

Environmental Litigation and Toxic Torts Committee Newsletter

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MESSAGE FROM THE CHAIRS

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In keeping with past tradition, the ABA Section of Environment, Energy, and Resources' Agricultural Management and the Environmental Litigation and Toxic Tort Committees have once again linked our content and practitioner authors together for a joint newsletter. This year's joint issue covers a broad and exciting array of issues and analyses that address some of the most pressing issues of our time: Exponent's Gary Bigham and Sheryl Law explore what happens when fertilizer becomes a "pollutant," Guy Knudsen, Ph.D. addresses the benefits and risks of biotechnology, Jennifer Bolger and Edward Witte discuss the impact *Raponos v. United States* has had on determining Clean Water Act jurisdiction over isolated wetlands, Marybelle Ang profiles two climate change cases, and Todd J. Janzen writes about the "Right to Farm Act." Additionally, Michael Duvall updates us on various litigation issues in the Case Law Update.

We would like to urge our members to consider attending the upcoming 17th Section Fall Meeting in Baltimore (where Agricultural Management Committee

chair Alan Sachs has his home office). The Fall Meeting will have several sessions designed for litigation attorneys, such as a session entitled "Cooperative Assessment vs. Litigation of Natural Resource Damages Claims: Strategic Choices and Consequences" and three sessions involving mock trials or hearings. For CERCLA lawyers, the planning committee "arranged" for a session on "Supreme Court CERCLA Hot Topics, including *Burlington Northern* and Enforcement Initiatives" as well as a "Brownfields Project Done Baltimore Style"—ample content to keep the environmental litigator engaged.

For the Aggies, there is a session called "At the Cutting Edge of the Real Oldest Profession: Hot Topics in Agriculture" and a session on liability prevention for "greenwashing" entitled "Earth-Friendly or Deceptive? The New World of Green Marketing Claims." Come and join the fun in Baltimore, including the launch of our Section's public service project involving the planting of one million trees (who gets the afforestation carbon credit?). Rest assured that the bottom-dwelling Orioles do not have a late-season home stand, but you can watch them play Boston on TV.

**ABA Section of Environment, Energy,
and Resources**
17th Section Fall Meeting
Sept. 23-26, 2009
Baltimore

PLAN TO ATTEND!

**Environmental Litigation and
Toxic Torts Committee Newsletter
Vol. 11, No. 2, August 2009
Geraldine E. Edens, Editor**

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**AGRICULTURE MEETS NATURAL
RESOURCE DAMAGE CLAIMS**

**Gary N. Bigham, L.G.
Sheryl Law**

Nutrient releases from agricultural sources have traditionally been exempt from regulatory scrutiny of the Clean Water Act (CWA) and the National Pollutant Discharge Elimination System (NPDES). However, in 2003, large confined animal feeding operations (CAFOs) that produce a liquid waste were brought under the NPDES. Lakes and streams whose use is impaired by the effects of nutrient enrichment are now subject to an Environmental Protection Agency-mandated Total Maximum Daily Load (TMDL) analysis to determine limits on both point and nonpoint nutrient sources, including stormwater runoff from agricultural sources.

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was enacted in 1980 as a regulatory tool to remove threats to human health posed by uncontrolled hazardous chemicals. It was amended in 1986 to establish a liability scheme and mechanism to repair damage to the environment caused by hazardous substances and disturbance from remediation. The Department of the Interior published the first regulations on Natural Resource Damage Assessment (NRDA) in 1987. With the exception of pesticide contaminated sites, there has been little need for the agricultural community to be particularly concerned with CERCLA and its NRD provisions—until now.

In June 2005, the Oklahoma Attorney General filed a complaint against several poultry producers, primarily under CERCLA. *State of Oklahoma v. Tyson Foods, Inc. et al.*, Case No. 4:05-cv-00329-JOE-SAJ (N.D. Okla.). The Attorney General is claiming that damages to the Illinois River and Tenkiller Ferry Reservoir in northeastern Oklahoma were caused by the poultry producers' activities in the Illinois River drainage basin, half of which lies in northwest Arkansas. For many years, farmers throughout this region have routinely applied poultry litter on their pastures as a primary source of fertilizer. The complaint alleges that

phosphorus and other substances run off from the pastures, causing harm to aquatic biological resources and impairing water quality and recreational opportunities in the Illinois River and Tenkiller Ferry Reservoir. See the article by Jess M. Kane in the March 2009 Agricultural Law Update by the American Agricultural Law Association for an overview of *Oklahoma v. Tyson*. How this case plays out could have an enormous impact on the agricultural industry across the nation. In this article we examine some of the key provisions of the NRD rules and discuss some of the difficulties in applying a rule originally intended for hazardous substances released from industrial sources, to stormwater runoff from pastures.

Eutrophication

All terrestrial and aquatic life on earth requires phosphorus and other nutrients for growth and survival. Eutrophication is the process of increasing the nutrient content in rivers and lakes. The result is an increase in biological productivity. Eutrophication is not always a bad situation. In nutrient-poor waters, eutrophication can lead to an increase in fish populations and overall biological productivity. However, too many nutrients in the water lead to excessive algae growth. When the algae dies, decomposing bacteria use up much of the oxygen resources, depriving other organisms of oxygen, and eventually causing a reduction in biological productivity.

Most algae are composed of carbon, nitrogen, and phosphorus in a ratio of approximately 40:7:1 (by weight). This means that seven times more nitrogen than phosphorus is needed to maintain growth. If one of the nutrients is unavailable, it inhibits algae growth and becomes the “limiting nutrient.” Phosphorus is typically the limiting nutrient in most freshwater rivers and lakes while nitrogen is the limiting nutrient in marine waters. Other nutrients and conditions can also limit algal growth.

Agricultural Runoff and NRD Regulations

This brings us to one of the apparent contradictions in applying CERCLA’s NRD rules to agricultural runoff. As noted in Kane’s article, a key part of the State’s claim in *Oklahoma v. Tyson et al.* and two earlier

cases is that phosphorus is a hazardous substance. Because CERCLA applies to releases of hazardous substances, phosphorus needs to be hazardous for CERCLA to be applicable. This does not make much sense because life on earth could not exist without phosphorus.

Phosphorus can exist in several forms, depending on whether it is naturally occurring or created. Elemental phosphorus (Chemical Abstract Service Registry Number (CASRN) 7723-14-0) does not occur naturally in the environment and combusts spontaneously when exposed to air. Because of this reactivity, elemental phosphorus is a designated hazardous substance under Section 102 of CERCLA and Section 311(b)(4) of the Clean Water Act (CWA). Other non-naturally occurring phosphorous compounds are also listed as hazardous substances. However, naturally-occurring forms of phosphorus are not hazardous substances. Natural phosphorus exists in the environment by itself, combined with other elements, or as phosphate (phosphorus combined with oxygen). Naturally-occurring phosphorus is found in living matter, including poultry manure.

Another apparent contradiction arises from the NRD rules that relate to the concept of baseline and the permitted discharge defense. Baseline is the environmental condition that existed at the time of the release of a hazardous substance. In other words, baseline is the environmental condition “but for” the release and its effects. Thus, a sewage treatment plant discharging phosphorus would be part of the baseline, while a party responsible for phosphorus in stormwater runoff from agricultural properties would be liable for natural resources damages, according to *Oklahoma v. Tyson et al.* Furthermore, the *Oklahoma v. Tyson* case only addresses the phosphorus in runoff derived from poultry litter applied to pastures and not to phosphorus in cattle manure, commercial fertilizer, or other phosphorus sources common in agricultural areas.

Sewage treatment plants with NPDES permits that include phosphorus are specifically exempted from NRD liability. Most states, charged by the CWA with the responsibility to regulate stormwater runoff, also have regulatory programs to manage nutrient

application (nitrogen, phosphorus, and potassium) to farmlands. These regulatory programs usually include visits to individual farms, soil testing, and developing individualized nutrient management plans. So, if the spirit of the NRD regulations was applied to agricultural runoff, farms in compliance with their state-endorsed nutrient management plans should also be exempt from NRD liability.

Eutrophication and the NRD Regulations

NRD cases are typically related to historical releases of persistent contaminants, such as metals in mining waste, organics (PCBs—polychlorinated biphenyls, PCDD/PCDFs—polychlorinated dibenzodioxins/polychlorinated dibenzofurans, PAHs—polycyclic aromatic hydrocarbons) in sediments, or solvents in groundwater. Damage to natural resources, according to the NRD regulations, is a reduction in what is called the level of service provided by the natural resource. A classic example is that people cannot eat sport-caught fish because a state health department has issued a consumption advisory due to high levels of mercury or PCBs. Another example might be that people cannot catch fish because the population has been decimated by some toxic contaminant. In both cases, the level of service provided by the lake or river is reduced because people cannot enjoy a usual form of recreation (fishing) or eat the fish that they catch. Service reductions can also arise if biological resources that are food sources for other organisms, such as fish prey, are diminished.

At worst, eutrophication can seriously reduce the level of service provided by a river or lake. The quality of water in a lake is the result of the quality of the inflow over its residence time (the time it would take to fill the lake). Lake residence times range from less than a year to many years depending on their size and the average river inflow. Thus, algae have plenty of time to grow in response to existing nutrient concentrations. Under some conditions, lake sediments can be an additional source of phosphorus.

Rivers are less sensitive to the effects of increased nutrient concentrations because of their lower residence time and rapid response to rainfall. River

discharge and water levels can vary greatly in rivers in response to rainfall events. River discharge increases in response to runoff, then subsides in a few days. River water quality also changes in response to runoff. Suspended solids and nutrient concentrations typically increase due to runoff, but then return to lower, pre-runoff conditions. Water moves quickly through a particular reach during runoff events and much more slowly during normal “base” flow. It takes an algal population about a week to undergo enough cell divisions to fully respond to an increase in nutrient concentrations. Rivers are, therefore, less sensitive to the effects of increased nutrient concentrations because the nutrient peak has subsided before the algal community can multiply in response.

Under normal conditions, the algal community in a lake or river is a mix of diatoms, green algae, blue-green algae (technically known as cyanobacteria), and other microorganisms. At an advanced state of eutrophy, however, the community can become dominated by blue-green algae that reach nuisance levels. Water becomes dark green and an algal scum often forms that blocks sunlight to aquatic plants. As the algae die, their decomposition can consume the available oxygen, which leads to elimination of most fish and benthic organisms. Many blue-green algae produce toxins that can be harmful to humans and wildlife. They also produce compounds that impart an unpleasant taste and odor to the water that can increase water treatment costs.

In the absence of nuisance levels of blue-green algae, objective assessment of service loss becomes difficult, particularly in rivers. Trustees may point to high concentrations of nutrients measured during stormwater runoff events, but the high concentrations do not persist long enough to significantly change the nutrient status of the river. Rivers are more sensitive to continuous nutrient sources, particularly during periods of low flow. Increases in nutrient inputs can lead to an increase in fish prey organisms and fish populations. This may be viewed favorably by fishermen. On the other hand, swimmers and boaters may not like the decrease in water transparency. The test of whether natural resource damage has occurred depends on whether there has been a reduction in the level of service

Guy R. Knudsen

provided by the river. Determination of natural resource damage in lakes can be more complicated, but comes down to the same question—have fish and wildlife populations been negatively impacted or recreational uses impaired?

Conclusion

Application of CERCLA and the NRD regulations to address impacts of nutrient enrichment, such as *Oklahoma v. Tyson et al.*, is problematic for several reasons. While some may argue that phosphorus is a hazardous substance and that CERCLA is, therefore, applicable, cursory consideration of the chemistry of phosphorus shows that naturally-occurring phosphorus is not the same as the man-made phosphorus species listed by CERCLA and the CWA. The natural aging process lakes undergo from nutrient runoff—“eutrophication”—can produce nuisance blooms of blue-green algae, capable of causing an obvious reduction in the level of service to human use and aquatic organisms. Below these levels of nutrient enrichment, negative impacts to human use or to fish and wildlife become difficult to measure, especially in rivers.

If a hypothetical release of a hazardous, listed form of phosphorus occurred and became the subject of an NRD assessment, all point and non-point sources of phosphorus would be considered to be part of the baseline. Cases such as *Oklahoma v. Tyson et al.* attempt to carve out a specific segment of the baseline and establish causation for damages to natural resources for that segment alone. Effects of nutrients from stormwater runoff are not easily divisible among the list of potential sources that include domestic pets, livestock, wildlife, septic tanks, and soil erosion.

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Genetically modified (“transgenic” or “biotech”) crops have transformed U.S. agriculture, but almost 15 years after the first commercial introduction of transgenic corn, the release and production of biotech crops remains controversial and litigious. In the past couple of years, some significant cases have continued to alter the playing field for companies producing, marketing, or seeking federal regulatory approval for transgenic crops. Some of these cases reflect an increasingly sophisticated legal and public relations approach by anti-biotech plaintiffs. Claims based on environmental laws and regulations have the potential to be bolstered with common law tort theories of liability (i.e., negligence, trespass, or nuisance).

In the September 2007 issue of the Agricultural Management Committee Newsletter (<http://www.abanet.org/enviro/committees/agricult/newsletter/archiveslist.html>), Bryan Endres provided background on the regulatory process for biotech crops, discussed the requirements that must be met before U.S. Department of Agriculture-Animal and Plant Health Inspection Service (USDA-APHIS) deregulation of a transgenic crop (allowing for commercial production), and addressed how the National Environmental Policy Act (NEPA) is implicated in that procedure. Indeed, the venerable NEPA, enacted well before the advent of transgenic organisms, continues to play the dominant role in recent cases. Overall, 2008 could reasonably be proclaimed a banner year for anti-biotech groups, who were rewarded with favorable court decisions related to several crops.

Sugar Beets

In January 2008, the Center for Food Safety (CFS), along with the Organic Seed Alliance, the Sierra Club, High Mowing Seeds, and Earthjustice, filed suit against USDA for approving Monsanto’s herbicide-resistant “Roundup Ready” sugar beet for commercial use without first conducting the appropriate environmental review (i.e., environmental impact statement (EIS)), in violation of NEPA and the Plant Protection Act.

Center for Food Safety v. Connor, Docket No. 3:08-CV-00484-JSW, N.D. Cal. CFS and its co-plaintiffs sought to enjoin planting of the new transgenic sugar beets, alleging that pollen from the crop would contaminate conventional and organic sugar beet fields.

In a setback for producers of biotech crops, a federal judge ruled in August 2008 that Monsanto and other interested parties could not intervene in the initial phase of the lawsuit examining whether APHIS had violated NEPA by deregulating the transgenic sugar beets. The judge reasoned that these parties couldn't intervene in the merits portion of the case, as they were not responsible for the actual deregulation of the crop. The plaintiffs hailed the ruling, claiming that it would prevent Monsanto from pouring its considerable resources "unfairly" into the legal process. However, the judge in *CFS v. Connor* did rule that if APHIS is found to have violated NEPA, then Monsanto and other parties would be allowed to intervene during the remedies phase of the case, as the outcome would directly affect their interests.

Biotech Grasses

In the September 2007 issue of the Agricultural Management Committee Newsletter, Bryan Endres discussed the ruling in a case where APHIS' approval of field trials of genetically engineered Roundup Ready grasses (creeping bentgrass, Kentucky bluegrass) was challenged. *International Center for Technology Assessment v. Johanns*, 473 F. Supp. 2d 9 (D.D.C. 2007). The transgenic grasses are owned by Scotts Grass Company using Monsanto's patents. The court vacated APHIS' denial of a noxious weed petition for the grasses, and granted summary judgment on plaintiffs' NEPA-based claims alleging that APHIS failed to properly assess potential impacts of field trials. Prior to the lower court's ruling, Scotts intervened in the case. Although USDA itself declined to appeal the decision, Scotts did appeal, challenging plaintiffs' ability to bring the case as well as the lower court's decision. However, in March 2008, the Court of Appeals for the District of Columbia Circuit granted plaintiffs' motion to dismiss, and tossed out Scotts' appeal. *Scotts v. ICTA et al.*, Docket No. 07-5238 (D.C. Cir. Mar. 17, 2008).

Predictably, the decision was hailed by CFS, which is ICTA's sister organization and a leading player in anti-biotech litigation. Beyond its significance as yet another NEPA-based court victory, *Scotts* provides a legal precedent potentially limiting the ability of biotech companies to intervene in cases that challenge the actions of regulatory agencies, once those agencies are no longer involved in the case. As Andrew Kimbrell, CFS executive director, put it, "The Court's dismissal of Scotts' appeal sends a strong signal to Scotts, Monsanto and other corporations that they will not be permitted to prolong litigation after the government has conceded defeat."

Alfalfa

In September 2008, the Ninth Circuit Court upheld a California district court's injunction (*Geertson Seed Farms v. Johanns*, 2007 WL 518624 (N.D. Cal. Feb. 13, 2007)) on all planting of Roundup Ready alfalfa seed, on essentially procedural grounds. *Geertson Seed Farms v. Monsanto*, 9th Cir. 2008, No. 07-16458. Monsanto sought a rehearing of its appeal, but the U.S. Appeals Court ruled in June 2009 that it would not accept further petitions for rehearing and upheld the injunction for the sale of the biotech seed which will run for at least three planting seasons. Commercial launch of Roundup Ready alfalfa awaits completion of a USDA EIS which industry insiders expect to be published this Fall.

In *Geertson v. Johanns*, the district court had ruled that APHIS violated NEPA by failing to require a full EIS. In their appeal, neither the government nor the intervenors (Monsanto and its licensee, Forage Genetics, Inc.) questioned the existence of a NEPA violation. Rather, they disputed the scope of the injunction, and claimed that the district court should have held a further evidentiary hearing before issuing a permanent injunction.

In affirming the lower court's decision, the Ninth Circuit determined that the injunction had been appropriately entered using a traditional balancing test, and that a further evidentiary hearing would have been effectively redundant with what APHIS must now do in an EIS. However, in a sharply worded dissent, Judge

N. Randy Smith argued that the district court's failure to conduct an evidentiary hearing prior to issuing the permanent injunction (as was required, in Judge Smith's view, by FRCP 65), should have been cause to remand the case to the district court.

Had the case been remanded for a full evidentiary hearing, would the outcome have been different? It's impossible to know, but the *Geertson* plaintiffs may have been fortunate that the 9th Circuit decision preceded a U.S. Supreme Court ruling of only a few months later. *Winter v. NRDC*, S. Ct. No. 07-1239 (2008). *Winter* had national defense implications, and perhaps in part for that reason, the Court felt obliged to strongly reiterate a standard requiring that injunctive relief in environmental protection cases be based on hard evidence that irreparable environmental or economic injury is likely. It is quite possible that, in future, *Winter* will raise the bar for injunction-seeking anti-biotech plaintiffs.

Significantly, *Geertson v. Monsanto* effectively affirmed the appropriateness of considering socioeconomic concerns (e.g., potential genetic contamination of organic and conventional alfalfa) in granting injunctive relief. The *Geertson* cases reinforce the continued erosion of a formerly prevailing regulatory assumption: that organic and conventional producers must themselves bear the burden of segregating their crops from biotech crops grown nearby, if contamination with transgenic material (e.g., via pollen drift) is of concern (see the September 2007 Agricultural Management Committee Newsletter article for background on this issue). Further, it is possible to read into the court's language concerning environmental harms, an indirect implication of potential legal liability for farmers and biotech companies.

The two *Geertson* cases highlighted another aspect of recent anti-biotech suits spearheaded by environmental groups: the inclusion of organic and/or conventional growers as co-plaintiffs. For example, the consortium of plaintiffs in *Geertson v. Johanns* included Geertson Seed Farms, Trask Family Seeds, CFS, Beyond Pesticides, Cornucopia Institute, Dakota Resource Council, National Family Farm Coalition, Sierra Club,

and Western Organization of Resource Councils. This approach may provide the public relations advantage of enhancing public sympathy and making biotech companies look like bullies attempting to force their product on reluctant farmers. It also may be an effective "divide and conquer" strategy, creating a rift between organic/conventional and biotech crop growers. The specter of claims arising between growers for genetic contamination, with liability based on nuisance and/or trespass precedents, not only may have a chilling effect on future biotech crop registration efforts, but also has the potential to create acrimonious relationships within large producer organizations.

Internal conflicts have been handled differently by various commodity groups. For example, the National Alfalfa & Forage Alliance (NAFA) has been highly proactive in promoting a "coexistence strategy" for the different types of growers, and last year produced a series of documents addressing coexistence issues relevant to organic alfalfa seed and hay producers, as well as alfalfa seed and hay exporters. Transgenic wheat, on the other hand, has been a contentious topic within the industry for years, despite the firmly pro-biotech stance of the National Association of Wheat Growers (NAWG). Until recently, NAWG's position contrasted with that of U.S. Wheat Associates, an export-focused cooperative which warned of the loss of wheat export markets if Monsanto's Roundup Ready wheat were to be released. However, it appears that the industry has started to unite and move towards advocacy of transgenic wheat, especially if workable export stewardship policies (e.g., effective segregation of transgenic and conventional crops) can be established.

Biotech Crop Planting Enjoined in a Wildlife Refuge

In a March 2009 decision, a federal district court ordered the U.S. Fish & Wildlife Service (FWS) to stop allowing growers to plant transgenic corn and soybean crops on the Prime Hook National Wildlife Refuge in Delaware. Plaintiffs claimed that the FWS had entered into cooperative farming agreements with private growers, without the required NEPA review and contrary to the FWS' policy requiring the

director's approval for planting of biotech crops. Interestingly, the defendants stated, after the suit was filed, that they would conduct NEPA review before planting biotech crops again; as a result, they contended, plaintiffs claims were moot. The court found that the claims were not moot and granted injunctive relief. This ruling blocks future farming operations on the refuge until compatibility determinations required by the National Wildlife Refuge System Administration Act as well as NEPA assessments have been completed. *Delaware Audubon Society v. U.S. Department of Interior*, U.S.D.C. Del 06-223-GMS, 2009 U.S. Dist. LEXIS 24746 (Mar. 24, 2009), available at <http://www.ded.uscourts.gov/GMS/Opinions/Mar2009/06-223.pdf>.

The ruling is significant because, although limited to the Prime Hook refuge, it may serve as a model for similar litigation at other national wildlife refuges where transgenic crops are currently being grown. Since Prime Hook had a policy in place limiting use of biotech crops, that distinguishing factor may influence other wildlife refuges in deciding matters of policy. It also may serve as an indication that the arena for anti-biotech crop litigation may soon be expanding, from primarily on-farm considerations in NEPA suits, to natural areas potentially impacted by nearby biotech crop production, with citizen suits potentially based on the Clean Water Act, Resource Conservation and Recovery Act, etc.

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ONE MILLION TREES PROJECT

To learn about the Section's nationwide public service project "One Million Trees Project — Right Tree for the Right Place at the Right Time," please visit:

http://www.abanet.org/environ/projects/million_trees/home.shtml

POST RAPANOS: THE REGULATORY MIASMA ENGULFING ISOLATED WETLANDS AND THE CLEAN WATER ACT

Jennifer L. Bolger
Edward B. Witte

The U.S. Supreme Court decision *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*) held the promise of resolving substantial differences of opinion regarding federal jurisdiction over certain "isolated wetlands." Instead, the *Rapanos* Court issued five separate opinions, with no majority, leaving property owners, developers, environmental advocates, and government regulators mired in dispute and uncertainty. For the last 3 years, courts have inconsistently applied the new standard. The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) have struggled with enforcement proceedings and grappled with appropriate guidance documents to clarify the extent of federal jurisdiction. Congress has even proposed new legislation to effectively overrule *Rapanos* and to level set the definition of protected waters under the Clean Water Act (CWA). As a result, understanding federal jurisdiction over water and wetlands has never been more muddled.

Rapanos Standard

At issue in *Rapanos* was the extent of federal jurisdiction over wetlands with limited hydrologic connection to other traditional waters under the CWA. The *Rapanos* plurality required wetlands to be factually adjacent (i.e., adjoining) to jurisdictional water to fit within the definition. Justice Kennedy, however, in his concurring opinion that has largely come to stand for the *Rapanos* holding, concluded that a wetland does not have to be wet, or immediately abutting a navigable water, and that a sufficient connection, or a "nexus," exists "if the wetlands . . . significantly affect the chemical, physical and biological integrity of the other covered waters more traditionally understood as navigable."

The "significant nexus" test manufactured by the *Rapanos* Court has left regulated property owners and developers, as well as the regulators, in a state of

enhanced technical and legal justification for jurisdiction, or the lack of jurisdiction, over isolated wetlands.

Post-*Rapanos* Regulation

Since *Rapanos*, there has been little consistency among courts and agencies over the extent and reach of the EPA's jurisdiction and the definition of "navigable waters of the United States" under the CWA. Chief Justice Roberts foreshadowed this rudderless direction in his concurring opinion, when he wrote if "no opinion commands a majority of the Court," lower courts will have "to feel their way on a case-by-case basis."

Although the Kennedy "significant nexus" test has become the standard most commonly applied by courts and agencies, the results are not always the same. For example, in *Pine Tree Homeowners' Association, Inc. v. Ashmar Development Co., LLC*, No. 04-Civ-10006, at 15 (S.D.N.Y. Jan 29, 2008) the court found that a neighborhood association failed to show a significant nexus and that "navigable waters" under the CWA cannot include an intrastate lake with no interstate commerce. In contrast, in *Northern California River Watch v. Healdsburg*, 9th Cir., No. 04-154428/10/06, the court concluded significant nexus was present, and so, too, was federal jurisdiction, where an isolated body of water in question seeped into a navigable body of water.

Rapanos Guidance

In response to Chief Justice Roberts' stern reprimand to the Corps for failing to adopt guidance on isolated wetlands, EPA and the Corps issued the "*Rapanos* Guidance" on federal jurisdiction under the CWA on June 5, 2007. The agencies received over 66,000 public comments in response to the guidance. A revised version was issued on Dec. 2, 2008.

The *Rapanos* Guidance instructs that the following waters are subject to federal jurisdiction:

- Traditional navigable waters;
- Wetlands adjacent to traditional navigable waters;

- Non-navigable tributaries of traditional navigable waters that are relatively permanent (i.e., the tributaries typically flow year-round or have continuous flow at least seasonally); and
- Wetlands that directly abut such tributaries.

Under the *Rapanos* Guidance, jurisdiction over the following waters will be decided after a fact-specific analysis is conducted to determine whether a significant nexus with a traditional navigable water exists:

- Non-navigable tributaries that do not typically flow year-round or have continuous flow at least seasonally;
- Wetlands adjacent to such tributaries; and
- Wetlands adjacent to, but that do not directly abut, a relatively permanent non-navigable tributary.

Even with the *Rapanos* Guidance, the regulated world is unsure of when isolated wetlands will be protected because those matters are fact specific and rely on a technical, scientific justification to prove jurisdiction. To underscore the problem, in an April 30, 2009 report sent to Congress, EPA complained of the significant strain on its resources and finances to process an enforcement case.

The Clean Water Restoration Act

Most recently, members of Congress have undertaken an effort to reset the CWA to give EPA and the Corps clearer jurisdiction over "waters of the United States." In 2007, Rep. James Oberstar (D-Minn.) introduced the Clean Water Restoration Act (CWRA) in the House, though it did not pass. In the current Congress, Sen. Russell Feingold (D-Wis.) sponsored the CWRA which the Environment & Public Works Committee passed on June 18, 2009.

The CWRA seeks to amend the CWA and overrule *Rapanos*. The CWRA expands the reach of the federal government from regulating "navigable waters of the United States" to encompassing "waters of the United States." Under the CWRA, "[t]he term 'waters of the United States' means all waters subject to the ebb and flow of the tide, the territorial seas, and all

interstate and intrastate waters, including lakes, rivers, streams (including intermittent streams), mud flats, sand flats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, and natural ponds, all tributaries of any of the above waters and all impoundments of the foregoing.” SB 787, 111th Congress, § 1 (2009).

Conclusion

Even after 3 years of jurisprudence and agency guidance to clarify the reach and extent of the *Rapanos* decision, the regulated community is no closer to a uniform application of jurisdiction over isolated wetlands. A new law may revive the promise of clarity on this issue, but it is not certain that it will pass or, if it does, whether that it will restore the regulatory framework to the original intent of the CWA. What is likely with the passage of a new law that broadens federal jurisdiction is a flood of challenges to the agencies and courts, leaving the regulated community in a continuing state of uncertainty over isolated wetlands.

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A TALE OF TWO CLIMATE CHANGE CASES

Marybelle Ang

To date, no court has ruled that there a fundamental right to live in a greenhouse gas-free or greenhouse gas-reduced environment. However, two recent California cases shed light on how plaintiffs can successfully challenge how greenhouse gases (GHGs) are treated in the rulemaking process: *SF Chapter of A. Philip Randolph Institute v. EPA* (No. C 07-04936 CRB, 2008 U.S. Dist. LEXIS 27794 (N.D. Cal. Mar. 28, 2008)) and *Center for Biological Diversity v. NHTSA*, 538 F.3d 1172 (9th Cir. 2008).

In *SF Chapter*, the plaintiffs tried to (1) compel the Environmental Protection Agency (EPA) to make a determination regarding carbon dioxide’s danger to the

public health or welfare (as directed by the Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497 (2007)), and (2) prohibit the Bay Area Air Quality Management District (BAAQMD) from issuing construction permits for two power plants. Plaintiffs based their writ of mandamus on a possible violation of the Clean Air Act (CAA).

The lawsuit was filed after the City of San Francisco proposed that two power plants be built within the city: one in Potrero Hill and the other at a site near the San Francisco International Airport (SFO). The Potrero Hill plant had been approved by the California Energy Commission through its certification process. In addition, the plant had received a Final Determination of Compliance from the BAAQMD, which concluded that it would comply with applicable federal and state air quality laws, as long as certain conditions in the proposal were fulfilled. Before the Board of Supervisors could move to approve the project, the BAAQMD needed to incorporate the air quality conditions of certification into an “Authority to Construct” permit. Similarly, the SFO plant also needed a construction permit from the BAAQMD and approval by the Board of Supervisors.

Plaintiffs lost on all five causes of action: federal and state mandamus, agency delay under the Administrative Procedure Act, public nuisance, and deprivation of due process. First, the trial court found that EPA had not violated any duty under the CAA by not yet determining whether CO₂ released from motor vehicles contributes to air pollution “which may reasonably be anticipated to endanger public health and welfare.” Clean Air Act, 42 U.S.C. § 7521(a)(1). (The Supreme Court in *Massachusetts* had not set a timeline for the EPA to respond to its directive to make a determination on CO₂.) Second, the court did not find any unreasonable delay in the EPA’s failure to respond to its decision.

Furthermore, the court rejected plaintiffs’ public nuisance claim, because the BAAQMD had statutory authority to issue the permits, which allowed the discharge of pollutants. *SF Chapter*, at *14. The court also relied on the California Health and Safety Code, which expressly authorizes permits for sources of air

pollution if certain conditions are satisfied. Moreover, it noted that because both plants had not yet obtained all necessary approvals, the nuisance claim was not ripe. Plaintiffs' due process claim failed as well; the court ruled that there is no fundamental right to be free of climate-change pollution. The court further held that a diminution in plaintiffs' property values or quality of life does not constitute a taking of either liberty or a property interest.

In *Center for Biological Diversity*, the Ninth Circuit addressed the National Highway Traffic Safety Administration's (NHTSA) Final Rule on corporate average fuel economy standards (CAFE) for light trucks (light trucks include utility vehicles, minivans, and pickups). Plaintiffs, which included the State of California, Natural Resources Defense Council, and the Sierra Club, argued that the Final Rule was "arbitrary, capricious, and contrary" to the Energy Policy and Conservation Act of 1975 (EPCA) and the National Environmental Policy Act (NEPA). *Center for Biological Diversity v. NHTSA*, 538 F. 3d 1172, 1181 (9th Cir. 2007). Title V of EPCA sets automobile fuel economy standards with the goal of decreasing dependence on foreign sources, and enhancing national security and affordable domestic energy supplies. Under EPCA, the fuel economy standard must be the "maximum feasible average fuel economy level" achievable in that automobile's model year. U.S.C.S. § 32902(a)

Moreover, the Ninth Circuit examined whether NHTSA's Environmental Assessment (EA) complied with NEPA, in light of NHTSA's failure to monetize potential benefits from GHG emissions in its cost-benefit analysis. NEPA requires federal agencies to prepare a "detailed statement" on the environmental effect of "major federal actions affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C)(I) (2007). The Court found that NHTSA did not assign any value to the "most significant benefit of more stringent CAFE standards," even though it had (a) received recommendations for how to value such benefits and (b) monetized other benefits such as reduction of pollutants, crash, noise, and congestion costs and increased energy security. *Center*, 538 F.3d at 1199. The court concluded that this oversight

caused NHTSA to underestimate the benefits of stricter CAFE standards.

Furthermore, the court concluded that the EA's cumulative analysis impact was inadequate because it failed to analyze the "incremental impact" of emissions on climate change or on the environment. *Id.* at 1215. The global scope of a problem, the court emphasized, would not relieve NHTSA of its duty to evaluate the impact of any rule setting a CAFE standard. Citing evidence that a continued rise in GHG levels could alter the climate significantly, the court decided that NHTSA's analysis could have but failed to determine whether changing GHG emissions could prevent adverse climate change. The court thus remanded to NHTSA to promulgate new standards and to prepare a revised EA or a full Environmental Impact Statement (EIS).

Two common themes emerge from both cases. First, courts will intervene in GHG cases only if a government agency has *not* followed applicable rules and statutes. Thus, GHG-free advocates must continue to closely monitor government agencies. Second, GHG-free advocates must get far more involved in the legislative and rulemaking process. Indeed, while it's unlikely the courts will create a fundamental right to a GHG-free environment, such a *statutory* right can be codified into law.

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INDIANA COURT OF APPEALS UPHOLDS THE RIGHT TO FARM ACT

Todd J. Janzen

In 1981, the Indiana legislature passed a “Right to Farm Act,” a law that protects farmers as well as other industries from “nuisance” suits against their operations, provided the operation is in the proper locale and has been in operation for more than 1 year when the alleged nuisance began. IND. CODE § 32-30-6-9. Right to Farm Acts have been passed by all fifty states in some form.

In 1987, Indiana’s Right to Farm Act received its first test in *Shatto v. McNulty*, 509 N.E.2d 897 (Ind. Ct. App. 1987). The *Shatto* case provided a typical example of the act’s protections—a non-farming rural resident attempted to shut down his neighbor’s hog farm because it smelled like manure. The court of appeals applied the Right to Farm Act, stating: “We must observe that pork production generates odors which cannot be prevented, and so long as the human race consumes pork, someone must tolerate the smell.”

A lot changed in rural Indiana and rural America since the 1987 *Shatto* case. Today’s rural countryside has even more non-farming residents and today’s farms have become bigger (and some would say smellier) than ever before. Surprisingly, however, the Supreme Court of Iowa—a Midwestern agricultural state—struck down the Iowa Right to Farm Act as unconstitutional in *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309 (Iowa 1998). The Iowa court held that the Iowa Right to Farm Act created a government “taking” of property without compensation. The Iowan justices reasoned that the Right to Farm Act allows the farmer to fill the air above his neighbor’s property with the smell of manure and other farm odors, thus creating an “easement” that is created without just compensation.

On Jan. 12, 2009, the Indiana Court of Appeals addressed *Bormann* in *Lindsey v. DeGroot*, 898 N.E.2d 1251 (Ind. Ct. App. 2009). Don and Jacquelyn Lindsey moved to rural Indiana in 1998, purchasing 10 acres of grassland and woods in

Huntington County, a prime agricultural area. Neither Don nor Jacquelyn were farmers when they moved into the country and they paid little attention to the small old hog farm approximately one-half mile away. But a few years later, the old hog farm was sold to Johannes DeGroot, who converted it into a modern 1,500 cow dairy farm. After the dairy farm had been in operation for more than 1 year, the Lindseys filed suit alleging “nuisance”—the farm created unpleasant smells, noise, and flies on the Lindseys’ property.

DeGroot asserted the Right to Farm Act as a defense. DeGroot argued that the dairy could not be a legal “nuisance” because it was located in an established rural locale and it had been in operation for more than 1 year at the time the Lindseys filed suit. DeGroot also alleged that his farm was not a nuisance, indeed, the evidence showed that the Lindseys’ rural home had actually *increased* in value after DeGroot arrived. The trial court granted DeGroot summary judgment.

On appeal, the Lindseys challenged the Indiana Right to Farm Act’s constitutionally, asking the Indiana Court of Appeals to apply the reasoning of *Bormann*. Citing precedent from Texas, *Barrera v. Honda Creek Cattle Co.*, 132 S.W.3d 544 (Tex. App. 2004), and Idaho, *Moon v. North Idaho Farmers Ass’n*, 96 P.3d 637 (Idaho 2004), where those state courts had refused to apply *Bormann* to the Right to Farm Act, the Indiana Court of Appeals refused to apply it to DeGroot’s operations. The court wrote: “We note that like the Idaho and Texas Courts, we have found nothing to suggest that Indiana has adopted the seemingly unique Iowa holding the right to maintain a nuisance is an easement.” Indiana’s Right to Farm Act is constitutional and applied to bar the Lindseys’ nuisance claim.

The Lindseys also claimed that their nuisance case fell under the “negligence” exception to the Right to Farm Act. Like many Right to Farm Acts, the Indiana Right to Farm Act does not apply where the nuisance results from the negligence of the operation. The Lindseys asserted that DeGroot had a history of environmental regulatory violations under the Indiana Department of Environmental Management’s confined feeding operation (CFO) rules. Because of these violations, the

Lindseys asserted, the Right to Farm Act's protections did not apply to DeGroot's operations.

To analyze this question, the Indiana Court of Appeals looked to negligence *per se* principles. Negligence *per se* requires a court to examine (1) the purpose of a statute and (2) the class of persons the statute intended to protect, in order to determine whether violation of that statute could be negligence as a matter of law. For example, in *Town of Montezuma v. Downs*, 685 N.E.2d 108, 112 (Ind. Ct. App. 1997), a pipeline company had failed to follow statutory regulations, resulting in a gas explosion destroying a home. One of the central tenets of *Montezuma* was that the violation of a statutory duty may be actionable where it was "the proximate cause of the injury."

Applying these principles and *Montezuma* to DeGroot's operations, the court found proximate cause lacking. The Lindseys claimed that an alleged manure spill, occurring a mile downstream from their home, was a statutory violation that interfered with the use of their property. The court held that the statutes allegedly violated, the Indiana Department of Environmental Management's CFO rules, were for the purpose of protecting of groundwater. The Lindseys designated no evidence that their groundwater had been impacted by this alleged manure spill. In fact, DeGroot designated evidence that two samples from the Lindseys' groundwater tested negative for any manure-related contamination. There was no link between the alleged environmental regulatory violations and the Lindseys' nuisance claim.

The court also found that DeGroot's operations had not devalued the Lindseys' home. The Lindseys failed to designate any evidence that their home had decreased in value since DeGroot moved in nearby. Mr. Lindsey testified that their home was worth \$400,000. This was a substantial increase from the \$280,000 appraisal done before DeGroot began its operations.

Finally, the Lindseys argued that DeGroot operated its farm in such a manner as to cause intentional infliction of emotional distress. The court dismissed this argument, stating, "DeGroot Dairy operated a CFO

dairy operation largely, if not entirely, compliant with Indiana regulations and a farming operation does not appear to be unlike any other farming operation one might expect to find operating in Indiana." DeGroot's farming operations were not atrocious or utterly intolerable. Thus, the Lindseys' claim that a dairy farm can be operated in such a manner as to cause emotional distress to the farm's neighbors, failed as a matter of law.

The Indiana Court of Appeal's ruling means the end of the Lindseys' "nuisance" suit. More notably, the case puts Indiana in the column of states declining to follow the Iowa Supreme Court's rejection of its Right to Farm Act in *Bormann*. Farmers in Indiana and elsewhere can now breathe a little easier, knowing the smell from their hogs, chickens, and cows is less likely to result in a successful nuisance suit against their operations.

Todd J. Janzen is an associate at the law firm of *Plews Shadley Racher & Braun LLP, Indianapolis, Indiana*. Mr. Janzen served as counsel for *DeGroot Dairy, LLC* and is the former chair of the *Agricultural Law Section of the Indiana State Bar Association*.

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CASE LAW UPDATE

Michael J. Duvall

This Case Law Update profiles a variety of recent cases impacting the agricultural and environmental fields, including several cases decided by the Supreme Court in a busy term for these issues.

This update profiles several injunction rulings in environmental cases, including one case that the Supreme Court dismissed for lack of standing, *Summers v. Earth Island Institute*, 555 U.S. ___, 129 S. Ct. 1142 (2009), and another that reiterated the requirement that irreparable harm be likely, not merely possible, for an injunction to issue and balanced interests of national security in favor of those of marine life, *Winter v. Nat. Resources Defense Council*, 555 U.S. ___, 129 S. Ct. 365 (2008).

This update also overviews several Clean Water Act (CWA) cases, including one case in which the Supreme Court approved the use of a cost-benefit analysis in determining the best technology available (BTA), *Entergy Corp. v. EPA*, 556 U.S. ___, 129 S. Ct. 1498 (2009), another in which the Ninth Circuit concluded that aquatic pesticides are considered pollutants, *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927 (6th Cir. 2009), and another in which the Supreme Court held that the U.S. Army Corps of Engineers (Corps), not the U.S. Environmental Protection Agency (EPA), may issue permits for certain types of rock "slurry" discharge.

This update details two Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) cases, including a Supreme Court decision addressing the standard for "arranger" liability as well as when apportionment, rather than joint and several liability is permissible, *Burlington N. & Santa Fe Ry. v. United States*, 556 U.S. ___, 129 S. Ct. 1870 (2009), and the latest case in the line of *Aviall-Atlantic Research CERCLA* contribution cases, *Westinghouse Elec. Co. v. United States*, in which the court first held that the plaintiff could not bring a contribution claim under § 113(f) without having established liability in a § 107 suit but then reversed

itself and held that costs potentially may be recovered based on the existence of a consent decree entered into with the state.

This update profiles several other cases. One case concerns issues relating to wildlife, agencies, the public trust, and proper parties to a suit, *Center for Biological Diversity, Inc. v. FPL Group Inc.* Another involves the interpretation of the "modified pollution exclusion" under a standard form Commercial General Liability (CGL) policy, *Hussey Copper Ltd. v. Royal Insurance Co.*, 567 F. Supp. 2d 774 (W.D. Pa. 2008), in which the court held that the exclusion did not relieve an insurer from its duty to defend a case involving third-party property damages. A case in which a jury found in favor of a pork "breed-to-wean" facility on nuisance claims also is profiled.

Injunction Cases

W. Org. of Res. Councils v. Johanns, 541 F.3d 938 (9th Cir. 2008)

Monsanto and Forage Genetics petitioned the Animal and Plant Health Inspection Service (APHIS), the arm of the U.S. Department of Agriculture (USDA) that regulates genetically engineered plant pests, for a determination of "nonregulated status" for Roundup Ready alfalfa, a genetically engineered plant. Several alfalfa growers and non-profit organizations opposed the petition, arguing that the genetically modified alfalfa would contaminate conventional and organic alfalfa, thereby impacting farmers' marketing of alfalfa and the export market. APHIS granted the companies' request for nonregulated status (making of finding of "no significant impact"), and Geerston Seed, a conventional alfalfa producer, and several environmental groups filed suit against the USDA, APHIS, and EPA, challenging the deregulation decision.

The district court, addressing the plaintiffs' National Environmental Protection Act (NEPA) claims, vacated the deregulation decisions and enjoined all future planting of Roundup Ready alfalfa nationwide. The defendants appealed, arguing that the injunction should not have been granted without an evidentiary hearing and that the district court ignored the traditional

irreparable injury requirement. The defendants argued that the injunction was overbroad because the district court did not consider the likelihood of potential harm of planting Roundup Ready alfalfa subject to mitigation measures proposed by APHIS.

The court of appeals upheld the injunction and concluded that the district court applied the traditional four-factor injunction test. Most notably, the district court specifically stated that an injunction did not “automatically issue” upon a finding of a NEPA violation. And although the district court did not hold an evidentiary hearing, such a hearing was not necessary because the injunction actually was limited in scope and purpose, in that it merely required compliance with NEPA.

Winter v. Nat. Resources Defense Council, 555 U.S. ___, 129 S. Ct. 365 (2008)

The Natural Resources Defense Council sought and obtained an injunction prohibiting the Navy’s training exercises that used mid-frequency sonar to detect submarines because of the damage caused to dolphins and whales. The district court ordered that the Navy prepare an Environmental Impact Statement (EIS) and imposed certain mitigation measures on the remaining scheduled exercises. In issuing the injunction, the district court found a likelihood that the Navy failed to comply with NEPA.

The Navy then sought relief from the executive branch. The chief of Naval Operations concluded that the injunction created an unacceptable risk with regard to the training of naval forces for deployment to high-threat regions, and the president determined that the Navy’s use of mid-frequency sonar during exercises was essential to national security. The Council on Environmental Quality therefore found emergency circumstances for complying with NEPA without completing an EIS. The district court refused to vacate its injunction, however, and the Ninth Circuit affirmed the district court’s order.

The Supreme Court vacated the injunction because it was entered based only on a “possibility” of irreparable harm, which contravened the longstanding

requirement of the likelihood of irreparable injury absent immediate relief. The Court also determined that the injunction balancing factors weighed in favor of the Navy, not the plaintiffs. Although the Court did not question the importance of the plaintiffs’ ecological and scientific interests, it placed paramount importance on the evidence presented by the Navy that the training exercises and accompanying use of sonar were vital to national security.

Summers v. Earth Island Institute, 555 U.S. ___, 129 S. Ct. 1142 (2009)

The Forest Service approved a logging project covering 238 acres of the Sequoia National Forest without the traditional notice and comment and administrative appeals process for land and resource management plans. The Earth Island Institute challenged the application of certain Forest Service regulations that created exceptions to the typical agency procedures and sought an injunction.

The district court issued a preliminary injunction halting the logging project and then extended that injunction to a nationwide scope because of the Forest Service’s exemption of certain land and resource management plans from typical notice and comment procedure. The Ninth Circuit upheld the nationwide injunction, holding that the Appeals Reform Act did not provide for the exceptions promulgated by the Forest Service, and the United States petitioned for *certiorari* to the Supreme Court.

After the district court had issued the injunction, the parties entered into a settlement under which the Forest Service agreed to allow notice and comment procedure before proceeding with the logging project. The Ninth Circuit had permitted the plaintiffs’ challenge to go forward based on their facial challenge to the Forest Service regulations, but the Supreme Court held that the plaintiffs had no standing to challenge the regulations in the abstract. Because the plaintiffs could not allege that the regulations were being applied to a specific project that would impede their right to enjoy the national forests, the plaintiffs lacked standing under Article III.

CWA Cases

Cost-Benefit Analysis and BTA

Entergy Corp. v. EPA, 556 U.S. ___, 129 S. Ct. 1498 (2009)

EPA promulgated regulations requiring new power plants to conform to a single type of cooling water intake structure, such as a closed-cycle cooling tower, but those regulations did not require existing plants to update their facilities to conform to this structure. Rather, the regulations permitted existing plants to choose from a range of technologies and vary from these requirements upon a showing that the compliance costs significantly outweigh the benefits of compliance.

The Court considered whether Section 316(b) permitted EPA to consider a cost-benefit analysis in determining the BTA or whether the statute's silence on that factor forbid such an analysis. In an opinion by Justice Scalia, the Court concluded that "[i]t is eminently reasonable to conclude that silence is meant to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree."

Based on the Court's decision, EPA will permit more than 500 power plants to use less-costly devices to extract water for cooling, even if those devices do not provide the maximum protection for fish and other small forms of aquatic life. This decision affects several states that sought to increase protection of certain fish, shellfish, and plankton in rivers and streams.

Aquatic Pesticides as Pollutants— Requirement of NPDES Permit

Nat'l Cotton Council of Am. v. EPA, 553 F.3d 927 (6th Cir. 2009), *pet. for reh'g en banc filed* (Apr. 9, 2009)

EPA issued a final rule that exempted aquatic pesticides from the CWA and, therefore, the requirement of a NPDES permit prior to discharge, if the pesticide was discharged directly into water to control pests or the pesticide was applied to control

pests present or near water and a portion was unavoidably deposited into waters. Environmental industry groups challenged the final rule, arguing that EPA exceeded its authority under the CWA. Central to the groups' challenge was the question of whether pesticides were considered "pollutants" under the CWA (and therefore subject to the NPDES permit requirement).

The Sixth Circuit Court of Appeals concluded that pesticides were unambiguously included within the definition of "pollutants" under the CWA because excess pesticide residue constitutes "chemical waste." Moreover, biological pesticides were unambiguously included in the statute's definition of "biological materials." For these reasons, the court held that the EPA's final rule was not a reasonable interpretation of the statute and, therefore, an NPDES permit is required to apply aquatic pesticides in and around water, unless those pesticides will not leave residue in the receiving waters.

A petition for rehearing en banc has been filed in this case, and several industry groups and associations have filed amicus briefs in support of that petition.

Authority of Army Corps of Engineers to Regulate Mining Discharge

Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. ___, ___ S. Ct. ___, Nos. 07-984, 990, 2007 WL 1738643 (June 22, 2009)

A gold mine operator sought to dispose of waste material, a "slurry" mixture of rock and water, in a nearby lake. The CWA classifies crushed rock as a "pollutant" and forbids its discharge except in compliance with the act, as permitted by EPA. The CWA also empowers the Corps to issue permits for the discharge of "fill material," defined as any material that has the effect of "changing the bottom elevation of water," including "slurry" or "similar mining-related materials."

The Court considered whether the mining company should have been required to seek a permit for the slurry discharge from EPA, which imposed tougher

standards, instead of the Corps. The Court held that only the Corps may issue permits for the discharge of fill materials falling under the Corps' authority and that, because the slurry involved in this case fell within that authority, the mining company was not required to seek discharge approval from EPA. This decision will impact the extent to which certain materials may be discharged into navigable waters.

CERCLA Cases

Arranger Liability; Joint and Several Liability

Burlington N. & Santa Fe Ry. v. United States, 556 U.S. ___, 129 S. Ct. 1870 (2009)

A now-defunct company stored agricultural chemical products such as the pesticide D-D manufactured by Shell Oil Company on parcels of land partially owned by Burlington. Those chemicals leaked and, after a cleanup by California and EPA, those entities sued Burlington and Shell to recover costs of cleanup. While the district court apportioned costs of cleanup between those companies, the court of appeals held that they were jointly and severally liable.

The Supreme Court reversed, holding that (1) Shell could not be held liable as an "arranger" because it did not enter into D-D sales with the intent that a portion of the product be disposed during the transfer process and (2) the district court correctly apportioned liability rather than imposing joint and several liability. With respect to arranger liability, the Court reasoned that mere knowledge of leaks and spills is insufficient to impose such liability under CERCLA. With respect to apportionment of cleanup costs, the Court concluded that a reasonable basis for the district court's apportionment existed, even considering that the court conducted its analysis *sua sponte*. The Court's holding was significant in this regard because it did not require that the parties, including the government, actually present theories of apportionment costs.

Potentially Responsible Party

Westinghouse Elec. Co. v. United States, No. 4:03CV861, 2008 WL 2952759 (E.D. Mo.

July 29, 2008); 2009 WL 881605 (E.D. Mo. Mar. 30, 2009)

Westinghouse owns a site previously owned by or used by the government and other parties for processing nuclear fuel. The site is heavily polluted, and Westinghouse incurred costs as a result of that pollution. After incurring remediation costs for this site, Westinghouse sued for cost recovery under § 107 and contribution under § 113 of CERCLA.

The non-governmental entities moved for summary judgment on Westinghouse's § 113 claim and the court framed the issue presented as "whether Westinghouse may bring or maintain a § 113(f) contribution claim in the absence of a pending § 107 suit, without having established liability in a former § 107 suit or in the absence of an administrative or judicially approved settlement under CERCLA." Westinghouse responded that it had several grounds for bringing a contribution claim under § 113(f): (1) it entered into an agreement with the state of Missouri to clean up the site, (2) it had been sued twice by the state of Missouri under § 107 (although both actions were dismissed without establishing liability), and (3) a state court entered a consent decree purporting to establish CERCLA liability.

In *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), the Supreme Court held that contribution under § 113 was *only* available to a party that had been the subject of a civil action under § 106 or § 107. If a party has not been sued under those sections, or if judgment never occurs, then a contribution claim under § 113 is not available. Later, in *Atlantic Research Corp. v. United States*, 501 U.S. 809, 127 S. Ct. 2331 (2007), the Court "explained that liability is central to the idea of contribution" and held that a party's right to contribution under the statute is conditioned upon an inequitable distribution of common liability.

The court concluded that because under *Aviall* and *Atlantic Research*, resolution of CERCLA liability is a prerequisite for bringing a contribution suit under § 113, Westinghouse's contribution claim failed. The court rejected each of Westinghouse's grounds for bringing the claim, because (a) the letter agreement did

not constitute an “administrative settlement” under CERCLA, (b) the previous lawsuits did not result in liability, and (c) the consent decree did not constitute a “judicially approved settlement” under CERCLA.

When the case was transferred to a different judge after the prior judge retired, Westinghouse moved the court to reconsider its order granting summary judgment. Specifically, Westinghouse argued that the court erred in holding that the consent decree was not a “judicially approved settlement” because the state of Missouri has authority under CERCLA to recover response costs under § 107, even in the absence of a delegation of authority by EPA to the state. Although the federal government argued that the court should not reconsider its previous order, the government stated that it agreed with Westinghouse’s position on this issue.

After concluding that the reconsideration of its prior opinion was in “the interests of justice,” the court reversed its earlier decision and held that the consent decree constituted a “judicially approved settlement” under CERCLA because states have the authority under § 107 to recover response costs, regardless of whether they are working with EPA under § 104. The court noted the split of authority that exists on this issue and concluded that the language and structure of CERCLA imposes no such requirement on states to recover cleanup costs. *Compare Wash. State Dep’t of Transp. v. Wash. Nat’l Gas Co., Pacificorp*, 59 F.3d 793, 801 (9th Cir. 1995); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1046-48 (2d Cir. 1985) with *Niagara Mohawk Power Corp v. Consol. Rail Corp.*, 436 F. Supp. 2d 398, 402 (N.D.N.Y. 2006); *Asarco, Inc. v. Union Pac. R.R. Co.*, No. 04-2144, 2006 WL 173662, at *7 (D. Ariz. Jan. 24, 2006); *W.R. Grace & Co. v. Zotos Int’l, Inc.*, No 98-CV8383, 2005 WL 1076117, at *4 (W.D.N.Y. May 3, 2005).

In its reconsideration order, however, the court did not conclude whether the consent decree triggered recovery or contribution, reasoning that those questions were ones of fact and may be affected by whether the costs were “voluntarily” incurred under the consent decree.

Wildlife as Part of the Public Trust; Proper Defendant Parties Overseeing Public Resources

Center for Biological Diversity, Inc. v. FPL Group Inc., 166 Cal. App. 4th 1349, 83 Cal. Rptr. 3d 588 (Cal. Ct. App. 2008)

A 40,000-acre wind farm that had operated since the 1980s had killed as many as 26,000 raptors, including thousands of protected species such as Golden Eagles, because of 5,000 outdated turbines. The Center for Biological Diversity sued the operators of a wind farm, including FPL Group Inc. and SeaWest, Inc., but did not sue the agencies responsible for regulating wind farms and public resources.

The trial court dismissed the suit and that dismissal was upheld on appeal. The court of appeals held that the plaintiffs were required to file suit against the agencies responsible for regulating wind farms and overseeing public resources, such as wildlife, rather than the wind farms’ operators. Because the plaintiffs sought to enforce the public trust, they were required to sue the appropriate public, not private, entities.

In a positive development for the plaintiffs, the court of appeals rejected the conclusion of the trial court that private parties may not invoke the public trust doctrine beyond the traditional interests in navigable and tidal waters and tidelands. The court of appeals therefore recognized wildlife as part of the public trust but assigned responsibility for the wind farms to the public agencies rather than to private companies.

Insurance Policies—Duty to Defend Under Modified Pollution Exception

Hussey Copper Ltd. v. Royal Insurance Co., 567 F. Supp. 2d 774 (W.D. Pa. 2008)

Lead-coated copper roofing panels supplied by Hussey Cooper Ltd. and used on the Kane County Judicial Center in Illinois deteriorated, releasing lead and copper that allegedly contaminated a stormwater detention pond. The county Public Building Commission filed suit, seeking compensation for the

repair and replacement of the roof, property damage, and cleanup costs. The county attorney filed a separate suit, seeking remediation costs under the state Environmental Protection Act.

Hussey Cooper sought coverage for the damages from two of its insurers under two CGL policies; specifically, Hussey Cooper sought both indemnification and defense in the litigation. The insurers invoked the policies' "absolute pollution exclusions," which typically are interpreted to bar coverage for property damage caused by environmental contamination. One insurer also invoked a "modified pollution exclusion."

The court rejected most of Hussey Cooper's arguments for coverage but held that while the modified pollution exclusion barred Hussey Cooper's claims relating to remediation or cleanup, claims for property damage unrelated to the ordered cleanup were not excluded under the policy. Thus, one insurer had a duty to defend Hussey Cooper under the policy. This decision could have far-reaching impact because the subject exclusion comes from standard Insurance Services Office, Inc. policy form that are used nationally.

Nuisance: "Breed-to-Wean" Facilities

Pierson v. Bible Pork, Inc., 5-MR-19 (Clay County, Illinois Circuit Court, verdict rendered Feb. 4, 2009), appeal pending, No. 5090308 (filed June 22, 2009)

Twenty-one residents claimed that Bible Pork, Inc., a leading pork producer in Illinois, was operating a "breed-to-wean" facility that constituted a public and private nuisance, on account of the gases and odors produced by the facility. The court granted summary judgment in favor of Bible Pork on the public nuisance claims and at trial, the jury found in favor of Bible Pork on the private nuisance claim. The case is significant because it may indicate that nuisance claims are not an effective means to challenge certain aspects of the integrated livestock industry.

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Michael B. Gerrard, Editor

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