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Water Resources Committee Newsletter

A joint newsletter of the Water Resources and Water Quality and Wetlands Committees

Vol. 16, No. 2 May 2014

FROM THE CHAIRS

Robin Craig, Jon Schutz, and Blaine Early

We are well into 2014 and, as always, there is a lot happening in water resources, water quality, and the Water Resources and Water Quality and Wetlands Committees. This joint newsletter is a continuing tradition of collaboration of these two large and active committees. It complements the services to our members provided by our respective Web sites, e-mail list serves, social media, and programs. Please send this newsletter to your colleagues and friends who may not yet be members of our committees and invite them to join us!

Sorell Negro (WR) and Beth Kinne (WQ&W) and their fabulous teams continue to provide our members with case summaries and other "Hot News." If you would like to contribute to either, please contact them directly: Sorell at SNegro@rc.com and Beth at kinne@hws.edu. Our newsletters and social media depend on contributions from our members. Please contact our newsletter editors Norm Dupont and Jeff Kray (WR) at ndupont@rwglaw.com and jkray@martenlaw.com, or Winston Borkowski (WQ&W) at winstonb@hgslaw.com.

The Water Resources Committee recently held its first conference call on the topic of state water resource planning. It was moderated by Tim Weston from Pennsylvania and included panelists from Montana, Colorado, and West Virginia. With the recent announcement of the highly anticipated rule to define jurisdictional "waters of the United States," the Environmental Protection Agency and U.S. Army Corps of Engineers have given water lawyers much to think about. The Water Quality and Wetlands Committee will soon be hosting a webinar to help understand the proposed rule. In June the Water Quality Committee will host a webinar on regulation of nutrient pollution. Larry Liebesman will moderate that webinar.

The Water Resources Committee is preparing for the Section's **32nd Annual Water Law Conference**, which will be held **June 4–6, 2014**, at the Red Rock Resort in Las Vegas. This is the same Water Law Conference that used to be held in February in San Diego. This year's program will cover topics that are increasing relevant to water lawyers, managers, and users. Sessions will cover Tribal Water Law 101; tribal water settlements; the water implications of new energy regulations; the new green water infrastructure (and its financing); emerging interstate water issues; constitutional takings litigation over water rights; and a "nuts-and-bolts" hydrology session, among others. The conference is held near the Red Rock Canyon National Conservation Area and will include a field trip to the Hoover Dam. You can register for the conference at www.ambar.org/EnvironWL.

These conferences are only possible with the help of the remarkable people on our planning committees. Thank you all! We always welcome members to

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Norman A. Dupont and Jeff Kray, Editors

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become involved in the committees' ongoing evolution, especially with respect to programs suggestions and contributions to the committee newsletter. Contact us at robinkcraig@gmail.com, jschutz@mwjlaw.com, or bearly@stites.com with any ideas you have about how the Water Resources or the Water Quality and Wetlands Committees can better serve you or your firm's professional development needs, or if you want to be more involved but aren't sure how best to contribute. We always have a place for you.

Robin Craig and *Jon Schutz* are Co-Chairs of the Water Resources Committee. *Blaine Early* is the Chair of the Water Quality and Wetlands Committee.

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U.S. ARMY CORPS OF ENGINEERS–ISSUED JURISDICTIONAL DETERMINATIONS POST *SACKETT V. EPA*: ARE THEY SUBJECT TO JUDICIAL REVIEW?

Paula M. Feldmeier

In administering the Clean Water Act section 404's permitting program, the U.S. Army Corps of Engineers' (Corps) regulations authorize the Corps, upon request, to provide the agency's view on whether a particular property contains "waters of the United States" within the agency's regulatory jurisdiction under the CWA. 33 U.S.C. § 1251 et seq.; *see* 33 C.F.R. §§ 320.1(a)(6), 331.2. The Corps then issues a written jurisdictional determination (JD) that outlines the geographic extent of wetlands or water bodies on the property that are subject to the Corps' regulatory jurisdiction. 33 C.F.R. § 331.2. A preliminary JD indicates the potential existence of waters of the United States on a particular parcel, or the approximate location(s) of such waters on the parcel. Constituting an action subject to the Corps' administrative appeal process, an approved JD more certainly states the existence of waters of the United States on a particular parcel, or the limits of such waters on the parcel. *Id.*

Judicial Review of Jurisdictional Determinations

While the courts in the 1980s generally considered JDs ripe for judicial review, district courts reviewing challenges to JDs under the Administrative Procedure Act (APA), 5 U.S.C. § 701 et seq., began to question the finality of JDs in the 1990s. Under APA, "agency action made reviewable by statute or final agency action for which there is no other adequate remedy in court are subject to judicial review." *Id*. at § 704. The first court of appeals to address the finality of JDs within the meaning of APA was the Ninth Circuit, in *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 589 (9th Cir. 2008). There, after exhausting the administrative appeal process, which upheld the approved JD, the borough sought judicial review of the JD so that it could place fill material in a 2.1-acre tract of wetlands in order to construct recreational development for its residents. The Ninth Circuit applied the finality analysis developed by the Supreme Court decision in *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997), to hold that the Corps' issuance of an approved JD finding that the borough's property contained wetlands did not constitute final agency action under APA for purposes of judicial review. "As a general matter, two conditions must be satisfied for agency action to be final: First, the action must mark the consummation of the agency's decision-making process—it must not be of merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.*

The Ninth Circuit, in *Fairbanks*, in applying the *Bennett* finality analysis was not persuaded with the Corps' argument that an approved JD was "'only [a] step[] leading to an agency decision, rather than the final action itself' [because it would] 'necessarily entail[] the possibility of further administrative proceedings,' like permit applications." 543 F.3d at 593 (quoting *Ecology Ctr., Inc. v. U.S. Forest Serv.*, 192 F.3d 922, 925 (9th Cir. 1999)). Instead, the court concluded that the first prong of the *Bennett* finality analysis was met because "[a]n approved jurisdictional determination announces the Corps' considered, definite and firm position about the presence of jurisdictional wetlands on Fairbanks' property at the time it is rendered." *Id.* The court was satisfied, however, that the second prong of the *Bennett* finality analysis was not met, holding that the Corps' approved JD was "not an action . . . by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id*. (quoting *Bennett*, 520 U.S. at 178). Factors the court considered in determining that the second prong of the *Bennett* finality analysis was not met included the following: (1) the borough's rights and obligations remained unchanged by the approved JD; (2) the approved JD could not be the subject of "immediate compliance nor of defiance"; (3) the JD did not have legal force, that is, if an enforcement action were later brought by the Corps against the borough, the borough "would face liability only for non-compliance with the CWA's underlying statutory commands, not for disagreement with the Corps' [JD]"; (4) at most, the JD "simply

reminds affected parties of the existing duties imposed by the CWA itself and commands nothing of its own accord"; and (5) "any difficulty [the borough] might face in establishing good faith flows not from the *legal* status of the Corps' determination as agency action, but instead from the *practical* effect of [the borough] having been placed on notice that construction might require a *Section 404* permit." *Id*. at 593–95. Accordingly, determining that plaintiffs failed to meet both prongs of the *Bennett* finality analysis, the Ninth Circuit dismissed the claim for lack of subject matter jurisdiction.

Applicability of *Sackett v. EPA* to Finality of Jurisdictional Determinations

In *Sackett v. Environmental Protection Agency*, 132 S. Ct. 1367, 1374 (2012), the Supreme Court held that an administrative compliance order was final agency action for which there [was] no adequate remedy other than APA review. In *Sackett*, the Environmental Protection Agency (EPA) issued an administrative compliance order issued under section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), requiring the plaintiffs to "immediately undertake activities to restore the Site in accordance with an EPA-created Restoration Work Plan." *Id.* at 1374. The order "expose[d] the Sacketts to double penalties in a future enforcement proceeding" and "severely limit[ed] the Sacketts' ability to obtain a permit for their fill from the Army Corps of Engineers." *Id*. at 1372.

Following *Sackett*, challenges to Corps-issued JDs attempted to extend the Supreme Court's finality holding to CWA JDs by equating JDs with administrative compliance orders. In *Belle Co., LLC v. U.S. Army Corps of Eng'rs*, 2013 U.S. LEXIS 27546, at *10–11 (M.D. La. Feb. 28, 2013), the court followed the Ninth Circuit's application of the *Bennett* finality analysis in *Fairbanks* to find that the approved JD issued to plaintiffs "d[id] not constitute final agency action within the context of the APA." The *Belle* court did not, however, find *Sackett* controlling; instead, it held that JDs did not have the binding effect of compliance orders. *Id*. at *12. The *Belle* court reasoned that although the compliance order in *Sackett* "included that the Sacketts' property contained wetlands, more importantly, the order *also* notified the Sacketts that the past discharge of pollutants into the wetlands constituted a violation of the CWA" and imposed a requirement on them to restore the site immediately. *Id*. at *11. The district court further reasoned that "[u]nlike the Sacketts who faced potential fines for each day they refused to follow the EPA compliance order, Belle does not face any imminent penalties," and plaintiffs could still submit a permit application, and "should this permit application be denied, Plaintiffs may appeal the decision to the administrative process outlined in the APA." The court thus dismissed plaintiffs' claims for lack of subject matter jurisdiction. *Id*. at *12. *See Hawkes Co., Inc. v. U.S. Army Corps of Eng'rs*, 2013 U.S. Dist. LEXIS 107858 (D. Minn. Aug. 1, 2013) (determining *Sackett*'s holding does not extend to apply to all final CWA JDs despite plaintiffs' argument that *Belle* reached the wrong result, and that *Sackett* applied to the JD).

Extending the *Fairbanks* and *Belle* Holdings to Traditionally Navigable Waters

In *Nat'l Ass'n of Home Builders (NAHB) v. EPA*, 956 F. Supp. 2d 198, 208–09 (D.D.C. 2013), plaintiffs filed suit seeking judicial review under APA of a determination by EPA and the Corps that portions of the Santa Cruz River are traditional navigable waters (TNWs), subject to the jurisdiction of section 404 of the CWA. The court applied the *Bennett* finality analysis in its consideration of plaintiffs' challenge to the TNW determination. Despite plaintiffs' assertion that the TNW determination was a final agency action because a Corps' regulation provides that "formal determinations concerning the applicability of the Clean Water Act . . . to activities or tracts of land . . . shall constitute Corps final agency action," the court determined that the "mention of 'final agency action' in [the Corps regulation] is not dispositive." *Id*. at 209 (quoting 33 C.F.R. § 320.1(a)(6)). That is, the court reasoned that "[n]o mention was made of finality for the purposes of judicial review under APA. *Id* at 210. The court also noted that the Corps explained in later rulemaking that JDs are not ripe for review, and while these "comments addressed [JDs] rather than TNW determinations, there is no meaningful distinction

between the two in this context, as both constitute ‘formal determinations concerning the applicability of the Clean Water Act.’” *Id*. 0 (quoting 33 C.F.R. § 320.1(a)(6)).

In applying the *Bennett* finality analysis to a TNW determination, the *NAHB* court noted that this was an issue of first impression, “as far as this Court can determine, no court has squarely addressed whether a TNW determination is final agency action. However, a number of courts have held that a CWA jurisdictional determination is not final agency action, based on reasoning that the Court finds persuasive here.” 956 F. Supp. 2d at 211. Extending the *Fairbanks* and *Belle* holdings on JDs to TNW determinations, the court reasoned that “[t]he TNW Determination does not require NAHB members to take any specific action. They either have obligations to seek permits under the CWA or they do not. Those obligations may have been clarified by the TNW Determination, but they do not arise out of the Determination.” *Id*. Thus, the court found that the TNW determination was not final agency action within the meaning of APA. The court also found unavailing the plaintiffs’ argument to extend *Sackett*’s holding to find that the TNW determination constituted final agency action. In distinguishing *Sackett*, the court stated that “[b]y contrast, the TNW Determination does not require NAHB members to do anything, nor does it expose them to additional penalties in a future enforcement proceeding, or impact their ability to obtain a permit from the Corps. The TNW Determination, at most, warns developers in the Santa Cruz watershed that they may be required to obtain a permit for certain activities in certain locations in order to be in compliance with the CWA.” *Id*. at 212. Accordingly, the court held that the TNW determination was not final agency action and not subject to judicial review under APA. *Id*.

Conclusion

Although only one court of appeals has so far determined that JDs do not constitute final agency action under APA, utilizing the *Bennett* finality analysis, courts in several circuits have followed the Ninth Circuit’s holding in *Fairbanks*. In recent suits challenging JDs in circuits outside the Ninth Circuit, courts have upheld the determination that JDs are not final agency action under APA, despite challengers’ attempts to extend *Sackett*’s holding that compliance orders are final agency actions subject to judicial review under APA to JDs. Also, at least one court has found the *Fairbanks* finality of JDs reasoning, and subsequent courts’ adoption of this reasoning and dismissal of the application of *Sackett* to JDs, as persuasive for finding that TNW determinations are also not final agency actions subject to judicial review under APA. Because the Supreme Court denied certiorari in the Ninth Circuit *Fairbanks* case, 2009 U.S. LEXIS 4621 (U.S. June 22, 2009), and no other circuit courts of appeals have reached the issue, the finality of JDs remains largely unsettled law; however, the trend appears to be a finding that JDs do not constitute final agency action subject to judicial review under APA, and this likely also extends to TNW determinations.

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SOLUTION TO THE POLLUTION: DEVELOPMENT OF THE CHESAPEAKE BAY TMDL THROUGH COOPERATIVE FEDERALISM

Tara Messing

On September 13, 2013, Judge Sylvia H. Rambo of the U.S. District Court for the Middle District of Pennsylvania in *American Farm Bureau v. EPA*, Case No. 1:11-CV-0067 (M.D. Pa. 2013), held that the Environmental Protection Agency (EPA) had the authority under the Clean Water Act (CWA) to promulgate the Chesapeake Bay total maximum daily load (TMDL) to limit nitrogen, phosphorous, and sediment in the Chesapeake Bay. Judge Rambo determined that EPA, in developing the TMDL, did not unlawfully infringe on the rights of the Bay jurisdictions, which include Virginia, Maryland, Delaware, West Virginia, Pennsylvania, New York, and the District of Columbia (DC). The court reasoned that the TMDL development process encouraged collaboration between the Bay jurisdictions and EPA, and was a valid exercise of power under the CWA framework of cooperative federalism. The ruling provided the Bay jurisdictions with the necessary certainty to begin implementing EPA's TMDL cleanup goals.

The Clean Water Act and Cooperative Federalism

The CWA establishes a cooperative federalism framework that requires both federal and state governments to work cooperatively and collectively to restore and maintain the nation's waters. In *Arkansas v. Oklahoma*, the U.S. Supreme Court found that the CWA "anticipates a partnership between the States and the Federal Government." 503 U.S. 91, 101 (1992). To develop and implement effective water quality-based controls, the CWA divides duties between EPA and the states. EPA is responsible for ensuring that the CWA requirements are met by enforcing regulations and providing technical assistance. While the CWA increased federal oversight and control over water pollution, Congress also recognized and preserved the states' duties to reduce pollution. 33 U.S.C. § 1251(b) (2012). The states are responsible for developing and implementing water quality standards (WQS). *Id.* § 1313(c). Additionally, states are required to identify waters that do not meet or are not expected to meet WQSs. *Id.* § 1313(d). Waters that fail to meet WQSs are listed by the state on the "Impaired Waters List." *Id.* § 1313(d)(1)(A). After a water body is listed as impaired, the state is required to establish a TMDL for the pollutants. *Id.* § 1313(d)(1)(c). A TMDL is a "pollution diet" that establishes the maximum amount of a pollutant that a water body can receive from point sources and nonpoint sources.

Historically, states were hesitant to list impaired waters due to the perceived difficulties in setting and implementing TMDLs. In response, environmental groups brought citizen suits against EPA. Notably, in *Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984), the Seventh Circuit Court of Appeals held that a state's failure to develop TMDLs for impaired waters might amount to a constructive submission of no limits by the state. In such a circumstance, the court decided that EPA had a mandatory duty to issue TMDLs. In addition to citizen suits, numerous consent decrees between EPA and environmental organizations came before the courts that established that EPA would develop TMDLs if a state failed to do so.

Developing the Chesapeake Bay TMDL

Cooperative federalism was an important tool for developing pollution limits for a 64,000-square-mile watershed that spans seven state jurisdictions. The majority of the Bay and its tidal waters are listed as impaired due to excess nitrogen, phosphorous, and sediment, which feed algae blooms that consume oxygen and create dead zones. Nonpoint sources from agriculture are the primary source of pollutants threatening the Bay, but these sources are not directly regulated by the CWA. Thus, developing a Bay-wide TMDL through a collaborative partnership among the Bay jurisdictions and EPA is crucial to eliminating multi-jurisdictional, nonpoint source pollution in the Bay.

The development of a Bay-wide TMDL is the most recent measure in a long line of restoration efforts to reduce excessive pollution by EPA and the Bay

jurisdictions. A major challenge with Bay preservation efforts is effecting collective action throughout the multistate watershed. Diverse stakeholder interests complicate reaching a consensus among the Bay jurisdictions. The first multistate coordinated effort to restore water quality in the Bay began in 1983 when Maryland, Virginia, Pennsylvania, DC, and the EPA administrator signed the 1983 Chesapeake Bay Agreement. *See* 1983 Chesapeake Bay Agreement, *available at* http://www.chesapeakebay.net/content/publications/cbp_12512.pdf.
Subsequently, the 1987 Chesapeake Bay Agreement set the first numeric goal for water quality: a 40 percent reduction in nitrogen and phosphorous by 2000. *See* 1987 Chesapeake Bay Agreement, *available at* http://www.chesapeakebay.net/content/publications/cbp_12510.pdf.

Progress was nevertheless slow. More than 10 years later, the 1987 agreement goals were far from achieved. As required by the CWA, Virginia, Maryland, and DC listed certain sections of the Bay as impaired, which triggered the statutory requirement to develop TMDLs. By 2000, the Bay jurisdictions and EPA signed the 2000 Chesapeake Bay Agreement and a memorandum of understanding (MOU). *See* Chesapeake 2000, *available at* http://www.chesapeakebay.net/documents/cbp_12081.pdf; Memorandum of Understanding Among the State of Delaware, the District of Columbia, the State of Maryland, the State of New York, the Commonwealth of Pennsylvania, the Commonwealth of Virginia, the State of West Virginia, and the United States EPA, *available at* http://www.chesapeakebay.net/content/publications/cbp_12085.pdf. The 2000 Chesapeake Bay Agreement divided restoration activities into five categories designed to restore the health of the Bay, emphasizing the importance of reducing nutrient and sediment pollution in the Bay. In the MOU, EPA promised to develop a Bay-wide TMDL if the voluntary actions set forth in the 2000 Chesapeake Bay Agreement were unsuccessful in meeting WQSs by 2010.

In 2007, the Bay jurisdictions and EPA convened during a meeting of the Principal Staff Committee. The parties agreed that EPA would develop nutrient and sediment TMDLs for the Bay and its tidal tributaries. President Obama's 2009 Executive Order 13,508, "Chesapeake Bay Protection and Restoration," further supported this decision. 74 Fed. Reg. 23,099 (May 12, 2009). The executive order encouraged "that Federal actions to protect and restore the Chesapeake Bay are closely coordinated with actions by State and local agencies in the watershed and that the resources, authorities, and expertise of Federal, State, and local agencies are used as efficiently as possible for the benefit of the Chesapeake Bay's water quality and ecosystem and habitat health and viability." *Id.* at 23,101.

The Bay jurisdictions submitted three watershed implementation plans (WIP) to EPA over the course of the TMDL development process. WIPs are state-created plans that function as road maps for how jurisdictions will achieve the preliminary target loads for nitrogen, phosphorous, and sediment allocations. More importantly, WIPs require states to provide EPA with reasonable assurance that the goals will be met, which provides an important accountability framework. If necessary, EPA has the authority to enact stricter backstop measures. On December 29, 2010, EPA developed a Bay-wide TMDL. The Bay TMDL sets allocations for nitrogen, phosphorous, and sediment for the entire watershed. The pollution limits will result in a 25 percent reduction in nitrogen, 24 percent reduction in phosphorous, and a 20 percent reduction in sediment.

The Court's Decision

Judge Rambo held that EPA had the authority under the CWA to develop the Bay TMDL. *Am. Farm Bureau Fed'n v. EPA*, Case No. 1:11-cv-0067 (M.D. Pa. 2013). The ruling effectively affirmed the TMDL pollution limits.

A major issue before the court was whether EPA overstepped its authority in implementing the Bay TMDL. The Farm Bureau conceded that EPA has the power to *issue* a TMDL, but argued that EPA improperly *implemented* the TMDL by including wasteload allocations (WLA), load allocations (LA), and section and individual source allocations. Judge

Rambo concluded the TMDL was not an unlawful implementation plan and reasoned that nothing in the CWA prohibits EPA from defining the TMDL in terms of WLAs and LAs. The court acknowledged that implementation is the states' responsibility, but determined the states were free to choose how to implement the TMDL allocations.

Judge Rambo recognized EPA's efforts to preserve the framework of cooperative federalism in developing the Bay TMDL. The court reviewed more than 30 years of preservation efforts in the Bay watershed and acknowledged a history of collaboration and coordination between EPA and the Bay jurisdictions. The court specifically emphasized the collaborative relationship that arose through the WIPs process, and the fact that the states had asked EPA to set pollution limits for the watershed in 2007.

However, the court rejected EPA's argument that its authority to develop the TMDL was augmented by MOUs, settlement agreements, and the President's executive order. The court determined that such supplemental sources alone do not expand the authority given by Congress under the CWA.

Implications of the Decision

Judge Rambo's ruling provided the Bay jurisdictions with much needed certainty in moving forward with implementing the TMDL in their respective states. To help the Bay jurisdictions comply with the new pollution limits, President Obama budgeted $72.6 million to fund the Bay cleanup effort in 2013. This federal funding will help alleviate the initial financial burden of implementation.

The Farm Bureau, along with 21 states across the country, has filed an appeal to the U.S. Court of Appeals for the Third Circuit. Briefing began in January 2014. If the court holds in favor of the plaintiffs and halts the TMDL, it is unlikely that the states independently will be willing to enact measures that aggressively address pollution in the Bay.

In addition to agricultural lobbying groups challenging the TMDL, environmental groups have also filed suit. In *Food & Water Watch v. EPA*, Case No. 1:12-cv-01639 (D.D.C. Dec. 13, 2013), the court dismissed claims by Food and Water Watch, a non-profit organization, challenging EPA's authorization of pollution trading and offsets outlined in the 2010 TMDL. The court's decision effectively upheld the TMDL and sends the message that the TMDL is here to stay.

The courts will ultimately decide whether the Bay TMDL is valid. If upheld, the decision will affirm that EPA, in partnership with the states, has the authority to establish science-based pollution limits for the Bay.

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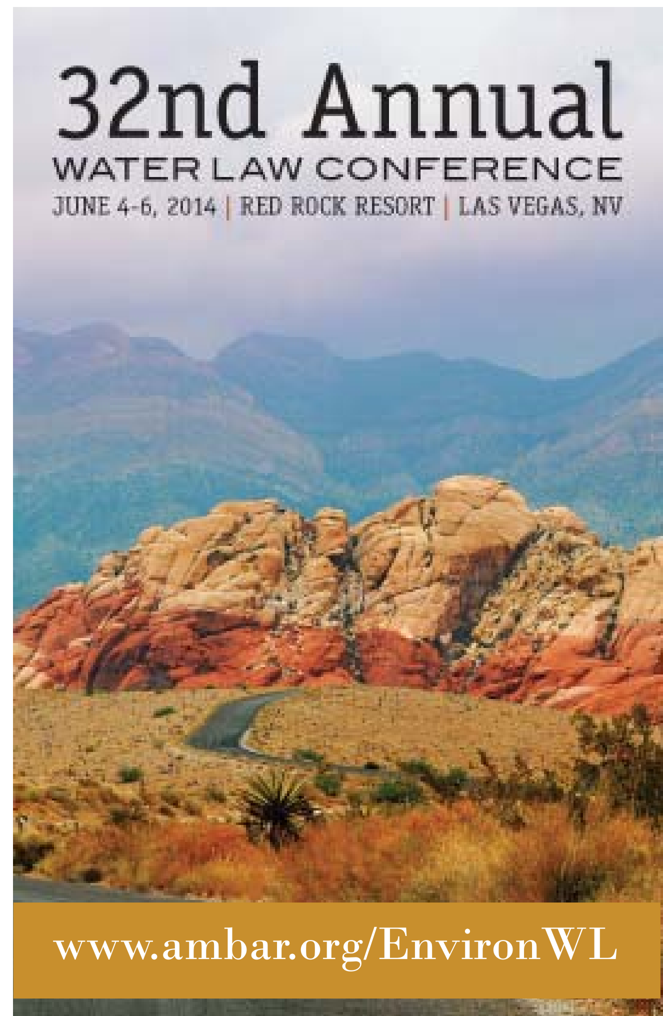

DEBARMENT: NOT JUST A CONTRACTOR'S CONCERN

Victoria Strohmeyer and Lauren R. Caplan

Mention the word "debarment" to federal contractors, and you might get some strong reactions. For those readers lucky enough not to have first-hand experience, debarment is the exclusion of a party from participation in federal procurement contracts or other covered transactions. Companies whose federal government sales comprise a large portion of their overall business have long considered debarment a death sentence without due process. However, if your company's business relies upon federal transactions or agreements (including leases, permits, and grants), you should share their dread. In response to congressional pressure, agencies are more aggressively using their debarment powers. For instance, in fiscal year (FY) 2011, the Environmental Protection Agency (EPA) initiated 98 proposed debarments, and imposed 111 suspensions, 115 discretionary debarments, and 42 statutory debarment actions under the Clean Air Act and Clean Water Act.

Many seasoned attorneys are shocked when they learn about the rules and application of debarment. The goal of debarment is to ensure that federal tax dollars are spent responsibly. In the procurement context, this means that contracts should only be awarded to responsible parties; with regard to environmental statutes, the goal is to ensure that federal funds are spent and public resources are allocated in a manner that improves (or at least is not detrimental to) environmental quality. To implement this policy, the federal government keeps a list of excluded parties (aptly named the "Excluded Parties List"), and all contracting officers or entities entering into agreements (contracts, grants, loan guarantees, leases, etc.) with the federal government must check that list before signing any new contract or agreement. If an entity is included on this list, it cannot be party to a government contract or transaction during the term of its debarment or suspension.

There are a few aspects of debarment that make its application particularly onerous.

1. According to regulation and case law, debarment is not a form of punishment. This means that it is administered separate from and in addition to any civil or criminal penalties. For example, a party could either be convicted of a crime or enter into a plea agreement regarding violations with the Department of Justice, and then be subject to a debarment proceeding a year later for the same violations.

2. Discretionary debarment is imputed throughout a family of companies and through employees. This means that a federal agency may impute conduct (a) from an individual to an organization; (b) from an organization to an individual; (c) between individuals; and/or (d) from one organization to its affiliate organization.

3. Discretionary debarment applies government-wide, and the procurement and nonprocurement discretionary debarments are reciprocal. For example, an entity's exclusion by the Environmental Protection Agency would have the effect of precluding that entity (and others to which and whom the exclusion was imputed) from participating in federal leases with the Department of the Interior.

4. Discretionary debarments flow down and up, meaning that an excluded party is prohibited from participation in all "covered transactions," which include any primary transaction with a federal agency and, depending upon the agency, some or all of any lower tier transactions. This includes any grant, loan, agreement, or lease or subcontract under those agreements.

If there is any risk that you may run afoul of the Clean Water Act (CWA), or any federal statute, you might be interested in knowing more about what debarment is, and more importantly, how you can avoid its consequences.

1. Deciphering the Types of Debarment

Debarments are initiated and decided at the agency level, and agencies can coordinate and collaborate in

debarment proceedings, but a single agency will take the lead. Two sets of debarment regulations (i.e., procurement rules are set forth in Federal Acquisition Regulations (FAR) part 9.4 and nonprocurement rules set forth in 2 C.F.R. part 180, also referred to as the "Common Rule"), are used throughout the entire federal government, but many agencies have their own supplementary debarment rules.

There are two types of exclusion: (1) suspension, which is a temporary interim action to exclude a party from participation in a government procurement or covered transaction pending a final decision regarding an exclusion for a definite period of time; and (2) debarment, which means that after a finding of cause for debarment, an agency places the entity on the excluded parties list for a definite period of time.

Debarments can be either mandated by statute or be discretionary. Under statutory debarment, an entity is required to be placed on the excluded parties list under the terms set forth in the law, whereas discretionary debarment results from an agency's review of the facts and circumstances relating to a cause for debarment. Statutory debarments (such as those mandated by the CWA) often have a restricted application, whereas discretionary debarments apply government-wide. Discretionary debarments are reciprocal among agencies, meaning that no agency can enter into a transaction with an excluded party, even if the party was debarred by a different agency and under a different rule. The agency-specific rules would apply to entities seeking to participate in a covered transaction with a particular agency.

Discretionary debarments are governed by two regulatory schemes, one for procurement (48 C.F.R. subpt. 9.4), and a separate set of rules for nonprocurement (2 C.F.R. pt. 180). These rules are reciprocal; a party debarred under the nonprocurement rules would also be an excluded party for purposes of the procurement debarment system. In general, the rules applied to a debarment action depend upon the type of agreement involved with the violation. Procurement debarment is applied for procurement contract actions, including purchase orders under existing contracts, whereas nonprocurement debarment applies to a "covered transaction." What constitutes a covered transaction is defined through a series of provisions in the Common Rule, and some agency-specific rules broaden this definition. The regulations provide that "all nonprocurement transactions . . . are covered transactions unless listed in the exemptions under § 180.215." The definition of nonprocurement transactions in 2 C.F.R. part 180 is written broadly, and encompasses "any transaction, regardless of type (except procurement contracts)."

2. Agency Discretion in Applying Debarment Rules

Agencies have a high level of discretion when it comes to the nonprocurement debarment process. For instance, the Department of the Interior's (DOI) specific debarment regulations, which would apply to many of the approvals and leases required to conduct business on federal lands, provide that the following are nonprocurement transactions: (a) federal acquisition of a leasehold interest or any other interest in real property; (b) concession contracts; (c) disposition of federal real and personal property and natural resources; and (d) any other nonprocurement transactions between DOI and a person. Therefore, unless exempted, any transaction with a federal agency or that requires the approval of a federal agency would be considered a covered transaction.

The nonprocurement rules identify a number of specific causes for debarment, such as fraud, antitrust violations, false claims, tax evasion, theft, lack of business honesty, lack of performance, or violation of terms to a public agreement. Violations of environmental statutes have been held to demonstrate lack of "business integrity" or "business honesty," meaning that even without the CWA's statutory debarment provision, EPA could use a CWA violation to bring a debarment action. Additionally, the nonprocurement debarment rule also includes a broad catchall cause for debarment: "any other cause of so serious or compelling a nature that it affects your present responsibility."

Although the nonprocurement rules provide that the agency has the burden of establishing the cause for

debarment, the rules also state that the agency has met its burden when the debarment action is based upon a conviction or civil judgment. Making matters worse, the nonprocurement rule's definition of conviction is broad, and includes misdemeanors. Once the government has established the cause for debarment, the burden shifts to a respondent to persuasively rebut the evidence establishing the cause for debarment and to demonstrate his/her present responsibility.

3. Understanding the Application of Debarment for Clean Water Act Violations

Under the authority of section 508 of the CWA (33 U.S.C. § 1368), the EPA places entities (or persons) convicted for certain CWA offenses (*see* 33 U.S.C. § 1319(c)) on the excluded parties list, rendering them ineligible to contract with any federal agency for any procurement with a violating facility. Note that the CWA's provision is limited in that it focuses on the owner of the facility where the CWA violation occurred and procurement contracts with that facility. This prohibition remains in effect until EPA certifies that the condition giving rise to such conviction has been corrected. By itself, the CWA statutory debarment provision is not particularly troubling for those companies who do not contract with the federal government at the violating facility. However, EPA's regulations implementing the CWA expand the prohibition further by disqualifying those convicted of a section 1319(c) violation from any subcontract, assistance, sub-assistance, loan, or other nonprocurement benefit or transaction where the violator performs any part of the transaction or award at the violating facility and the violator owns, leases, or supervises the violating facility. *See* 2 C.F.R. § 1532.1110. Making matters worse for those convicted of a CWA violation, EPA often exercises its discretionary debarment authority on top of the statutory debarment obligation to exclude the convicted entity from all covered transactions.

EPA prides itself on its "robust suspension and debarment program," and EPA considers its vigorous exercise of its suspension and debarment authority an important aspect of its duty to protect the agency's business interests by ensuring that nonresponsible entities do not receive the taxpayers' money. According to the most recent report by the Interagency Suspension and Debarment Committee (issued on Sept. 18, 2012, covering FY 2011), only three agencies (the Department of Defense, the Office of Personnel Management, and the Department of Homeland Security) issued more debarment-related actions than EPA. Additionally, EPA entered into three administrative agreements, which are akin to settlement agreements and generally require compliance monitoring.

4. The Takeaway: Don't Be Complacent

If you anticipate ever entering into any relationship with the federal government, there are steps that you can take to insulate yourself from the dangers of debarment. In reality, there is no way that you can eliminate the risk of an employee violating a regulation, but taking steps to increase awareness and vigilance demonstrates that you are doing everything that you can to decrease the likelihood of violations within or attributable to your company or its employees. By implementing comprehensive environmental and safety guidelines internally, you will create awareness around these issues and provide a path for employees finding themselves in a difficult situation. Having a company-wide ethics program supported by management further demonstrates your company's commitment to compliance with all laws governing your business. Add in an anonymous hotline where employees can report incidents of noncompliance and you are well on your way to creating a solid program that fosters compliant behavior and creates avenues for dealing with issues.

Because we are human, there will be mistakes. Many times, these mistakes result from the unauthorized actions of employees or contractors. Nonetheless, these acts can lead to a debarment throughout the entire company. If your company does find itself part of an enforcement action, the existence of a solid compliance program will be the cornerstone for your case that you are a responsible party and should not be debarred. A culture of sweeping incidents under the rug will send the message that your company does not learn from its mistakes, and will further the agency's fears that your company cannot be trusted. On the

other hand, if you can demonstrate that your compliance polices are current and responsive, and you can show that compliance permeates the culture of your company, you are more likely to foster a collaborative environment with debarment officials. This is the only way to work toward an administrative agreement, which is an outcome much better than debarment.

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FLORIDA CITIZEN SUIT MAY AFFECT EPA ANTIDEGRADATION POLICY NATIONWIDE

Winston K. Borkowski

A federal suit filed in Florida has the state and the regulated community concerned that the U.S. Environmental Protection Agency (EPA) may be poised to rewrite Florida's antidegradation policy without state or industry participation. The Florida Wildlife Federation, along with Alfred and Cindy Davis, filed a 128-page complaint against EPA demanding sweeping changes to state and federal antidegradation policies and implementation measures.

The suit (*Davis II*) is the second suit involving antidegradation policy and implementation filed by the Davises. *Florida Wildlife Federation v. McCarthy*, No. 8:13-cv-2084-SDM-EAJ (M.D. Fla. filed Aug. 10, 2013). A 2009 suit (*Davis I*) resulted in EPA entering a settlement agreement with Mr. and Mrs. Davis. *Davis v. Jackson*, No. 8:09-cv-1070-T-17-TBM (M.D. Fla. filed June 9, 2009). Florida's Department of Environmental Protection (FDEP or department) filed a motion to intervene in the *Davis II* case on March 3, 2014. On March 6, 2014, Florida's wastewater and electric utilities moved to intervene joined by the Florida Stormwater Association and the Florida League of Cities.

While anticipating resistance from the plaintiffs, the Florida associations and trade groups were surprised by EPA's filing of a response in opposition to their motion to intervene claiming that the regulated community was adequately represented by the federal agency. As detailed below, EPA settled *Davis I* and announced to the court the potential for settlement of certain issues in *Davis II*, which is scheduled for mediation on May 15, 2014.

The *Davis II* complaint includes 23 counts, most all tied to the plaintiffs' central argument that antidegradation is a part of water quality standards and as such must be part of the process of assessing waters for impairment under section 303(d) of the Clean Water Act (CWA or the act). Based on that premise, the plaintiffs allege a combination of citizen suit claims

and violations of the federal Administrative Procedure Act (APA), directed at EPA's approval of—or failure to object to—FDEP's 303(d) lists and the department's impaired waters listing methodology set out in chapter 62-303, Florida Administrative Code (FLA. ADMIN. CODE). Plaintiffs also alleged that EPA has failed to respond to three petitions for rulemaking filed in 2012 and that EPA has violated the *Davis I* settlement agreement.

As part of the *Davis I* settlement agreement, EPA agreed to perform an antidegradation analysis when FDEP submitted its next 303(d) list to EPA (the Cycle 3, Group 5 list applying Florida's rotating basin approach to assessing the state's several thousand water bodies). EPA filed a motion to dismiss the plaintiffs' first amended complaint, and on June 16, 2010, the court dismissed all but one of eight counts directed to EPA. Rather than defend against the one surviving count, EPA executed a settlement agreement on December 20, 2010.

In a series of whereas clauses, EPA stated that it intended to consider antidegradation requirements when reviewing 303(d) submittals from FDEP and that "EPA intends to address, nationally, how antidegradation requirements should be considered when assessing waters pursuant to section 303(d) of the Clean Water Act." EPA committed to adding waters to Florida's 303(d) list based on antidegradation requirements if the state failed to do so.

FDEP has consistently applied its antidegradation rules only when issuing permits for surface water discharges under its EPA-approved National Pollutant Discharge Elimination System (NPDES) permitting program; EPA has never required otherwise. In an attempt to address EPA's commitments in the *Davis I* settlement, FDEP assessed antidegradation in developing its Group 5 303(d) list by identifying all permitted surface water discharges to the waters within the Group 5 basins and ensuring that an antidegradation analysis had been performed for each permitted discharge.

Title 40, section 130.7(3) of the Code of Federal Regulations creates the link between listing decisions under CWA section 303(d) and antidegradation by stating that, for listing purposes, the terms "water quality standard applicable to such waters" and "applicable water quality standards" refer to those water quality standards established under section 303 of the act, including numeric criteria, narrative criteria, waterbody uses, and antidegradation requirements.

This provision is the basis of 18 of the 23 counts in the *Davis II* complaint with 12 of the 18 directly related to the antidegradation. Four of the 12 counts addressing antidegradation are citizen suit claims under section 505 of the CWA; the remaining eight antidegradation claims are brought under the federal APA, alleging that EPA's actions were arbitrary and capricious or exceeded EPA's authority.

EPA filed a motion to strike all counts as a "shotgun" complaint. As an alternative to striking the entire complaint, EPA's motion requests that the court dismiss only the citizen suit claims and not the allegations based upon the federal APA. EPA stated in a footnote to its motion that it "does not seek dismissal of the remaining counts in the Complaint." Consequently, the only way for EPA to prevail in the case is to file a motion for summary judgment and obtain a favorable ruling as to all counts. EPA would have to overcome allegations in the *Davis II* complaint to which EPA has seemingly already conceded explicitly in the *Davis I* litigation and implicitly by subsequent actions.

In *Davis I*, EPA filed a motion to dismiss eight of the eleven counts filed against EPA as one of three defendants. All counts against EPA were dismissed but for one that alleged that EPA's February 19, 2008, approval of FDEP's impaired waters listing methodology (ch. 62-303, FLA. ADMIN. CODE) was arbitrary and capricious because the rule includes no provision addressing antidegradation. The court explained that EPA's February 2008 decision document stated that no provision of Florida's listing methodology relates to antidegradation. The court concluded that the one count could not be dismissed.

Based upon the facts alleged, the applicable law, and to some extent EPA's admissions through its actions and in the text of its decision documents, EPA's

prevailing on all 23 counts on a motion for summary judgment in *Davis II* is uncertain. In an amended joint case management report filed January 29, 2014, the parties stated that "settlement of some pending claims is possible." As noted, mediation is scheduled for May 15, 2014.

In sum, even if EPA defends the suit vigorously there is a significant risk that the *Davis II* plaintiffs may prevail on one or more counts. The result may be a remand for EPA to take additional action or another settlement agreement wherein EPA commits to future actions. It is plausible that EPA would agree to have the settlement agreement incorporated into a judicially enforceable consent decree. As discussed herein, the *Davis II* complaint suggests that EPA is developing guidance to specifically address the role of antidegradation when developing 303(d) lists. EPA's agreeing to a consent decree may be more likely in the *Davis II* litigation in light of EPA's pending rulemaking efforts and guidance development.

As part of the *Davis I* settlement agreement, EPA committed to addressing antidegradation in the context of listing decisions under CWA section 303(d) on a national level. EPA's Water Quality Standards Regulatory Clarifications; Proposed Rule, was published for comment September 4, 2013. 78 Fed. Reg. 54,518. The proposed rule expands EPA's interpretation of antidegradation and imposes an extensive new set of requirements on the states. Antidegradation in the context of listing waters as water quality limited segments under CWA section 303(d) is not specifically addressed.

The *Davis II* complaint suggests that a parallel effort to establish EPA guidance specifically addressing antidegradation in the context of 303(d) listing decisions is underway. The complaint includes a reference to an EPA memorandum dated March 11, 2011, that discusses antidegradation in the context of listing decisions. The memorandum referenced is EPA's guidance to its regional directors as to the preparation of the 2012 303(d)/305(b) integrated reports (2012 IRG). The 2011 memorandum includes a section titled "Antidegradation and Listing Guidance" and states that EPA intends to work with the states and stakeholders to develop guidance "on how best to assess and identify waters to determine whether State antidegradation requirements have been obtained."

On September 3, 2013—the day before EPA published its proposed rule expanding its interpretation of antidegradation—EPA issued its guidance to the regional directors as to the preparation of the 2014 303(d)/305(b) integrated reports (2014 IRG), which states: "EPA is working to develop additional guidance to address how antidegradation requirements should be considered when assessing waters under CWA Section 303(d)." Plaintiffs assert in *Davis II* that a draft guidance document has been sent to the Office of Information and Regulatory Affairs in the Office of Management and Budget, but their legal counsel has been unable to obtain a copy of the draft guidance.

Whether EPA's Water Quality Standards Regulatory Clarifications; Proposed Rule was, at least in part, related to the *Davis I* litigation is unclear. What is clear is that EPA is embroiled in litigation seeking what could be viewed as a total rewrite of its antidegradation policy at the same time the federal agency is actively pursuing rulemaking addressing antidegradation policy and implementation. Language included in the 2012 and 2014 IRG documents suggests that the *Davis I* litigation has influenced EPA policy as EPA appears poised to, at a minimum, issue guidance as to how all states—not just Florida—consider antidegradation in the context of assessing attainment of water quality standards.

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A LOUISIANA LEVEE BOARD'S LAWSUIT TO RECOVER FOR COASTAL LAND LOST FROM WETLAND DREDGING

Matt S. Landry

The Lawsuit to Recover Lost Coastal Lands

The Southeast Louisiana Flood Protection Authority—East (Flood Protection Authority), a levee district charged with protecting Greater New Orleans' east bank of the Mississippi River from flood damage, recently filed a lawsuit against 97 oil, gas, and pipeline companies. It sought injunctive relief and alleged damages resulting from wetland dredging. *See* Petition for Damages and Injunctive Relief, *Bd. of Comm'rs v. Tenn. Gas Pipeline Co*., No. 13-6911 (La. Dist. Ct. filed July 24, 2013). The Flood Protection Authority filed the lawsuit in April 2013 seeking multiple remedies from loss of wetlands and the concomitant increased risk of flood damage allegedly caused by the oil companies' wetland dredging and oil and gas operations.

Since the 1930s, Louisiana has lost a quarter of its landmass, an area roughly the size of the state of Delaware. Louisiana is projected to continue to shrink at a rate of one football field per hour and lose an area of land the size of Manhattan every year until the state loses another Delaware-sized chunk by 2062. *See* La. Coastal Prot. & Restoration Auth., Louisiana's Comprehensive Master Plan for a Sustainable Coast: Committed to Our Coast 18 (2012). Between 35 and 85 percent of Louisiana's coastal land loss is estimated to have been caused by ten thousand miles of canals dredged by oil and gas companies since the 1940s. Direct excavation of coastal land accounts for 16 percent of the land loss, while indirect effects such as saltwater intrusion and the prevention of flow of sediments as a result of spoil bank construction account for the rest. Reed & Wilson, *Coast 2050: A New Approach to Restoration of Louisiana's Coastal Wetlands*, 25 Physical Geography 4, 7–8, 10 (2004); Oliver A. Houck, *Land Loss in Coastal Louisiana: Causes, Consequences, and Remedies*, 58 Tul. L. Rev. 3, 17 (1983).

To restore wetlands damaged by dredging, the Louisiana Coastal Protection and Restoration Authority (Coastal Protection Authority) estimates that it needs roughly $50 billion over the next fifty years. The Coastal Protection Authority would spend the $50 billion on a series of projects identified in the Louisiana coastal master plan, which it claims can begin to reverse the trend of coastal land loss by 2042. The Coastal Protection Authority estimates that if the state receives $100 billion, then Louisiana can begin to add wetlands by 2032 and add about one thousand square miles of wetlands by 2062—roughly half of what it has lost since 1932.

The Flood Protection Authority's Legal Claims

The Flood Protection Authority alleged in its suit that a network of thousands of miles of canals dredged by oil and gas companies for access to well sites and for constructing pipelines has caused vegetation die-off, sedimentation inhibition, erosion, and submergence of land within Louisiana's coastal zone. This loss has, in turn, endangered the levees and flood walls protecting the people and property under its protection and caused the Flood Protection Authority to incur additional flood protection expenses. For example, the lawsuit notes that the Army Corps of Engineers was obligated to build the Hurricane and Storm Damage Risk Reduction System, a $14.5 billion chain of levees and flood walls after Hurricane Katrina. The Flood Protection Authority will not only share in the cost of constructing the new protective levees and flood walls, but will also bear the cost of operating and maintaining the components of the system within its jurisdiction, in addition to various other flood protection expenses.

The lawsuit makes claims for strict liability, negligence, nuisance, and breach of contracts to which the Flood Protection Authority is a third-party beneficiary, and breach of duties owed pursuant to the "natural servitude of drainage." Multiple claims are grounded in the regulatory framework established by the Rivers and Harbors Act, the Clean Water Act, the Coastal Zone Management Act, and regulations related to rights-of-way granted across state-owned lands and water

bottoms administered by the Louisiana Office of State Lands. The complaint alleges that the defendants' breach of permits administered under these regulations constituted a breach of contract to which the Flood Protection Authority was a third-party beneficiary. Furthermore, the Flood Protection Authority alleges these regulations established a duty of care that was knowingly breached by the defendants.

The Collateral Disputes

Whether or not these legal claims will be heard on their merits has and will continue to be affected by several collateral disputes. First, in October 2013, Governor Bobby Jindal removed two members of the board of commissioners of the Flood Protection Authority for their support of the lawsuit in a resolution, including John Barry, author of *Rising Tide: The Great Mississippi Flood of 1927 and How It Changed America*. After Governor Jindal appointed two new members, the reconfigured Flood Protection Authority board, nevertheless, reaffirmed the suit in December 2013.

Second, Governor Jindal and the Louisiana Oil and Gas Association (LOGA) have argued that the board of commissioners of the Flood Protection Authority neither had the authority to file the suit nor to hire the private law firm, Jones, Swanson, Huddell & Garrison, to litigate the lawsuit. Governor Jindal argued that the lawsuit usurped the state's role in coastal restoration, citing Louisiana Revised Statutes section 42:262, a general rule applicable to all state public officers and employees prohibiting them from "employ[ing] any special attorney . . . [without] written approval of the governor and the Attorney General." The Flood Protection Authority argued that its authority is clearly stated in statutes specific to levee districts, especially Louisiana Revised Statutes section 38:309(B), which states that levee district "board[s] may sue and be sued." Further, the Flood Protection Authority obtained approval from Louisiana Attorney General Buddy Caldwell. On March 10, a state court held that the Louisiana attorney general was authorized to approve the Flood Protection Authority hiring the private law firm. More than the judicial rulings, proponents of the suit have touted LOGA President Don Brigg's admission in his deposition testimony that he did not have "facts or data to support [his] opinion" that "oil and gas companies are not coming to Louisiana because of the threat of lawsuits."

The next set of disputes are presently unfolding in the Louisiana legislature, where Senator Robert Adley has filed several bills to directly challenge the Flood Protection Authority's lawsuit and preempt future similar suits. La. SB 79 would provide the governor more control over the selection of the Flood Protection Authority's board members, while two other bills would more directly imperil the Flood Protection Authority's lawsuit. La. SB 547 would authorize retroactive invalidation of the contract made between Flood Protection Authority and the private law firm by interpreting public policy to disfavor contracts like the contract in question, authorizing such contracts to be amended to comply with public policy, and applying the amendment retroactively. While La. SB 547 seeks to retroactively invalidate the Flood Protection Authority's power to have made the litigation contract with a private firm, La. SB 546 seeks to retroactively "preclude[] and preempt[]" the Flood Protection Authority to have filed the lawsuit in the first place. If Senator Adley's coalition is successful in passing La. SB 546 or 547, proponents of the lawsuit will likely contest the bill as an impermissible retroactive application of law in violation of the Contracts and Due Process Clauses.

Meanwhile, several of the oil company defendants are fighting off another lawsuit filed in November 2013 by two of New Orleans's neighboring parishes, Jefferson and Plaquemines. The coastal parishes allege that oil and gas and pipeline companies have caused increased exposure to coastal storm surges by dredging canals either in violation of or without obtaining coastal use permits required under the Coastal Zone Management Act and related Louisiana coastal zone regulations. The coastal parishes seek damages to restore each coastal zone "as near as practical to its original condition."

Nuisance

If the Flood Protection Authority's lawsuit survives these collateral attacks, then courts might have an

opportunity to settle several issues of state law. Aside from one issue, the authority's claim for "nuisance" is straightforward. Louisiana does not specifically provide a remedy for "nuisance." However, articles 667–69 of the Louisiana Civil Code establish "legal servitudes" that limit the use of one's property to the extent that one's use of his property "deprive[s] his neighbor of the liberty of enjoying his [property]." In *Ibanet v. Exxon Corp*., the Louisiana Supreme Court held a mineral lessee liable to an oyster lessee on an adjoining estate for damage to his oyster beds caused by state-permitted canal dredging, because the oil company "knew or should have known" that dumping fill material on the oyster leased land would cause damage. The supreme court further noted that the damage could have been avoided by depositing the material in available locations that did not breach the terms of its permit, where the oyster lessee would not have suffered damage. 642 So. 2d 1243, 1253 (1994). Like the plaintiffs in *Ibanet*, the Flood Protection Authority will likely argue that oil and gas and pipeline companies have known for decades that salinity intrusion erodes wetlands and that their dredging was causing salinity intrusion. They will argue that the defendants have also known for decades that backfilling is an effective method of mitigating harm and that the defendants not only could have mitigated wetland destruction through backfilling, they also could have avoided harm altogether had they used alternative methods of dredging.

Whether the authority can recover will likely depend on how a court construes the term "neighbor." Unlike other predial servitude such as the natural servitude of drainage, for which "[n]either contiguity nor proximity of the two estates is necessary for the [servitude to] exist[]" according to Louisiana Civil Code article 648, to establish a "nuisance," the two estates must be "neighbors." The Louisiana Court of Appeal for the Fourth Circuit has held that the term "refers to any landowner whose property may be damaged irrespective of the distance his property may be from that of the proprietor whose work caused the damage." *Gulf Ins. Co. v. Employers Liab. Assur. Corp*., 170 So. 2d 125, 129 (La. App. 4 Cir. 1964). The U.S. Court of Appeals for the Fifth Circuit has cited the Louisiana Fourth Circuit's holding in *Roberts v. Cardinal Servs., Inc.*, when articulating the meaning of "neighbor," but has not issued a holding on the matter. 266 F.3d 368, 386 (5th Cir. 2001). In contrast, in *In re Katrina Canal Breaches Consolidated Litigation*, Judge Stanwood Duval of the U.S. District Court for the Eastern District of Louisiana held that estates three miles from one another were not sufficiently proximate to be neighbors. 647 F. Supp. 2d 644, 734 (E.D. La. 2009). In the Flood Protection Authority's case, application of the narrow interpretation articulated by the Eastern District of Louisiana would limit the extent of the authority's recovery if the board otherwise prevailed on the merits, because some of the dredge sites are located farther than three miles away from the authority's ring of levees and flood walls.

The conflicting definitions of these jurisdictions highlight the importance of whether Judge Nannette Brown of the Eastern District of Louisiana decides to remand the case. *See* Casey Pickell, Louisiana Levee Litigation Brings the Legal Significance of Wetland Loss to Light, LSU J. ENERGY L. & RES., ENERGY L. CURRENTS, Oct. 21, 2013, (discussing the legal arguments concerning remand). If Judge Brown remands the case, then it will ultimately be subject to appeal in the Louisiana Fourth Circuit, where "neighbor" might be interpreted more expansively. If not, then we might see whether the U.S. Fifth Circuit favors the Louisiana Fourth Circuit's interpretation it has previously cited, or whether it concurs with Judge Duval of the Eastern District of Louisiana.

Natural Servitude of Drainage

The most novel of the authority's claims is one for interference with the natural servitude of drainage established in articles 655–56 of the Louisiana Civil Code. The natural servitude of drainage provides a landowner or lessee whose estate is naturally above others an implied easement to drain surface water from his estate to other estates. The owner of the estate below, the "servient estate," may not prevent the natural flow of surface water onto his estate from the estate above, the "dominant estate." The owner of the dominant estate is prohibited from making more burdensome the natural flow of surface water from his

estate to the servient estate. To the extent these duties are breached, the violator is subject to tort liability.

Louisiana courts have strictly applied the rule against interference with the natural servitude of drainage. The owner of the dominant estate will be liable if the owner of the servient estate can establish that an "act of man" has increased the volume of water, altered the quality of the water, or caused matter to be carried with the flow of surface water that would not naturally be carried with it. The burden or prevention of flow must occur by an "act of man," such as land filling, rather than an act of nature, such as a beaver dam. *See, e.g.*, *Bransford v. Int'l Paper Timberlands Operating Co., Ltd.*, 750 So. 2d 424, 426–27 (La. Ct. App. 2000). Louisiana courts have not balanced the harm to the plaintiff with the utility of the alteration, as have other states that apply a "reasonable use" rule. Even when interfering with the natural flow of surface water has been in the interest of furthering "every man['s] . . . right to clear and cultivate his land," the Louisiana Supreme Court has imposed liability for violating the principle handed down from Roman law that one "ought not to ameliorate his own land to the injury of his neighbors." *Martin v. Jett*, 12 La. 501, 505 (1838). *A fortiori*, it is unlikely the court will make an exception for oil and gas production, to which the Louisiana Supreme Court has not expressed a popular entitlement in the context of a natural servitude of drainage claim.

The most complex issue facing the court will likely be determining whether the Flood Protection Authority's estate is situated above or below the dredged estates and the extent to which the natural flow of surface water has been burdened and/or prevented. To be situated below another, only a slight disparity in elevation is required. *Nicholson v. Holloway Planting Co.*, 229 So. 2d 679, 681–82 (La.1969). Where the disparity in elevation between two estates alternates such that at some points one estate is above and at other points it is below the other, the burdens imposed by the natural servitude of drainage likewise alternate such that, where the estate is above, its owner must not burden the natural flow of surface water to the other estate and where the estate is below, it must not prevent the natural flow of surface water from the other estate. *Poole v. Guste*, 262 So. 2d 339 (La. 1972). The analysis does not stop here, however, because the court must determine the "natural situation of estates," not merely the current situation of estates.

The Flood Protection Authority will be required to prove that at some points it suffered a burdened flow of water to its estate, while for other points of its estate, it must prove that the dredged sites prevented the flow of water away from its estate. For damage to the levees along the Mississippi River, the Flood Protection Authority must prove that the dredged estates prevented the natural flow of water away from its estate. Within the authority's jurisdiction, land is highest along the Mississippi River, because for centuries periodic flooding has deposited sediments, naturally elevating the land immediately next to the river above the land farther from the river. From the high point of the levee, the land slopes through a middle section of land, which naturally retained various degrees of surface water, and eventually turned into what was naturally swampland at the furthest part from the Mississippi River. For the section of the plaintiff's estate not located along the Mississippi River, the authority may have the less challenging task of proving that defendants' canal dredging caused a more burdensome flow of surface water to its estate.

The problem of diminished wetlands and impacts of increased water flow is real. But, before the courts can begin to consider the myriad legal issues raised by the Flood Protection Authority's lawsuit, the lawsuit must survive the 2014 Louisiana legislature.

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EPA CLEARS MUDDY WATERS WITH REVISIONS TO THE 2009 CONSTRUCTION AND DEVELOPMENT RULE

Mohammad O. Jazil

On March 6, 2014, the U.S. Environmental Protection Agency (EPA) published a final rule easing and clarifying the requirements of its 2009 Construction and Development Rule (2009 C&D rule), which regulates stormwater discharges from large construction sites. *See* Effluent Limitations, Guidelines, and Standards for the Construction and Development Point Source Category, 79 Fed. Reg. 12,661 (Mar. 6, 2014). According to EPA, the 2014 revisions should also resolve litigation over the 2009 C&D rule. Specifically, EPA notes that the 2014 revisions satisfy its "commitments under the settlement agreement" in *Wisconsin Builders Association v. EPA,* Case Nos. 09-4113, 10-1247, 10-1876 (7th Cir.). 79 Fed. Reg. at 12,663. Developers in jurisdictions where EPA has retained National Pollutant Discharge Elimination System (NPDES) permitting authority should welcome these revisions to the 2009 C&D rule; the final rule signals a retreat, or at least a temporary reprieve, from the steady march toward numeric effluent limitations for stormwater discharges—a prospect that many in the construction industry claim could cost billions of dollars.

Consistent with EPA's authority to set a floor for technology-based effluent limits that apply to specific point source categories, the 2009 C&D rule established effluent limitation guidelines and new source performance standards for construction activities. *See* Effluent Limitations, Guidelines, and Standards for the Construction and Development Point Source Category, 74 Fed. Reg. 62,996 (Dec. 1, 2009). These effluent limitation guidelines included nonnumeric requirements to implement erosion and sediment controls, stabilize soils, manage dewatering activities, prohibit certain discharges, provide for and maintain buffers around surface waters, and utilize surface outlets for discharges from impoundments. More importantly, the 2009 C&D rule also included a numeric limit of 280 nephelometric turbidity units (NTU) for turbidity, ostensibly based on passive treatment systems (i.e., systems that rely on filtration and settling to remove sediment and turbidity), and compliance monitoring to ensure that developers would meet the new numeric limit. Petitions for review followed.

After the petitions for review had been consolidated before the U.S. Court of Appeals for the Seventh Circuit, and while briefing in the case was ongoing, the Small Business Administration (SBA)—an independent federal agency created to protect small business interests—asked EPA to reconsider the 2009 C&D rule. *See* Letter from Walthall, Chief Counsel, SBA Office of Advocacy, to Jackson, EPA Administrator (Apr. 20, 2010). The SBA explained that EPA's numeric turbidity limit would "cost businesses, including small businesses, in excess of $9.7 billion per year," *id.* at 3, and that EPA had misinterpreted data in setting the numeric limit, *id.* at 4–6. EPA thereafter filed an unopposed motion with the Seventh Circuit asking the court to vacate and remand the 2009 C&D rule's numeric limit. The Seventh Circuit remanded the issue back to EPA, but decided not to vacate the numeric turbidity limit. EPA subsequently published a direct final rule staying the numeric turbidity limitation and, in December 2012, entered into a settlement agreement with the petitioners in *Wisconsin Builders Association* where it agreed to revise the 2009 C&D rule, including the numeric limit. *See* Direct Final Rule Staying Numeric Limitation for the Construction and Development Point Source Category, 75 Fed. Reg. 68,215 (Nov. 5, 2010).

EPA's March 6, 2014, revisions to the 2009 C&D rule remove the numeric effluent limit for turbidity, and the accompanying compliance monitoring requirements. Other revisions to the nonnumeric limitations in the 2009 C&D rule include a definition for the term "infeasible" to mean "not technologically possible, or not economically practicable and achievable in light of best industry practice," providing clarity for the exceptions in the 2009 C&D rule that apply when certain controls are infeasible. 79 Fed. Reg. at 12,667. Revisions to the nonnumeric standards should similarly clarify the applicability of erosion control, soil stabilization, and buffer requirements.

To be sure, the withdrawal of EPA's numeric turbidity limit is the aspect of EPA's final rule that will have the most far-reaching effect. As the SBA explained, meeting the 280 NTU limit would have required many to utilize advanced treatment systems (i.e., an expensive system of pipes, pumps, valves, chemical agents, and computerized data collection and monitoring) rather than the simpler and less expensive passive systems contemplated by EPA.

EPA nevertheless notes that it is still studying the data and comments submitted to it in 2012, and might yet propose numeric limits and monitoring requirements in the future. But, for now, removal of the numeric standard of 280 NTU is good news for developers.

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NOMINATE

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THE GREAT LAKES AND MISSISSIPPI RIVER INTERBASIN STUDY REPORT: NO RECOMMENDATION FROM THE CORPS

Clare E. Luddy, PE, JD

The U.S. Army Corps of Engineers (USACE or the Corps) released the Great Lakes and Mississippi River Interbasin Study (GLMRIS) report on January 6, 2014. The report "presents a comprehensive range of options and technologies available to prevent the interbasin transfer of aquatic nuisance species (ANS) between the Great Lakes and Mississippi River through aquatic pathways." GLMRIS, at ES-1 (http://glmris.anl.gov/glmris-report/). The Corps presents eight alternatives to reduce the risk of 35 different aquatic nuisance species transferring either way between the Great Lakes and the Mississippi River, but all anyone wants to talk about is Asian carp getting into the Great Lakes. See, e.g., video at Asian Carp: Threat to Great Lakes—QUEST Wisconsin, 2011 (http://www.youtube.com/watch?v=j9fgqA8kpYA&feature=youtu.be).

Chicago and Two Watersheds

Some theorize that the original 1840s-era canal built to connect Lake Michigan to the Mississippi River system tipped the balance of growth in the Midwest from St. Louis to Chicago. Before railroads, trucks, and planes, water was the most economical way products could be transported over long distances. Chicago grew and developed where it is because it straddles both watersheds. Lakeside the Chicago River and, ten miles or so to the west, the Des Plaines River, drain separate watersheds.

By 1850, the 1840s canal was already being used to channel wastewater away from Lake Michigan, the source of Chicago's 30,000 residents' drinking water, because of deadly cholera and dysentery outbreaks. By 1900, when Chicago's population had soared to almost 1.7 million, a new canal, the Chicago Sanitary and Ship Canal (CSSC), was built to provide both transportation and wastewater removal. See *The Encyclopedia of Chicago*, 2004, at www.encyclopedia.chicagohistory.org.

Downstream communities objected to Chicago's waste flowing their way. Other Great Lakes states objected to Chicago's diversion of Lake Michigan water because it was thought to reduce the level of the Great Lakes. U.S. Supreme Court rulings allowed Chicago to continue operating the CSSC but required cleaner wastewater discharge and limited flow from Lake Michigan. *See Missouri v. Illinois*, 200 U.S. 496 (1906) (dismissing bill to enjoin Chicago from discharging sewage downstream because causation was not proven as many other communities do the same); *Sanitary Dist. of Chicago v. United States*, 266 U.S. 405 (1925) (upholding federal government's right to restrict flow from Lake Michigan in order to maintain Great Lakes lake levels and therefore navigation); *Wisconsin v. Illinois*, 449 U.S. 48 (1980) (amending earlier decree limiting flow from Lake Michigan).

The Metropolitan Water Reclamation District of Greater Chicago (MWRD) continues using the CSSC for wastewater discharge, serving a population of 5.25 million people, plus significant industrial, commercial, and stormwater loads. MWRD Mission and Services, Facilities, at www.mwrd.org. To improve water quality and reduce flood risks, MWRD commenced the tunnel and reservoir plan (TARP) in 1972, building massive storage to capture combined sewer flow until it can be treated before discharging it into the river system. Forty-two years and roughly $3.5 billion later, over 100 miles of deep rock tunnels and certain reservoirs have been completed. MWRD continues to implement TARP with the help of the Corps. *United States v. Metro. Water Reclamation Dist. of Greater Chicago*, Consent Decree, Case: 1:11-cf-08859 Document #: 3-1 Filed: 12/14/11. *See also MWRDGC TARP Status Report as of December 1, 2013*, at www.mwrd.org.

More recently, other Great Lake states have unsuccessfully sued to force action on the threat of Asian carp transferring through the CSSC to Lake Michigan and the other Great Lakes. The Seventh Circuit affirmed the denial of a motion for an injunction, *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765 (2011), *cert. denied*, 132 S. Ct. 1635 (2012), and the district court granted defendants' motion to dismiss the complaint that was based on federal common law of public nuisance and the Administrative Procedure Act (APA). *Michigan v. U.S. Army Corps of Engineers*, 911 F. Supp. 2d 739 (N.D. Ill. 2012). The Corps' current efforts against aquatic nuisance species transfer include operating one or more electric barriers since 2002, using a fish kill agent, and temporary lock closures. *Id.* at 745, 746. The Corps was required by statute to keep the CSSC open for navigation and could not, therefore, be creating a public nuisance by refusing to close it permanently. *Id.* at 755–56.

GLMRIS Authority and Scope

In 2007, Congress authorized the secretary of the army to conduct "a feasibility study of the range of options and technologies available to prevent the spread of aquatic nuisance species between the Great Lakes and Mississippi River Basins through the Chicago Sanitary and Ship Canal and other aquatic pathways." Water Resources Development Act (WRDA) 2007, Pub. L. No. 110-114, § 3061(d). The result is the GLMRIS report.

"This authority differs from traditional USACE feasibility study authorizations in that it directs the identification and assessment of a range of available options and technologies, and it does not require the recommendation of any one option. It also authorizes completion of study activities at full federal expense." GLMRIS 6. Normally, project authorization would require recommendation of an option with an environmental assessment or environmental impact statement for National Environmental Policy Act (NEPA) compliance. Also, significant cost sharing with local stakeholders has become the Corps' default procedure. Here, the "local" stakeholders, Chicago, Illinois, and the MWRD, do not seem to want much more than the current electric barrier. Federal funding may be the only viable method for new alternatives.

In July 2012, Congress shortened the report's time frame by 20 months. MAP-21, the Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, § 1538. On schedule per MAP-21, USACE issued the GLMRIS report this January. USACE identified 254 potential aquatic nuisance species and then narrowed that list to 35, identified other "aquatic

pathways" besides Chicago and studied those separately, and has issued a 232-page report with thousands of pages of appendices. GLMRIS 36. Though USACES's initial intent was to make a recommendation, it did not do so because of the compressed schedule. GLMRIS 18. No recommended plan or NEPA compliance documentation is included.

Of the 35 aquatic nuisance species studied, USACE identified ten species of high or medium concern for the Mississippi River system and three species of medium concern for the Great Lakes. For example, the only high-risk concerns were bloody red shrimp and fishhook water flea. Asian carp, bighead and silver varieties, were considered of medium concern for transfer to the Great Lakes. GLMRIS 60–61.

The Corps considered "legal, policy, and resource constraints, as well as environmental factors." GLMRIS 17. They identified six executive orders and sixteen federal acts that constrain their procedure or results. The scope does not include examination of human-mediated transfer of aquatic nuisance species, like the trucks of live Asian carp that crossed the Detroit Ambassador Bridge in 2012 and might have dumped their load in the Great Lakes. *See* Tom Henry, *Canadian Court Fines Firm for Trucking Asian Carp*, Toledo Blade, Jan. 18, 2014. USACE did not examine any possible aquatic nuisance species transfers through Canada or from other bordering watersheds.

The most significant constraints are from existing statutory requirements of the Clean Water Act (33 U.S.C. § 1251 et seq.) and various flood control acts. Chicago's water system, as evidenced by its ongoing consent decree (*supra*), is an environmental work in progress, struggling to meet water quality and flood control requirements in its current configuration. Any changes to that configuration will also have to meet the same requirements. The relatively clean diluting water from Lake Michigan improves the chances of the downstream waterways meeting water quality standards. Disruption of this flow toward the Mississippi or reversal of flow toward Lake Michigan will have significant negative water quality impacts and increased flood risk.

GLMRIS Alternatives

GLMRIS proposes eight alternatives to provide a "comprehensive range of options and technologies available to prevent the interbasin transfer of aquatic nuisance species (ANS) between the Great Lakes and Mississippi River through aquatic pathways." GLMRIS, at ES-1. There are five connections to Lake Michigan that feed into the CSSC, two related to the Chicago River and three related to the Calumet River. GLMRIS, at ES-2. In each alternative, aquatic nuisance species control measures are defined along with their negative impacts. The building blocks of these control measures are GLMRIS locks, aquatic nuisance species treatment plants, and various screens and barriers. GLMRIS 65–71.

Cost estimates include significant construction costs for mitigation of negative impacts on flood risk, ecosystems, and water quality. GLMRIS 81. The report contains no mitigation or costs for negative impacts on navigation caused by difficulties in navigating through control structures or by complete barriers to navigation. GLMRIS 86.

These preliminary designs, costs, and time frames are estimates based on only a 5 percent level of detail in designs (GLMRIS 172) and optimistic assumptions that property will be available, permits will be forthcoming, and funding will be consistent and ongoing for the length of the projects. *See* GLMRIS 186. Once a direction is chosen, detail design work required will take additional time. The Corps has set the project evaluation period as 50 years, beginning in 2017. GLMRIS 33. Most structures would be located in Illinois, but some associated with the Calumet-Sag Channel, would be located in Indiana. GLMRIS, at ES-2. See GLMRIS chapter 3 for a detailed description of all eight alternatives.

Alt. #1: No New Federal Action, 0 years, $0 cost: Continue operating and improving the Brandon electric barriers that now discourage fish from crossing the divide between the basins. Replacement of the original demonstration barrier with barrier I is ongoing to improve overall performance.

Alt. #2: Nonstructural Control Strategies, 0 years, $68 million/year: This baseline condition is an assumed part

of all other alternatives and includes removal, chemical control, inspection and cleaning of watercraft, and educational programs.

Alt. #3: Mid-System Control (25 years, $15,543 million) and Alt. #4: Lakefront Control with buffer (10 years, $7,806 million) provide control structures affecting all five Lake Michigan aquatic connections but are not complete barriers to shipping or water flow. However, Alt. #4 provides for a buffer zone between the lakeside controls (electric barrier, treatment plant, and screened sluice gate) and the Brandon electric barrier. Also, Alt. #4 could be implemented in a significantly shorter time frame, 10 years versus 25 years, and half the cost of Alt. #3. Alt. #4 requires water quality mitigation measures for the CSSC and other inland channels and Alt. #3 does not. However, these are included in the project cost and time frame.

Alt. #5: Lakefront Hydrologic Separation (25 years, $18,389 million) and Alt. #6: Mid-System Hydrologic Separation (25 years, $15,512 million) are the only complete hydrological separation alternatives proposed. Highest cost Alt. #5 places the aquatic nuisance species control structures at the lakefront and Alt. #6 places them mid-system, somewhat closer to the natural watershed divide. For both, the cost of the control structures is less than 5 percent of the total project costs because of the high cost of mitigating the extreme flooding and water quality issues associated with these options. Alt. #5, however, only affects water quality in the inland channels, not Lake Michigan, since all aquatic connections to Lake Michigan are severed at the lakefront.

Alt. #7: Mid-System Separation Cal-Sag open with buffer (25 years, $15,097 million) provides a complete barrier to flow on the two Chicago River connections to the CSSC and aquatic nuisance species control structures on the three connections of the Calumet-Sag Channel (Cal-Sag), leaving the Cal-Sag open to navigation. A buffer is maintained by continuing use of the Brandon electric barriers. Cost is high due to the significant tunnel storage that would be required on the Chicago River.

Alt. #8: Mid-System Separation CSSC open with buffer (25 years, $8,333 million) provides a complete barrier to flow through the three aquatic connections to the Cal-Sag, and aquatic nuisance species control structures at the two lakefront connections of the Chicago River, leaving the CSSC open for navigation. A buffer is maintained by continuing use of the Brandon electric barriers. This is a lower cost alternative but requires a similarly long schedule because of the extensive mitigation required on the Cal-Sag.

Post-GLMRIS: Next Steps

The Corps is an engineering consultant that is an expert in public water development projects and has experience with the Chicago area waterways. WRDA 2007 and MAP-21 required them, as experts, to investigate and develop the GLMRIS report, but they do not require the Corps to provide a recommended plan of action. A recommendation from such experts would be extremely helpful to all stakeholders. A possible recommendation may well be found in the Corps' discussion of alternative adaptive management, which provides a possible staged procedure. GLMRIS 194. They propose, as an example, starting with Alternative #4, which takes roughly 10 years, and then possibly proceeding with either Alternative #7 or #8, with either CSSC or Cal-Sag left open, respectively. *Id.*

However, the GLMRIS report makes the point that the real next step is finding some sort of consensus among stakeholders, as difficult as that may be. Case history shows that, while Chicago has prevailed in keeping the CSSC open, other states have succeeded in limiting Chicago's use of it. While a recommendation from the Corps would be helpful, it is up to all of the stakeholders, Chicago, Illinois, the rest of the Great Lakes states, and the rest of the country, to work together to determine the best way to protect the Great Lakes and the Mississippi River system from aquatic invasive species. In order to proceed with any GLMRIS alternative besides the status quo, Congress has to allocate billions of dollars over many years and authorize the Corps to proceed. That kind of massive federal project needs broad support to succeed.

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DISTRICT COURT IN THE EIGHTH CIRCUIT MUDDIES WATERS ON THE APPLICABILITY OF THE CONCURRENT REMEDY DOCTRINE IN GOVERNMENTAL ENVIRONMENTAL SUITS

Jonathan S. Wolff

On March 31, 2014, the U.S. District Court for the District of Minnesota provided an answer to the novel question of "whether the concurrent [remedy doctrine] applies to bar equitable relief in government suits." *U.S. v. Mlaskoch*, No. 10-2669, 2014 WL 1281523 (D. Minn. Mar. 31, 2014).

In *U.S. v. Mlaskoch*, federal district Judge John Tunheim granted the United States's motion for summary judgment for injunctive relief against Bradd and Julie Mlaskoch. The United States alleged that the Mlaskochs violated sections 301(a) and 404 of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1344, despite the fact that the alleged violation possibly occurred more than five years prior to the filing of the suit, which potentially placed the suit outside the federal default statute of limitations. Despite this apparent obstacle, the district court held that regardless of when the suit was filed, the governmental enforcement exception of the concurrent remedy doctrine supported the government's claims for injunctive relief.

In so holding, the *Mlaskoch* court distinguished its case from the U.S. Court of Appeals for the Eighth Circuit's ruling in *Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008 (8th Cir. 2010), which barred the equitable relief sought by the Sierra Club in a citizen enforcement suit because of the concurrent remedy doctrine. If appealed and the Eighth Circuit grants an appeal, the resulting case will represent another circuit court's ruling in what is developing into a circuit split regarding the applicability of the concurrent remedy doctrine in environmental cases.

Background

The *Mlaskoch* case arose out of a real estate construction and development project. Bradd and Danielle Mlaskoch purchased a piece of property on January 13, 2005, with the intent to build improvements upon it. After purchasing the property, the Mlaskochs were responsible for substantial construction on the property, and dug ditches, excavated ponds, and filled the ground with dredge materials. At no point did the Mlaskochs or any affiliated entities or parties apply for or obtain a permit from the U.S. Army Corps of Engineers. Their combined activities violated sections 301(a) and 404 of the Clean Water Act.

The United States filed suit in the District of Minnesota on June 28, 2010, alleging violations of sections 301(a) and 404 of the Clean Water Act and sought injunctive relief against the Mlaskochs. The Mlaskochs demurred on the charges, but argued that the United States filed suit beyond the five-year federal statute of limitations and therefore was time-barred.

The Court's Decision

As a threshold matter, the court held, and both parties agreed, that since the Clean Water Act does not contain a statute of limitations, the federal default statute of limitations would apply. *Mlaskoch* at *10. The federal statute of limitations, codified at 28 U.S.C. § 2462, states:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued.

28 U.S.C. § 2462 (2012). A claim accrues under section 2462 when a plaintiff has a complete and present cause of action. *Mlaskoch* at *11 (citation omitted). Thus, the Mlaskochs argued, in order for the government's action to be timely, the alleged violations must have occurred sometime after June 28, 2005, five years before the date that the government filed. *Id.* at *11.

The parties presented conflicting evidence and disputed the timing of the alleged underlying violations. The United States argued that the Mlaskochs'

violations occurred after June 28, 2005 (and that it had brought suit within the time frame of the federal statute of limitations), the Mlaskochs argued that the violations occurred prior to June 28, 2005 (and that the United States's claims were untimely). *Id.* at *10–11. On the facts provided, the district court opined that a "reasonable fact finder could conclude that at least some of the development activities at the [s]ite . . . occurred after June 28, 2005." But the court did not stop there. Rather, it chose to entertain the United States's argument that:

> even if a material issue of fact remains regarding the timing of the developments[. . .] the Court should still grant its motion for summary judgment on liability because at least some of the United States' remedies for the alleged violations are not subject to the statute of limitations.
>
> Specifically, the United States argues that the statute of limitations does not bar the present action in its entirety because § 2462 does not apply to the injunctive and remedial relief sought by the United States in its complaint.

Id. at * 11. The court began with an examination of section 2462's text. Citing Eighth Circuit precedent, the court found that section 2462 applies only to proceedings for the enforcement of any "*civil* fine, penalty, or forfeiture" and that "[c]ourts interpreting the scope of § 2462 have determined that by its terms § 2462 'does not bar equitable remedies.'" *Id*. (quoting *Otter Tail*, 615 F.3d at 1018) (emphasis added). The court then reasoned that section 2462, as a general matter, does not "restrict the time in which the United States may seek *equitable* relief." *Id.* at *12 (emphasis added). But, the *Mlaskoch* court noted, the United States was not solely seeking either civil fines or penalties *or* equitable relief—the United States sought "civil fines or penalties *in addition to* equitable relief." *Id.* (emphasis added). Because the United States sought both civil penalties *and* equitable relief, the Mlaskochs argued that under the concurrent remedy doctrine, the United States's claims were time-barred.

The concurrent remedy doctrine, as applied by the Eighth Circuit, provides that where "a party's legal remedies are time-barred, that party's concurrent equitable remedies generally are barred as well." *Id.* (quoting *Otter Tail*, 615 F.3d at 1018). The district court intimated that though the Eighth Circuit may have barred equitable relief under the concurrent remedy doctrine in a *citizen*-initiated Clean Air Act suit with nearly identical facts, the *Mlaskoch* case was distinguishable because the equitable relief was sought by the federal government in its official enforcement capacity.

First, the court found that "other courts to confront this question have found that government suits raise different interests with respect to the statute of limitations, and have overwhelmingly concluded that the concurrent remedy doctrine does not bar suits for injunctive relief brought by the government under the [Clean Water Act] where the five year limitation of § 2462 has run." *Id.* (citing *United States v. Telluride Co.*, 146 F.2d 1241, 1248–49 (10th Cir. 1998); *United States v. Banks*, 115 F.3d 916, 919 (11th Cir. 1997)).

Second, the court opined that in distinguishing government suits from citizen suits brought under environmental statutes, courts have cited the "well-established rule that 'an action on behalf of the United States in its governmental capacity . . . is subject to no time limitation, in the absence of congressional enactment clearly imposing it.'" *Id.* (quoting *Banks*, 115 F.3d at 919 (citing *E.I. Du Pont De Nemours & Co. v. Davis*, 246 U.S. 456, 462 (1924))). The district court also found that the "canon of statutory construction that '[s]tatutes of limitation sought to be applied to bar rights of the Government, must receive a strict construction in favor of the government.'" *Id.* (citation omitted). The district court then construed the Eleventh Circuit's holding in *Banks*, which held:

> the concurrent remedy rule cannot properly be invoked against the government when it seeks equitable relief in its official enforcement capacity. Because Congress did not expressly indicate otherwise in the statutory language of section 2462, its provisions apply only to civil penalties.

Id. (quoting *Banks*, 115 F.3d at 919) (citations omitted). The district court adopted the holding in *Banks*, and found that "the concurrent remedy rule

cannot properly be invoked against the government when it seeks equitable relief in its official enforcement capacity [b]ecause Congress did not expressly indicate otherwise in the statutory language of section 2462 [that] its provisions apply only to civil penalties." *Id.* (quoting *Banks*, 115 F.3d at 919).

Thus, the district court concluded, because "nothing in the Clean Water Act itself or § 2462 precludes the United States from seeking injunctive relief . . . the United States' claims for such relief are not barred, even if § 2462 would preclude it from recovering damages." *Id.* at *13.

Implications

At face value, the decision should put potential environmental law violators on notice that their scope of liability may extend far beyond that previously thought. If *Mlaskoch* is affirmed in the Eighth Circuit, governmental enforcement agencies will be able to enjoin practices or successfully pursue other equitable relief for violations that occurred long ago.

It is unclear how a *Mlaskoch* appeal might hold up in the Eighth Circuit, as the rationale of the *Otter Tail* decision provides no indication on whether a court might accord a governmental party special treatment because of its status. In fact, the discussion in *Otter Tail* makes few references to the suit's status as a citizen suit—but none of these references is anything more than a description of the type of suit; the references do not explain how a citizen suit might be different than a private or public suit. *See Otter Tail*, 615 F.3d at 1014–15. Rather, the holding in *Otter Tail* is based on (and replete with) several permutations of the principle that where a legal right is time-barred, so is the equitable remedy.

In rejecting the Sierra Club's claims that its equitable relief was not time-barred, the *Otter Tail* court cited the U.S. Supreme Court case *Russell v. Todd* for the proposition that "'when the [equity] jurisdiction of the federal court is concurrent with that at law, or the suit is brought in aid of a legal right, equity will withhold its remedy if the legal right is barred by the local statute of limitations.'" *Otter Tail*, 615 F.3d at 1018 (citing *Russell v. Todd*, 309 U.S. 280, 289 (1940)). The *Otter Tail* court interpreted *Russell* to "bar equitable relief wherever time barred legal remedies would have been available to the same right." *Id.* The *Otter Tail* court then proceeded to examine and cite with approval several cases where equitable relief was barred because of the concurrent remedy doctrine's rule. *See, e.g.*, discussing *Otter Tail* court's, 615 F.3d at 1019, of *Williams v. Walsh*, 558 F.2d 667, 673 (2d Cir. 1977); *Nemkov v. O'Hare Chicago Corp.*, 592 F.2d 351 (7th Cir. 1979); *National Parks Conservation Ass'n v. TVA*, 502 F.3d 1316, 1327 (11th Cir. 2007); *Saffron v. Dep't of the Navy*, 561 F.2d 938 (D.C. Cir. 1977); *Roemmich v. Eagle Eye Dev., LLC*, 526 F.3d 343 (8th Cir. 2008)).

The *Mlaskoch* and *Otter Tail* courts took different routes to reach their decisions. The *Mlaskoch* court pulled heavily from *Banks*, which is based on the Supreme Court case *E.I. Du Pont De Nemours & Co. v. Davis*, 246 U.S. 456 (1924). Courts, including *Mlaskoch*, cite *E.I. Du Pont De Nemours & Co.* for the principle that statutes of limitations should be strictly construed in favor of the government. The *Mlaskoch* court's reliance is obviously different from—though not discordant with—the *Otter Tail* court's focus on the strict application of the concurrent remedy doctrine and reliance on *Russell*. The *Mlaskoch* and *Otter Tail* courts' different paths leave open the question of which principle, in case of an appeal, the Eighth Circuit will use to issue a ruling—the governmental-exception language used in *Mlaskoch* or the strict application of the concurrent remedy doctrine in *Russell*.

A ruling either way by the Eighth Circuit will only add to the circuit confusion on the concurrent remedy doctrine's application to governmental-enforcement suits. As stated above, two circuit courts have considered this direct issue, but both have ruled that the government's equitable relief is not time-barred. The Eleventh Circuit confronted this question and held that the statute of limitations did not bar the United States's suit for equitable relief, basing its opinion on the *E.I. Du Pont De Nemours & Co.* case. *Banks*, 11 F.3d at 919. The Tenth Circuit confronted this question in *United States v. Telluride Co.*, 146 F.3d 1241 (which the *Otter Tail* court cited, but did not discuss). The *Telluride* court, adopting the rationale of the

Banks court, held that the concurrent remedy doctrine did not bar the government's equitable claims.

Several other circuit courts have ruled on the applicability of the federal statute of limitations to equitable relief. The U.S. Court of Appeals for the District of Columbia Circuit, in the case *Saffron v. Department of the Navy*, 561 F.2d 938 (D.C. Cir. 1977), held that where a plaintiff sued for both legal and equitable remedies subject to a statute of limitations, "there was but a single right and single default involved" and barred the relief plaintiff sought. *Id.* at 940. The U.S. Court of Appeals for the Seventh Circuit, in *Nemkov v. O'Hare Chicago Corp.*, 592 F.2d 351, 354–55 (7th Cir. 1979), ruled that the concurrent remedy doctrine precludes injunctive relief based on a legal claim arising from the same set of facts. The U.S. Court of Appeals for the Eleventh Circuit, in *National Parks and Conservation Association, Inc. v. Tennessee Valley Authority*, 502 F.3d 1316, 1326 (11th Cir. 2007), a case after *Banks*, dismissed claims for injunctive relief following expiration of the statute of limitations for Clean Air Act violations. These circuits, however, have failed to consider the governmental-exception rule, as far as the author can find.

The *Mlaskoch* case will be one to watch. With the Supreme Court's recent holding in *Gabelli v. S.E.C.*, 133 S.Ct. 1216 (2013), which provided a ruling on when a violation is "discovered" by the federal government, the Supreme Court might also be called to provide clarification on when such a *Gabelli* discovery may (or may not) provide for equitable relief in a government enforcement suit. Indeed, an appeal by the *Mlaskoch* defendants and subsequent ruling by the Eighth Circuit could push the topic into the purview of the Supreme Court. One thing is certain: both governmental enforcement agencies and private defendants have waited long beyond the limits of section 2462 for some much-needed Supreme Court guidance on the concurrent remedy doctrine.

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COLORADO'S LEGISLATIVE AND ADMINISTRATIVE RESPONSE TO SEPTEMBER 2013 FLOODING

Adam Davenport and Matthew L. Merrill

Water matters in Colorado typically revolve around competition among many stakeholders vying to secure an allocation of the state's inadequate water supplies. However, last September's extensive flooding along Colorado's Front Range has changed the dialogue, at least temporarily, to issues arising from excessive quantities of water. The South Platte River and several of its small tributaries were the locus of the most extensive flood-related damage to water infrastructure including headgates, ditches, and municipal water treatment facilities. Flooding also impacted facilities associated with the area's booming oil and gas industry, causing spills of oil and produced water into floodwaters. Public water treatment works located along streams and rivers were also heavily damaged, resulting in discharges of untreated and partially treated sewage.

This article discusses the Colorado General Assembly's and administrative agencies' initial responses to the floods. Legislators have advanced several bills to mitigate or repair damaged surface water infrastructure during the 2014 legislative session. Assertions by some in the water community that the flooding recharged the South Platte River alluvial aquifer have led to proposals for changes in groundwater administration. Finally, flood-related oil and gas surface water contamination is the basis for an ongoing Colorado Oil and Gas Conservation Commission regulatory review to attempt to prevent or minimize oil and gas-related spills during future high water flow events.

A Five-Hundred-Year Rain

On September 11, 2013, rain began to fall on Colorado's Northern Front Range, and by September 13 some areas had received nearly 15 inches. By comparison the annual average rainfall for this area is approximately 20 inches and average September rainfall is below 2 inches. Colorado Climate Center,

Colorado Flood 2013, *available at* http://coflood2013.colostate.edu/. Rivers and streams that usually flow at a trickle in early autumn surged out of their banks and destroyed highways and homes. Several basins reported rainfall or stream-flow equivalent to a five-hundred-year event. The destruction created compelling footage that was featured by national and international media.

Television and print news also featured images of industrial storage tanks carried away in the floodwaters, and reports of extensive facility damage and spilled fluids from Colorado's oil and gas industry. The Wattenburg field, home to a booming shale oil development project, is located downstream from areas that received the most rain and the flooding forced many companies to temporarily cease operations.

The damage to Colorado's water infrastructure received comparatively less media attention. The flood tore headgates and diversion structures from the beds and banks of rivers. In some cases rivers and streams charted completely new courses leaving water users who once diverted directly from the river now literally high and dry. Many Colorado farmers depend on ditch diversions from streams to deliver irrigation water to fields. Front Range municipalities depend on ditches to deliver supplies to treatment plants and customers. The destruction from the flooding was on a scale seldom seen in Colorado. The city of Longmont located north of Denver on the St. Vrain River sustained over $152 million dollars in damage, including $21 million in damage to its crucial water infrastructure. Personal Communication with Sean Cronin, Executive Director, St. Vrain & Left Hand Water Conservancy District (Mar. 14, 2014). The flooding also damaged and caused spills from wastewater treatment plants.

Legislative Response

Colorado's 2014 legislative session opened four months after the floods, and legislators were quick to introduce flooding related legislation to deal with physical water availability issues. First, House Bill 14-1002 would establish the Water Infrastructure Natural Disaster Grant Fund together with an initial appropriation of $12 million for the fund. The funds may be awarded to local government entities that have domestic wastewater treatment works, public drinking water systems, or on-site wastewater treatment systems impacted, damaged, or destroyed in connection with the flood of September 2013. The bill would also allow the funds to be used in response to other future disasters that damage this type of infrastructure. This bill passed the Colorado House of Representatives on March 3, 2014, and has advanced to the appropriations committee in the Colorado Senate.

In addition to funding, holders of existing water rights have voiced concerns about approvals that could be required in connection with rebuilding water infrastructure. Colorado uses a system of water courts to adjudicate water rights and to review changes to previously adjudicated rights. Where a stream has moved from its previous course, rebuilding a ditch headgate at the new streambed could be a change in point of diversion that requires a water court proceeding to prove non-injury to other water rights. C.R.S. § 37-92-103(5); *Trails End Ranch v. Colo. Div. of Water Resources*, 91 P.3d 1058 (Colo. 2004). An existing statute, C.R.S. § 37-86-111, allows a headgate to be moved upstream under certain circumstances, but after the September floods some water users may need to move laterally, or even downstream in order to accommodate flood-related changes in streambeds.

House Bill 14-1005 is an attempt to resolve legal uncertainties associated with relocating a headgate. This bill would expand the existing relocation statute to provide that, upon a change in channel course or location, a headgate may be relocated on the same stream, even if the proposed headgate relocation is not upstream. It also clarifies that the relocation "must not physically interfere with the complete use or enjoyment of any absolute or decreed conditional water right." Finally, the bill amends C.R.S. § 37-92-103(5) to provide that such relocation does not require a water court change proceeding. The bill has passed a third reading in both Colorado's house and senate, and as of this publication, appears likely to be signed into law.

In contrast, legislation that would change the rules regarding legal availability of groundwater in response

to the flood has not been successful. Under Colorado's prior appropriation system of water rights, most surface ditches predate well development, and wells are perpetually "out of priority." Groundwater is only legally available to groundwater users if senior ditches have an adequate supply of water. Adequate water supplies for senior surface rights are evaluated by reference to, inter alia, the lagged depletions associated with well pumping, that affect a river for many months or years after pumping ceases. Under Colorado law, well users must replace depletions to the surface stream that resulted from prior pumping. *See, e.g.*, *Well Augmentation Subdist. of the Central Colo. Water Conservancy Dist. v. City of Aurora*, 221 P.3d 399 (Colo. 2009).

Although this has been the law in Colorado for nearly 50 years, it remains controversial and groundwater users routinely seek relief from these requirements. This year, Senate Bill 14-072 proposed to override water court decrees that require replacement of depletions from pumping, on the basis that the flooding had "fully replaced" all groundwater depletions in the South Platte River Basin that "accrued on or before September 12, 2013." The Colorado state engineer presented an analysis rejecting this "fully replaced" assumption, and Senate Bill 14-072 was shelved in the Senate Agriculture, Natural Resources and Energy Committee.

Administrative Response

As the floodwaters receded, local newspapers began to fill with pictures and stories of flooded, and in some cases, toppled oil and gas production equipment in the South Platte River Basin due to the flooding. The Colorado Oil and Gas Conservation Commission (COGCC), the Colorado agency charged with regulating oil and gas operations, estimated that 1149 barrels (48,250 gallons) of crude oil were spilled during the flood. In addition, more than 1035 barrels (43,479 gallons) of produced water were also spilled. COGCC, *Flood Response, November 26, 2013*, *available at* http://cogcc.state.co.us/Announcements/Hot_Topics/flood2013/COGCC2013FloodResponse.pdf.

Moving quickly in response to these spills, on October 21, 2013, the COGCC released *Recommended Practices for Flood Impact Zone Reconstruction*, *available at* http://cogcc.state.co.us/Announcements/Hot_Topics/Flood2013/RecommendedPracticesFlood%20Impact%20Zone-20131021.pdf, a list of best practices for operators rebuilding flood-damaged oil and gas facilities in the South Platte Basin floodplain. Among other items, the COGCC recommended that:

- Operators build secondary containment structures with steel berms and synthetic liners attached to the top of the steel berm;
- All tanks should be constructed on compacted fill to reduce subgrade failure;
- Tanks should be ground-anchored with engineered anchors and cables routed through welded eyelets;
- Production facilities should be aligned parallel to the general drainage;
- Structural fencing and barriers should be located at the upstream end of facilities to deflect flood debris; and
- All wells in flood-prone areas should be fitted with remote shut-in equipment so that wells could be closed quickly during a flood or other emergency.

These provisions are voluntary and have not yet been adopted as formal and binding rules. COGCC, *Recommended Practices for Flood Impact Zone Reconstruction*, Oct. 21, 2013.

On March 14, 2014, the COGCC released a report entitled "*Lessons Learned*," *available at* http://cogcc.state.co.us/Announcements/Hot_Topics/Flood2013/FinalStaffReportLessonsLearned20140314.pdf, summarizing observations and recommendations following the flood. In the report the COGCC does not recommend statutory changes but does recommend changes to regulations governing oil and gas production. In addition to recommending that the October 2013 best management practices be made mandatory, the report also recommends that each operator in Colorado be required to maintain current inventories of wells and production equipment located near waterways so that operators can quickly determine whether wells and equipment might be in danger during an emergency. The report further recommends that no pits be constructed within a designated distance from the ordinary high water mark of a waterway. While pits are relatively uncommon on

Colorado's Eastern Slope where the flooding occurred, pits are commonly used on Colorado's Western Slope in the Raton and San Juan areas. There, pits are constructed near streams because those are often the only flat lands available among steep slopes. Finally, the report recommended that tanks, tank batteries, and production equipment be located as far from waterways as practically possible, taking into account the needs of surface owners, operators, and topography. COGCC, *A Staff Report to the Commissioners: "Lessons Learned" in the Front Range Flood of September 2013*, Mar. 14, 2014.

In addition to oil and gas, local news outlets reported that an estimated 20 million gallons of raw sewage and 150 to 270 million gallons of partially treated sewage were spilled or discharged into the South Platte Basin during and shortly after the flooding. The Colorado Department of Public Health and Environment (CDPHE) teamed with the Environmental Protection Agency (EPA) to monitor and test the waters of the South Platte River Basin for water quality impacts as a result of discharges of sewage during the flooding. Samples collected on September 26, 2013, revealed levels of E. coli —a common indicator of fecal contamination—above recreational standards at 16 of 29 locations (although three of these sites had reported elevated levels of E. coli prior to the flooding). Testing at the same locations in October 2013 indicated that only four sites exceeded E. coli standards. Although elevated above recreational standards, the levels of E. coli sampled did not exceed drinking water or agricultural standards. *CDPHE Water Quality Sampling Summary*, located at http://www.colorado.gov/cs/Satellite/CDPHE-EPR/CBON/1251645971558 (last accessed Mar. 17, 2014). EPA and CDPHE will conduct further testing and monitoring this spring.

Operators of public water systems faced numerous challenges restoring services after the flooding. The Water Quality Control Division of CDPHE issued numerous directives and guidelines for water treatment facilities and other water providers. Operators were instructed to advise CDPHE immediately if groundwater collection systems had been inundated by floodwaters. The division warned of possible contamination from oil and gas activities, industrial waste, domestic waste, and livestock operations. *CDPHE General Draft Guidance for Public Water Systems Affected by September 2013 Flood Emergencies*, located at http://www.colorado.gov/cs/Satellite/CDPHE-EPR/CBON/1251645971558. CDPHE also issued a comprehensive guidance document for private property owners whose homes had been damaged from the flooding. The document contained resources for home and business owners regarding cleanup of flood debris, restoration of power, and the safe disposal of potentially hazardous wastes.

Implications

Colorado's initial legislative and administrative response to the September 2013 flooding has been calibrated to respond to citizens' immediate needs. Legislation related to rebuilding surface infrastructure, which is a critical need in 2014, has proceeded quickly. The ditch headgate legislation presumes that water users will be able to rebuild their infrastructure cooperatively and that resort to water courts will not be needed to resolve disputes about whether new locations or infrastructure will place one user in a more favorable position with respect to other water users. We think cooperation will prevail in most instances, and the occasional disagreement would not justify delaying every relocation and reconstruction to allow for a water court proceeding.

In contrast to the need to rebuild surface infrastructure, there appears to be time for continued debate regarding groundwater administration in Colorado. Similarly, the debate whether current oil and gas regulations do enough to ensure safe operation near Colorado's waterways is unlikely to be resolved in the near term. However, COGCC's best practices are an important interim step in responding to the flood and the anticipated rulemaking should put operators in a better position to withstand future events.

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