RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

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I. THE CLEAN WATER ACT

San Francisco Baykeeper, Inc. v. Moore, 180 F. Supp. 2d 1116 (E.D. Cal. 2001)

In this decision, the United States District Court for the Eastern District of California denied San Francisco Baykeeper's motion for summary judgment. The Eastern District held that San Francisco Baykeeper did not suffer an injury sufficient to establish standing. The court also found that the injury was not redressable and the plaintiff could not show continuing violation of the Clean Water Act. Furthermore, the court held that the voluntary cessation rule could not be applied as a substitute for organization's burden to establish standing.

Plaintiff San Francisco Baykeeper is a nonprofit organization responsible for the preservation of the San Francisco Bay and Delta. San Francisco Baykeeper is dedicated to the protection of this area of California because of the high aesthetic and recreational value of the waterways. Defendant is the California Department of Boating and Waterways (DBW), which is the agency responsible for implementing water hyacinth and Egeria densa control programs.

This case arises out of the discharge of chemical herbicides and pesticides into the water, in an effort by DBW, to control the growth of foliage. San Francisco Baykeeper alleged the action of DBW violated the Clean Water Act. The Clean Water Act prohibits the discharge of pollutants without a permit. San Francisco Baykeeper informed DBW of

its intent to file suit and DBW ceased its discharge of pesticides. DBW applied for a National Pollutant Discharge Elimination System permit.

The district court found San Francisco Baykeeper did not have standing under the citizen suit provision of the Clean Water Act. The Clean Water Act permits citizens to bring suit and defines citizen as "a person or persons having an interest which is or may be adversely affected." San Francisco Baykeeper, however, only has standing if its members would otherwise have standing individually. The organization was represented, in this action, by an individual member, Jennings. The district court found Jennings was obligated to fulfill the requirements set forth by the Court in *Lujan v. Defenders Wildlife*, 504 U.S. 555 (1992). According to the Court in *Lujan*, Jennings was required to demonstrate that he suffered an injury in fact that was concrete and actual, traceable to the action of the defendants, and likely to be redressed.

The court found that Jennings, on an individual basis, sufficiently demonstrated aesthetic and recreational interest in the San Francisco waterways. He, however, failed to demonstrate a sufficient injury in fact. The court relied on *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167 (2000), in which the Supreme Court stated that a plaintiff must show an ongoing violation in order to demonstrate an injury in fact and establish standing. The district court found that DBW stopped discharging pesticides into the waterways prior to this action. San Francisco Baykeeper failed to show that the harm continued after DBW ceased its operation.

San Francisco Baykeeper argued that since DBW's permit application was pending, it remained without possession of a permit, and was therefore still in violation of the Clean Water Act. Relying on *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987), the court found this argument unpersuasive. The Supreme Court in *Gwaltney* found that the violator must be given the opportunity to comply. The notice provision of the Clean Water Act gives the defendant an opportunity to comply with the Act. DBW, in the present case, submitted an application for a National Pollutant Discharge Elimination System permit. If the court permitted the San Francisco Baykeeper's suit to continue, it would eliminate DBW's opportunity to alter its actions in order to comply with the Act.

San Francisco Baykeeper also argued that there was a likelihood of a recurrence of the pesticide spraying because of statements made by the Regional Board that it would not act against DBW if it resumed spraying prior to receipt of a permit. The court was unconvinced by this argument and refused to speculate about the Board's decisions.

The court also, in comparison, noted the language of the Clean Air Act which permits a citizen suit against anyone "who is alleged to have violated" the Act. The district court, however, interpreted this language to require repeated, continuous, or intermittent violations, and not past violations alone. Therefore, the district court opted to follow the Supreme Court rule in *Laidlaw* that citizens lack statutory standing to sue for violations of the Clean Water Act that cease before the complaint is filed.

It is a litigation requirement that the plaintiff have standing to bring suit. This is a frequent issue in environmental litigation due to the large number of nonprofit organizations operating to protect the environment for the public. Often these groups fail to prove concrete and personal injury. In this case, however, Jennings, as a representative of San Francisco Baykeeper, was able to show that he and the other members of his organization were injured. They all lost the ability to use the California waterways without fear of contacting or ingesting poisons from chemicals and pesticides. The court held that the plaintiff did not have standing, though, because the actions of DBW ceased. The district court applied Supreme Court precedent in order to reach its decision. It is just one more example, however, of how difficult it is to attain justice in environmental litigation. Citizens cannot bring suit under the Clean Water Act to attain vindication for past wrongdoing or to gain some equity for the constant fear they face from dangerous chemicals in the environment.

Laura Massaro

Miccosukee Tribe of Indians of Florida v. South Florida Water Management District, 280 F.3d 1364 (11th Cir. 2002)

The Miccosukee Tribe of Indians and the Friends of the Everglades brought a citizen suit against the South Florida Water Management District (the Water District) alleging that the Water District was discharging pollutants from the S-9 pump station into Water Conservation Area 3A (WCA-3A), without a national pollutant discharge elimination system (NPDES) permit, in violation of the Clean Water Act (CWA).

Both parties filed motions for summary judgment in the United States District Court for the Southern District of Florida. The district court granted the Plaintiffs' motion, denied the Water District's motion,

and enjoined the Water District from operating the S-9 pump station without an NPDES permit. The Water District appealed the district court's order prohibiting the operation of the S-9 pump station without an NPDES permit and the injunction prohibiting its operation to the Eleventh Circuit Court of Appeals.

In the early 1900s, the Army Corps of Engineers began digging in areas that were historically part of the Everglades to ease the draining of the western portion of Broward County. This area is part of the C-11 Basin and the Army Corps' digging created the C-11 Canal. Later, in the 1950s, the Army Corps constructed two levees which created the Water Conservation Area-3A to the west of the C-11 Basin. The C-11 Canal collects water run-off from the C-11 Basin and seepage from WCA-3A and the S-9 pump station pumps this water from the C-11 Canal into WCA-3A. The South Florida Water Management District manages the operation of these levees, canals, and pump stations.

The water from C-11 Canal that the S-9 pump station releases into the WCA-3A contains pollutants. These pollutants consist of phosphorus which is at levels that are higher than what is naturally occurring in the WCA-3A. The district court found that "because the waters collected by the C-11 Canal contained pollutants and this water would not flow into WCA-3A without the operation of the S-9 pump station, S-9 added pollutants to the WCA-3A in violation of the CWA."

First, the court reviewed the district court's grant of summary judgment to the Plaintiffs de novo on the issue of the pumping of the polluted water. Section 1311 of the CWA requires an NPDES permit for a discharge of pollutants from a point source into navigable waters. The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." Both parties agreed that the S-9 pump station is a point source and that the water released by the pump station contains pollutants. Neither party disputed that both the C-11 Canal and the WCA-3A are considered navigable waters under the CWA. The issue in contention in this case was "whether the pumping of the already polluted water constitutes an *addition* of pollutants to navigable waters *from* a point source."

The Water District argued that the addition of pollutants from a point source can only occur if the point source itself adds pollutants from the outside world to navigable waters. The Water District relied on *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir.1982) and *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988), which were both hydro-electric dam cases. The Water District alleged that since the S-9 pump station did not itself

introduce pollutants into WCA-3A, no addition of pollutants had occurred and an NPDES permit was not required.

The court then analyzed whether the addition of pollutants into WCA-3A actually occurred from the S-9 pump station. To make this determination, the court used the definition of discharge of a pollutant. The court found that pollutants were being discharged into WCA-3A, a navigable water. For the second part of the definition, the court determined the question of whether, "but for the point source, the pollutants would have been added to the receiving body of water." Since the pollutants were being discharged into WCA-3A *only* because of the change in flow caused by the S-9 pump station, an addition of pollutants from a point source was occurring. The court found that "an addition from a point source occurs if a point source is the cause-in-fact of the release of pollutants into navigable waters."

The next issue that the court addressed was the district court's grant of injunction enjoining the Water District from the operation of the S-9 pump station without an NPDES permit. The Water District argued that the district court abused its discretion in granting the injunction by not relying on traditional equitable standards in its decision. The court, relying on various cases, stated that the effect of the injunction on the public interest and the costs of the injunction should be considered in the granting of an injunction. If the Water District stopped the operation of the S-9 pump station, substantial flooding would occur in western Broward County which would adversely affect the population there. Furthermore, the plaintiffs had stated that they did not desire for the Water District to cease the operation of the S-9 pump station because of the serious flooding that would occur. Based on the serious effects of discontinuing the operation of the S-9 pump station, the court found that the district court's injunction could not be properly enforced. The flooding that would be caused by stopping the operation of the pump far outweighed the discharge of phosphorus into WCA-3A without an NPDES permit.

The court of appeals affirmed the district court's decision that the Water District was in violation of the Clean Water Act, since it was discharging pollutants into WCA-3A without an NPDES permit and the court of appeals vacated the judgment granting the injunction to cease the operation of the S-9 pump station because of the serious public consequences that would result.

Punam Parikh

II. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

United States v. Shell Oil Co., 281 F.3d 812 (9th Cir. 2002)

In this case, the United States Court of Appeals for the Ninth Circuit reaffirmed the federal government's waiver of sovereign immunity under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), clarified the balancing test to be used in determining the liability of the federal government as an arranger, and discussed the "act of war" defense available under CERCLA.

Looking at the McColl Site in Southern California today, one would never know that a few years ago it was listed as a Superfund site. In fact, what was once home to over 100,000 cubic yards of hazardous waste, including acid sludge and processed benzol, is now a wildlife sanctuary and community recreation center. During World War II (WWII), defendants Shell Oil Company, Union Oil Company, Atlantic Richfield Oil Company, and Texaco (collectively Oil Companies) used the McColl site to dump wastes from their production of aviation fuel for the war, as well as other chemical wastes produced in their other operations.

Background

During WWII, the U.S. military was the primary consumer of this aviation fuel (avgas). Accordingly, the United States played a significant role in the production of avgas throughout WWII. The federal government established the War Production Board (WPB) and the Petroleum Administration for War (PAW) to oversee and ensure the ample production of avgas. The PAW made policy decisions regarding production orders issued to specific companies, as well as rationed the amounts of raw materials and facility construction contracts available to interested companies. Because these decisions were made during wartime, the PAW and WPB could essentially take over avgas manufacturing operations, but they opted to maintain contractual relationships with the Oil Companies. Even though these agencies exercised considerable control over post-production distribution of avgas, the Oil Companies that opted to maintain long-standing avgas production contracts with the United States were eligible for federal financial assistance in recovering unforeseeable and extraordinary expenses. Despite the additional expenses, the production of avgas was a profitable operation, and the Oil Companies sought out contracts with the government. Even with heavy-handed federal oversight of the wartime

production of avgas, the Oil Companies retained ownership of their facilities and never conceded control of their refinery operations. The United States did not own any of the facilities nor did it own any of the materials required to produce avgas.

Avgas Production: Cradle to Grave

Simply put, "[a]vgas was a blend of petroleum distillates and chemical additives." Avgas contained up to 40% of a compound called "alkylate," which was a deliberately manufactured by-product of sulfuric acid. In fact, so much avgas was in demand that the "production of avgas increased more than twelve-fold," and consequently, "[s]ulfuric acid consumption increased five-fold" over a three year span.

The Oil Companies had several options for disposing of the waste generated during avgas production. They could reprocess it and continue to use it in avgas production, they could use it in operations that required a lower grade of alkylation acid, or they could dump it. The cheapest option was the obvious one, and most of the acid sludge generated during avgas production was dumped. Because of the persistent demand for avgas and the lack of adequate reprocessing facilities, the Oil Companies found themselves dumping much of their waste at the McColl site, which accepted spent acid and acid sludge from June 1942 until after WWII.

The United States knew the process for manufacturing avgas and consequently knew the types and amounts of wastes that were generated. In an effort to maintain the flow of production of avgas and prevent a crippling backlog of acid wastes, the United States "facilitated the lease of a large storage tank," but it neither ordered nor approved any action by the Oil Companies to dispose of the spent acid and acid sludge. The Ninth Circuit highlighted the lack of evidence indicating that the United States had any knowledge of the Oil Companies' dumping waste at McColl.

In the 1950s, McColl and the Oil Companies began to seal up the site's waste sumps to allow for residential development in the area. Four decades later, after the United States initiated cleanup activities at the site and incurred nearly $100 million in removal costs, the United States and the State of California brought a recovery action, under CERCLA, against the Oil Companies. The Oil Companies responded with a counterclaim against the United States, alleging the government was liable for cleanup costs.

The District Court's Decision

The District Court for the Central District of California found all parties liable—the Oil Companies, as arrangers, as well as the United States, which it found to be 100% liable in its capacity as an arranger for the disposal of nonbenzol waste. *United States v. Shell Oil Co.*, 841 F. Supp. 962, 969-70 (C.D. Cal. 1993); *United States v. Shell Oil Co.*, No. 91-0589, slip op. at 14-19 (C.D. Cal. Sept. 18, 1995); *United States v. Shell Oil Co.*, 13 F. Supp. 2d 1018 (C.D. Cal. 1998).

All parties appealed. The United States appealed on the grounds that it had not waived its sovereign immunity under 42 U.S.C. § 9620(a)(1) (1994) and that it was not liable for the cleanup of the nonbenzol waste. The Oil Companies appealed the district court's rejection of their "act of war" defense.

The Ninth Circuit's Decision

The Ninth Circuit affirmed the district court's holding that the United States had waived its sovereign immunity under § 9620(a)(1), but reversed the decision regarding its liability for nonbenzol waste cleanup. The Ninth Circuit also affirmed the district court's rejection of the Oil Company's "act of war" defense and attempted to define parameters for that defense in the future.

Sovereign Immunity

The United States accepted liability for the cleanup of its benzol waste products. However, it disputed that it waived sovereign immunity insofar as it imputed liability for its role in regular governmental activities. In other words, the United States accepted that under § 9620, it waived liability for its involvement in "nongovernmental activities." However, the Ninth Circuit agreed to the contrary with the Third Circuit in *FMC Corp. v. United States Department of Commerce*, 29 F.3d 833, 842 (3d Cir. 1994) (en banc), which rejected a narrowly contrived waiver of sovereign immunity for nongovernmental activities only. For example, the United States has repeatedly accepted findings of liability under CERCLA for cleanups of military installations in which the United States is clearly acting in its regular "governmental" capacity—only the government can operate military bases.

Furthermore, the Ninth Circuit agreed with the D.C. Circuit in holding that the United States waived sovereign immunity under § 9620 to the same extent it waived sovereignty under § 9607. *See East Bay Mun. Util. Dist. v. United States Dep't of Commerce*, 142 F.3d 479, 482

(D.C. Cir. 1998). Again, citing to the Third Circuit decision in *FMC*, the Ninth Circuit held that "'[t]he relevant sovereign immunity question under CERCLA is . . . whether [the government's] activities . . . are sufficient to impose liability on the government as an owner, operator, or arranger.'" The Ninth Circuit reminded the government that it could avail itself of the "two defenses provided within § 9607," as a party providing nonnegligent aid pursuant to the National Contingency Plan or as a government actor responding to an environmental emergency created by a third party.

Arranger Liability

After determining that the United States had waived sovereign immunity under CERCLA, the Ninth Circuit analyzed the district court's holding that the government was liable for the cleanup of the nonbenzol waste as an arranger under § 9607. The district court held that despite the Oil Companies not alleging as such, the United States could be liable as a direct arranger when it involved itself in arranging for the disposal of the acid sludge and wastes via the PAW and WPB's role in the acid waste disposal as well as the government's attempts to lease the storage tank.

However, because the Oil Companies did not argue that the United States was a direct arranger, the Ninth Circuit spent more time in its discussion of the alternate broader theory for liability. Under a broad arranger theory, the Oil Companies argued that the government was liable as it "had sufficient control over the process that created the waste such that it should be considered an arranger." The specific test that the Oil Companies proffered was "that if a party 'has substantial control over a manufacturing process wherein a hazardous waste stream is generated and disposed of, then that party assumes the obligation to control the disposal of that waste stream.'" However, the district court applied a test similar to the test the Eighth Circuit used in *United States v. Aceto Agricultural Chemical Corp.*, 872 F.2d 1373 (8th Cir. 1989), in which "'[a] party is . . . an arranger (1) if it supplies raw materials to be used in making a finished product, (2) and it retains ownership or control of the work in progress, (3) where the generation of hazardous substances is inherent in the production process.'"

The Ninth Circuit distinguished *Aceto*, as the defendants in that case were in fact pesticide manufacturers who owned the materials needed to manufacture the pesticide, as well as the finished pesticide products. The United States only purchased avgas from the Oil Companies; it never owned the acid sludge, sulfuric acid, or petroleum needed to manufacture the fuel.

In the alternative, the Oil Companies cited to *United States v. Northeastern Pharmaceutical & Chemical Co. (NEPACCO)*, 810 F.2d 726 (8th Cir. 1986), wherein the Eighth Circuit found the principal shareholder/president and supervisor liable for cleanup of buried drums of chemical waste despite the fact that neither had a property interest in the chemicals or the drums. The Eighth Circuit explained in *Aceto*, as well as *NEPACCOU*, that an arranger can be liable for costs under CERCLA without ownership of the substances dumped; rather, the "authority to control disposal" was enough to hook an arranger under CERCLA. *Aceto*, 872 F.2d at 1382.

The Ninth Circuit distinguished the Eighth Circuit decision in *NEPACCO*, as the defendants in *NEPACCO* exercised some modicum of *actual control*, not potential control, over the disposal of the waste. While the United States could have exercised eminent domain and seized the refineries during wartime, it never did. Furthermore, the United States never directed the Oil Companies to dispose of the waste in the way they did.

While the Ninth Circuit rejected the Oil Companies' and district court's bases for pinning arranger liability on the United States, it clarified its rejection by offering that courts have never found a party liable, under CERCLA, as an arranger, where it neither owned the disposed waste nor had the authority to control the waste disposal process. Moreover, the Ninth Circuit provided two supporting opinions which are factually more akin to the instant matter than either *Aceto* or *NEPACCO*. In *FMC Corp. v. United States Department of Commerce*, 29 F.3d 833 (3d Cir. 1994) (en banc), the plaintiffs sought contributory costs from the United States for its role in the wartime production of rayon and the resulting environmental cleanup. In *FMC*, the United States owned the manufacturing equipment and the neighboring plant which generated the sulfuric acid necessary for production. The government also controlled the supply, prices, and manufacturing process. While the Third Circuit was split evenly on the issue of whether the government was liable as an arranger, the Ninth Circuit in the instant action held that if the Third Circuit was evenly divided on the issue of liability where the United States exercised such overt control, it was clear that the government would not be liable as an arranger where it exercised substantially less control, as it did with the disposal of the avgas wastes.

While the Ninth Circuit cited to *FMC* for its example of not finding liability where the government was more involved than it was at the McColl site, it cited to *United States v. Vertac Chemical Corp.*, 46 F.3d 803 (8th Cir. 1995), for its factual similarities to the instant action. In

Vertac, the Eighth Circuit held that where the United States issued orders regarding Agent Orange production during the Vietnam War and knew of the manufacturing process and concurrent waste production, but neither owned the manufacturing materials nor knew of the waste disposal process used by the manufacturer, the government could not be held liable as an arranger under CERCLA § 9607(a)(3). Ultimately, the Ninth Circuit reversed the district court's finding of arranger liability for the United States with respect to the cleanup of nonbenzol wastes at McColl.

The Oil Companies' Act of War Defense

The Oil Companies claimed that the district court wrongly rejected their "act of war" defense to CERCLA liability. The Ninth Circuit noted that the term "act of war" is defined neither in CERCLA nor case law, but in the same breath it reaffirmed the district court's narrow reading of ambiguous defenses and broad assignment of liability. Against that canvas, the Ninth Circuit easily reaffirmed the rejection of the "act of war" defense, as "acts of war" have typically contemplated a "unilateral act[] of the United States," whereas in the case at bar, the Oil Companies availed themselves of a mutually beneficial contractual relationship with the government during wartime for the production of materials to further the war effort. Regardless of the war the government was fighting in the background, the Oil Companies freely entered into for-profit agreements with the United States, and moreover, the Oil Companies themselves selected the means of disposing of the avgas wastes, a disposal practice that went on before and after the war. Furthermore, the Oil Companies dumped more than just avgas waste at McColl; they also dumped wastes from their other refinery operations.

Conclusion

While the Ninth Circuit reversed the district court's finding of arranger liability for the United States, its holding comports with the precedent of the Third and Eighth Circuits, which offers more predictability with respect to interpretations of the often-murky waters of CERCLA liability. Furthermore, its rejection of the "act of war" defense from the Oil Companies lent clarification to (yet) an(other) undefined CERCLA term. At base, the Ninth Circuit's opinion in *Shell* supports the theory that sometimes the most valuable opinions are the most predictable.

Theresa Lesh