered—whether New York's fracking and horizontal drilling moratorium qualified as a *force majeure*. Nonetheless, drafters should take heed of New York's narrow interpretation of *force majeure* clauses in oil and gas leases.

The Second Circuit's decision is available online at: https://scholar.google.com/scholar_case?case=14927973240577151840&hl=en&as_sdt=6&as_vis=1&oi=scholarr

(John McGahren, Drew Cleary Jordan, Duke McCall III)

NINTH CIRCUIT FINDS NOTICE OF INTENT TO SUE THE FOREST SERVICE ALLEGING VIOLATIONS OF THE ENDANGERED SPECIES ACT SUFFICIENT IN THE FACE OF A MOTION TO DISMISS

Klamath-Siskiyou Wildlands Center v. Rob MacWhorter, the U.S. Forest Service, ___F.3d___, Case No. 13-35453 (9th Cir. Aug. 10, 2015).

Plaintiffs filed a complaint for declaratory and injunctive relief against defendants challenging the U.S. Forest Service's (Forest Service) approval of a suction dredge mining operation in streams that are designated a critical habitat for coho salmon, listed as threatened with extinction under the federal Endangered Species Act (ESA). Plaintiffs' lawsuit alleged that defendants' approved the mining without first consulting with the National Marine Fisheries Service (NMFS) under § 7 of the ESA. In response, defendants filed a motion to dismiss under Fed. R. Civ. P. 12(b)(1), alleging that the U.S. District Court lacked subject matter jurisdiction on grounds that plaintiffs' notice of intent to sue was deficient. The District Court granted defendants' motion to dismiss based on the sufficiency of the notice letter. Upon a timely appeal, the Ninth Circuit reversed holding that plaintiffs' initial notice of intent letter provided sufficient notice of the claims against the Forest Service. The Court of Appeals cited to precedent analyzing the sufficiency of notice under the ESA, concluding that the:

> …key issue in all three cases was whether the notice provided information that allowed the defendant to identify and address the alleged violations, considering the defendant's superior access to information about its own activities.

Plaintiffs' notice met this standard.

Background

On June 12, 2012, plaintiff, Klamath-Siskiyou Wildlands Center (KS) sent the Forest Service a notice of intent to sue under the ESA, alleging the Forest Service's violation of § 7 of the ESA by authorizing dredge mining operations in the Rogue River-Siskiyou National Forest in Oregon-designated critical habitat for the coho salmon-without first consulting with NMFS. On June 14, 2012, KS sent an amended notice of intent to sue adding Rogue Riverkeeper to its notice.

Plaintiffs' initial notice alleged that § 7 of the ESA imposed a substantive duty on federal agencies to ensure that its actions do not jeopardize a listed species or adversely modify their critical habitat. This notice also cited to the ESA as setting forth an interagency consultation process to assist the federal agencies in complying with this duty. (16 U.S.C. § 1536(a)(2).) The notice cited to the NMFS' designation of critical habitat for the coho salmon, alleging that rivers and streams within the Rogue River-Siskiyou National Forest were specifically designated as such. The notice explained how the dredge mining activities adversely affected the listed coho salmon and its critical habitat, citing to specific dates on which the Forest Service received notices of intent to conduct mining activities from various miners.

On August 8, 2012, Rob MacWhorter responded to plaintiffs' notice letter stating that plaintiffs' notice:

> …did not provide specific information about which mining operations are of concern, such as names of miners or mining claims, locations, or dates of mining operations.

But, Mr. MacWhorter's letter stated that he was able to match up some of the names of the miners, the location of their claims, or the dates of their mining operations.

The Ninth Circuit's Decision

The ESA requires that plaintiffs provide notice of a violation at least 60-days prior to filing suit. (16 U.S.C. § 1540(g)(2)(A)(i).) The ESA notice provision is similar to the citizen suit provisions in the federal Clean Water Act (CWA) and the Resource Conservation and Recovery Act (RCRA), so the court can look to those statutes for interpretation of the notice provisions. (*Hallstrom v. Tillamook Cnty.*, 493 U.S. 20,23 & n.1 (1989).) In particular, the EPA promulgated implementing regulations for the CWA, stating that notice:

> …shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, 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. (40 C.F.R. § 135.3(a).)

The ESA provides no implementing regulations so the court found it may look to this section for guidance but is not required to adopt this particular interpretation.

Adequate Notice

This Court of Appeals has held that the 60-day notice requirement in the ESA is designed to

> …put the agencies on notice of a perceived violation of the statute and an intent to sue. When given notice, the agencies have an opportunity to review their actions and take corrective measures if warranted. The provision therefore provides an opportunity for settlement or other resolution of a dispute without litigation. (Citing *Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 5145, 522 (9th Cir. 1998).)

The court found that as long as the notice letter is reasonably specific as to the nature and time of the alleged violation, a plaintiff has fulfilled the notice requirement.

Here, plaintiffs notice letter did not generally allege ESA violations—rather, it:

> …specifically alleged a geographical and temporally limited violation of the ESA. It alleged that the Forest Service approved NOIs to engage in suction dredge mining in the Rogue River-Siskyou National Forest during a specific three-year period, and that the Forest Service had not consulted as required under § 7 of the ESA for NOIs proposed mining in critical coho habitat. The Ninth Circuit found that armed with this information, the Forest Service could determine via its own readily accessible records, "whether, and in what instances, it has approved NOIs for which consultation was required under § 7."

The court found that the Forest Service was in a better position to know what waters within the National Forest provided critical coho salmon habitat; the service did not need more information from plaintiffs to identify the NOIs for which there was, or might have been, an ESA violation.

Conclusion and Implications

The Forest Service cited to several CWA cases interpreting the sufficiency of notice. However, this Ninth Circuit Court of Appeals held that a plaintiff pursing a CWA claim need not "list every specific aspect or detail of every alleged violation." (*San Francisco BayKeeper, Inc. v. Tosco Corp.*, 309 F.3d 1153, 1155 (9th Cir.2002).) Here, the court found the notice letter was reasonably specific to allow the Forest Service to determine the time and place of the violation. Indeed, the Forest Service's response to plaintiffs' notice letter confirmed that it did not require any further detail to identify and abate its § 7 violations.

(Thierry Montoya)

NINTH CIRCUIT HOLDS NO PERMIT NEEDED UNDER THE CLEAN WATER ACT FOR IRRIGATION PROJECT COVERING PARTS OF CALIFORNIA AND OREGON

ONRC Action v. U.S. Bureau of Reclamation, ___F.3d___, Case No. 12-35831 (9th Cir. Aug. 21, 2015).

The U.S. Court of Appeals for the Ninth Circuit has held that the U.S. Bureau of Reclamation (Bureau) need not obtain a pollutant-discharge permit under the federal Clean Water Act (CWA) to operate an irrigation project covering parts of California and Oregon. In granting summary judgment for the Bureau, the District Court reasoned that the CWA's permit requirement did not apply to the kind of water discharge utilized in the irrigation project because of an applicable U.S. Environmental Protection Agency (EPA) regulation. After the District Court's decision, the U.S. Supreme Court decided *Los Angeles County Flood Control District v. Natural Resources Defense Council*, __ U.S. __, 133 S. Ct. 710 (2013) (*L.A. County Flood Control*). In that case, the Supreme Court held that no "discharge of pollutants" occurs within the meaning of the CWA:

> …when polluted water 'flows from one portion of a river….through a concrete channel or other engineered improvement in the river,' and then 'into a lower portion of the same river.'

This is because, according to prior Supreme Court precedent, the CWA only requires permits for transfers between "meaningfully distinct water bodies." In lieu of discussing the District Court's reasoning, the Ninth Circuit took the "simpler path" to resolving the appeal; it held that the Bureau did not need a pollutant-discharge permit because the factual record showed that the irrigation project only transfers water between bodies that are not meaningfully distinct.

Background

The Klamath Irrigation Project (Project), authorized by Congress in 1905, draws water from the Klamath River and Upper Klamath Lake in Oregon, provides the water for use in the surrounding land, and then conveys the water to Lower Klamath Lake in California. The Klamath Straits Drain then moves water from Lower Klamath Lake back to the Klamath River.

Before the Project, Lower Klamath Lake and the Klamath River were linked by the Klamath Straits. A railroad development built in 1917 blocked the Klamath Straits, but the Bureau restored the link in the 1940s by excavating and channelizing the Klamath Straits Drain. The Klamath Straits Drain spans about 8.5 miles between the Lower Klamath Lake and the Klamath River, 1.5 miles of which follow the prior natural path of the Klamath Straits. The Klamath Straits Drain uses two pumping stations to help water flow from Lower Klamath Lake to the Klamath River, though these pumping stations are not always active.

Plaintiff ONRC Action, an environmental group in Oregon, filed a citizen suit under the CWA claiming that the Bureau violated the CWA by discharging pollutants from the Klamath Straits Drain into the Klamath River without a permit. The District Court granted summary judgment for the Bureau based on its conclusion that discharging water from the Klamath Straits Drain into the Klamath River was exempted from the CWA's permit requirement under an Environmental Protection Agency regulation.

The Ninth Circuit's Decision

A panel of the Ninth Circuit expressly declined to address the District Court's reasoning. Rather, the panel relied on an ostensibly straightforward application of *L.A. County Flood Control*, decided after the District Court issued its opinion, to hold that the Bureau did not need a CWA permit to convey water from the Klamath Straits Drain to the Klamath River.

The CWA prohibits "any addition of any pollutant to navigable waters from any point source" without a permit. A point source is "any discernible, confined and discrete conveyance." In *L.A. County Flood Control*, the Supreme Court assessed a factual scenario where concrete channels transferred water from one part of a river into another part of the same river. The Supreme Court held that "pumping polluted water from one part of a water body into another part of the same body is not a discharge of pollutants under the

CWA." It reasoned that "no pollutants are 'added' to a water body when water is merely transferred between different portions of that water body"; transferring water counts as a discharge of pollutants under the CWA only if the transfer occurs between "meaningfully distinct water bodies."

The panel looked to the record in the instant case and noted three facts. First, the Klamath Straits Drain is essentially an "improved version" of the natural Klamath Straits. Second, much of the water that flows through the Klamath Straits Drain into the Klamath River originated in the Klamath River itself. Third, although the Project utilizes two pumping stations in the Klamath Straits Drain to help water flow into the Klamath River, it would be possible for water to flow naturally between the two bodies of water even if the Bureau removed the pumping stations. Considering these facts, the Ninth Circuit held that the Klamath Straits Drain and the Klamath River are not meaningfully distinct water bodies. Thus, the Bureau did not need a permit under the CWA to convey water from one to the other.

Conclusion and Implications

The Ninth Circuit noted that determining whether bodies of water are meaningfully distinct is a factual undertaking and may only apply in limited circumstances. However, it is noteworthy that the Ninth Circuit declined to expand the application of the Clean Water Act and other courts are likely to follow this decision.
(Danielle Sakai, John Balla)

NINTH CIRCUIT ORDERS FINAL RESPONSE FROM EPA ON ADMINISTRATIVE PETITION TO BAN USE OF PESTICIDE

Pesticide Action Network North America; Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency, ___F.3d___, Case No. 14-72794 (9th Cir. Aug. 10, 2015).

A three-judge panel on the Ninth Circuit Court of Appeals has granted a petition for a writ of *mandamus* filed by the Pesticide Action Network and the Natural Resources Defense Council (collectively: Pesticide Action Network). The writ of *mandamus* petition sought a final response from the U.S. Environmental Protection Agency (EPA) on the Pesticide Action Network's administrative petition filed in 2007 challenging the EPA's determination that the use of a pesticide chlorpyrifos is safe in rural areas. In granting the petition, the Ninth Circuit ordered that the EPA issue either a proposed or final revocation rule or a full and final response to the 2007 administration petition by October 31, 2015 because nearly a decade had elapsed, in which the EPA repeatedly failed to issue a final response and the EPA's recent pronouncements that chlorpyrifos posed a significant threat to water supplies.

Background

The Food Quality Protection Act of 1996 required that the EPA complete an initial review of every pesticide then in use within ten years to ensure compliance with relevant safety standards in ten years and repeat the process using updated scientific data every 15 years. During this initial review, the EPA in 2000 announced an agreement with pesticide manufacturers to ban the application of the pesticide chlorpyrifos in residential areas, but issued both interim and final decisions permitting the continued use of chlorpyrifos in agricultural areas.

The Pesticide Action Network disagreed with the EPA's assessment that chlorpyrifos is safe and filed an administrative petition in September 2007 (2007 administrative petition) alleging that the EPA ignored evidence of chlorpryifos' toxicity. The EPA did not issue a formal response to the 2007 administrative petition other than publishing a notice of the petition in the *Federal Register*. The Pesticide Action Network subsequently filed suit in federal district court in New York in July 2010 demanding a final response to the 2007 administration petition. Five months later, the EPA and the Pesticide Action Network filed a stipulation staying the suit. The stipulation was based on EPA's promise that it would issue a human health risk assessment of chlorpyrifos by June 2011 and a final response to the 2007 administrative petition by November 2011. EPA failed to publish a final response by November 2011, or anytime thereafter.

In April 2010, the Pesticide Action Network filed for a writ of *mandamus* in the Ninth Circuit (2012 mandamus petition). The EPA responded by publishing a partial denial of the 2007 administrative petition and stated that it would either issue a complete denial of the 2007 administrative petition by February 2013 or issue a proposal rule/final rule without prior proposal to revoke or modify the existing chlorpyrifos tolerances by February 2014. The Ninth Circuit subsequently denied the 2012 mandamus petition, noting that the EPA had a "concrete timeline" in place to respond to the Pesticide Action Network's 2007 administrative petition.

The EPA failed to act in February of 2013 and 2014. The Pesticide Action Network filed a renewed petition for a writ of *mandamus* in September 2014, which is the subject of the instant opinion. The EPA issued a preliminary final denial of the 2007 administrative petition in January of 2015 but was unable to offer a firm date when the EPA could issue a final response. Dissatisfied with the uncertainty of the EPA's response, the Pesticide Action Network reiterated its request that the Ninth Circuit issue a writ of *mandamus* compelling the EPA to issue a final ruling on the 2007 administrative petition.

The Ninth Circuit's Order

The only question before the Ninth Circuit was whether the EPA's delay in responding to the Pesticide Action Network's 2007 administrative petition warranted the extraordinary remedy of *mandamus*. In concluding that it does, the Ninth Circuit used the *TRAC* factors to determine if an agency's delay is so "egregious" to warrant *mandamus* relief.

Time

The court first considered the length of time afforded to the EPA to issue a final decision on the 2007 administrative petition. In rejecting the Pesticide Action Network's 2012 mandamus petition, the court noted that the EPA had a "concrete timeline" for issuing a final ruling in a matter of months. Now, as the court recognized, the delay had stretched to eight years and the EPA was still unable to offer a timetable for concluding or even initiating proceedings to determine the risk posed by chlorpyrifos and issue a final response on the 2007 administrative petition.

The Threat Posed by Chlorpyrifos

The court then considered the threat posed by chlorpyrifos to human health. The EPA had initially determined that chlorpyrifos was safe in 2006, but had backtracked significantly from that pronouncement over the last several years. New labeling requirements on chlorpyrifos were recently imposed by the EPA and the EPA reported in a new status report that a nationwide ban on the pesticide may be justified due to its significant threat to water supplies. The court, therefore, had "little difficulty" concluding that the EPA should be compelled to act quickly in light of the EPA's own assessment of the dangers to human health posed by chlorpyrifos.

History of Missing Deadlines

The court finally acknowledged the EPA's "significant" history of missing deadlines previously set with regards to the 2007 administrative petition. Stating that the EPA's delay has already been the subject of three non-frivolous lawsuits, the court directed the EPA to issue either a proposed or final revocation rule or a full and final response to the 2007 administrative petition by October 31, 2015.

Conclusion and Implications

The Ninth Circuit granted the Pesticide Action Network's petition for a writ of *mandamus* directing the EPA to issue a final response to the Pesticide Action Network's 2007 administrative petition. In so doing, the Ninth Circuit found that the EPA's eight-year delay in responding to the Pesticide Action Network's administrative petition warranted the "extraordinary remedy" of a writ of *mandamus*. This case, although perhaps unique on its facts, suggests that a writ of *mandamus* directing a federal agency to act in response to an administrative petition may be appropriate in situations involving undue delay and risks to human health.

(Danielle Sakai, Benjamin Lee)

DISTRICT COURT FINDS CERCLA DOES NOT PREEMPT STATE-LAW NUISANCE CLAIMS AND THAT VOLUNTARILY INCURRED INVESTIGATION COSTS DO NOT CONSTITUTE SPECIAL INJURY

Alcoa, Inc. v. APC Investment Co., ___F.Supp.3d___, Case No. CV 14-6456-GW(Ex) (C.D. Cal. Aug. 12, 2015).

The U.S. District Court for the Central District of California held, among other things, that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) does not preempt state-law nuisance claims and instead indicates that plaintiffs may pursue overlapping state-law and CERCLA remedies, but may ultimately recover only once. Additionally, the court stayed the case pending the Ninth Circuit's decision in *Whittaker Corp. v. U.S.*, No. 13-CV-1741-FMO(JCx), which would resolve the dispute in the instant case as to whether the Plaintiffs' CERCLA claims fell within § 107(a) or § 113(f) of CERCLA.

Background

This case is one of several arising from environmental contamination at the Omega Chemical Superfund site. Plaintiffs, including Alcoa, Inc. and numerous other companies, asserted five claims against several defendants, with three claims arising under CERCLA and one each under the Resources Conservation and Recovery Act (RCRA) and California's public nuisance statute, Cal. Civ. Code § 3480. Before the court were six motions seeking to dismiss, strike, or stay various portions of plaintiffs' case. In its analysis, the court first analyzed several issues common to multiple parties followed by several relevant issues only to one or a few parties.

The District Court's Decision

The first issue common to multiple parties was the dispute as to two CERCLA provisions—§ 107(a) and § 113(f)—which allow potentially responsible parties (PRPs) to recover from other PRPs the costs of cleaning contaminated sites. Plaintiffs argued that their first two claims fell within § 107(a), and thus imposed upon defendants joint and several liability. Defendants, however, contended that plaintiffs' first two claims had to proceed, if at all, under § 113(f), in which case contribution actions would only impose liability upon PRP defendants for their equitable share of costs. The court noted that this dispute turned on several sub-issues, which included, among other things, whether §§ 107(a) and 113(f) are mutually exclusive, and if so, whether the nature of the response costs dictates which of the two sections applies. As to this dispute, the court stayed the action pending the Ninth Circuit's decision in *Whittaker Corp. v. United States*, a case that both parties agreed was on point and would certainly impact to outcome of this action.

Public Nuisance Claims

Plaintiffs' public nuisance claims were another issue common to multiple parties. Defendants argued that CERCLA preempted plaintiffs' public nuisance claims, which the court rejected. The court held that CERCLA neither impliedly nor expressly preempted state-law nuisance claims and that likewise, CERCLA conflict preemption did not bar such claims. The court also rejected defendants' argument that CERCLA preempted state-law nuisance claims if those claims sought remedies duplicating remedies sought under CERCLA. The court held that CERCLA's double-recovery bar (42 U.S.C. § 9614(b)) does not suggest preemption, and instead indicates that plaintiffs can pursue overlapping state-law and CERCLA remedies, but ultimately recover only once.

Defendants also argued that state-law nuisance claims seeking § 113(f)-recoverable costs conflicted with CERCLA's "comprehensive statutory framework" and aim of standardizing contribution rights among PRPs. According to defendant\s, this meant that CERCLA's "unified contribution scheme" preempted state-law claims seeking CERCLA-type contribution. The court rejected this argument on the grounds that the "savings clause" in § 113(f) precludes preemption as to state-law claims for contribution.

Primary Jurisdiction Doctrine

Defendants also invoked the primary jurisdiction doctrine by arguing that plaintiffs' request for injunctive relief in their public nuisance claim could

interfere with the U.S. Environmental Protection Agency's (EPA) interim remedy for groundwater contamination at the Omega Site, which took the EPA decades to develop. The court held that a stay or dismissal of the entire claim on primary jurisdiction grounds was unwarranted because defendant\s sought a stay or dismissal of *only* plaintiffs' request for injunctive relief. Given that plaintiffs' public nuisance claim sought both monetary and equitable relief, at least one of which did not implicate primary jurisdiction, dismissal was unwarranted.

'Special Injury' Condition

Defendants also attacked plaintiffs' public nuisance claim by arguing that plaintiffs failed to adequately allege the "special injury" necessary to maintain a public nuisance claim. In California, a private person may maintain an action for public nuisance only if it is "specially injurious" to himself. (Cal. Civ. Code § 3493) The court rejected this argument noting that (1) plaintiffs failed to allege a harm to rights held in common with the public, and (2) plaintiffs' voluntarily incurred costs of investigating a public nuisance (as opposed to legally-compelled costs) did not constitute a special injury. Therefore the plaintiffs had failed to properly allege a claim for public nuisance and the court dismissed it.

DTSC's 'Primary Jurisdiction'

The motions likewise sought to dismiss the RCRA claim on the grounds that the claims should be the primary jurisdiction of the California Department of Toxics Substances Control and that plaintiffs did not plead facts showing "imminent and substantial endangerment" under RCRA § 7002. The court disagreed on both grounds. The court first held that defendants did not satisfy their burden of establishing a basis for applying primary jurisdiction to plaintiffs' RCRA claims because defendant\s did not identify a complex issue that Congress has committed to the DTSC's initial jurisdiction. The court also held that under Rule 12(b)(6), construing all inferences and allegations in plaintiffs' favor, plaintiffs' "plausibly alleged facts from which the Court [could] infer possible imminent and substantial endangerment."

Conclusion and Implications

The District Court's holding affirms that CERCLA does not preempt state-law nuisance claims, yet clarifies that even though plaintiffs may pursue overlapping nuisance and CERCLA remedies, plaintiffs can ultimately recover only once. The court's decision to stay the case pending the outcome of *Whittaker Corp. v. U.S.* indicates important and fundamental issues that remain unresolved in the Ninth Circuit as it relates to the types of claims (*i.e.*, cost-recovery or contribution) plaintiffs may bring under §§ 107(a) and 113(f) of CERCLA.
(Danielle Sakai, Thomas Oh)

DISTRICT COURT UPHOLDS CALIFORNIA'S LOW CARBON FUEL STANDARD

American Fuels & Petrochemical Manufacturers Association v. Corey, ___F.Supp.3d___, Case No. 1:09-cv-02234 (E.D. Cal. Aug. 28, 2015).

Energy, farming, and trade association interests filed suit against California officials in federal court, challenging California's Low Carbon Fuel Standards (LCFS) as violative of the Commerce Clause of the U.S. Constitution. Following an appeal to and remand from the U.S. Court of Appeals for the Ninth Circuit, defendants filed motions to dismiss and for summary judgment on plaintiffs' claims. The U.S. District Court for Eastern District of California granted most of defendants' motions, effectively rejecting plaintiffs' constitutional challenge to California's LCFS.

Background

The LCFS regulates and seeks to reduce greenhouse gas emissions linked to transportation fuels used in California. LCFS does so by assigning a "carbon intensity" value to each fuel based on a lifecycle analysis. The state requires fuel providers to match the carbon intensity score of their fuels with the carbon intensity target for a given year. Petroleum refiners and importers and producers of transportation fuels all face LCFS compliance obligations.

Energy, farming, and trade association interests filed a challenge to California's LCFS in December 2009, alleging the LCFS violates the Commerce Clause of Article I, § 8 of the U.S. Constitution, which provides that "Congress shall have Power … [t]o regulate Commerce … among the several States." Courts have interpreted the Commerce Clause as precluding states from unduly burdening or unjustifiably discriminating against interstate commerce, a prohibition commonly referred to as the Dormant Commerce Clause. State statutes that facially discriminate against interstate commerce or have the direct effect of providing benefits to in-state interests while burdening out-of-state interests face the greatest scrutiny under the Commerce Clause. Such provisions are rarely upheld. Statutes that only indirectly impact interstate commerce face less scrutiny and are generally upheld if the state's interest is legitimate and benefits resulting from the regulation at issue exceed the burdens imposed on interstate commerce. Plaintiffs argued in their challenge to the LCFS that the LCFS discriminated against out-of-state fuel and fuel feedstocks through its use of the carbon intensity rating system.

At the District Court—Round One

In December 2011, the District Court struck down parts of the LCFS as unconstitutional. The court found the LCFS provisions at issue served a legitimate purpose of reducing greenhouse gases, but concluded that purpose could be achieved by less discriminatory alternatives. The District Court determined that the LCFS was impermissibly discriminatory because it gave California sources "an artificially favorable and lower carbon intensity value" while:

> …all other existing crude sources [were] assigned higher carbon intensity values than the actual carbon intensity values for those crudes.

In addition, the court found that the LCFS treated certain California fuels favorably by assigning those fuels a baseline average carbon intensity value substantially lower than the actual carbon intensity score, but not affording similar treatment to non-California fuels.

The Ninth Circuit's Remand Ruling

On appeal, the Court of Appeals affirmed the determination that the crude oil provisions of the LCFS were not facially discriminatory, but reversed the determination that those provisions were discriminatory in purpose and effect. The Court of Appeals remanded the case to the District Court to determine whether certain LCFS provisions placed an undue burden on interstate commerce.

The District Court's Decision

On remand, plaintiffs filed an amended three-part complaint, challenging both the original LCFS

regulations, which went into effect in January 2011 (Original LCFS), as well as the LCFS' provisions pertaining to crude oil, which were amended in 2012 (Amended LCFS). Plaintiffs first asserted that the Original LCFS violated the Commerce Clause through direct regulation of interstate and foreign commerce:

> …including the extraction, production and transport of transportation fuels and fuel feedstocks outside of California.

Plaintiffs next asserted that the Amended LCFS likewise violated the Commerce Clause as a result of direct regulation of interstate and foreign commerce. In their third claim Plaintiffs asserted that both the Original and Amended LCFS violated the Commerce Clause because both "discriminate on their face, and as applied, against transportation fuels and fuel feedstocks imported from outside of California with the intended effect of (i) promoting in-State production of transportation fuels," and (ii) "keep[ing] consumer dollars local by reducing the need to make fuel purchases from beyond [California's] borders." Defendants moved to dismiss plaintiffs' second claim and part of plaintiffs' third claim and moved for summary judgment on plaintiffs' first claim and part of plaintiffs' third claim.

The District Court's Decision

The District Court began its analysis by granting defendants' motion for summary judgment on plaintiffs' first claim, noting that the Ninth Circuit's decision had resolved Plaintiffs' extraterritoriality claim as to the Original LCFS. Next, the District Court granted defendants' motion to dismiss plaintiffs' second claim. The court held that while the Amended LCFS' crude oil provisions functioned differently than the Original LCFS provisions in some respects, with regard to extraterritoriality the two operated essentially the same. Thus, the plaintiffs' extraterritoriality claim as to the Amended LCFS also failed.

The Third Claim for Relief

The bulk of the District Court's analysis focused on the plaintiffs' third claim, which alleged that the Original and Amended LCFS discriminated in purpose and effect against out-of-state interests. Plaintiffs' claim hinged on the argument that:

> …the California market-wide average carbon intensity values … that a regulated party must use when assessing its LCFS deficits/credits do not take into account the actual carbon intensity of the fuel(s) that a regulated party uses, which results in an inaccurate and artificial deficit/credit calculations.

Plaintiffs asserted that these averages benefit in-state interests while burdening out-of-state interests.

The District Court disagreed. The stated purpose of California's LCFS, the court noted, is:

> …to implement a low carbon fuel standard, which will reduce greenhouse gas emissions by reducing the full fuel-cycle, carbon intensity of the transportation fuel pool used in California. Because this stated purpose was nondiscriminatory and plaintiffs failed to show any underlying discriminatory purpose, the court concluded that plaintiffs had not established a discriminatory purpose.

Allegations of a Discriminatory Effect on Out of State Interests

The court then turned to plaintiffs' contention that the LCFS had a discriminatory effect on out-of-state interests. The court found that the LCFS' crude oil provisions appeared to harm some in-state interests while benefiting other in-state interests. Similarly, the LCFS harmed some out-of-state interests while benefiting other out-of-state interests. According to the court, this type of state regulation "does not fit neatly, if at all, into dormant Commerce Clause precedent." Dormant Commerce Clause precedent establishes that impermissible discrimination means a type of differential treatment between in-state and out-of-state interests that benefits the former and burdens the latter—not a mix of the two. Because the plaintiffs failed to show such discrimination, the District Court granted summary judgment on plaintiffs' claim that the LCFS' crude oil provisions impermissibly discriminated in violation of the Commerce Clause. But the court denied defendants' motion to dismiss plaintiffs' claim that the ethanol provisions of the Original LCFS discriminated in purpose in effect, rejecting defendants' argument that plaintiffs had disavowed the challenge to the ethanol provisions on remand.

Conclusion and Implications

The District Court's decision resolves in defendants' favor nearly all of plaintiffs' challenges to the Original and Amended LCFS provisions. The only claim that survives is plaintiffs' assertion that the ethanol provisions of the Original LCFS have a discriminatory purpose and effect. Given the court's analysis and rejection of plaintiffs' other claims,

DISTRICT COURT ENJOINS IMPLEMENTATION OF EPA/CORPS RULE DEFINING WATERS OF THE UNITED STATES UNDER THE CLEAN WATER ACT

North Dakota v. U.S. Environmental Protection Agency, ___F.Supp.3d___, Case No. 3:15-cv-00059 (D. N.D. Aug. 27, 2015).

North Dakota and 12 other states (States) filed suit against the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (collectively: Agencies) challenging the Agencies' issuance of a rule redefining "Waters of the United States" under the federal Clean Water Act. The States alleged that the new rule unlawfully expanded the Agencies' jurisdiction under the Clean Water Act to cover state lands and water resources beyond the limits established by Congress. In a break from decisions issued by other federal District Courts, the U.S. District Court for the District of North Dakota enjoined implementation of the new rule, finding that it appeared likely the Agencies had violated their Congressional grant of authority in promulgating the new rule.

Background

The Clean Water Act seeks to protect the Nation's waters from pollution through the adoption of various programs designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." The provisions of these programs generally extend to and include "navigable waters," which are defined under the act as "the waters of the United States, including the territorial seas." The determination of which intrastate waters are "waters of the United States" has proven controversial and has been the subject of much litigation, culminating in a spilt decision of the U.S. Supreme Court in *Rapanos v. U.S.*, 547 U.S. 715 (2006).

On April 21, 2014, the Agencies issued a proposed rule to change the regulatory definition of "waters of the United States." Following a public comment period, the Agencies issued a final rule defining waters of the United States on June 29, 2015. The effective date of the new rule was specified as August 28, 2015.

The same day the Agencies issued the final rule the States filed their complaint for declaratory and injunction relief, alleging that the new rule violated the Administrative Procedure Act, the Clean Water Act and the National Environmental Policy Act (NEPA). On August 10, 2015, the States moved for a preliminary injunction, seeking to enjoin the implementation of the rule before its August 28th effective date.

The District Court's Decision

After concluding that original jurisdiction to hear the States' claims resided in the District Court, rather than the Court of Appeals, the District Court proceeded to address the merits of the States' motion. The court noted that it was required to assess four factors in determining whether to issue a preliminary injunction: (1) the threat of irreparable harm to the movant; (2) the balance of harms to the parties; (3) the movant's likelihood of success on the merits; and (4) the public interest.

Likelihood of Success on the Merits

The court devoted most of its analysis to assessing whether the States' claims challenging the new rule had a likelihood of success on the merits. The court explained that the standard to be applied in this analysis varied, depending on whether the regulation at issue was promulgated in a "presumptively reasoned democratic process." If it was, a "substantial

likelihood of success on the merits" standard applied. If the presumption was rebutted and the evidence established that the new rule was not the product of a reasoned democratic process, the States needed only to establish a "fair chance of success." The court concluded that the evidence before it revealed the new rule was issued in a manner that was "inexplicable, arbitrary, and devoid of a reasoned process" and thus the "fair chance" standard applied, but the court also volunteered that its conclusions would be the same under the higher "substantial likelihood of success" standard.

Analyzing the States' likelihood of success on the merits, the court concluded that the States were likely to prevail on the merits of both their claim that the Agencies violated their grant of authority under the Clean Water Act and failed to comply with the requirements of the Administrative Procedure Act.

Looking to a Significant Impact on the Integrity of Other More Traditional Covered Waters

With respect to the States' claim that the Agencies violated their grant of authority under the Clean Water Act, the court focused on the whether the waters included within the new rule were likely to "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" The court concluded that the new rule allowed EPA to regulate waters that do not have any effect on the "'chemical, physical, and biological integrity' of any navigable-in-fact water," and thus there was a fair chance the States could establish that the new rule exceeded the congressional grant of authority under the Clean Water Act.

The APA Claims

In assessing the likelihood of success on the States' Administrative Procedure Act claim, the court found a lack of any scientific basis for certain bright-line standards included in the new rule and concluded that the final rule was not a "logical outgrowth" of the proposed rule because the final rule substituted geographic distances for ecologic and hydrologic concepts that formed the basis of the proposed rule. The court concluded it was not necessary to reach the merits of the States claim that the Agencies violated the National Environmental Policy Act because the States had met their burden of establishing a likelihood of success on their other claims.

Harms and the Public Interest

Turning the assessment of harms and public interest, the court found the States would suffer irreparable harm both as a result of their loss of sovereignty over intrastate waters and monetary losses the States would be unable to recoup because of the United States' sovereign immunity. In contrast, the court concluded that delaying implementation of the rule would cause the Agencies no appreciable harm. Moreover, the court found that delaying implementation of the rule to allow for a full and final resolution of the States' claims on the merits was in the public interest.

Conclusion and Implications

The court's decision does not finally determine the merits of the States' claims and does not hold that the Agencies' new rule defining the "waters of the United States" is unlawful. But the court's decision does prevent the implementation of the new rule pending a final determination on the merits and provides at least a preliminary view of the court's assessment of the merits of the States' claims. Because the lawfulness of the Agencies' new rule is the subject of litigation in a number of other courts and only a minority of states is before this court, a final determination of the nationwide validity of the new rule is unlikely to occur any time soon.
(Duke K. McCall, III)

DISTRICT COURT HOLDS THAT PLAINTIFF'S SIXTH AMENDED PETITION ASSERTING CLEAN WATER ACT CLAIM DID NOT SATISFY THE NOTICE REQUIREMENTS OF THE STATUTE

Peter Payne, et al v. U.S., ___F.Supp.3d___, Case No. 4:15CV246-LG-CMC (E.D. Tx. Aug. 17, 2015).

Peter Payne, Mary Beth Payne, David Howard, and Oksana Howard (plaintiffs) filed state takings, nuisance, and negligence claims, as well as a federal Clean Water Act (CWA) claim against Highland Homes, LLC., GCS Trails of Frisco d/b/a Golf Club of Frisco, and Sun Den Frisco Investment d/b/a Golf Club of Frisco (collectively: Golf Club), seeking redress for damages to their homes arising from alleged residential construction defects and creek-bank erosion. In response, Golf Club filed motions to dismiss for lack of jurisdiction. The U.S. District Court denied Golf Club's motions seeking to dismiss the state law claims based on a lack of jurisdiction, but granted the motions dismissing the CWA claim without prejudice. The dismissal was based on plaintiffs' failure to provide statutory citizen suit notice of their claim to the Golf Club, or to the federal defendants. The court rejected plaintiffs' argument that a prior lawsuit alleged against the Golf Club complied with the CWA's citizen suit notice requirements.

Background

Plaintiffs' alleged that the area behind their homes frequently flooded, causing erosion that impacted the value of their properties.

CWA allows private citizens to sue any person "alleged to be in violation" of the conditions of an effluent standard or limitation under the CWA or of an order issued with respect to such a standard or limitation by the Administrator of the U.S. Environmental Protection Agency (EPA) or a state. (*See*, 33 U.S.C. § 1365(a)(1).) Citizens may not bring suit, however, unless and until they have given 60 days notice of their intent to sue to the alleged violator (as well as to the Administrator and the state). (33 U.S.C. § 1365(b)(1)(A).) The purpose of this notice requirement, the Supreme Court explained in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found. Inc.*, 484 U.S. 49, 60 "is to give [the alleged violator] an opportunity to bring itself into compliance with the Act and thus likewise render unnecessary a citizen suit." EPA regulations give further guidance on the contents of the notice, at 40 CFR § 135.3(a):

> Notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto, shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to constitute a violation, the person or persons responsible for the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.

In practical terms, the notice must be sufficiently specific to inform the alleged violator about what it is doing wrong, so that it will know what corrective actions will avert a lawsuit. Even if the notice is broad enough in scope and was timely, a second requirement for citizen suits is that the defendant must be "in violation" of a relevant standard, limitation, or order.

In *Gwaltney*, the Supreme Court held that:

> …[t]he most natural reading of 'to be in violation' is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation-that is, a reasonable likelihood that a past polluter will continue to violate in the future. (*See*, *Gwaltney*, 484 U.S. at 57.) The Court held that this language precluded the possibility of a citizen suit based on a wholly past violation; instead, the plaintiff must allege that the violations are ongoing at the time suit is brought. Justice Scalia would have gone further on the latter point and would have required the plaintiff to substantiate an allegation of an ongoing violation, if the point was contested. (*See*, *Gwaltney*, 484 U.S. at 69.)

He agreed, however, that:

> …[a] good or lucky day is not a state of compliance. Nor is the dubious state in which a past effluent problem is not recurring at the moment

but the cause of that problem has not been completely and clearly eradicated.

If the violation is cured at some point while the suit is pending the case nevertheless does not become moot. It may be possible that the citizen plaintiffs would lose their right to an injunction, if, as the G*waltne*y majority put it, "it is 'absolutely clear' that the allegedly wrongful behavior could not reasonably be expected to recur." (G*waltney*,quoting from *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203, 89 S.Ct. 361, 364, 21 L.Ed.2d 344 (1968).)

The District Court's Decision

Plaintiffs' did not dispute a failure to provide notice required by the CWA. Instead, plaintiffs' alleged that its Sixth Amended Petition filed in a previous lawsuit concerning the same flooding, and involving Golf Club, provided Golf Club with the requisite notice. Plaintiffs' alleged that the following language in their Petition provided Golf Club with notice:

> These actions/inactions, and others, of Defendants, individually and/or collectively have resulted in the mismanagement of flood waters, causing an increase of volume and velocity within Cottonwood Branch [tributary], increasing the frequency of flooding, and…altering the flow of water and increasing the rate of erosion fill material and soils providing lateral support to the soils beneath plaintiffs' homes, and discharging fill materials into Cottonwood Branch and Lake Lewisville in violation of the CWA.

The court held that this language did not meet the notice requirement of the CWA:

> It would be unreasonable to expect [Golf Club] to decipher notice that a CWA lawsuit would be filed against them from a thirty-six page Petition that asserts no claims against them for violation of the CWA and only vaguely references possible CWA violations while discussing the jurisdiction and liability of other defendants. Furthermore, it is questionable whether a previous lawsuit could ever fulfill the notice requirement under the CWA, because the very intent of the notice requirement is to *avoid* litigation where possible….Litigation could never reasonably be used as a means of preventing litigation.

Moreover, as plaintiffs' admitted to not providing the EPA Administrator and the State of Texas with notice, that failure, in and of itself, was a violation of the CWA notice requirement warranting dismissal of plaintiffs' claims against Golf Club.

Conclusion and Implications

Under the Code of Federal Regulations, at a minimum, notice "shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated…" (40 C.F.R. §135.3(a).) Here the District Court found that plaintiffs' complaint did not meet this standard. (Thierry Montoya)

DISTRICT COURT HOLDS THAT THE CLEAN WATER ACT APPLIES TO POLLUTANTS EXPELLED FROM A VENTILATION FAN USED ON POULTRY CONFINEMENT HOUSES

Rose Acre Farms, Inc. v. North Carolina Department of Environment and Natural Resources, ___F.Supp.3d___, Case No. 5:14-CV-147-D (E.D. N.C. July 30, 2015).

This is a long-running dispute in which Rose Acre Farms, Inc. (Rose Acre) sought to avoid federal Clean Water Act (CWA) regulation and National Pollutant Discharge Elimination System (NPDES) permitting requirements by arguing that its poultry operation confinement houses, and the ventilation system which discharged dust, feathers, and manure ultimately into U.S. waters, were exempt from NPDES permitting under the CWA's "agricultural stormwater" exception. Rose Acre filed a declaratory relief complaint in District Court seeking an order exempting it from NPDES permitting requirements, and declaring that the North Carolina Department of Environmental and Natural Resources (DENR) lacked authority

that the North Carolina Department of Environmental and Natural Resources (DENR) lacked authority to require it to obtain an NPDES permit. Defendant intervenors and DENR (collectively: defendants) moved to dismiss Rose Acre's complaint. The court granted defendants' motion to dismiss refusing to:

> …upset the congressionally-approved balance of responsibilities between federal and state courts with respect to the CWA's NPDES permitting scheme…the court is confident that North Carolina appellate courts will faithfully consider non-binding, compelling precedent concerning whether DENR lacks the legal authority in this case to require Rose Acre to obtain a NPDES permit.

Background

Rose Acre operates an egg production facility in Hyde County, North Carolina. This facility includes 12 high-rise confinement houses holding 3.2 million egg-laying hens. These 12 confinement houses are ventilated by fans which blowout feathers, dust, litter, and excrement from the containment houses. The excrement contains ammonia.

Pursuant to state regulations, Rose Acre built a wet detention pond to accumulate precipitation that falls on the ground around the farm. A few times a year, this detention pond discharges into a nearby canal. This canal drains into the Pungo River, a tributary of the Pamlico River.

In 2004, the DENR issued Rose Acre its first five-year NPDES permit. On March 25, 2009, Rose Acre applied to DENR for a renewal of the permit. DENR issued a final permit on September 24, 2010, requiring no discharge by Rose Acre and imposed Best Management Practices (BMPs).

On October 15, 2010, Rose Acre filed an administrative challenge to the newly renewed NPDES permit, arguing that DENR had no authority to require Rose Acre to operate under a NPDES permit. On October 17, 2011, the Administrative Law Judge (ALJ) issued a recommended decision granting Rose Acre's motion for summary judgment. Pursuant to state law, the contested case went to the North Carolina Environmental Management Commission (EMC) for review, which rejected the ALJ's recommendation and ordered an evidentiary hearing to determine whether Rose Acre had discharged pollutants. On January 4, 2013, the Superior Court remanded the case for evidentiary hearing.

On March 12, 2014, Rose Acre filed this suit seeking declaratory judgments from the district court that the pollutants expelled from the ventilation fans in its confinement houses and washing down into other waters constitutes agricultural stormwater, which is exempt from NPDES permitting requirements, and further declaring that DENR lacks the authority to require Rose Acres to obtain an NPDES permit.

On May 14, 2014, environmental groups moved to intervene on defendants' behalf; status granted by the court on July 8, 2014. Various motions ensued with this decision focusing on defendants' motion to dismiss for lack of subject-matter jurisdiction.

The District Court's Decision

Federal Jurisdiction

Rule 12(b)(1) and (h)(3) state that if the court determines at any time it lacks subject matter jurisdiction, the court must dismiss the action. Here, Rose Acres alleged subject matter jurisdiction under 28 U.S.C. §§1331, 1332, and 2201. Federal question jurisdiction under §1331 requires the interpretation of federal law or at least the implication of federal policy. In the case of state/federal law hybrids, state law must raise a federal issue, disputed and substantial, and exercising federal jurisdiction would not upset balance of federalism. (Citing to *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*,(*Grable*) 545 U.S. 308, 312.) Federal jurisdiction would be determined by cases falling within the *Grable* and *Gunn v. Minto*, (*Gunn*) 133 S.Ct. 1059 tests.

Rose Acre's declaratory relief claims merely expressed a remedy, not jurisdiction. Rose Acre would have to prove an independent basis for federal jurisdiction:

> Thus, for subject-matter jurisdiction to exist, it must be the case that defendants could bring a claim arising under federal law against Rose Acre concerning its NPDES permit obligations….Here any claim that defendants could bring against Rose Acre concerning its NPDES permit obligation would be under state law…'

Here, the relevant North Carolina statute, which determines whether persons must obtain an NPDES permit explicitly relies on federal regulations:

> Should the state bring an enforcement action based on a person's failure to obtain an NPDES permit, the state must prove (among other things) that federal law required the permit. Accordingly, such an action would raise a federal issue.

The second *Grable* factor requires the parties to actually dispute the federal issue in this case. That requirement is met as Rose Acre alleges federal law does not obligate it to obtain an NPDES permit "because any discharge that might occur falls under the CWA's agriculture stormwater exception."

The third *Grable* factor requires that the federal issue be substantial. There must be a "serious federal interest in claiming the advantages thought to be inherent in a federal forum." (*Grable*, *supra*, 545 U.S. at 313.) The sole issue in *Grable* was the interpretation of a federal tax statute (in-hand or mail service) with potentially wide-reaching administrative effects and it would not upset federalism. *Gunn* involved a legal malpractice claim that required extensive interpretation of the exclusively federal patent statute, but did not affect federal patent law at all:

> Specifically, the Court noted the 'backward-looking nature of a legal malpractice claims' and the lack of controlling or preclusive effect that a state-court decision would have on patent jurisprudence. (Quoting *Gunn, supra*, 1066-67.)

The court found that the case fell within the *Grable* category as this case presents a:

> …nearly pure issue of law as to whether the agricultural stormwater discharge exception in the CWA covers the possible precipitation-related discharge of litter and manure into Rose Acre's detention pond.

Unlike the backward-looking nature of the legal malpractice case in *Gunn* the resolution of the legal issue in this case "would affect the behavior of Rose Acre and DENR moving forward." (*Id.*)

The final *Grable* factor requires that the court's consideration of the federal issue not disturb "any congressionally approved balance of federal and state judicial responsibilities." (*Id.*, quoting from *Grable, supra*, 545 U.S. at 314.)

A State-Federal Partnership under the Clean Water Act

The court that the CWA is a partnership between the states and the federal government to meet a shared objective: to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." (*Arkansas v. Oklahoma*, 503 U.S. 91,101 (1992).) Congress provides federal funding to states contingent upon the creation of a regulatory scheme that is at least as stringent as the federal minimum standards, allowing states the right to tailor water quality criteria to local needs, implement their own NPDES permitting systems, and enforce their own administrative rules.

Conclusion and Implications

This case began as a contested state court case commencing in the North Carolina Office of Administrative Hearings in October 2010, continuing to a final agency decision by the North Carolina Environmental Management Commission in January 2012. Rose Acre pursued the appeal of such to the North Carolina Superior Court in March of 2012. The North Carolina Superior Court issued its opinion in January of 2013 upholding the final agency decision. That decision held that Rose Acre's CWA "agricultural exemption" claim did not apply to pollutants expelled from the ventilation fans on Rose Acre's confinement houses, and that DENR has the authority to require Rose Acre to obtain an NPDES permit.

Almost a year following the remand, Rose Acre pursued this action apparently seeking to re-litigate the issued decided on the state level decided within the authority granted to the state agencies by the CWA. Rose Acre has appealed this District Court ruling.

(Thierry Montoya)

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