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Article One

The Clean Water Act's "Maintenance Exception" Does Not Legitimize an Illegal, Unpermitted Levee

Quad Cities Waterkeeper Inc. v. Ballegeer, et al.
(Case No. 4:12-CV-4075-SLD-JEH, C.D. Il, Sep. 29, 2016)

Plaintiffs are environmental groups that sued David G. Ballegeer, Balleger Trucking, Inc., Ballegeer Excavating, Inc. and Francis Ballegeer (collectively "Defendants") under the citizen suit provisions of the Clean Water Act ("CWA"). Plaintiffs' suit alleged that Defendants' unpermitted discharge of concrete, rebar, dirt, and other pollutants on the banks and bed of the Green River violated the CWA. Defendants alleged that their artificial concrete scree, known as riprap, was structurally necessary to maintain the levee and protect the property from flooding. Defendants did not receive authorization from the U.S. Army Corps of Engineers ("Corps") to create or maintain the levee, nor did they receive any CWA permit for such. At issue was whether the otherwise-illegal placements of concrete and other waste materials next to and in the Green River exempted from prohibitions of the CWA by the maintenance exception. The court held that, as a matter of law, the CWA's section 1344(f)(1)(B) maintenance exception cannot apply to the maintenance of a levee that is itself violative of the CWA, because it is an emission or dredged or fill material not covered by a Corps permit. *Id.*

Background

Between the years of 1972 to 1976, Defendants claim that the previous owner of the property had built two natural levees on the property. In 1976, after a levee had been washed away due to the river flooding, Defendants rebuilt it. From 1980 to 1984, Defendants constructed a new natural levee that enlarged the levee to the entire river length of the property. Beginning in 1985, Defendants began pushing onto the banks, concrete waste to shore the levees. Over the course of the years, Defendants continued adding more concrete waste to various locations of the riverine in response to the flooding. These additions totaled hundreds of linear feet of concrete and other construction waste, and as a result of the creation and maintenance of the levee, concrete, rebar, and dirt ended up in the river.

The court found that the Defendants had neither received authorization from the U.S. Secretary of the Army, acting through its Corps, to build or maintain the levee nor were they authorized under either of the two nationwide permits to maintain the concrete levees. Defendants however maintained that the concrete and other materials both atop and at the base of the levee were structurally necessary to maintain it and protect the property from flooding. They further claimed that although the concrete and other materials discharged were pollutants within the meaning of the CWA, they were permitted to discharge these materials under the CWA's statutory maintenance exception.

Court's Rationale

In determining whether the Defendants were exempted from the prohibitions of the CWA by the

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maintenance exception, the court ordered a summary judgment briefing on the applicability of the maintenance exception. Under the "maintenance exception," which courts interpret to be narrowly construed, *United States v. Huebner* (1985) 752 F.2d 1235, 1241, the CWA exempts discharges of dredged or fill material "for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, damns, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures…." 33 U.S.C. § 1344(f)(1)(B). Such "[m]aintenance [under this exception] does not include any modification that changes the character, scope, or size of the original fill design," and "[e] mergency reconstruction must occur within a reasonable period of time after damage occurs in order to qualify for this exemption." 33 C.F.R. § 323.4(a)(2). The Corps has published regulations providing guidance on when rehabilitation projects are permissible under environmental law. Under Section 404(f)(1) of the CWA, routine maintenance of levees are specifically exempted if the levees were constructed prior to the passage of the CWA in 1972, or, if the levees constructed since that date have been permitted and appropriately investigated and determined to be in compliance with the applicable provisions of the CWA. See 33 CFR 323.4(a)(2).

While the Defendants argued that the additions of concrete and other materials to the structure fall within the exception because they have been in the nature of "maintenance" to that original levee, the court disagreed. Rather, the court found that the Corps' regulations clearly indicated that it interprets the CWA to allow maintenance only of permitted structures, and that the maintenance of a levee that is itself illegal under the CWA would produce absurd results: "To legalize maintenance of an illegal structure—more, to expressly exempt the maintenance from a regulatory regimes—is absurd; the far more natural reading of the statute is to infer that 'currently serviceable structures' to which maintenance is permitted must themselves not be in violation of the CWA cannot show that the concrete placement were for the purpose of maintenance of an existing structure." *Id*. at 5.

Additionally, the court found that its reading of the statute was further strengthened by other exceptions to the CWA § 404 permitting regime, which showed a consistent purpose of exempting only minor discharges of dredged or fill materials, supporting activities that were themselves minimally impactful and not violative of the CWA. The court granted summary judgment in favor of Plaintiffs, finding that because the levee was built after 1972, it therefore should have received a permit of authorization from the Corps, and because Defendants did not, the levee was illegal, and therefore its maintenance was as well.

Conclusion

Defendants alleged that their riprap structure was inspected by representatives of the Corps and the Illinois Department of the Environment, with both noting that the structure was "okay." The Corps records confirmed the site visit but nothing more.

Article Two

BNSF Could Only Be Held Liable For Coal Discharged Directly Into U.S. Waters

Sierra Club, et al. v. BNSF Railway Company
(Case No. C13-967-JCC, W.D. WA, Oct. 25, 2016)

Sierra Club (collectively "Plaintiffs") was one of several environmental groups which filed a Clean Water Act ("CWA") citizen suit alleging that BNSF Railway Company ("BNSF") violated the CWA by allowing its railcars to release coal and related pollutants into protected U.S. waterways without first obtaining a National Pollution Discharge Elimination System ("NPDES") permit authorizing such discharges. Palintiffs' lawsuit alleged that BNSF train cars traveling through the state of Washington discharged coal pollutants through holes in the bottoms, sides, and open tops of its rail cars and trains. On August 19, 2016, both sides moved for summary judgment. The court held that Plaintiffs alleged sufficient facts to meet the standing requirement at the representative waterways, and that BNSF's railcars were "point sources" as defined within CWA, 33 U.S.C. § 1362(14). However, the court ruled that BNSF could not be liable for the coal discharged to land, and from the land to the water because that would not constitute a *point source* discharge. Rather, the court reasoned that BNSF could only be liable for the coal discharged *directly* into the navigable waters at issue. *Id.* at 8.

Background

Plaintiffs are seven environmental advocacy organizations filing suit against BNSF, an operator of railway lines that run from Wyoming to Washington, for violation of section 1311(a) of the CWA. Plaintiffs alleged that BNSF failed to obtain a NPDES permit allowing its coal

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and related pollutant discharges from its railcars – representing a violation of the CWA. Not contesting that fact, BNSF sought to dismiss the case, arguing that Plaintiffs failed to prove standing, namely injury in fact and causation, for each of the waterways alleged. Similarly, BNSF claimed that Plaintiffs were unable to establish that its railway cars constituted a "point source" within the meaning of the CWA.

Court's Rationale

The court first rejected BNSF's argument that Plaintiffs needed to establish injury in fact. The court found that such a requirement in environmental cases was satisfied because Plaintiffs' allegations of injury included "aesthetic or recreational interest in a particular place…and that interest is impaired by a defendant's conduct." *Id*. at 4. In this case, the court found sufficient, that Plaintiffs' members had stated that they had seen coal in the water and had been reluctant to continue use of waterways, stating that "[this] is exactly the type of injury sufficient to confer standing…." *Id*. at 5.

With regard to causation, the court found that Plaintiffs could rely on "circumstantial evidence such as proximity to polluting sources, predictions of discharge influence, and past pollution to prove both injury in fact and traceability." *Id*. at 6. The court agreed with Plaintiffs' contention that because BNSF was the sole transporter of coal in Washington, over and adjacent to the navigable waters at issue, their injuries were traceable to BNSF. In agreeing with Plaintiffs, the court found that Plaintiffs needed to prove *only* that their injuries at the allegedly representative waterways were traceable to BNSF, not necessarily that BNSF caused an injury at each waterway at issue. Further, the court also found that although Plaintiffs did not provide standing witnesses for each of the waterways at issue in the case, that "for CWA regulatory purposes, all waters within a state are interrelated," and that many of the waterways for which the Plaintiffs did not identify standing witnesses were connected to the waterways in which they did provide standing witnesses. *Id.* at 6.

Lastly, BNSF moved to dismiss the complaint on grounds that its rail cars did not constitute a "point source" within the meaning of the CWA, which the court rejected. Under the CWA, a "point source," is "any discernable, confined, and discrete conveyance, including but not limited to any…container [or] rolling stock…from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

Although the court recognized that it was not clear whether the alleged point source, the BNSF trains, had caused coal to move into the water, the court reasoned that BNSF could not be liable for the coal discharged to land, and from the land to the water because that would not constitute a *point source* discharge. Rather, the court reasoned that BNSF could only be liable for the coal discharged *directly* into the navigable waters at issue. *Id*. at 8. Moreover, the court did however find that coal particles that were allegedly discharged by BNSF trains that traveled adjacent to and above the waters at issue qualified as *point source* discharges because there was a discrete conveyance, namely that the BNSF trains traveled directly *next to* or *across from* the water, which could implicate liability for BNSF based on the aerial point source discharges.

As the court found extensive evidence supporting both the plaintiffs' and BNSF's arguments, it concluded that the immediate review of the arguments presented by both the plaintiffs and BNSF revealed inherent disputes of material fact. The court determined that a reasonable trier of fact could determine that plaintiffs' evidence was sufficient to support a conclusion that plaintiffs' allegations were more likely true than not, and it thus dismissed BNSF's motion for summary judgment.

Conclusion

The CWA specifically defines train cars as being "rolling stock," which is specifically designated as a point source in the CWA. In spite of this, BNSF alleged that its rail cars were not point sources of coal pollution a Plaintiffs' alleged as precipitation and wind must carry the coal discharge from the land, where the pollutant has fallen, into protected waters. BNSF, therefore, argued that such discharges are nonpoint source in nature. The court rejected this idea.

The issue of direct v. indirect discharges in protected waterways has been addressed in *Peconic Baykeeper, Inc. v. Suffolk County*, 600 F.3d 180 (2d Cir. 2010). In that case, the Second Circuit reversed the lower court's holding that activities involving the spraying of pesticides without CWA permits represented a violation. The lower court's holding was based on its belief that spray applicators attached to trucks and helicopters were not point sources as they only discharged pesticides into the air – not directly into water. The Second Circuit held that a point source is to be broadly defined to include the identifiable conveyance of pollutants into protected waterways – to include the spraying of pesticides from a traceable source, making the trucks and helicopters into point sources.

Article Three

RCRA Authorizes A Court To Grant Injunctive Relief, But May It Do So In This Instance

Lajim, LLC v. General Electric Co.
(Case No. 13 CV 50348, N.D. Il, Oct. 4, 2016)

Plaintiffs an individual and an entity owning a golf course (collectively "Plaintiffs"), filed a citizen suit against General Electric ("GE") seeking a mandatory injunction to require GE to remediate the contamination under the Resource Conservation Recovery Act ("RCRA") – Plaintiffs' "Count I." After extensive discovery, the court granted summary judgment to Plaintiffs as to liability on Count I. The court then turned to the issue of the propriety of injunctive relief, if any, available to Plaintiffs under RCRA. The issue of whether the court can enter injunctive relief in a citizen suit, even when a state proceeding is ongoing, is affirmatively addressed in RCRA. RCRA plainly authorizes injunctive relief. 42 U.S.C. section 6972(a). Here, however, the court would defer for a reasonable time to allow GE remediation plan to be considered by the Illinois Environmental Protection Agency ("IEPA"), and to then compare GE's plan to Plaintiffs' proposed scope of relief – before determining whether Plaintiffs' have met their burden of proof on the issue of the right to a mandatory injunction.

Background

Other than closing the Mine pursuant to the Order, the Government had nothing to do either with its operation or the design and disposal of the contaminated tailings.

From 1949 to 2010, GE operated a plant in Morrison, Illinois. The plant manufactured appliance and automotive controls for products, including refrigerators, air conditioners, and motor vehicles. The manufacturing process used chlorinated organic solvents to remove oil from parts. The solvents were toxic and regulated by federal and state environmental agencies. GE stored the solvents in degreasers located on the plant, but these were decommissioned in 1994.

At the order of the IEPA, GE began various monitoring procedures. In 1986, chlorinated solvents were detected in three municipal supply wells that provided drinking water to Morrison. Soil samples taken from around the degreaser sites also confirmed the presence of solvents in the soil. In 2004, after concluding that active remediation would be required to clean up the site, IEPA filed suit against GE on state-law grounds seeking the costs it had expended as a result of the hazardous substance release, and an injunction requiring GE to determine the nature and extent of the soil and groundwater contamination, and then to perform remediation. In 2010, after years of litigation, the suit resulted in a consent order between GE and the IEPA. Pursuant to the consent order, GE was to investigate the problem, report on that investigation, identify what goals needed to be met, and develop a plan to reach those goals. After five years, a great deal of investigatory work had been ordered and performed, however, no remediation had been performed anywhere on site in the thirty years since the initial discovery of the toxic solvents.

Court's Rationale

GE contended that because it was already the subject of an enforcement action from the state IEPA for the same matter, it could not be subject to citizen suit liability under RCRA. The court rejected GE's argument, finding that Plaintiffs' citizen suit was not barred because the state was not prosecuting the case under RCRA, and that the plain language of the RCRA, as well as case law, recognized the court's power to proceed despite parallel state proceedings to enjoin GE. The court reasoned that if Congress wanted to bar RCRA citizen suits because a state was proceeding under a similar statute, Congress would have explicitly said so.

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About Thierry R. Montoya

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Thierry also represents clients in natural resources issues involving water, oil and gas interests, air and water permitting and violations including NPDES and Title V.

On the land use side, Thierry provides permitting, zoning, CEQA/NEPA, and eminent domain expertise. Thierry also represents public and private sector clients in construction biddings, contracting, and litigation.

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Additionally, in determining the appropriateness of mandatory injunctive relief for remediation, the court found that while much investigation and monitoring had occurred, it was uncontested that GE had not taken any remediation actions to clean up what the court had already found to be an imminent risk to health and the environment. Despite the consent order, the court also found that plaintiffs had specifically identified the precise mandatory injunctive relief sought and that the scope of relief was arguably different than any remediation IEPA would impose.

Given that the IEPA had not yet authorized a remediation plan pursuant to the consent order, the court, in preliminarily finding for plaintiffs, determined that before it could determine whether plaintiffs had met their heavy burden, the court would defer for a reasonable period of time to allow GE's plan to be developed and considered by the IEPA, and would also compare the scope of the remediation in GE's plan to the scope of relief plaintiffs have already proposed so that it could better determine if plaintiffs sought to supplement or supplant the consent order. The court is to hold a further hearing in February 2017 to make a more fact intensive inquiry into the extent of contamination for which GE is already labile to determine whether the extraordinary remedy for mandatory injunctive relief is appropriate, and if so, what that relief would entail.

Conclusion

Here, the court will have to decide, in large part, whether it can contradict the consent order, i.e., whether it has the authority to contradict the findings made by the IEPA. GE has alleged that the court lacks this authority and must agree to IEPA's findings relative the scope and extent of any remediation.

But RCRA does contain section 6972(a)(1)(B) which allows citizens to seek judicial relief from the federal courts when an agency was failing to protect people or the environment from danger. As the *Interfaith Community Organization, Inc. v. PPG Industries, Inc*., 702 F.Supp.2d 295 (2010) court recognized:

"Defendant is correct, in some sense, that Plaintiffs are "attacking" the [state agency's] actions and standards. Yet, this [is] the very nature of an imminent and substantial endangerment citizen suit: it allows citizens to seek judicial remedies where, allegedly, an agency has failed to protect people or the environment from danger. To abstain on the basis of collateral attack here would defeat Plaintiffs' statutory right to a citizen suit." *Id*. at 314. The Seventh Circuit has also recognized that state agencies do not always get things right, and that Congress enacted RCRA's citizen suit provision to "enable affected citizens to push for vigorous law enforcement even when governmental agencies are more inclined to compromise or go slowly." *Adkins v. VIM Recycling, Inc*., 644 F.3d 483, 501 (2011).

One reason Congress enacted § 6972(a)(1)(B) was to monitor and protect health and the environment even when regulatory and state agencies fail to do so, noting that regulatory agencies face many demands on their time and may become "captured" by special interests. *Adkins*, 644 F.3d at 499.

The outcome of the claim for injunctive relief will await further court ruling. This may well be an informative decision on the issue of whether and when the court may diverge from a consent order and the ruling of a state environmental agency.

About AlvaradoSmith

AlvaradoSmith is experienced in all facets of public and private project development and implementation, environmental review and compliance, and natural resource law. We represent public utilities, public agencies, private developers, commercial property owners, and private landowners in major facilities and infrastructure development projects, land acquisition, pipeline development, soil and groundwater cleanups, and renewable energy projects. We know the ins and outs of environmental and natural resource law compliance.

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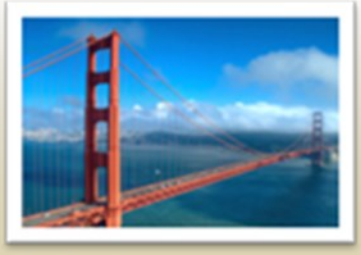

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