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By: Thierry R. Montoya, Esq.

Article One

Plaintiff's Failure To Comply With the Clean Air Act's Notice Requirement Dooms Case

The Humane Society of the United States v. Gina McCarthy, in her official Capacity as Administrator, et al.
(Case No. 15-cv-00141, D.C. Cir. Sept. 19, 2016)

The Humane Society ("Plaintiffs") sued EPA pursuant to the Administrative Procedure Act (APA), seeking to compel EPA to provide a response to their 2009 petition for rulemaking, requesting that EPA regulate Concentrated Animal Feeding Operations (CAFOs). Plaintiffs argued EPA's failure to respond to their petition violated the APA. The court noted, "whether this court has jurisdiction in this matter turns on whether the government has waived immunity to suit…Plaintiffs failed to effectuate waiver of sovereign immunity through notice," and therefore, the Court held that it "lacks subject matter jurisdiction over this particular dispute." *Id.* Defendant's motion to dismiss was granted.

Background

Plaintiff's 2009 petition alleged that CAFO's represented one of the largest sources of air pollution in the country. "Concentrating and feeding large populations of animals in one location generates enormous quantities of biological waste products, including feces and urine, as well as a variety of dangerous air pollutants, including ammonia, hydrogen sulfide, methane, nitrous oxide, volatile organic compounds, and particulate matter – emissions of which contribute to climate change, threaten public health and safety, and harm the environment." Petition at 13, 17.

Citing to certain studies, Plaintiff's alleged that "[e] missions from CAFOs cause significant health problems such as respiratory illnesses, including bronchitis, pulmonary disease, asthma, and respiratory distress syndrome; irritation to the eyes, nose, and throat; neuropsychological abnormalities, including anxiety and depression; memory loss; heart disease; and can lead to death." Petition at 38-39.

The petition also cited to alleged environmental degradation arising from CAFOs. The petition alleged that CAFOs exacerbate climate change; impair air quality; lead to the formation of haze, fine particulate matter, and ozone; and contribute to the impairment of land and water resources, causing "dead zones" in waterways and acidification of soil and waters. Petition at 10, 17, 38-40.

As such, Plaintiffs alleged that EPA should regulate CAFOs under the Clean Air Act's ("CAA") by (1) using its authority to list CAFOs as a category of sources under the CAA; (2) promulgating standards of performance for new CAFOs; and (3) prescribing regulations for state performance standards for existing CAFOs. 42 U.S.C. § 7411, Petition at 1.

EPA did not respond to Plaintiff's petition, a more than five-year delay which Plaintiffs allege to have been an unreasonable delay and a failure to act in violation of the APA. Accordingly, Plaintiff's requested that the Court declare EPA's delay to have been unreasonable and to order it to make a final decision on the petition within ninety days, with the Court retaining jurisdiction over this matter until EPA has fulfilled its legal obligations, as stated in the petition.

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Article One (cont.)

Plaintiff's Failure To Comply With the Clean Air Act's Notice Requirement Dooms Case

Court's Rationale

The issue before the Court is whether the government has waived immunity to suit as "sovereign immunity is jurisdictional in nature." *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). A suit challenging an agency action may be brought in federal court under the APA, as the APA provides a waiver of sovereign immunity by the government in cases of final agency action, and when agency action is made reviewable by statute. *Id.* The APA does have a carve-out that is relevant to this case: "The waiver does not apply if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought by plaintiff. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 2204 (2012).

Here, Plaintiff alleged that the CAA's Citizen Suit Provision, 42 U.S.C. §7604, granted them the right to sue the EPA's Administrator "to compel…agency action unreasonably delayed." *Id.* This provision requires that a plaintiff provide EPA with notice 180 days before commencing an unreasonable delay suit. *Id.* The government alleged that as Plaintiff failed to provide the mandated notice, the government never waived its immunity to suit and this Court would lack jurisdiction.

Under the *Sierra Club v. Thomas*, 828 F.2d 783, 794 (D.C. Cir. 1987) ruling, a person may bring a suit in district court under the CAA against the EPA Administrator for an alleged failure to perform a nondiscretionary act or duty, and the district court has jurisdiction "to order the Administrator to perform such act or duty," as well as to "compel… agency action unreasonably delayed." 42 U.S.C. § 7604 (a). Following *Thomas*, Congress amended the language of the Citizen Suit Provision to give district court's jurisdiction over "action [s] for unreasonable delay." *Id.* Subsequent litigation over the scope of amendment to the Citizen Suit Provision nullified *Thomas's* ruling and granted district court's "the power to compel EPA to act." *Mexichem Speciality Resins, Inc. v. EPA*, 787 F.3d 544 (D.C. Cir. 2015).

As to the requirement that the action "is not discretionary," multiple cases held that a claim for unreasonable delay requires that the action sought be compelled is "not discretionary," since "a delay cannot be unreasonable with respect to action that is not required." *Ctr. for Biological Diversity v. EPA*, 794 F.Supp.2d 151, 156 (D.D.C. 2011)-quoting *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 n. 1 (2004). Here, EPA does not have "discretion" to respond to Plaintiff's petition, rather it must respond within a reasonable time under 5 U.S.C. section 555(b), therefore, the action is not discretionary.

The legislative history of the Citizen Suit Provision clarified that the Court would have CAA jurisdiction to hear Plaintiff's suit if proper notice was given. Specifically:

"The amendments will allow a citizen suit to be brought in Federal district court against the Administrator where the plaintiff alleges that EPA has failed to act, and further alleges that the failure violates one of more of the standards set out in section 307(d)(9) of the Act, or that the failure constitutes unreasonable delay. Under this Amendment, the citizen suit provision of the Act will encompass the full range of inaction covered by the Administrative Procedure Act (APA). **Under this amendment, the district courts would be granted authority to compel actions by the Administrator that have been unreasonably delayed**, as well as to design remedies to address EPA failures to act that are arbitrary, capricious, and abuse of discretion or not in accordance with law…

The amendment also gives the district courts jurisdiction under section 304(a)(2) to compel agency action unreasonably delayed. This jurisdiction would apply in circumstances where EPA has already commenced a proceeding directed at the final action sought by plaintiff, but had failed to complete it within a reasonable time." *Id.*

The legislative history convinced the Court that it had subject matter jurisdiction for EPA failure to have responded to a petition for rulemaking that had been unreasonably denied, but that jurisdiction was premised on Plaintiff having complied with the 180 day notice requirement. Plaintiff conceded that they had not so the case could not proceed.

Conclusion

Plaintiff also argued that EPA should be estopped from arguing that the Citizen Suit provision provides the court with jurisdiction over this matter as EPA allegedly argued a contrary position in another case. The Court disagreed with Plaintiff's argument holding that EPA did not advocate a contrary position in the cited case as both cases, this one and the other, asked the Court to apply the Citizen Suit Provision to nondiscretionary functions.

Article Two

The United States Not Liable As An "Operator" Under CERCLA Because It Closed The Mine Pursuant To The War Production Board's Limitation Order Issued In 1943

United States of America, and California Department of Toxic Substances Control v. Sterling Centercorp Inc., et al.
(Case No. 2:08-cv-02556-MCE-JFM, E.D. Cal. Sept. 20, 2016)

On October 27, 2008, the United States and the DTSC (the "Government") commenced a CERCLA action to recover past response costs and for declaratory relief - alleging that Defendants ("Sterling") were responsible for future response costs at the Lava Cap Mine, a Superfund site (the "Mine"). On August 25, 2009, Sterling alleged a contribution counterclaim against the Government alleging that the Government was liable under CERCLA as an owner and operator of the Mine. Sterling later dropped the "owner" argument. Sterling's counterclaim alleged that the Government's War Production Board Limitation Order L-208 ("Order") "and its prohibition on the use of material and equipment to remove any waste or conduct any other operations in or about the [Mine]." *Id.* Sterling also requested a declaration that the Government was liable under CERCLA along with an equitable apportionment of responses costs under CERCLA section 113(f). On cross motions for summary judgment, the court held that the Government was not an "operator" of the Mine for CERCLA purposes "because it closed the facility in accordance with the "Order." *Id.*

Background

The Lava Cap Gold Mining Corporation ("LCGMC") owned and operated the Lava Cap Mine in Nevada County, California from 1934 to 1943, during which time LCGMC was one of the leading gold and silver producers in California. Government's Motion for Summary Judgment, Statement of Facts ("SOF") ¶¶ 2-4. The LCGMC produced from two mines - the Central mine later became known as the Lava Cap Mine. SOF ¶ 5. LCGMC's mill operations generated waste rock and tailings, consisting of finely ground rock; both contained arsenic. SOF ¶¶ 6, 86, 91. LCGMC impounded its tailings behind a timber dam ("log dam") along Little Clipper Creek just below the mill. SOF ¶ 6.

LCGMC's production increased throughout 1934 and by 1940, LCGMC employed approximately 330 men in the mines and mill, and the mines were sending approximately 400 tons of ore to the mill daily. SOF ¶ 7, 8. In order to prevent tailings from polluting Bear River, LCGMC built a second dam about a mile downstream of the mill and upper tailings impoundment. SOF ¶ 9. A "Lost Lake" formed behind this second tailings dam now known as "Lost Lake dam." SOF ¶ 10. LCGMG disposed of its tailings in the Little Clipper Creek drainage adjacent to the mine's ore processing buildings and allowed them to flow south along the Creek to Lost Lake. *Id.*

In 1942, the War Production Board the Order restricting the operation of "non-essential mines" [i.e., gold mines] to hire workers. SOF ¶ 12. LCGMC, however, received a temporary waiver because the ore it was sending to the smelter was considered an important fluxing material. *Id.* The War Production Board rescinded the waiver in 1943 and accordingly active mining and milling operations at the Lava Cap Mine ceased that same year. *Id.*

Cleanup Activities

In 1992, EPA began its preliminary CERCLA investigations at the Mine documenting arsenic and lead in the soil and sediment. In April 1997, the California Regional Water Quality Control Board ("RWQCB") and DTSC inspected the collapsed log dam, and found extensive deposits of tailings in Little Clipper Creek and downstream in Clipper Creek and Lost Lake. *Id.*

EPA added the Mine as a Superfund Site and to the National Priorities List in January 1999, and has been performing response actions at the Site since that time to address arsenic contamination in the soil, surface water, and groundwater. *Id.*

Remedial work remains to be completed - EPA needs to complete the cleanup of contaminated surface water drainage in the Mine area. SOF ¶ 96. Additionally, EPA has begun designing the pipeline system that will provide clean public drinking water to residents with contaminated drinking water wells, and will continue to study and monitor the groundwater at the Site. SOF ¶ 97. In the future, EPA will determine whether treatment of the groundwater is necessary. *Id.*

As of April 2008, EPA has incurred at least $20 million in response costs. *Id.* As of December 2010, DTSC has incurred at least $1 million in response costs. SOF ¶ 101. Support for these costs were presented in a bifurcated case between liability and damages. An October 31, 2012 to November 7, 2012 bench trial at to liability concluded that Sterling was liable for all proper removal and remedial costs incurred by the Government at the Mine.

In September of 1952, Sterling's predecessor, New Goldvue Mines, Inc. acquired LCGMC's assets, including the Mine site, through its wholly owned subsidiary, Keystone Copper Corporation. "Sterling therefore became MCGMC's successor by de facto merger." *Id.* Sterling took no action to clean up the Mine for decades. *Id.*

Court's Rationale

Sterling alleges that "because the War Production Board shut the mine down during World War II, it 'operated the mine exclusively for two years and controlled all decisions about the Mine….[By the simple fact of this closure, Sterling alleges the government]…controlled every decision relating to the activity of the mine, including preventing [LCGMC] from managing waste in any manner, thereby dictating a finding of CERCLA operator liability." *Id.*

Sterling made this argument in light of the Government's evidence that the War Production Board never had any presence at the Mine, never constructed any facilities or roads to facilitate Mine operations, and never had any role in the Mine's management - including no involvement in the direction of LCGMC's affairs.

The Supreme Court held that for CERCLA purposes an "operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility." *United States v. Bestfoods*, 524 U.S. 51, 66, (1998). As further clarification of that definition, the Court held that

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The United States Not Liable As An "Operator" Under CERCLA Because It Closed The Mine Pursuant To The War Production Board's Limitation Order Issued In 1943

"an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Id.*

The Ninth Circuit has also addressed operator liability under CERCLA holding that it requires management of the enterprise and/or decision-making authority over the facility's waste disposal operations. *Redevelopment Agency of the City of Stockton v. BNSF Ry. Co.*, 643 F.3d 668, 680 (9th Cir.2011)-holding that defendants were not operators as they did not "manage, direct, or conduct operations specifically related to [the] pollution, that is, operations having to do with the leakage or disposal of [the] hazardous waste."

In determining operator liability, the court also relied upon the Eastern District's decision in *United States v. Iron Mountain Mines*, Inc., 881 F.Supp. 1432 (E.D. Cal.1995). In that decision, the United States and the State of California pursued CERCLA cost recovery actions against *Iron Mountain* Mine as a result of acid mine draining flowing from the former mine site. In that case, one of the former potentially responsible parties, Rhone-Poulenc, was a successor to Mountain Copper who owned the mine during World War II. In *Iron Mountain*, the government not only prohibited gold mining at the site as deemed not essential to the war effort - it also offered a financial incentive for the production of copper and zinc, "securing an agreement with Mountain Copper to sell its entire copper and zinc output to the government and controlled marketing and pricing of the ore produced at the mine." *Id.* There were further factual allegations that the government was involved with mine activities including hiring workers, building access roads and the like.

Although the government in *Iron Mountain* was more involved in the mine's activities, the court still granting the United States' motion to dismiss, holding that Rhone-Poulenc had not proven that the United States "was involved in the 'hands-on, day-to-day' management of the mine," or that it "controlled the cause of the contamination, the mining equipment, or made any decisions regarding disposal of the mining waste." *Id.* The *Iron Mountain* court concluded that Mountain Copper remained in control of all basic mine operations, and that Mountain Copper never shared control with the United States.

Here, there was no evidence that the Government was involved in any way with the Mine's basic operations and, if so, its involvement could not be deemed to rise to levels depicted in *Iron Mountain*. *Id.* "If anything, the government's involvement in this case was must less extensive in that is did nothing more than issue and enforce Order…, which closed the mine as non-essential for the war effort." *Id.*

Conclusion

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.

About Thierry R. Montoya

Thierry R. Montoya has achieved successful results for both public and private sector clients in a variety of complex environmental, land use, construction, and eminent domain matters. Thierry's practice includes environmental litigation under CERCLA, RCRA, the Clean Water Act, Proposition 65, and state and federal and common law.

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.

Article Three

Current Owners At The Time of the CERCLA Lawsuit Were Not Responsible For Response Costs Incurred Before They Took Title To The Facility

Commonwealth of Pennsylvania Department of Environmental Protection v. Trainer Custom Chemical LLC
(Case No. 15-1232, E.D. Penn. Aug. 30, 2016)

Plaintiff sued Defendants Trainer Custom Chemical, LLC ("Trainer"), Jeremy Hunter, and James Halkias (collectively, "Defendants") for CERCLA and state health and safety code violations arising from the contamination of the Stoney Creek Site ("Site") - a Trainer owned facility. Plaintiff moved for summary judgment as to Trainer's statutory "owner" liability under CERCLA-raising a novel argument as to when "owner" liability begins. Plaintiff argued that the Defendants were liable for cleanup costs before TCC's ownership of the property, including the electricity bills Plaintiff paid when Stoney Creek still owned the site. The District Court held that a current owner of contaminated property is not liable under Section 107(a)(1) CERCLA for cleanup costs incurred prior to ownership.

Background

Plaintiff filed suit against Trainer and two owners [Defendants] for recovery of cleanup costs Plainitff expended addressing a facility Defendants owned. The cleanup had commenced when the facility was owned by another company, and virtually all of the costs for which reimbursement was sought related to electrical power paid for by Plaintiff, which the prior owner of the property had failed to pay. Those costs were incurred more than three years before Defendants [the current owners] purchased the site.

At issue, therefore, was whether Trainer was liable for the electric bills and other costs incurred before Trainer acquired ownership of the site - "or, more, generally, what is the temporal definition of 'owner' under CERCLA?" *Id.*

Court's Rationale

Neither the parties nor the court had found any relevant cases on this issue in either the Third Circuit or the Eastern District of Pennsylvania. The Ninth Circuit, however, addressed the issue in *California Department of Toxic Substances Control v. Hearthside Residential Corp. ("Hearthside")*, 613 F.3d 910 (9th Cir.2010).

In 1999, Hearthside purchased an undeveloped tract of wetlands known as the Fieldstone property in Huntington Beach, Ca. This undeveloped tract was adjacent to several residential parcels owned by other parties. At the time of its acquisition, Hearthside knew that its Fieldstone property was contaminated with PCBs.

Later in 2002, Hearthside entered into a consent order with the California Department of Toxic Substances Control ("DTSC") agreeing to clean up the PCB contamination on the Fieldstone property. Also in 2002, DTSC determined that an adjacent residential site was also contaminated with PCBs, which DTSC alleged had come from the Fieldstone property.

DTSC advised Hearthside of its responsibility to investigate and cleanup the residential site in addition to the Fieldstone property; Hearthside refused and limited its cleanup to its own property.

In 2003, DTSC began its site cleanup of the adjacent residential site. In 2005, shortly after DTSC certified that the Fieldstone property cleanup was complete, Hearthside sold it to the California State Lands Commission.

DTSC sued Hearthside under CERCLA for recovery of the State's response costs. Hearthside alleged that it was not liable for response costs incurred prior to their purchase of the property – as CERCLA intended that the "current owner or operator" was the owner or operator at the time the response costs were incurred, not the owner or operator at the time the suit was commenced.

The Ninth Circuit opinion noted the lack of any controlling precedent on the issue, but concluded that using the date of response costs to identify a current owner was consistent with the statute of limitations, which begins with the incurrence of costs, and the intent to foster early settlement. "Congress's decision to activate the statue of limitations at the time of cleanup is strong contextual evidence that Congress intended the owner at the time of cleanup to be the 'current owner' in a subsequent recovery suit." *Id.* at 915. When reviewing the purposes of CERCLA, the court reached "the same conclusion - that current ownership is measured at the time of cleanup." *Id.* As such, a new owner is not liable for recovery costs incurred before it took ownership of the facility.

The Pennsylvania court agreed that the Ninth Circuit analysis made "common sense" and reasoned that, while CERCLA is a broad statute, "strict liability is not limitless liability."

Conclusion

That last point is one that countless sophisticated defendants have tried to make in CERCLA actions. And while the defendants in this case may not have been sophisticated in some of their arguments, they convinced the District Court on the issue central to their monetary liability. Alas, they may now have to also convince the Third Circuit Court of Appeals, as the PaDEP has requested certification for an interlocutory appeal.

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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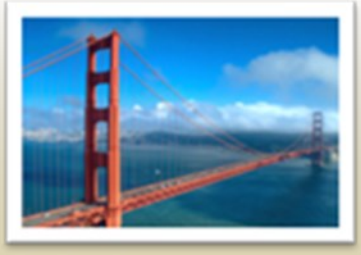

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