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FEATURE ARTICLE

LIKELY NINTH CIRCUIT CASE ON APPEAL OVER THE CLEAN WATER ACT AND 'SIGNIFICANT NEXUS' APPLICABILITY MAY PORTEND THE FATE OF THE SCOPE OF THE ACT NATIONWIDE

By Harvey Sheldon

There is a case that may be headed to the Ninth Circuit Court of Appeals out of the U.S. District Court in California that may turn out to be instructive nationwide as to the practical value of the U.S. Supreme Court's rulings in the *Sackett* and *Hawkes* cases. The case is *Duarte Nursery, Inc. v. U.S. Army Corps of Engineers*, Case No. 2:13-cv-02095-KJM-AC (E.D. Cal. June 10, 2016). I say "likely" as the U.S. Disctrict Court expressed the willingness to certify parts of the case on interlocutory appeal.

Background

In *Sackett v. U.S. EPA*, 132 S. Ct. 1367, 566 US __, 182 L. Ed. 2d 367 (2012), the U.S. Supreme Court found that people against whom the U.S. Army Corps of Engineers (Corps) issued an order directing them to undo filling that had occurred in their backyard were entitled to judicial review of the order via the Administrative Procedure Act (APA). (See, https://scholar.google.com/scholar_case?case=13663798285804514473&q=sackett+v.+US+EPA&hl=en&as_sdt=2006&as_vis=1)

In *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016) the U.S. Supreme Court ruled that a finding of jurisdictional wetlands was sufficient and final to constitute an action of which there could be judicial review on the record. (*See*, https://www.supremecourt.gov/opinions/15pdf/15-290_6k37.pdf)

The Pacific Legal Foundation, which was involved in both *Sackett* and *Hawkes*, is representing a defendant nursery and its executive (Duarte) at the District Court. Duarte is seeking appeal from a U.S. District Court decision that dismissed their clients' complaint for due process deprivation by and granted summary judgment to the U.S. Army Corps of Engineers on its counterclaim that the Duarte arrangements for plowing ground it purchased in the Sacramento River Basin violated the federal Clean Water Act permit requirement for filling waters of the United States. The District Court case is *Duarte Nursery, Inc. v. U.S. Army* Corps of Engineers, No. 2:13-cv-02095-KJM-AC, E.D. Cal., June 10, 2016; see, https://scholar.google.com/scholar_case?case=728953536281684705 7&q=Duarte+Nursery,+Inc.+v.+U.S.+Army+Corps+of+Engineers&hl=en&as_sdt=2006&as_vis=1)

The Clean Water Act—'Waters of the United States'—and *Duarte Nursery*

The Duarte Nursery situation has been the subject of discussion and a rallying point for opponents of the new "waters of the United States" (WOTUS) definition that is under review in the Sixth Circuit. Farm, wine and other agricultural organizations are in fear that the courts will render the agricultural activity exemption from Clean Water Act permitting a less than satisfactory defense against future wetland permitting violation cases.

The history of events in *Duarte*, in simple outline as taken from the District Court case Slip Opinion, is that the Nursery identified some 2000 acres that it deemed appropriate for its use or investment. After selling off roughly 75 percent of the acreage, it proceeded to arrange for the growing of winter wheat on over 400 acres of land it retained. This involved hiring someone to plow the ground. Some of the affected acreage had been historically cropped, but not all. The specific area in question was historically

used for grazing. Before any plowing activity occurred, the Duarte firm hired an environmental consultant to determine if there were protected wetlands on the retained acreage. A report was prepared and provided Duarte, identifying some 16 acres of the property as in fact likely protected wetlands. Instructions were given to fence off the wetlands from the plowing. Thereafter, the plowing (or ripping) occurred. Some weeks later an employee of the Corps saw the ripped fields and, believing that some of the activity was on wetlands, he commenced to open a file. After some phone communications, a letter was sent to Duarte by the Corps that included a cease and desist command. There is no dispute that the plowing did include some fraction of the wetlands, possibly because the fencing was not correct.

Procedural Background in *Duarte*

The District Court proceedings in the case actually began with a filing by Duarte of a civil complaint that the government's orders to cease and desist had been made without affording Duarte a hearing or adequate opportunity to produce evidence in defense. This allegedly deprived Duarte of due process rights as a matter of law. The Corps filed a counterclaim for § 404 Clean Water Act filling without a permit. Some stipulations of facts were agreed upon or not, documents were filed of record, including Duarte's consultants' report and Corps sponsored expert affidavits, and depositions were held.

The parties filed cross motions for summary judgment, and, after argument thereof, it fell to District Court Judge Kimberly Mueller to rule on the case.

The litigation and motion history of the case has been somewhat complicated. Predictions from what has transpired to date involves applying some logic from the rulings, the court's own statements to the litigations and some educated guesswork.

The summary that follows is based substantially on direct contact from lead counsel for Duarte, Anthony Francois of the Pacific Legal Foundation.

> On June 10, the District Court ordered a wide ranging order that ruled on multiple pending summary judgment motions and disposed of all liability issues in the case, including Duarte Nursery's claims against the government, and the government's Clean Water Act claim against Duarte Nursery. (*See*, http://www.pacificlegal.org/file/Order-on-summary-judgment-motions.pdf)

That order leaves one step in the District Court, which is a trial on remedy for the Clean Water Act claim. The parties have filed a joint pre-trail conference statement, but the pretrial conference and trial itself are not presently set. The government is seeking a civil penalty of $2.8 million, purchase of 66-122 acres of vernal pool credits, and additional injunctive relief.

Following the June 10 Order, Duarte filed several procedural motions: 1) to reconsider or certify issues on the Clean Water Act ruling, 2) to amend the answer to the Clean Water Act counterclaim, and 3) for entry of partial judgment on Duarte Nursery's claims against the government under Rule 54(b). Duarte withdrew the § 54(b) motion, and the court heard the other motions on September 2, and Duarte is waiting on a ruling on those motions. In a tentative ruling and at oral argument, Judge Mueller stated that she is inclined to deny reconsideration but instead to certify one of the liability issues for interlocutory appeal to the Ninth and stay the remedy trial pending that appeal.

The likely certification is a significant decision in the case. The issue Judge Mueller says the court is likely to certify is whether Justice Kennedy's lone concurrence in *Rapanos v. U.S.* remains an applicable test for Clean Water Act jurisdiction in the Ninth Circuit, based on the recent *en banc* decision in *U.S. v. Davis*, 825 F.3d 1014 (2016). *Davis* revises the way the Ninth Circuit reads fractured Supreme Court rulings. Duarte has yet to receive her ruling on the motion, but this is what is anticipated based on her statements at the hearing.

Durate has also appealed from the judge's dismissal in the June 10 order, on sovereign immunity grounds, of Duarte Nursery's First Amendment retaliation claim against the government, under the collateral order doctrine. The government moved to dismiss that appeal, and the Ninth Circuit just granted the dismissal late last week.

> So where do we stand? The case is in the District Court with liability resolved on all claims, pending trial on remedy under the Clean Water Act claim, but the District Court has said it will certify one of the liability issues for interlocutory appeal.

While some of the national publicity on this case says the Tehama County site, some 40 miles distant from the Sacramento River, could not involve wetlands and otherwise make the finding of violation result sound utterly nutty, Judge Mueller carefully detailed fact after fact that the court derived from the record. Judge Mueller noted there are creeks on or bordering the property in question that feed to the Sacramento River. Also, Duarte's own consultants found:

> A total of 16.17 of pre-jurisdictional waters of the U.S. were delineated within the Property. The types of waters of the U.S. identified on-site are distinguished as vernal pools, vernal swales, seasonal wetlands, seasonal swales and other waters including intermittent and ephemeral drainages.

In short, based on the record as discussed in the opinion, there was knowledge by the Duarte Nursery and the individual defendant Duarte that wetlands were present. To some extent, they were plowed. The District Court found that the act of plowing by the equipment used would displace soils and place them some inches or feet elsewhere within the same wetlands. This, the court said, is filling of U.S. waters as the Clean Water Act has been construed by other courts.

More specific details follow.

Significant Nexus

The court than went on to discuss the issue of significant nexus, as articulated by the Ninth Circuit, citing *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (2007). At one point the court articulated the Ninth Circuit rendering of *Rapanos* and Justice Kennedy's concurrence as the "substantial nexus" test. On the evidence reviewed, the District Court here found that the consultants for Duarte and the Corps expert found that the affected wetlands provide some biological and chemical feed to the Sacramento River Basin, by direct runoff, along with the surface water itself. In what may really be the most important line in the opinion, the court stated:

> Plaintiffs [Duartes] do not point to any 'specific facts showing that there is a genuine issue for trial.'….The court thus finds that the wetlands on the Property have a 'significant nexus' with the Sacramento River, which is a traditionally navigable waterway.

The court also read the Clean Water Act to exclude the affected acreage from the so-called agricultural exemption because of its lack of farming history in fact.

On Appeal to the Ninth Circuit?

The District Court has expressed the desire to grant an interlocutory appeal prior to the penalty stage of the proceedings. There is a briefing schedule set in the Ninth Circuit, which will commence later this year and into early 2017. While the case is touted and sensationalized as a threat to American agriculture and personal freedoms, it might also be viewed as a lesson to lawyers about the limits to the victories for judicial review gained in the *Sackett* and *Hawkes* Supreme Court cases. First and foremost, the facts scream out for contest on the issue of how significant a nexus there really is to the Sacramento River from putting a few acres far upstream under plow. Does the runoff have some special quality is there an addition of actual pollution going on, might agricultural use retard runoff of precious surface water? In other words, why can the trial court say there is no factual contest on the critical significant nexus question? *Sackett* and *Hawkes* stand for the proposition that you get a judicial review hearing for your client; they do not stand for getting a trial type contested hearing, much less a victory, if you do not present facts on your client's side and dispute critical questions that require a trial before a decision is made.

Some reports indicate that the Ninth Circuit will be asked to revisit its willingness to view Justice Kennedy's *Rapanos* case concurrence as always determinative of the scope of "waters of the United States". In a recent criminal appeal, the Ninth Circuit may have shown its hand:

> A fractured Supreme Court decision should only bind the federal courts of appeal when a majority of the Justices agree upon a single underlying rationale and one opinion can reasonably be described as a logical subset of the other. When no single rationale commands a majority of the Court, only the specific result is binding on lower federal courts. *U.S. v. Davis*, 825 F.3d 1014, 1021-1022 (2016).

Conclusion and Implications

In the context of what definitional rule should apply to the Duarte property, it may well be that Justice Kennedy would not have found a "significant nexus" present on their property, and that he would have ruled in the Duartes' favor, much as occurred in the original *Rapanos* case, where Kennedy concurs in Justice Antonin Scalia's "plurality" opinion that the Corps' reading of "waters of the United States" was too great a departure from historic precedent about actual flowing waters to be correct. Moreover, Kennedy stated in essence that a nexus exists where the wetland or water body, whether alone or combined with other similar sites, significantly affects the physical, biological, and chemical integrity of the downstream navigable waterway. Kennedy also said:

> When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.' *Rapanos*, 126 S.Ct. at 2248.

Moreover, in the *Duarte* situation, the fact that the wetlands in question help hold or channel flood and rainwater hardly seems to distinguish them from any other land on which precipitation falls. In the District Court's mind, the Duartes apparently did not make a significant record on the significant nexus question. In considering their appeal, the Ninth Circuit may be more inclined to give them a second chance at that, nevertheless, than to decide in the abstract whether or not Justice Kennedy's concurrence governs in the absence of contest on the question of ultimate fact below. For more information, *See*, https://www.pacificlegal.org/cases/duarte-nursery.

Harvey M. Sheldon, Esq. is a Partner at the law firm Hinshaw and Culbertson, LLP, resident in the firm's Chicago office. Harvey has extensive experience in the field of environmental law, including counseling, litigation, mediation and other dispute resolution and facilitation services. He has handled issues and litigation involving the Clean Air Act, Resource Conservation and Recovery Act, Clean Water Act, Superfund, and other important environmental laws and regulations. He is also regularly engaged in related business, transactional and liability questions for clients. Harvey has represented private clients ranging from individuals and entrepreneurial companies to Fortune 100 corporations and major financial institutions. He has appeared in both federal and state trial courts and in courts of appeals in environmental and other matters civil and criminal. Harvey is on the Editorial Board of the *Eastern Water Law & Policy Reporter*.

EASTERN WATER NEWS

ENVIRONMENTAL GROUPS FILE NOTICES OF INTENT TO SUE TARGETING GOVERNMENT AGENCIES FOR ALLEGED ENDANGERED SPECIES ACT VIOLATIONS

In a series of actions that could have significant implications for public infrastructure projects in inland southern California, the Center for Biological Diversity and different sets of other environmental groups (collectively: CBD) recently filed two notices of intent to sue federal and local government agencies over alleged violations of the federal Endangered Species Act (ESA). According to the CBD, the agencies have operated a water project and a wastewater facility in San Bernardino County in a manner that failed to protect against impacts to a species listed as "threatened" under the ESA. If the entities fail to take appropriate measures to protect against these alleged impacts going forward, the CBD may file legal challenges.

Background

The Santa Ana sucker is a small, short-lived fish species that occurs in the Santa Ana River watershed; the watershed draining portions of the San Gabriel and San Bernardino Mountains of southern California. By the time the fish was listed as a "threatened" species under the ESA in 2000, the CBD alleges that the sucker had been removed from at least 75 percent of its historic habitat. Now, the CBD alleges that the sucker is limited to four to ten kilometers of habitat in the Santa Ana River watershed, and that this available habitat is declining. As a result of this habitat decline and other threats to the sucker, the CBD recently filed provided notices of intent to sue the U.S. Army Corps of Engineers (Corps), as well as several water purveyors over operation of two major infrastructure projects.

The Seven Oaks Dam

The first project is the Seven Oaks (Dam). Standing at almost 3,000 feet long and 550 feet high, the dam is a long-arched embankment structure that is operated by the Corps located near the City of Redlands. Proposed as a way to diminish severe flooding risks downstream on the Santa Ana River—including the Inland Empire and Orange County—construction of the dam began in 1993 and concluded in 1999, before the sucker was listed under the ESA.

In a 60-day notice sent to the Corps in late-July, the CBD alleges that the Corps has failed to properly engage in formal consultation with the U.S. Fish & Wildlife Service (FWS) regarding operations of the dam. Under § 7(a)(2) of the ESA, federal agencies must:

> …insure that any action authorized, funded, or carried out by such agency... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of [critical] habitat of such species. 16 U.S.C. § 1536(a)(2).

To accomplish this goal, federal agencies must consult with the FWS whenever their actions "may affect" a listed species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14.

Pursuant to the ESA, the environmental groups argue that the Corps has failed to initiate formal consultation with the FWS since Seven Oaks Dam was built regarding the:

> …effects of [ongoing] management of Santa Ana River flood-control projects, including the [Dam], on several threatened and endangered species, including impacts to the Santa Ana sucker and its federally designated critical habitat.

Other listed species at issue involve the San Bernardino kangaroo rat.

Even though the sucker was listed after Dam construction was completed, the CBD claims that changes in operation of the Dam over the last two decades have triggered this formal consultation requirement. Because the Dam's operation allegedly has the

potential to undermine the conservation and recovery of the sucker, jeopardize its continued existence, and destroy or adversely modify the critical habitat, the groups allege the Army Corps' inaction violates the ESA.

Rapid Infiltration and Extraction Facility

The second project, known as the Rapid Infiltration and Extraction (RIX) facility, operates as a tertiary wastewater treatment plant for the Cities of Colton and San Bernardino. When operational, the RIX facility treats up to 50 million gallons of wastewater per day, and is permitted to discharge up to 64 million gallons per day into the Santa Ana River downstream of the cities.

According to the CBD's Notice, the issues under the ESA arise whenever the RIX facility is shut down for required maintenance. Under § 9 of the ESA every "person," which includes state, county, and municipal entities, is prohibited from "taking" or causing the take of any listed species. 16 U.S.C. § 1538(a). The term "take" is broadly defined under the ESA to include "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect." *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704 (1995).

In some instances, when the RIX facility is shut down for maintenance, treated wastewater discharges to the Santa Ana River temporarily cease. These shutdowns reduce the available water flow in the river, which the CBD alleges results in the unlawful "take" of the sucker. Since at least 2014, the CBD alleges that the management and operation of the RIX facility has "caused the repeated take of over one hundred Santa Ana suckers." Interestingly, while the CBD recognizes that the operators of the RIX facility are required to shut down the facility for maintenance in order to comply with their federal and state Clean Water Quality Act permit requirements, the CBD is requesting that the operating agencies adopt improvements that would reduce the frequency of future shutdowns, as well as mitigate impacts to the fish.

Conclusion and Implications

While it remains uncertain whether the CBD will follow through on its promised lawsuits, these cases could prove to have significant implications for Inland Empire water and wastewater agencies moving forward. For more information, *see*, Press Release, Center for Biological Diversity, http://www.biologicaldiversity.org/ news/press_releases/2016/santa-ana-river-07-25-22016.html; Press Release, Lawsuit Launched Over California Cities' Killing of Threatened Santa Ana Suckers, http://www.biologicaldiversity.org/news/press_releases/2016/santa-ana-sucker-08-22-2016.html
(Matt Collins, Steve Anderson)

THE BATTLE CONTINUES IN ONE OF THE NATION'S LARGEST INTER-BASIN WATER TRANSFERS

The battle over the water contained in ancient carbonate aquifers in Nevada and Utah stretches back decades. The Southern Nevada Water Authority (SNWA) has been under increasing pressure to find secure sources for water for Las Vegas amid the ongoing record drought and the unprecedented drop of Lake Mead. Las Vegas, with its 2 million residents and 40 million visitors a year, currently draws about 90 percent of its drinking water from Lake Mead.

Factual Background

In an effort to supplement its ever growing thirst, in 1989, Las Vegas Valley Water District (the successor to SNWA) applied for unappropriated water in hydrographic basins located in Cave Valley, Dry Lake, Delamar Valley and Spring Valley. The plan was to mine the ancient aquifers and pipe the water 300 miles south to support the rapidly growing Las Vegas Valley.

After hearing on the applications, the Nevada State Engineer (State Engineer), as head of the Nevada Division of Water Resources, gave the project a thumbs-up by allocating 84,000 acre-feet of ancient groundwater a year to the SNWA for export to Las Vegas. The rulings by the State Engineer represented the largest water appropriations in Nevada history. The water basins encompass 20,688 square miles. The basins' size have been compared to New England, encompassing great portions of Vermont, New Hampshire, Massachusetts, Connecticut and some of New York. It likely would have been the largest inter-basin transfer of water in U.S. history.

The Lawsuit

Not surprisingly with these natural resource matters, the State Engineer's ruling was challenged by a multitude of groups, ranging from farmers to environmental groups and even counties in neighboring states. Both the SNWA and protestants submitted thousands of pages of scientific information, evidence and testimony for consideration during a record-long six-week hearing. In a long-awaited decision, on December 10, 2013, District Judge Robert Estes ruled that the State Engineer did not adequately investigate whether the proposed groundwater scheme would pump these basins dry or conflict with existing water rights. [*White Pine County v. King*, Case No. CV1204049 (7th Dist. NV. 2013).]

Judge Estes ruled that the water under Cave, Dry Lake and Delamar appeared to be already appropriated. For Spring Valley, the judge found little assurance that the proposed water withdrawals would be safe. The judge remanded the decision back to the State Engineer to recalculate how much water is available. In the decision, the Judge instructed the State Engineer to structure appropriations so that such basin equilibrium would be achieved in "a reasonable time."

Current Status

Since Judge Estes' ruling in 2013, many of the parties involved have petitioned the Nevada Supreme Court to weigh-in on the matter. The State Engineer took no action on the applications while the pending petitions were before the Supreme Court. As of early 2016, the last petition before the U.S. Supreme Court was denied, thus allowing the State Engineer to move forward with its reconsideration of the applications. The State Engineer has now taken the first steps in getting this matter resolved. On September 14, the State Engineer was set to hold a status conference where the parties would discuss:

- Whether an additional administrative hearing is nece ssary or whether the matters can be reconsidered based on the evidence already in the record;
- Whether additional work needs to be accomplished or evidence developed prior to reconsideration by the State Engineer;
- Timing for the exchange of additional evidence, if necessary; and
- If necessary, scheduling of any additional administrative hearing.

The results of this status conference were unavailable at the time of this writing.

Conclusion and Implications

The State Engineer's reconsideration will likely be a lengthy process and challenged at every step along

the way. All parties to this inter-basin transfer plan have a lot at stake. The SNWA— and, ultimately, water ratepayers—have already spent millions of dollars on prep work for the project. By 2019, the U.S. Bureau of Reclamation says, there is a 64 percent chance the water level in Lake Mead will drop low enough to trigger a federal emergency provision mandating severe cuts to all state drawing from the lake. With these cuts on the horizon, the water appropriations that are subject to the State Engineer's reconsideration will go a long way to shore up Las Vegas' water security. On the other hand, those parties who have existing senior water rights in the affected basins risk the possibility of unsustainable management of the water resources. Regardless of the State Engineer's decision, one thing is certain, battles over water rights are not new to the west and will undoubtedly continue for the foreseeable future.
(Wesley A. Miliband, Eric R. Skanchy)

NEWS FROM THE WEST

This month's News from the West covers legislation in the State of Colorado allowing for limited rainwater collection by state residents. We also cover a decision out of the Supreme Court of California addressing the mining culture of the West. The Court addressed the practice of suction mining on federal lands, state law and federal preemption and found that state law survived challenges.

A True 'Rainy Day Fund' Rain Barrel Bill Officially Takes Effect In Colorado

On August 10, 2016, Colorado's ban on rain barrel use for precipitation collection officially came to an end with the enactment of House Bill 16-1005. This bill, signed by Governor John Hickenlooper in May, now allows Colorado residents, subject to certain restrictions, to collect and use precipitation from their rooftops for outdoor purposes.

Although it might seem odd to some, up until now Colorado law has largely prohibited the collection or harvesting of precipitation. In Colorado, the prior appropriation system governs water and the right to use the resource. This system predates Colorado's statehood and is often paraphrased by the expression "first in time, first in right." *See, Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 447 (1882). According to this rule, those who first use the water and decree their rights in court receive senior rights and protections against injury from newer junior rights. Under the prior appropriation system, all water tributary to a natural stream is subject to appropriation. Precipitation and snow melt which contribute to the natural streams and tributary aquifers of the state are therefore included in this ambit of appropriated water. The issue of capturing precipitation and using it has consequently seen years of vigorous examination due to the competing but ultimately aligned goals of conservation of this resource and the legal right to use it.

In 2009, Governor Bill Ritter signed the first piece of legislation officially allowing precipitation collection in Colorado. Senate Bill 09-80 allowed rural residents who qualify for an "exempt" well and whose property cannot be served by a municipality or water district to collect precipitation through a permit from the Colorado Division of Water Resources. Qualified, permitted residents could then collect precipitation and use it for ordinary household purposes, lawn/garden irrigation of not more than one acre, watering of poultry, domestic animals, and livestock on farms and ranches, and fire protection. Now due the enactment of House Bill 16-1005, the right to capture and use precipitation, albeit for more limited purposes, has been extended to a great portion of Colorado's population.

After several failed attempts and robust debate, Colorado law has now changed to allow precipitation collection by a wider range of citizens. Many people are likely puzzled and do not fully understand why it look so long to end what might be considered an antiquated law. The controversy surrounding this bill, however, is anything but simple and concerns significant issues of water rights, the prior appropriation system, and the semi-arid Colorado environment. Opponents of the measure feared that widespread collection of precipitation would lead to injuries to senior water right holders who depend upon runoff to fulfill their water rights. They argued that detention of precipitation while only temporary and minimal

might still alter the historical flow patterns that occur when precipitation is allowed to take its natural course and could therefore adversely affect water right holders. Proponents of the measure, on the other hand, argued that if not captured and used most of the precipitation will be lost to evaporation and vegetation. These proponents consistently cited to a Colorado State University study that found the use of rain barrels would not decrease the amount of surface runoff traveling to downstream users. In order to alleviate these concerns, the new law establishes several precautionary measures. For example, the new law expands Colorado State Engineer's authority to now curtail rain barrel usage if necessary to avoid injury to senior water rights. Also, the new law directs the State Engineer to report on or before March 1, 2019, and 2022 on whether the allowance of rain barrel collection under the new law has caused any discernable injury on downstream water rights. The law also plainly points out that use of a rain barrel does not constitute a water right. The bill therefore establishes safeguards to protect those with established water rights while allowing for the collection and limited use of precipitation.

The new law allows single-family homes or multiple family homes of no more than four units to collect precipitation without any permit requirement. Homes that are joined by common sidewalls such as duplexes or townhomes are considered single family residences and qualify under this law. Each qualified residence may use no more than two barrels or other storage containers with a total, combined storage capacity of 110 gallons with sealable lids. Typical systems often utilize gutters or downspouts connected to a barrel and a distribution system such as a garden hose or drip system. Use of the collected water is limited to outdoor purposes such as irrigation of lawns and gardens on the property from which it is collected. Importantly, the collected water cannot be used for household purposes or for drinking water purposes. Ultimately, although the amount of water that may be collected is rather minimal and the allowed uses are limited, one can hope that the legalization of this practice will lead to more intelligent water use and management by giving residents an opportunity to manage their own small-scale water systems. In order to aid those who would like to lawfully pursue precipitation collection, Colorado State University has released a "Rainwater Collection in Colorado" fact sheet which details allowable uses, restrictions, and frequently asked questions. This fact sheet is available here: http://extension.colostate.edu/docs/pubs/natres/06707.pdf. The Colorado Division of Water Resources has also released an Information Table and other information as required by the new law. That information is available here: http://water.state.co.us/SURFACEWATER/RAINWATERCOLLECTION/Pages/default.aspx.

With House Bill 16-1005's passage and official enactment, Colorado now joins the States of Arizona, Oklahoma, and Utah in allowing but regulating precipitation harvesting and becomes the last state to lift a ban on the practice. Many view this new law as a step forward for conservation and efficient use of Colorado's water resources. Others have expressed concern over the long-term effects upon valuable senior water rights. Time, however, will tell if this newly allowed practice will have any discernable effect upon these rights throughout the state or whether it is, instead, a wise conservation measure. Regardless, allowing certain residences to collect precipitation in rain barrels certainly will not solve Colorado's predicated water supply shortage. But it would seem that every drop counts and increased awareness and appreciation of conservation and efficient water use is vitally important for all who reside in Colorado and have a stake in its future.
(Chris Stork, Paul Noto)

California Supreme Court Rejects Federal Preemption Challenges—Upholds State Law Restrictions Against Suction Dredge Mining In Waters on Federal Land

The California Supreme Court recently ruled in *People v. Rinehart* that California state laws restricting the practice of suction dredge mining are not preempted by federal mining laws, and that states can regulate mining practices for environmental protection purposes, including for the protection of fish populations and water quality. [*People v. Rinehart*, ___ Cal.5th___, Case No. S222620 (Cal. Aug. 22, 2016).]

Suction dredging is a mining technique that removes material from waterways by means of a high-powered suction hose that vacuums up loose material from the streambed. Gold and other heavier materials are separated by passage through a floating sluice box, and the excess water, sand, and gravel is returned to the waterway.

Under the California Fish & Game Code:

> …[t]he use of vacuum or suction dredge equipment by a person in a river, stream, or lake of this state is prohibited, except as authorized under a permit issued to that person by the [Department of Fish and Wildlife] in compliance with the regulations adopted pursuant to § 5653.9. (Fish & G. Code, § 5653, subd (a).)

The code also states:

> …[i]t is unlawful to possess a vacuum or suction dredge in areas, or in or within 100 yards of waters, that are closed to the use of vacuum or suction dredges. (Fish & G. Code, § 5653, subd. (e).)

In 2009, in response to concerns regarding the impact of suction dredging on water quality and certain fish habitats, the Legislature imposed a temporary moratorium on the issuance of dredging permits pending environmental review by the Department of Fish and Wildlife (DFW). (Stats. 2009, ch. 62, §§ 1, 2.) In 2011, the California Legislature placed a June 30, 2016 sunset date on the moratorium in the event that environmental review and the development of new regulations were not completed by that date. (Stats. 2011, ch. 133, § 6.) In 2012, the DFW finished its environmental review but concluded that it lacked regulatory authority to address fully the environmental impacts of suction dredging. (*See,* Stats. 2015, ch. 680, § 1, subd. (c).) Consequently, in 2015, the California Legislature removed the 2016 sunset provision (Stats. 2012, ch. 39, § 7) and enacted legislation clarifying the scope of the DFW's and other state agencies' regulatory authority. (Stats. 2015, ch. 680, §§ 2, 4).

The moratorium provisions, which are primarily found in Fish and Game Code, § 5653.1, remain in place.

Federal law allows United States citizens to go onto unappropriated, unreserved public land to prospect for and develop certain minerals. The discovery of a mineral deposit, followed by compliance with the procedural requirements for formally locating the deposit, gives an individual the right of exclusive possession of the land for mining purposes. (*See, U.S. v. Locke* (1985) 471 U.S. 84, 86.). Rinehart was mining on federal land within the Plumas National Forest, within his unpatented placer mining claim when, in 2012, he was charged by criminal complaint with both possession and unpermitted use of a suction dredge in violation of Fish & Game Code, § 5653.

Reinhart demurred to the complaint, contending that contended § 5653 and the moratorium provisions of § 5653.1 effectively banned suction dredging in California and prevented the only commercially reasonable method of extracting gold from his and others' federal mining claims. Rinehart further argued that California's restrictions on suction dredging are preempted by federal mining laws because the restrictions placed an obstacle to Congress' purposes and objectives to grant mining prospectors the right to mine on federal land free from material interference.

The trial court overruled the demurrer, rejected the preemption defense, convicted Rinehart on both counts and sentenced him to three years' probation.

The Third District Court of Appeal agreed with Rinehart that federal mining law should be interpreted as preempting any state law that unduly hampers mining on federal land. The Court of Appeal further concluded that Rinehart had made a colorable argument that California's restrictions comprised a *de facto* ban on suction dredging and rendered mining on his unpatented claim commercially impracticable. The Court of Appeal therefore reversed and remanded the proceedings to the trial court to resolve disputed factual issues for which the trial court had refused to admit evidence.

The California Supreme Court reversed the decision of the Court of Appeal and ruled that neither the Federal Mining Act of 1872 nor the Federal Surface Resources and Multiple Use Act preempted California's suction dredging restrictions or moratorium. The Court explained that the United States Constitution vests Congress with the power to make all needful rules and regulations respecting the territory or other property belonging to the United States; and that, unlike the Commerce Clause, the Property Clause has no prohibitive effect when dormant. "Instead," the Court stated, "to displace the application of state law on federal land, Congress must act affirmatively." (Citing *Kleppe v. New Mexico* (1976) 426 U.S. 529, 543.) The Court declared that a state:

> …'is free to enforce its criminal and civil laws' on federal land, unless those laws conflict with

> federal legislation or regulation; in the event of a conflict, of course, 'state laws must recede.'... (Quoting *Kleppe*, at p. 543.)

The Supreme Court found that neither of the federal mining laws cited by Rinehart contained an express preemption provision, occupied a field in a manner that forecloses state regulation, nor imposed obligations making it impossible to comply simultaneously with state and federal law. The Court further found that California's regulation of suction dredge mining did not impair the accomplishment and execution of Congress' full objectives and was not, therefore, federally preempted.

The Court also found that the Mining Act of 1872 endorses prospectors' obligations to abide by past and present laws and grants a right of possession "so long as they comply with the laws of the United States, and with State, territorial, and local regulations." (Citing 30 U.S.C. § 26.) One notable exception applies for laws that are "in conflict with the laws of the United States governing [claimants'] possessory title," with which compliance is not required. It was the opinion of the Court that the focus of the Mining Act of 1872 was establishing interests in real property and whereas the law *does* intend to displace state law with respect to laws governing title, "in other areas, state and local law are granted free reign."

The Court concluded by declaring that "Federal support for mining is not limitless."

Rinehart asserted that Congress intended to grant individuals a federal right to mine in that all valuable minerals and deposits in federal land "shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase." (Citing 30 U.S.C. § 22.) That intent, Rinehart argued, requires preemption of any state law that unduly infringes upon that federal mining right.

The Supreme Court disagreed. Looking to the law's legislative history, as well as relevant prior mining statutes including the Federal Acts of 1866 and 1870, the Court observed that:

> …the way in which Congress went about establishing incentives to invest time and capital in a potentially risky enterprise [was] instructive [in that the federal laws] did not insulate against parochial regulation.

The Court found this legislative history supportive of its finding that Congress' primary concern was removing federal obstacles to mining, and particularly protecting possessory and ownership interests in real property against the threat of a property sale that might otherwise deter prospectors from pursuing mineral development, but that the federal mining laws did not guarantee immunity from local regulation.

The Court also compared the suction dredging moratorium to prior bans on hydraulic mining, observing that as early as 1884, the net result of multiple lawsuits enjoining hydraulic mining under state nuisance law created a *de facto* ban on that practice for nearly a decade, during which Congress did not move to restore the affected mining companies' rights and instead approved and helped enforce the ban.

The Court further held that California's restrictions on suction dredging were not preempted by § 612 of Title 30 of the United States Code (part of the Surface Resources and Multiple Use Act of 1955). Finding that Congress sought among other things to eliminate the practice of mining claims being staked out as a pretext to support activities wholly unrelated or, not "reasonably incident" to prospecting and mining, the Court determined that California's restrictions on suction dredging did not implicate or interfere with those Congressional purposes and objectives.

While grounded, in part, on statutory and case law that is well over 100 years old, *People v. Rinehart* raises new and significant questions regarding the extent to which states may regulate mining practices on federal land. Only time and the implementation of further regulations will tell. If the historical pattern of California's regulation of mining, water, and fish repeats itself, those outer limits will likely again be tested in court. The Court's decision is accessible online at: https://scholar.google.com/scholar_case?case=7261338396912076081&q=People+v.+Rinehart&hl=en&as_sdt=2006&as_vis=1

(Derek Hoffman, Michael Duane Davis)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

Editor's Note: Complaints and indictments discussed below are merely allegations unless or until they are proven in a court of law of competent jurisdiction. All accused are presumed innocent until convicted or judged liable. Most settlements are subject to a public comment period.

Civil Enforcement Actions and Settlements—Water Quality

•On August 17, 2016, EPA announced a settlement of federal Clean Water Act (CWA) violations by the City of Columbia, Missouri, involving pollutant discharges from the Columbia Landfill and Yard Waste Composting Facility. As part of the settlement, the city agreed to pay a civil penalty of $54,396 and perform a Supplemental Environmental Project (SEP) project involving the construction of a wetland area at a cost of no less than $475,000. An EPA inspection in April 2014 found the landfill and composting facility discharged pollutants into a nearby creek that were in excess of its NPDES permit limits.

•On August 18 2016, EPA announced an order directing the Hopi Tribe (Tribe) under which the Tribe has agreed to reduce levels of arsenic in drinking water at the Hopi Cultural Center, a public drinking water system that serves approximately 25 people. Under the terms of the EPA's order, the Hopi Tribe is required to develop a schedule to comply with the federal Safe Drinking Water Act's arsenic standard within two months. Within six months, the Tribe must install treatment technology to begin reducing arsenic in the Center's water. Prior to complying with the arsenic standard, the Tribe will provide bottled water to guests. The Tribe must also conduct more robust sampling for arsenic, report all arsenic results to the EPA and comply with public notification requirements.

•On August 24, 2016, EPA announced a settlement with Central Missouri AGRIService, LLC, concerning alleged CWA violations associated with construction of a railroad loop track and grain loading facility in Marshall, Missouri. As part of the settlement, Central Missouri AGRIService has agreed to pay a civil penalty of $166,914 to the United States. The case involved discharges of fill material into wetlands and streams without required authorization under the CWA. EPA inspectors identified several CWA violations, including failure to timely develop a Storm Water Pollution Prevention Plan (SWPPP), failure to develop an adequate SWPPP, failure to update the SWPPP, failure to implement the SWPPP, failure to install or implement adequate stormwater control measures, failure to perform and document stormwater self-inspections, and failure to notify on-site workers of the SWPPP. The violations resulted in sediment being discharged to unnamed tributaries to North Fork Finney Creek.

•On August 31, 2016, EPA announced a settlement with George Mason University under which the University will pay a $20,964 penalty to settle alleged violations related to the discharge of fuel oil from a storage facility in Fairfax, Virginia. into a waterway that flows into the Potomac River. The university discharged approximately 4,100 gallons of fuel oil form a facility located about one-half mile from an unnamed tributary of Rabbit Run, which flows through several tributaries and then into the Potomac River. Following discovery of the spill, the university responded immediately and stopped additional downstream flow of the oil. The university also quickly completed work on recovering oil and removing the contaminated soils.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•On August 16, 2016, EPA announced a settlement with OMNOVA Solutions, Inc. under which the company will pay a $7,090 penalty to resolve alleged violations involving the transportation of used oil that contained polychlorinated biphenyls (PCBs) from the company's chemical manufacturing facility

located in Jeanette, Pennsylvania. EPA alleged that the company violated PCB regulations under the federal Toxic Substances Control Act (TSCA) when it transported PCB waste to a disposal facility without following proper procedures or completing required documentation. OMNOVA contracted with Veolia, Inc. to pick up and transport its used oil in August 2015. The oil was contaminated with PCBs.

•On August 18, 2016, EPA announced a settlement with an oil and gas equipment company for hazardous waste violations at five Texas facilities. Pumpco Energy Services Inc. will pay a penalty of $237,980 for violating the federal Resource Conservation and Recovery Act (RCRA) by improperly generating, transporting and disposing of hazardous waste. EPA inspectors found Pumpco generated or offered for transport and treatment enough hazardous waste to qualify as a small-quantity—or sometimes large-quantity—generator. While illegally operating as a small- or large-quantity generator, Pumpco allegedly violated RCRA by failing to obtain an EPA identification number, notify EPA or the state of Texas of its hazardous waste activities, keep required records, and improperly storing, handling, or treating diesel fuel or mixed waste diesel fuel. The alleged violations occurred at facilities in Cleburne, Jacksboro, Valley View, Barnhart, and Pleasanton, Texas.

•On September 9, 2016, EPA, DOJ, the U.S. Department of Interior and the state of Ohio announced a settlement with Rutgers Organics Corporation (Rutgers) under which the company agreed to complete the cleanup of the Nease Chemical Superfund Site (site) near Salem, Ohio, estimated to cost $18.75 million. The agreement is memorialized in a consent decree lodged in federal court today in Youngstown, Ohio. Under the consent decree, Rutgers also agrees to restore injured natural resources at the site and nearby areas, at a cost of approximately $500,000, and to reimburse federal and state agencies their past response and assessment costs of about $1 million.

•On September 13, 2016, EPA announced a settlement with Fairfax County, Virginia. Under which the County has agreed to pay a $64,450 penalty for underground storage tank violations at 15 county locations where facilities stored gasoline, diesel fuel or motor oil. The settlement addresses compliance with environmental regulations that help protect communities and the environment from exposure to oil or potentially harmful chemicals. At the facilities, the county did not test the equipment that was being used to detect leaks from pressurized underground lines that were connected to the storage tanks. In addition, at two facilities, the county failed to annually test its tank lines for tightness. None of the violations included any type of release or leak from the tanks or pipes. The county has corrected all violations.

Indictments convictions and sentencing

•A federal jury in Greenville, North Carolina, convicted Oceanic Illsabe Limited, Oceanfleet Shipping Limited and two of their employees of violating the Act to Prevent Pollution from Ships (APPS), obstruction of justice, false statements, witness tampering and conspiracy. Oceanic Illsabe Limited is the owner of the M/V Ocean Hope, a large cargo vessel that was responsible for dumping tons of oily waste into the Pacific Ocean last year. Oceanfleet Shipping Limited was the managing operator of the vessel. Both companies operate out of Greece. Also convicted at trial were two senior engineering officers who worked aboard the vessel, Rustico Ignacio and Cassius Samson. The jury convicted on each of the nine counts in the indictment. The convictions were related to June 2015 discharges of up to ten metric tons of sludge into the ocean. The vessel was also regularly pumping contaminated water directly overboard. None of these discharges were disclosed as required by law.
(Andre Monette)

JUDICIAL DEVELOPMENTS

ELEVENTH CIRCUIT APPROVES DIFFERENT REQUIREMENTS FOR GRANDFATHERED CLEAN WATER ACT PERMITS—UPHOLDS NATIONWIDE PERMIT FOR SURFACE COAL MINING

Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers, ___F.3d___, Case No. 15-14745 (11th Cir. Aug. 12, 2016).

The U.S. Army Corps of Engineers (Corps) in 2012 approved a federal Clean Water Act (CWA) Nationwide Permit (NWP 21) for the discharge of pollutants to waters of the United States from surface coal mining allowing for the "grandfathering" of permits issued pursuant to the prior, 2007 iteration of NWP 21, as well as the issuance new permits. In its second review of the Corps' analysis supporting NWP 21, the Eleventh Circuit Court of Appeals rejected the challengers' claims the Corps failed to place limits on grandfathered permits "necessary" to find activities permitted under NWP 21 would have only "minimal cumulative adverse effect[s] on the environment."

Background

Surface coal mining involves the discharge of dredged or fill material to surface water as a result of digging to expose coal seams with the spoils being placed in streambeds or used to fill valleys, the replacement of soil, rock and coal residue (overburden) once coal has been removed from under streambeds, and by discharges to sediment ponds and via the construction and use of mining infrastructure such as roads and processing plants.

The Corps has issued and re-issued NWP 21 multiple times since 1982. The 2007 iteration of NWP 21 placed no limits on the length of streams that could be filled by covered activities. The Corps suspended NWP in six Appalachian states in 2010, due to concerns that covered activities were resulting in greater environmental impacts than had been anticipated.

In 2012 the Corps adopted NWP 21, taking a two-pronged approach. Under the first prong, permits issued pursuant to the 2007 NWP 21 could be reissued provided it would not impact more waters than previously authorized, and subject to the imposition of additional:

> …activity-specific conditions that the district engineer deems appropriate, such as compensatory mitigation.

All other permits would be issued under the second prong, subject to a 1/2-acre limit, including a 300 linear foot limit for the loss of streambed, and prohibiting valley fills.

The Corps' required analysis under the CWA concluded activities authorized under NWP 21 "would not have more than minimal cumulative adverse effects on the environment," and under the federal National Environmental Policy Act (NEPA) that NWP 21 would not significantly affect the environment so that an environmental impact statement was not required.

Black Warrior Riverkeeper and other environmental advocacy groups challenged these conclusions, specifically alleging that the Corps had found the restrictions on new permits under NWP 21 were "necessary" to support the required CWA and NEPA findings, and that therefore the lack of the same restrictions on grandfathered permits necessarily undermined those findings. In a prior round of litigation, the Corps admitted on the eve or oral argument before the Eleventh Circuit that its analysis had failed to account for the extent of fill that could result from renewal of grandfathered permits. The matter was remanded to the District Court, which ordered the Corps to revise its analysis.

The Eleventh Circuit's Decision

Black Warrior's challenge was subject to a highly deferential standard of review to determine "whether the agency's decision was based on a consideration of the relevant factors and, ultimately, whether it made a clear error of judgment." The court summarized this as follows:

> In view of the substantial deference we afford agency action, Riverkeeper faces an upstream swim. It renews its "disparate treatment" argument, contending again that the Corps' CWA and NEPA determinations are arbitrary and capricious because the Corps determined that the new ½-acre and 300 linear-foot limits imposed on permits under 21(b) are necessary to ensure minimal environmental impact, but declined to impose any of those new limitations on the grandfathered-in permits under 21(a). In other words, Riverkeeper says that the activities authorized under 21(a) cannot possibly result in minimal impact to navigable waters because they are not subject to the very limitations that the Corps itself deemed necessary to ensure minimal impact.

The Court of Appeals found the Corps concluded the restrictions on permits imposed under *both* prongs were "necessary" to support the required findings, not just the restrictions imposed on new permits. The court was not persuaded that the restrictions on new permits were the only restrictions capable of ensuring permits "would not have more than minimal cumulative adverse effects on the environment." It noted that the Corps granted Corps District Engineers wide discretion to impose an array of restrictions on grandfathered permits, up to requiring individual permits. Further, if the activity covered under the grandfathered permit is expanded beyond the previously permitted boundaries, "it cannot be authorized under NWP 21 *unless* it qualifies under" the more restrictive conditions for new permits.

Lastly, because the District Court had declined to enjoin or stay the 2012 version of NWP 21 from taking effect, on remand the Corps was able to produce a revised analysis taking into account the actual extent of activities that could be permitted under the grandfather provision, as all possible permits had been applied for and issued. Thus, the record before the court disclosed with certainty the maximum extent of effects from grandfathered permits (as well as the extent of compensatory mitigations imposed), while the analysis of the potential impacts from new permits under NWP 21 necessarily relied on estimates of how many permits would be issued. Thus, requiring across-the-board restrictions on new permits while preserving discretion to condition grandfathered permits was not arbitrary and capricious: "The Corps reasonably concluded that" the known subset of grandfathered permits "presents less of a risk of harm to the aquatic environment" than the unknown "more unpredictable" set of new permits, justifying holding new permits "to a different, higher, standard."

In the end, the court found:

> The long and short of it is, there was nothing arbitrary and capricious about the Corps' decision to treat old and new activities differently under the two provisions of this Nationwide Permit, or in its finding that the activities authorized under both provisions would result in minimal individual and cumulative impacts to the aquatic environment. Accordingly, we affirm the judgment of the district court granting final summary judgment to the Corps.

Conclusion and Implications

The Eleventh Circuit's reasoning could support a different standard for a known, limited subset of grandfathered permits in many different contexts. Where the maximum extent of potential impacts from grandfathered activities can be known with certainty, more limited restrictions, conditions and mitigation than those imposed on the unknown-universe of new activities may be supportable. The court's decision is accessible online at: https://scholar.google.com/scholar_case?case=5130997653543619178&q=Black+Warrior+Riverkeeper,+Inc.+v.+U.S.+Army+Corps+of+Engineers&hl=en&as_sdt=2006&as_vis=1
(Deborah Quick)

D.C. CIRCUIT FINDS IT CANNOT 'RESCUE' THE FEDERAL GOVERNMENT FROM OVERPAYMENT OF CERCLA REMEDIATION COSTS THAT WERE MADE VIA CONTRACTUAL AGREEMENT

Lockheed Martin Corporation v. U.S., ___F.3d___, Case No. 14-5302 (D.C. Cir. Aug. 19, 2016).

The United States pursued an appeal of its federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) liability for a portion of the cost of cleaning up hazardous substances at three California facilities owned by Lockheed Martin Corporation (Lockheed). Lockheed produced rockets at these facilities, the process of which contaminated these sites. Acknowledging its share of CERCLA liability, the government agreed to reimburse Lockheed's share of CERCLA liability via overhead charges on unrelated contracts. At issue was whether the government had a valid claim that the particular mechanism by which it paid its share of the costs of environmental remediation under CERCLA would result in impermissibly requiring the government to make double payment. The D.C. Circuit Court of Appeals concluded that the U.S. District Court's CERCLA judgment did not create any double recovery. The court rejected the government's allegations that the crediting mechanism did not help, but instead harmed it further, and further noted that the billing agreement was of the parties' own choosing. The Court of Appeals affirmed the lower court's judgment.

Background

Lockheed Propulsion Company, a corporate successor to Lockheed, operated the three sites at issue in this case—Redlands, Potrero Canyon, and LaBorde Canyon—between 1954 and 1975. The generation of hazardous waste was one of the consequences of Lockheed's rocket production work at these California sites was

In 1997, Lockheed Martin began to clean up the sites. That same year, Lockheed entered into an agreement with the Department of Justice (DOJ) to toll the applicable statute of limitations for CERCLA claims. (42 U.S.C. § 9613(g)(2).) The tolling agreement was repeatedly renewed over the course of the next several years.

As of the start of the trial in this case, in February 2014, Lockheed had incurred environmental response costs for the three California sites totaling approximately $287 million, and estimated that it would incur another $124 million in the future. As the parties agreed in the DOSA, Lockheed charged some of these costs to its government customers as those costs were incurred.

The federal government pays its contractors for technology, products, and services in accordance with various statutes and regulations, including the Federal Acquisition Regulations (FAR), 48 C.F.R. § 1.000 *et seq*. There are two basic types of government contracts: fixed-price and cost-reimbursement. Under a firm fixed price contract, the government pays an agreed-upon price without regard to the costs incurred by the contractor, which assumes the risk and responsibility for its costs. Under a cost reimbursement contract, the government pays a contractor its "direct costs" and "indirect costs," plus a profit.

Direct costs are those that relate to a specific contract, such as the costs of material and labor. (48 C.F.R. § 52.216-7(b).) Indirect costs are those not associated with a specific contract, such as overhead and general administrative expenses. To be included in the price of goods or services, indirect costs must be "allowable." That means that the costs, among other things, must be "allocable," "reasonable," and not otherwise disallowed.

The FAR includes a "Credits Clause." 48 C.F.R. § 31.201-5, designed to prevent double recovery. This provision states:

> …[t]he applicable portion of any income, rebate, allowance, or other credit relating to any allowable cost and received by or accruing to the contractor shall be credited to the government either as a cost reduction or by cash refund.

In September 2000, Lockheed and the government resolved their dispute over environmental costs by entering into a Discontinued Operations Settlement Agreement (DOSA). The Settlement Agreement provided that Lockheed could treat as "allowable,"

and thus include as indirect costs in contracts, the majority of its environmental-remediation costs at these three former sites.

In the DOSA, the government agreed to permit Lockheed to place all of its "allowable" discontinued-operations costs, including those incurred in environmental cleanup, into the Discontinued Operations Pool (DiscOps Pool). Lockheed then allocated those sums across all of its business areas, which in turn can include whatever portion they were allocated, on an amortized basis over a five-year period, as part of the indirect costs in their contracts for goods and services.

The District Court's Decision

The lower court held that, under the FAR and the DOSA, when Lockheed recovered from the government under CERCLA, there is:

> …a commensurate reduction in the Settled Discontinued Operations Costs pool that Lockheed [can] charge as indirect costs in its government contracts.

In this manner, "Lockheed will not realize a double recovery," because "[f]rom a monetary standpoint, Lockheed w[ill] be back where it started." The lower court also concluded that it would be unfair to force Lockheed:

> …to recover all of its response costs as indirect costs on its government contracts….proceeding in that way makes Lockheed less competitive in future contests for government contracts, because its need to recover response costs through indirect cost payments would require inflated and possibly non-competitive bids.

The D.C. Circuit's Decision

On appeal, the government's theories boiled down to an objection against double recovery:

> If the government were to pay what is at most a 29 percent CERCLA share of the approximately $124 million in estimated future costs, its total CERCLA exposure for the future cost portion at the end of the cleanup would be approximately $36 million.

Stated another way, the government alleged that it:

> …has already paid 55 percent of the total past and future response costs that Lockheed is expected to incur…absent a CERCLA judgment, it will eventually pay 83 percent of total response costs at the site—well above its court-allocated equitable share of only 19 to 29 percent of future costs incurred in cleanup the sites.

Lockheed countered that double recovery would not be the result as the Billing Agreement's crediting mechanism would require any CERCLA recover from the government to be credited back to Lockheed's customers, more than offsetting the government's payments.

While the court agreed that at first glance it would appear as if the government had paid the vast majority of past cleanup costs, and that Lockheed would continue billing of its own remediation costs to its current and future contracts, mostly federal contracts, until it was reimbursed, it continued:

> But here, the [lower court's] CERCLA judgment did not create a double recovery. The reason the government will end up paying far more that its own 19 to 29 percent share of future costs is that it voluntarily agreed to let Lockheed pass through its share, too. It was the government's choice to accept the Billing Agreement, authorizing Lockheed to assign to the DiscOps Pool charges as indirect contract costs certain cleanup costs related to facilities at which Lockheed had discontinued operations.

The court went on to state:

> Although Lockheed was largely responsible for the cleanup costs, the government has indirectly paid the vast majority of past cleanup costs, and Lockheed will continue to bill its own remediation costs to its current and future contracts — principally federal government contracts — until Lockheed is fully reimbursed…

Conclusion and Implications

In the end, the "situation" the government found itself in seems to have been of it's own making—a

system whereby Lockheed was allowed to charge costs incurred in cleaning up the sites to new federal contracts. The adage, a "contract is a contract" seemed to have impressed the Court of Appeals who saw itself as powerless to have change the outcome due to the the Billing Agreement. The court acknowledged that it was in no position to "save the government from the natural and probable consequences of its own conduct." The Court of Appeals' decision is accessible online at: https://www.cadc.uscourts.gov/internet/opinions.nsf/0/F7776DB3E279BF5585258014004E9664/$file/14-5302-1631150.pdf
(Thierry Montoya)

DISTRICT COURT HOLDS A UNILATERAL ADMINISTRATIVE ORDER PURSUANT TO CERCLA SECTION 106 IS NOT A 'CIVIL ACTION' FOR THE PURPOSES OF A SECTION 113(F) CLAIM FOR CONTRIBUTION

Diamond X Ranch LLC, v. Atlantic Richfield Company, ___F.Supp.3d___,
Case No. 3:13-cv-00570-MMD-WGC (D. Nev. Aug. 26, 2016).

Diamond X (plaintiff) owns more than 1700 acres of property in Douglas County, Nevada, and Alpine County, California. Plaintiff alleged that its property has been contaminated by acid mine drainage flowing from the Leviathan Mine, (Mine), in Alpine County. The U.S. Environmental Protection Agency (EPA) listed the Mine on the National Priorities List (NPL) in May 2000, and identified Atlantic Richfield (ARCO) as a potentially responsible party (PRP). EPA issued a Unilateral Administrative Order (UAO) against ARCO in November 2000, and a second in June of 2008. The UAOs identified ARCO as a PRP and required ARCO to initiate a Remedial Investigation and Feasibility Study (RI/FS). Plaintiff and ARCO filed CERCLA § 107(a) and § 113(f)(1) claims against each other—as against ARCO for its release of hazardous substances from the Mine; and for Diamond X's operation of an irrigation system on the Property, thereby determining "if, when, where and how much water containing hazardous substances was placed and deposited on the Diamond X Property." Both parties filed motions to dismiss—plaintiff moving to dismiss ARCO's § 107(a) and § 113(f)(1) claims alleging that ARCO was barred from asserting a § 107(a) claim because of plaintiff's own § 107(a) claim, and because ARCO's response costs were incurred pursuant to EPA's UAOs - which amounted to "civil actions." The court denied plaintiff's motion as: i) ARCO had incurred expenses that were outside the scope of contribution and the scope of plaintiff's § 107(a) claim; ii) the UAOs were not "civil actions" under § 106(a).

Background

Plaintiff filed a ten-count complaint against ARCO in 2013, complaining that its subsidiary's use of the Leviathan Mine from 1953 until 1962 resulted in discharges of acidic mine drainage that migrated onto plaintiff's property. Diamond X alleged causes of action under the federal Clean Water Act (CWA) and under CERCLA for money spent remediating the property.

Plaintiff alleged a § 107(a) claim to recover clean-up costs on the property in response to hazardous waste releases from the Mine. Plaintiff alleged that ARCO's remedy was limited to contribution under § 113(f)(1) in primary reliance on *Whittaker Corp. v. U.S.*, 825 F.3d 1002 ((9th Cir. 2016). In *Whittaker*, the Court held that § 107(a) cost recovery and § 113(f)(1) are distinct remedies available to parties under distinct procedural circumstances. The Court in *Whittaker* explained:

> [T]he remedies available in §§107(a) and 113(f) complement each other by providing causes of action to 'persons in different procedural circumstances.' Section 113(f)(1) authorizes a contribution action to PRPs with common liability stemming from an action instituted under...section 107(a). And section 107(a) permits cost recovery (as distinct from contribution) by a private party that has itself incurred cleanup costs. Hence, a PRP that pays money to satisfy a settlement agreement or a court judgment may pursue section 113(f) contribution.

> But by reimbursing response costs paid by other parties, the PRP has not incurred its own costs of response and therefore cannot recover under § 107(a). As a result, though eligible to seek contribution under section 113(f)(1), the PRP cannot simultaneously seek to recover the same expenses under §107(a).

The Cost Recovery Claims

Whittaker brought two § 107(a) cost recovery claims alleging owner and arranger liability against the defendant, the federal government, for response costs incurred to clean up contamination in the soil and groundwater at a former military munitions manufacturing site (Site). According to Whittaker's first amended complaint (FAC), Whittaker voluntarily performed and incurred costs for interim remedial efforts at the Site under the oversight of the California Department of Toxic Substances Control (DTSC). Whittaker alleged that it entered into a voluntary consent order (Consent Order) with DTSC in 1994 related to such efforts. In 2002, DTSC issued an Imminent and Substantial Endangerment Determination and Order and Remedial Action Order (Endangerment Order) for Whittaker to remediate the site, which provided, in part, that Whittaker remain subject to the Consent Order. Whittaker alleged that neither Order was entered into subject to CERCLA or a court order.

In 2000, Whittaker itself was subject to § 107(a) cost recovery claims brought by a group of water agencies and companies in the area of the Site (collectively: Water Purveyors) for reimbursement of costs expended by the Water Purveyors to respond to groundwater contamination in certain off-Site production wells (Water Purveyor Action). This action was eventually settled in 2007 (Water Purveyor Settlement). Whittaker alleged that its subsequent FAC against the federal government sought response costs outside the scope of the Water Purveyor Action.

The Motion to Dismiss

The federal government brought a motion to dismiss Whittaker's FAC, arguing that Whittaker was limited to contribution actions as a PRP with common liability stemming from the § 107(a) claims in the Water Purveyor Action. Whittaker countered that it still possessed § 107(a) claims because no § 113(f) claim was available for response costs outside the scope of the Water Purveyor Action.

The District Court's Decision

The District Court disagreed with Whittaker, and held that nothing in the text of § 113(f)(1) limits recovery under a contribution action to the scope of the previous cost recovery action against the plaintiff:

> Here, [Whittaker] meets the procedural circumstances of § 113(f)(1), and its remedy for the costs it seeks 'during or following' the [Water Purveyor Action] is a contribution claim under § 113(f)(1).

Accordingly, the District Court held that Whittaker's § 107(a) cost recovery claims could not survive a Motion to Dismiss and dismissed its FAC, which did not seek relief under § 113(f)(1), with prejudice.

The District Court noted that on appeal, the Ninth Circuit held that Whittaker was not limited to a contribution action and reversed. The Ninth Circuit held that Whittaker was now seeking to recover "a different set of expense[s] for which Whittaker was not found liable" under its settlement agreement in the Water Purveyor Action. The Ninth Circuit rejected the federal government's argument that a party who has been sued in a § 107 cost recovery action for expenses related to pollution at a site should be limited to a contribution action for all of their expenses at the site.

> Thus, the court held that Whittaker was not required to being a claim for contribution under section 113(f)(1) against the government because it is seeking section 107(a) claim 'to recover expenses that are separate from those for which Whittaker's liability is established or pending.'

The Counterclaim

Similarly, ARCO alleged that its counterclaim sought to recover for costs that were separate from those plaintiff sought to recover under its § 107(a) claim. Accepting ARCO's claim as true, as it must under a motion for dismiss, the court held that ARCO incurred expenses that are outside the scope of contribution and the scope of plaintiff's § 107(a) claim for which liability had not been set.

Regarding the UAOs, the court disagreed with plaintiff's interpretation of *U.S. v. Atlantic Research Corporation (Atlantic II)*, 551 U.S. 128 (2007) to argue that UAOs are "enforcement actions." Plaintiff cited to the Supreme Court's holding that PRPs who "have been subject to § 106 or 107 enforcement actions are still required to use § 113, thereby ensuring its continued vitality." (*Atlantic II* at 134.) Although this quote would appear to include UAOs under "civil actions," this interpretation, the court found, ignores the procedural posture of this case. Atlantic Research "commenced suit [against the United States] before, rather than during or following, a CERCLA enforcement action," thus it could not bring a § 113(f) action as it had to rely on a § 107 claim to recover its costs.

Plaintiff relied on *PCS Nitrogen, Inc. v. Ross Development Corporation*, 104 F.Supp.3d 729 (D. S.C. 2015), which presses the minority opinion that a UAO is equivalent to a "civil action." The majority of courts hold that UAOs under § 106(a) are not a "civil action" for the purposes of § 113(f)(1). (*See, Emhart Industries, Inc. v. New Eng. Container Co., Inc.*, 478 F.Supp.2d 199, 203 (2007).)

Conclusion and Implications

For civil actions in the Ninth Circuit, a final judgment ends the litigation on the merits leaving nothing more for the court to do but to enter judgment. (*See, Williamson v. UNUM Life Ins. Co. of Am.*, 160 F.3d 1247, 1250 (9th Cir. 1998).) Here, the District Court in Nevada found that UAOs did not express such finality as, at a minimum, the phased RI/FS study, requiring ongoing evaluations by EPA and ARCO to determine the final remediation plan—lacked the same definitive scope or finality as a judgment in a "civil action." The court's decision is accessible online at: https://scholar.google.com/scholar_case?case=8613122918350562487&q=Diamond+X+Ranch+LLC,+v.+Atlantic+Richfield+Company&hl=en&as_sdt=2006&as_vis=1
(Thierry Montoya)

DISTRICT COURT DENIES GOVERNMENT'S REQUEST FOR DISMISSAL BASED ON CERCLA CONSENT DECREE, BUT GRANTS MOTION LIMITING REIMBURSEMENT

U.S. v. NCR Corp. and Appleton Papers Inc, ___F.Supp.3d___, Case No. 10-C-910 (E.D. Wis. Aug. 19, 2016).

The U.S. District Court for the Eastern District of Wisconsin denied the United States' motion which sought to have the court declare, as a matter of law, that defendants NCR, Georgia-Pacific and P.H. Glatfelter would be responsible for any damages Appvion successfully won against the United States but granted the United States' motion to limit the ability of Appvion to be reimbursed under the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) § 107 to the time periods discussed in Appvion's successful appeal to the Seventh Circuit Court of Appeals.

Background

The Comprehensive Environmental Response, Compensation, and Liability Act established Superfund, a program to fund the cleanup of hazardous materials at contaminated sites. As part of the program, § 107(a) (42 U.S.C. § 9607(a)) defines what parties can be liable for the cleanup and outlines their liability. Under § 113 a liable party may seek contribution from any other person who is liable or potentially liable under § 107(a) and creates a settlement bar, prohibiting a contribution claim against:

> …[a] person who has resolved its liability to the Untied States or a State in an administrative or judicially approved settlement.

This case involves the 70-year history of pollution at the Lower Fox River Site resulting from paper manufacturing and was allegedly exacerbated by the action of the United States Government. Appvion brought a claim under CERCLA § 107 against the

United States, seeking recovery of costs suffered by Appvion due to dredging and other activities by the U.S. Army Corps of Engineers (Corps) which failed and increased the damage resulting from the pollution.

In response to this new complaint, the United States asserted counter-claims seeking contribution claims against three potentially responsible parties (PRPs), NCR, Georgia-Pacific, and Glatfelter, asserting that, to the extent the United States is found liable to Appvion, the PRPs were responsible for contribution under § 113. The United States contended that the 2001 consent decree between the United States and Appvion, limited the government's liability to $4.5 and provided the government with a contribution bar under § 113.

NCR and Glatfeller opposed the motion and argued that the court's observation about the fairness of the decree in no way serves as a conclusive ruling as to the extent of the liability of the United States. NCR also argues that granting the government's motion would essentially create a *per se* rule that any PRPs who settle would be granted immunity for § 107 claims when the contribution bar which the government relies on for its argument, by its own language only applies to claims brought under § 113.

The District Court's Decision

Capping Liability

As to the government's attempt to cap its liability, the District Court denied the motion, finding that the previous determination by the court regarding the fairness of the consent decree were not intended to be a final ruling on the government's liability. The court noted that the settlement, as well as anything that the government had already paid, would certainly be relevant when later determining the government's liability under § 113, noting that:

> …[a] District Court applying tradition rules of equity would undoubtedly consider any prior settlement as part of the liability calculus.

The government argued that not granting the motion would essentially be an end run around the § 113(f)(2) settlement bar. The court rejected this idea, relying on the Supreme Court's rationale in *Atlantic Research* that:

> …permitting PRPs to seek recover under §107(a) will not eviscerate the settlement bar set forth in § 113 (f)(2). The provision prohibits § 113(f) contribution claims against '[a] person who has resolved its liability to the United States or a state in an administrative or judicially approved settlement.' The settlement bar does not by its terms protect against cost-recovery liability under § 107(a). *U.S. v. Atl. Research Corp.*, 551 U.S. 128, 140 (2007) (quoting 42 U.S.C. § 9613(f)(2)).

Scope of the Claim

The government's second motion seeks to dismiss aspects of Appvion's § 107(a) counter claim that, it argues, exceeds the scope of the claim, which a previous ruling of the Seventh Circuit allowed. The District Court previously had denied Appvion's claim, however, Appvion appealed that decision to the Seventh Circuit. Appvion's appeal focused on its ability to bring a § 107 claim to recover costs required to comply with a unilateral administrative order (UAO) from 2007 and the Seventh Circuit noted that the central issue of the appeal was payments "paid under the [UAO]." Appvion argued that nothing in the Seventh Circuit's decision limited them to this one aspect of the claim and the reasoning applies to all aspects of its claim. However, the District Court found that the costs required to comply with the UAO were different enough from the other aspects of Appvion's § 107 claim that, if they intended on continuing the other aspects of the claim, they should have appealed them directly and briefed the issue. The way it stands now, they did not attempt to appeal those portions and, therefore, the District Court found that nothing in the Seventh Circuit decision overturned the court's previous dismissal of Appvion's § 107 claim except as it relates to costs complying with the UAO.

Conclusion and Implications

The District Court for the Eastern District of Wisconsin found that the fact that parties have entered into a consent decree to resolve previous CERCLA § 113 claims does not preclude another party from seeking recovery under § 107. The court ruled that while

these factors would certainly be taken into account following a hearing on damages, they are not enough for the court to make a ruling without an equitable hearing. This case will be closely watched as it may have significant impacts on future CERCLA settlements and the ability to enforce contribution bars in the future.
(Danielle Sakai, Matthew Onyett)

DISTRICT COURT FINDS ORDINARY CORPORATE CORRESPONDENCE SUFFICIENT TO SUPPORT TRIAL ON PRP STATUS UNDER CERCLA

Virginia Street Fidelco, LLC v. Orbis Products Corporation,
___F.Supp.3d___, Case No. 11-2057 (D. N.J. Aug. 3, 2016).

Parsing cost recovery and contribution liability under §§ 107 and 113 of the federal Comprehensive Environmental Response Compensation and Liability Act (CERCLA), the U.S. District Court denied summary judgment under § 107 and ordered former officers, directors and executives of a Newark, New Jersey, chemical plant, as well as the corporate parent, to stand trial as potential responsible parties on the basis of standard internal and external correspondence. The District Court found plaintiffs the City of Newark, which took title to the property as a result of foreclosure, and the city's successor landowner alleged sufficient involvement by the individual defendants in the decision regarding storage and disposal of hazardous substances to warrant a trial on the merits. Plaintiffs' § 113 contribution claims, however, were dismissed.

Background

For 60 years the Orbis Products Corporation (Orbis) operated a chemical plant at 55 Virginia Street, in Newark, New Jersey, producing flavor and aromachemicals. In 1983, Orbis began decommissioning the plant. Orbis is a wholly-owned subsidiary of Adron, Inc., which prior to 1985 operated under the name Norda.

Various members of two generations of the Amaducci family worked as executives for Orbis and acted as officers and directors of both Orbis and its parent corporation. The evidence before the court on summary judgment included written communications between various Amaduccis and the New Jersey Department of Environmental Protection (NJDEP) regarding environmental issues at the plant, as well as internal communications among family members regarding NJDEP correspondence. Certain family members also testified to personal knowledge regarding the receipt, storage and shipment of hazardous materials from the plant, both while it was operating and during decommissioning.

With respect to the corporate parent, there was evidence that it had been established not as an independent entity but rather to allow the continued sale of Orbis products without violating a non-competition agreement with a third party.

The plaintiffs sought cost recovery under CERCLA's § 107—allowing recovery of cleanup costs from a responsible party, and § 113—providing a right to contribution among responsible parties for cleanup costs following entry into a settlement with a governmental agency.

The District Court's Decision

The Section 107 Claims

There are four categories of potentially responsible parties (PRPs) under § 107: 1) current owners and operators of a vessel or facility where a hazardous substance is disposed of; 2) owners or operators of a facility at the time a hazardous substance was disposed of; 3) "arrangers" for disposal of a hazardous substance; and 4) transporters of hazardous substances. Plaintiffs alleged the Amaducci and Orbis' parent corporation were liable as former owner/operator and arranger PRPs.

With respect to former owner/operator liability, the court had to determine if there was a genuine issue as to material facts concerning whether each of the defendants:

> …at the time of disposal of any hazardous substance [] *owned* or *operated* any facility at which such hazardous substances were disposed of.

The individual defendants would be PRPs as former operators if they managed, director or conducted operations:

> …specifically related to pollution, that is operations having to do with the leakage or disposal of hazardous waste, or decision about compliance with environmental regulations. *U.S. v. Bestfoods*, 524 U.S. 51, 66-667 (1998).

Liability as a former operator PRP requires a "high degree of involvement" (*New Jersey Dept. of Environmental Protection v. Gloucester Environmental Management Services, Inc.*, 800 F.Supp. 1210, 1219 (D. N.J. 1992)) and "individual participat[ion] in the hazardous substance disposal activities." *U.S. v. Tarrant*, Case No. 03-3899, 2007 WL 1231788, at *2 (D.N.J. 2007).

Arranger liability requires ownership, including proof of possession, of the hazardous substance, as well as either that the defendant "maintained control over the process that resulted in the release of the hazardous waste or knowledge that such a release will occur during the process" that resulted in release. *EPEC Polymers, Inc. v. NL Industries, Inc.*, Case No. 12-3842, 2013 WL 2338711, at *7 (D. N.J. 2013).

The District Court found that the internal correspondence among the Amaduccis as well as their communications with NJDEP were sufficient to defeat their motion for summary judgment and warrant trial to establish whether each of them exercised sufficient decision-making authority over the disposal of chemicals at the plant. With regard to the parent corporation, the court found its lack of any employees, that it held assets from the plant during decommissioning but otherwise had no assets of its own, and had been capitalized solely by a $200,000 loan from Orbis, provided sufficient evidence to establish a genuine issue as to whether the corporate veil should be pierced to find Orbis' parent corporation liable.

The Section 113 Claims

The court, however, swiftly disposed of plaintiffs' § 113 contribution claims. Under § 113(f)(3)(B), PRPs may seek contributions for cleanup costs from other PRPs once the PRP seeking contribution has "settled their liability with the Government." Plaintiffs relied on a settlement the city had entered into with a third party, McClellan Street Urban Renewal, LLC, regarding cleanup of the plant site. The court, however, held contribution is only available when the PRP has entered into a settlement with a government agency, not a private party.

Conclusion and Implications

The correspondence in evidence, both internal and external, the District Court found it sufficient here to warrant trial on PRP status consisted of ordinary course communications about and to a state regulator, and highlights the fact-specific nature of PRP-liability inquiries. The opinion provides a useful roadmap, applying the statutory definitions and case law interpretations to a fairly standard fact pattern—illustrating the mundane nature of acts that can lead to CERCLA liability.
(Deborah Quick)

Eastern Water Law & Policy Reporter
Argent Communications Group
P.O. Box 506
Auburn, CA 95604-0506

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