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CONTENTS

FEATURE ARTICLE

EASTERN WATER NEWS

PENALTIES AND SANCTIONS

RECENT FEDERAL DECISIONS

Continued on next page

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FEATURE ARTICLE

EXECUTIVE ACTIONS: PRESIDENT OBAMA'S RELEASES HIS CLIMATE ACTION PLAN WHICH ADDRESSES AIR QUALITY AND WATER SUPPLY/FLOOD CONTROL IMPACTS

By Dennis Kanuk

After Congress failed to pass the American Clean Energy and Security Act (also known as the Waxman-Markey climate change bill) in 2009, the federal government has resorted to attempts to regulate carbon dioxide and other greenhouse gas emissions through executive actions. Addressing climate change in his State of the Union Address delivered in February 2013, President Obama declared, "if Congress won't act soon to protect future generations, I will."

On June 25, 2013, President Obama took the first step to deliver on that promise, announcing "The President's Climate Action Plan," a multifaceted package of federal actions designed to tackle climate change and related impacts on the environment and the economy.

The Plan, a collection of initiatives, agency instructions, and directions for rulemaking under existing laws, particularly the federal Clean Air Act (CAA), adopts many of the proposals proposed by the President's Council of Advisors on Science and Technology in March 2013. The petitionstrategies, programs, and actions that comprise the Climate Action Plan are organized around three "pillars" of the President's climate change strategy: cutting "carbon pollution" in the United States; preparing the nation for the impacts of climate change; and leading international efforts to "combat global climate change." The 21-page Climate Action Plan is available at http://www.whitehouse.gov/share/climate-action-plan

Reducing Carbon Emissions in the United States

The actions included in the first pillar of the President's Plan aim to achieve the goal set by President Obama in 2009 to reduce domestic greenhouse gas emissions to 17 percent below 2005 levels by the year 2020.

The centerpiece of this effort is a plan for the U.S. Environmental Protection Agency (EPA) to develop limits for carbon emissions produced by electric power plants that use fossil fuels. In a Memorandum issued to the Environmental Protection Agency in conjunction with the announcement of the Climate Action Plan, President Obama instructed the EPA to use its authority under § 111(b) and § 111(d) of the Clean Air Act to issue nationwide carbon emissions standards for new and existing fossil-fuel-fired power plants. "Memorandum from President Obama to Administrator of the Environmental Protection Agency, Power Sector Carbon Pollution Standards" (June 25, 2013) (Presidential Memorandum).

Other actions outlined in the Plan to reduce the nation's carbon emissions output involve directions to federal agencies, new and expanded programs and initiatives, and proposals for future regulation, which include:

- Promulgating increased fuel economy standards for heavy-duty vehicles to take effect after the current Model Year 2014 – 2018 standards.

- Curbing emissions of hydroflourocarbons by prohibiting certain uses and identifying and approving climate-friendly alternatives.

- Forming an interagency strategy to reduce methane emissions.

- Establishing new minimum efficiency standards for appliances and federal buildings, and expanding

the federal Better Buildings Challenge voluntary energy efficiency program to include multifamily housing, in addition to industrial and commercial buildings.

•Streamlining the federal approvals process for renewable energy and transmission projects, and increasing renewables on public lands and military installations.

•Developing advanced transportation technology, such as alternative fuels, batteries and fuel cells, across all modes of transportation.

•Increasing federal funding and providing loan guarantees for clean energy technologies such as advanced biofuels, emerging nuclear technologies, and clean coal.

•Preserving natural carbon sequestration capacity in the environment by protecting and restoring forests, grasslands, and wetlands through conservation and sustainable management.

Preparing Communities for the Impacts of Climate Change

The second pillar of the President's Plan focuses on addressing and preparing for the impacts of climate change in communities across the country. The Climate Action Plan includes programmatic and planning actions to improve energy-efficiency in residential, commercial, and industrial uses and invest in "climate-resilient" homes, buildings, and infrastructure capable of withstanding potential environmental changes brought on by climate change.

The Climate Action Plan involves a range of actions across many federal agencies to identify and evaluate approaches to land and water resource management, agricultural sustainability maintenance, drought management, wildfire risks, and flood preparation in response to the impacts of climate change on the environment. The Plan envisions the creation of agency task forces and partnerships to allow the federal government to help local communities respond to climate change impacts.

The Plan also includes research and data-driven initiatives to identify sectors of the economy that are vulnerable to climate change, fund research programs to develop practical and useable climate change knowledge and strategies, provide access to all federal climate-relevant data, and share planning tools and best practices to manage climate change.

Leading International Efforts to Address Global Climate Change

The third pillar of the President's Plan calls for continued leadership by the United States in international efforts to address global climate change and related impacts. The Plan calls for the United States to expand and enhance existing multilateral agreements and bilateral cooperation with major and emerging world economies, and to negotiate international agreements to achieve global free trade in environmental goods such as solar, wind, hydro, and geothermal technologies.

Despite slow progress, the Plan promises to continue the nation's commitment to the United Nations Framework Convention on Climate Change, and states that the Obama administration will push for "ambitious, inclusive, and flexible" agreements at the 2015 climate conference.

The Climate Action Plan also calls for the federal government to phase out financial support for fossil fuel consumption by ending U.S. government support for public financing of most new coal-fired power plants overseas, and in a parallel domestic action, eliminating fossil fuel tax subsidies in the federal budget for Fiscal Year 2014. The Plan also includes support for the global natural gas market and clean energy technologies through financial assistance and shared technology and best practices.

Greenhouse Gases and the Clean Air Act

Perhaps the most controversial aspect of the President's Climate Change Plan, and possibly a harbinger of things to come, is the call for the EPA to regulate carbon emissions from fossil-fuel-fired power plants. This proposal represents the latest in the cascade of Clean Air Act regulations triggered by the Supreme Court's landmark decision in *Massachusetts v. U.S. EPA*, 497 U.S. 497 (2007) finding that greenhouse gases fall within the definition of an "air pollutant" subject to the Clean Air Act. Although the EPA has issued greenhouse gas emissions rules and regulations for mobile sources and certain stationary sources under the Clean Air Act, the President's Climate Action Plan will significantly expand the EPA's author-

ity to regulate greenhouse gases under the CAA.

The central challenge facing the EPA in any attempt to regulate carbon emissions under existing law is that the Clean Air Act simply was not designed for the task, considering the sheer number of sources and the volume of emissions generated in the United States. Absent congressional action to amend the Clean Air Act or adopt new legislation aimed at greenhouse gases, the President has asked the EPA to adopt a "square peg in a round hole" approach to regulating carbon emissions under the Clean Air Act. After the EPA issued its "Endangerment Finding" that greenhouse gases threaten the public health and welfare in 2009, the agency began applying the Clean Air Act to greenhouse gas emissions.

Adapting the complex Clean Air Act to regulate greenhouse gases has been no easy task for the EPA, and the agency has faced legal challenges every step of the way. For example, the EPA issued its so-called "Tailoring Rule" in 2010, which raises the statutory thresholds in the Clean Air Act for certain air permitting requirements in order to avoid an infeasible regulatory scheme that would have required the EPA to issue more than six million new permits for stationary sources of carbon emissions. "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule," 75 Fed. Reg. 31,514 (June 3, 2010). Although the D.C. Circuit Court of Appeals has upheld the Tailoring Rule against a challenge that the EPA impermissibly restricted the scope of the Clean Air Act and a petition for rehearing *en banc* was denied, a petition for writ of *certiorari* is pending before the Supreme Court. *Coalition for Responsible Regulation v. U.S. Environmental Protection Agency*, 684 F.3d 102 (D.C. Cir 2012), *pet. for rehearing en banc denied,* 2012 WL 6621785 (D.C. Cir. Dec. 20, 2012), *pet. for cert. filed* Mar. 20, 2013 (Case No. 12-1253).

The President's Climate Action Plan charges the EPA with regulating a whole new category of sources using an untested approach under the Clean Air Act. The Presidential Memorandum to the EPA issued in concert with the Climate Action Plan contains two key instructions to the EPA. First, to issue New Source Performance Standards (NSPS) for new and modified power plants under § 211(b) of the Clean Air Act by September 20, 2013. Second, the Memorandum instructs the EPA to develop standards, regulations, or guidelines to regulate carbon emissions generated by modified, reconstructed and existing power plants. Whatever their content, it is all but certain that the rules issued by the EPA in response to the President's directive will face stiff opposition in federal court.

Regulation of Carbon Emissions from Power Plants under the Clean Air Act

The EPA first assessed potential avenues to regulate existing stationary sources of greenhouse gas emissions under the Clean Air Act in an advanced notice of proposed rulemaking issued in 2008. "Regulating Greenhouse Gas Emissions Under the Clean Air Act," 73 Fed. Reg. 44, 354 (July 30, 2008). The EPA evaluated three approaches under different sections of the CAA, each of which would involve different mechanisms and standards for controlling air pollution. The EPA found that it could establish targets for atmospheric concentrations of greenhouse gases known as National Ambient Air Quality Standards, or designate greenhouse gases as Hazardous Air Pollutants, both of which could require the use of Best Available Control Technology or Maximum Available Control Technology by emission sources. Alternatively, greenhouse gases could be regulated using the EPA's authority under §§ 111(b) and 111(d) to set standards for new sources and establish guidelines for existing sources, using a less-stringent Best Demonstrated Technology model.

By instructing the EPA to regulate carbon emissions through standards issued pursuant to §§ 111(b) and 111(d) of the Clean Air Act, the President has effectively ordered the EPA not to apply the National Ambient Air Quality Standard or Hazardous Air Pollutant provisions of the Clean Air Act to carbon emissions for fossil-fuel-fired power plants. This approach may prove unpopular with environmental organizations pushing for more immediate and drastic reductions in greenhouse gases.

Regulation of carbon emissions from fossil fuel power plants under § 111 of the Clean Air Act is a two-step process. First, the EPA must define the categories of sources of carbon emissions to be regulated (*e.g.*, natural gas combined cycle plants) and issue a NSPS for each, following a Best Demonstrated Technology standard. Second, the EPA must set forth carbon emissions guidelines for existing sources that would be subject to the NSPS. Although NSPS for carbon emissions must be issued under § 111(b) first,

the performance standards for existing sources need not be the same as those established by the NSPS for the source category.

State governments will play a key role in the design and implementation of the carbon emissions standards for existing power plants, as § 111(d) does not give the EPA direct permitting authority over existing sources. Rather, each state must submit a State Implementation Plan to demonstrate how each state will meet the guidelines set by the EPA, or be subject to an implementation plan developed by the EPA.

Performance Standards for New Power Plants

In his Presidential Memorandum to the EPA, President Obama instructed the EPA to issue a proposed NSPS for new electric utility generating units (EGUs) under § 111(b) of the Clean Air Act by September 20, 2013 and issue a final rule thereafter "in a timely fashion."

The EPA previously proposed NSPS under Clean Air Act § 111(b) for EGUs in April 2012. "Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units," 77 Fed. Reg. 22,392 (April 13, 2012). The agency's proposed rule would have set an average annual emissions rate limit for all fossil fuel EGUs except municipal, commercial, or industrial waste combustors and certain "transitional" EGUs. The EPA took the unusual step of treating all fossil fuel EGUs as one "source category" subject to the same standard, which was based on the emissions rate of a new natural gas combined cycle facility, and would have effectively required other new fossil fuel EGUs to adopt costly carbon capture and storage technology to meet the standard. Under the EPA's proposed rule, regulated EGUs could not average their emissions with other EGUs, or meet the standard through participation in an emissions trading program.

The proposed rule was met with significant opposition, with many arguing that the proposed rule would effectively prohibit the construction of any new fossil fuel EGUs except natural gas plants. After receiving more than two million comments on the proposed standard, the EPA allowed the deadline for a final rule to pass in April 2013 and indicated that it would issue a new proposal.

On July 1, 2013, the EPA delivered a new rule to the White House Office of Management and Budget for evaluation. While the new rule has not yet been released to the public, observers expect that while the revised NSPS will cover the same range of EGUs, it will include differentiate emissions rates for different source categories based on fuel type, and perhaps allow additional flexibilities not included in the prior proposal. The issuance of these NSPS will then allow the EPA to move forward with regulations governing existing power plants.

Performance Standards for Existing Power Plants

The Presidential Memorandum instructs the EPA to develop "standards, regulations, or guidelines that address carbon pollution from modified, reconstructed, and existing power plants," under § 111(d) of the Clean Air Act.

Although the President has instructed the EPA to regulate only existing fossil-fuel-fired power plants, the steps taken by the EPA to comply with his Memorandum may form a blueprint for future regulations of carbon emissions and other greenhouse gases in other sectors. Importantly, the rule to be issued by the EPA could represent the first significant and concrete step towards a national cap-and-trade program for carbon emissions.

Triggered by the issuance of a NSPS, § 111(d) requires the EPA to develop regulations for existing sources of air pollutants subject to a NSPS. Examples of the few categories of existing sources currently subject to § 111(d) performance standards include municipal solid waste landfills, sulfuric acid plants, primary aluminum reduction plants, and phosphate fertilizer manufacturing facilities. The regulation of fossil-fuel-fired power plants under this section of the Clean Air Act thus represents a significant expansion of this little-used provision.

President Obama has set an aggressive timeline for the EPA to craft standards for existing sources. The Presidential Memorandum calls for the agency to issue proposed carbon emissions standards for existing sources by June 1, 2014, and issue a final rule by June 1, 2015. If the EPA meets those goals, states would be required to submit their State Implementation Plans incorporating those standards by June 30, 2016. The mechanisms developed by states to enforce the EPA standards for existing power plants could include measures to curb consumption by end users of electricity or other limits that could affect local economies, and may bring climate change to the forefront of the next presidential campaign.

Conclusion and Implications—Setting the Stage for a Federal Carbon Emissions Cap-and-Trade Program

President Obama has instructed the EPA to work with "leaders in the power sector, labor leaders, non-governmental organizations, other experts, tribal officials, other stakeholders, [and] members of the public," to build a consensus around the proposed rule. Many expect the EPA to respond to this challenge by proposing a cap-and-trade program, based in part on the agency's experience with the Acid Rain Program and sulfur dioxide emissions trading under § IV of the Clean Air Act.

Indeed, the Presidential Memorandum instructs the EPA to "develop approaches that allow the use of market-based instruments, performance standards, and other regulatory flexibilities." In light of various carbon emissions trading programs already operational in some states and abroad, it's difficult to see the EPA adopting a "market-based instrument" other than some form of cap-and-trade program.

The President's instruction to "launch this effort through direct involvements with States" also points towards the creation of a nationwide carbon emissions trading program, as several states have already instituted such programs for carbon emissions generated by fossil-fuel-fired power plants, including the nine northeastern states participating in the Regional Greenhouse Gas Initiative, as well as California under its cap-and-trade program for power plants implemented by the California Air Resources Board in 2013. The EPA will likely look to leverage these efforts by allowing those participating states to meet the agency's standards through continued participation, or integrating those state programs into a national trading program.

If the EPA does propose a carbon emissions trading program for existing power plants, it would not be the agency's first attempt to implement a cap-and-trade program under § 111(d). In 2005, the EPA issued the Clean Air Mercury Rule (CAMR) to establish a cap-and-trade system to regulate mercury emissions from coal-fired power plants. The CAMR would have operated by setting a national emissions cap for mercury emissions, with a portion of that total cap allocated to each state based on the distribution of existing sources. The EPA would have then required each state to submit commit to a plan to stay below its budget, with an option to meet that obligation through participation in an EPA cap-and-trade program. The CAMR included stringent emissions monitoring and reporting requirements for regulated sources to ensure compliance.

The D.C. Circuit Court vacated the CAMR in February 2008, on the grounds that the EPA improperly removed coal-fired power plants from the list of toxic mercury emission sources regulated under the Hazardous Air Pollutant provisions of the Clean Air Act in order to subject those sources to a cap-and-trade scheme under § 111(d). *New Jersey v. U.S. Environmental Protection Agency*, 517 F.3d 574 (D.C. Cir. 2008). Although the issue was briefed by the parties, the court's decision did not address whether the EPA had the authority to institute a cap-and-trade program.

The key question in deciding the legality of a cap-and-trade program formed pursuant to § 111(d) of the Clean Air Act will be whether an emissions trading program meets the applicable definition of a "standard of performance." Section 111(a)(1) of the CAA requires that the EPA issue a "standard" that reflects the "degree of emission limitation achievable" through the "the best system of emission reduction," which has been "adequately demonstrated," after taking into account the cost of the system. While the EPA has argued that a cap-and-trade system meets this definition, and § 111 may be broad enough to encompass such a program, the EPA's arguments have yet to be tested and upheld in the courts.

With the expansion of the EPA's role to cover carbon emissions from new and existing fossil-fuel-fired power plants under the Clean Air Act, the Climate Action Plan provides the EPA with new regulatory tools to control greenhouse gases, and may pave the way for a nationwide cap-and-trade program that could be extended to other industries. While a nationwide carbon emissions trading program is an exciting and even likely possibility, significant questions remain, to be worked out between the EPA, the states, and other stakeholders.

Key questions to be answered for any trading program include whether to set a cap on the total volume of carbon emissions or to use an average emissions rate as a cap, how to allocate emissions allowances to states or regulated sources, and whether to allow for an alternative compliance measure if the cost of emissions allowances available become pro-

hibitively high and impact the supply of electricity. The final design of a national cap-and-trade program, which could range from simple and restricted emission allowance trading between regulated sources to a full-blown nationwide or even global carbon market, will be crucial to the ultimate success or failure of the program.

While the near-term impact of many of the other individual measures included in the President's Climate Action Plan may only amount to small dents in domestic carbon emissions or slow shifts in federal agency policies, collectively, the Plan represents an effort by President Obama and his administration to integrate climate change considerations across a range of federal policies and actions. The Climate Action Plan will further cement greenhouse gas emissions and climate change impacts as key factors in federal decision-making.

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Dennis is the newest member of the Editorial Board of the *Climate Change Law & Policy Reporter*.

EASTERN WATER NEWS

COALITION PETITIONS EPA TO USE 'RESIDUAL DESIGNATION AUTHORITY' TO REQUIRE PERMITS FOR SITES DISCHARGING STORMWATER TO IMPAIRED WATERWAYS

A coalition, led by American Rivers, the National Resources Defense Council, and the Conservation Law Foundation, submitted three petitions (Petitions) to the U.S. Environmental Protection Agency (EPA), asking the agency to invoke the rarely used federal Clean Water Act (CWA) "residual designation authority" (RDA) to address stormwater runoff from certain industrial, commercial, and institutional sources which the environmental groups believe is a major source of water quality impairment around the nation. Invocation of this program would require Clean Water Act discharge permits for those industrial, commercial, and institutional sites discharging storm water to impaired waterways in Region 1 (New England), Region 3 (Mid-Atlantic), and Region 9 (Pacific Southwest).

The Petitions' Goals

Each petition requests a determination from the EPA that non-*de minimis*, non-National Pollutant Discharge Elimination System (NPDES) permitted stormwater discharges are contributing to violations of Water Quality Standards in impaired waters throughout the three regions. In turn, the petitions assert that the EPA should require NPDES permits for such activities pursuant to § 402(p) of the Clean Water Act.

The Petitions allege that stormwater runoff is one of the leading causes of water pollution in the United States. According to the Petitions, stormwater runoff can harm surface water resources, which can, in turn, cause or contribute to exceeding Water Quality Standards by changing natural hydrologic patterns, accelerating stream flows, destroying aquatic habitats, and elevating pollutant concentrations in waterways. The Petitions further claims that these increases in pollutants can have negative effects on the health of the water body and the organisms that live in it.

Regulatory Framework

The purpose of the Clean Water Act, as one of the primary federal water quality protection laws in the United States, is to restore and maintain the chemical, physical, and biological integrity of the nation's waters by regulating point and non-point pollution. The CWA gives the EPA authority to enact and enforce regulations to meet the goals of protecting, restoring, and maintaining waterways throughout the country, improving their quality now and sustaining them moving forward.

The CWA was amended in 1987 to require the EPA to address stormwater pollution. Pursuant to this mandate, the EPA began issuing NPDES permits for storm water discharges associated with large-scale construction sites. Permits may be issued by the EPA, or by states that have been authorized by the EPA to act as NPDES authorities, such as California (through the Regional Water Quality Control Boards). Failure to acquire an NPDES permit, or follow its requirements, can result in heavy fines: up to $25,000 per day for violations, and up to $50,000 per day for knowing violations, with fines doubling after the first offense.

The environmental petitioners contend that industrial, commercial, and institutional sites that cover large areas of land, like those at issue in these petitions, may have a high potential to harm the environment. The most significant water quality impact generally associated with large-scale industrial, commercial, institutional and construction activity is discharges of sediment to surface water bodies. According to the Petitions, uncontrolled construction activity can contribute more sediment to streams than is naturally deposited over several decades and excessive sediment runoff can destroy spawning beds, suffocate bottom-dwelling organisms and fish eggs, decrease stream oxygen levels, and blocks sunlight that is critical to the growth of water vegetation.

The EPA (and where the NPDES program is state-implemented, the states) requires that all construction projects larger than one acre obtain an NPDES permit. NPDES permits for construction activity require construction sites to have a stormwater pollution prevention plan (SWPPP), which describes

the controls that will be used on site to minimize stormwater runoff, and prevent contamination. The controls, or Best Management Practices (BMPs), including structural controls to minimize pollutants and runoff, such as silt fences, sediment basins, phased site grading, and other stabilization measures, are an integral part of the SWPPP. A discharger is in violation of its NPDES permit, and the CWA, if no SWPPP is developed, the BMPs listed in the SWPPP are not implemented or properly maintained, or the BMPs are clearly inadequate to prevent discharges of sediment and stormwater from the site. One important facet of the NPDES permits is that they hold the property owner responsible for permit compliance, rather than the contractor who may be charged with maintaining the site.

Under § 402 of the CWA, no person may discharge any pollutant into waters of the United States without an NPDES permit. Those permits must impose water quality-based effluent limitations when necessary to meet water quality standards. Since the 1987 CWA amendment, the EPA has required NPDES permits for discharges of industrial and municipal stormwater. While those are the only categories of stormwater discharges specifically regulated in the text of the statute, Congress also created a catch-all provision directing the EPA to require NPDES permits for any stormwater discharge that the Administrator or State director determines contributes to a violation of water quality standards or is a significant contributor of pollutants to waters of the United States.

This catch-all provision—known as EPA's residual designation authority (RDA)—gives the EPA room to ensure that problematic discharges of stormwater do not go unregulated. Any person or group may petition the EPA for designation of stormwater sources for regulation under this authority. The agency has stated, and various courts have confirmed, that the RDA can be applied to a single facility or a category of discharges, and that it allows for statewide or watershed-wide designations. It is under this RDA provision the petitions in question here have requested wider stormwater discharge regulation, and additional NPDES permit requirements for industrial, commercial, and institutional sites in each of the subject regions.

Analysis

The Petitions request that EPA use its RDA authority to issue individual permits directly to specific dischargers that are currently unregulated and may be discharging stormwater directly into a waterway. By requiring large, primarily private-owned properties, including shopping centers, airports, and large industrial complexes, to obtain discharge permits, the EPA could potentially force many of these properties to install structural BMPs or even retrofit their existing infrastructure in order to retain more stormwater runoff onsite. These changes would impose new costs on existing sectors of industry that may not be prepared to manage the changes compliance will require.

Conclusion and Implications

The EPA has 90 days to respond to the Petitions. Whether EPA will be open to adopting the coalition's suggestions is unclear, as is the effect the Petitions would have on the East, even if the EPA chooses to act on them. Stormwater discharge throughout the nation is well-regulated, to the point that any newly adopted requirements might not alter existing regulation, thought it may affect which entity is doing the regulating. Increased federal regulations may have the ancillary effect of reducing burdens on municipalities, who often currently do much of the current stormwater enforcement in the state. (Steve Anderson)

NEWS FROM THE WEST

This month's News from the West features cases from California, Montana and Washington. First, California water agencies, environmental groups, and local governments have filed lawsuits against the Sacramento-San Joaquin Delta Plan, a plan created under the Delta Reform Act to attempt to achieve two equal goals of making California's water supply more reliable and protecting the Delta. Next, the Montana Supreme Court denies a ditch easement to a landowner with water rights. Finally, in Washington, environmental plaintiffs claim dairies' discarded manure qualifies as "solid waste" within the meaning of the Resource and Conservation Recovery Act (RCRA).

Multiple Lawsuits Filed Against the Delta Plan

San Luis & Delta-Mendota Water Authority v. Delta Stewardship Council, Lead Case No. 34-2013-80001500 (May 24, 2013)

One of the intended purposes of the Sacramento-San Joaquin Delta Plan is to resolve decades of water conflict by providing for the long-term development and management of the estuary in a way that balances two, coequal goals of protecting the rich Delta environment, and ensuring a reliable supply of water for California's residents and farmland. Instead of resolving these conflicts, however, the Plan has now sparked multiple lawsuits. The litigation comes from groups across the political spectrum, including environmentalists, commercial fishermen, water diverters and local governments, who each claim that the Delta Plan violates the California Environmental Quality Act (CEQA) and the Delta Reform Act, the Delta Plan's authorizing legislation. The lead lawsuit was filed by the San Luis & Delta-Mendota Water Authority (Case No. 34-2013-80001500), a joint powers agency representing a number of water agencies with contracts for water from the Central Valley Project, which provides water to a million Californians and two million acres of agricultural land. Similar to the other lawsuits, the lead suit alleges multiple violations, including that the Delta Plan violates CEQA because its Program Environmental Impact Report (PEIR) fails to provide an accurate assessment of the Delta Plan's environmental impacts.

While each of the lawsuits filed against the Delta Plan claim that the Plan violates CEQA and the Delta Reform Act, the specific allegations vary depending on the petitioners' point of view. For example, the Delta Reform Act requires that the Delta Plan reduce California's reliance on Delta water, but groups on both sides of the issue are upset with the Delta Plan's recommendations, policies, and methods for achieving that goal. Environmental and fisheries groups, including the Center for Biological Diversity, and the California Sportfishing Protection Alliance, claim that the Delta Plan lacks an enforcement mechanism to ensure that its recommended restrictions are effective. Conversely, water users, including the State Water Contractors, argue that the Plan greatly exceeds its intended scope by imposing restrictions beyond the power granted under the Delta Reform Act. The City of Stockton has also filed suit, concerned about the Delta Plan's impact on the City's local development authority. Despite the multiple lawsuits, the Delta Stewardship Council has stated that it intends to fully defend the Plan in court, insisting that the Plan is preferable to the continued litigation and inaction that California has endured for the last few decades.

Montana Supreme Court Rejects Landowner's Claim of Ditch Easement

Roland v. Davis, 2013 MT 148 (2013).

Gene Roland sought a declaratory judgment that he had received a ditch easement to transport water across Fred Davis' property. When Roland purchased property from Davis in 1993, the warranty deed contained no express mention of water rights, ditch easements, or appurtenances. Nevertheless, Roland believed that he had received water rights appurtenant to the property and that a ditch easement existed to transport the water to his property. In 1994, Davis purchased property that historically contained a ditch, although no ditches were observable at that time. It was later discovered that there was a ditch that ran from a creek, across Davis' property to a 20-acre "place of use" on Roland's property. Roland sought to reopen the ditch, claiming either that his water rights trigged a ditch easement, or that he had

an implied easement from existing use. The Supreme Court of Montana agreed with Davis and affirmed the lower court's ruling that Roland had not received a ditch easement.

To establish an implied easement, a plaintiff must demonstrate: (1) separation of title; (2) a use that is apparent and continuous at the time the property is divided; and (3) reasonable necessity of the easement for the beneficial enjoyment of the land granted or retained. Roland failed to establish an implied easement because he did not demonstrate apparent and continuous use of the easement at the time of purchase. The District Court found that no water had flowed through the ditch since 1979, and that Roland's predecessor-in-interest had actually created impediments to the use of the ditch, including a roadway system that destroyed portions of it. The Court also found that ditch easements and water rights are distinct property rights. Although Roland had received water rights when he purchased the property, the Court rejected Roland's argument that the law requires such water rights to be accompanied by a ditch easement, noting that a landowner may own a water right without a ditch, or a ditch without a water right. For these reasons, the Montana Supreme Court held that Roland failed to demonstrate that he had received an implied easement.

Environmental Plaintiffs Claim Dairies' Manure is 'Solid Waste' under RCRA

Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC, ___F.Supp.2d___, Case No. 13-CV-3016-TOR (E.D. Wash. June 21, 2013)

The defendants own dairies that house a large number of animals and must handle a large amount of manure produced by the herd. The dairies use various methods to manage the manure, including: transforming it into compost for sale, applying it as fertilizer to agricultural fields, and storing it as liquid manure in lagoons until it is used as fertilizer. The plaintiff, Community Association for Restoration of the Environment, Inc. (CARE), filed an action in District Court in the Eastern District of Washington alleging that the dairies' manure is a solid waste within the meaning of the RCRA because when over-applied to agricultural fields and allowed to leak from lagoons, it is "discarded" and causes high levels of nitrates in underground drinking water. The dairies filed a motion to dismiss.

To bring a citizen suit under RCRA, CARE must demonstrate that the dairies contribute to the:

> …handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment. 42 U.S.C. § 6972 (a)(1)(B).

The central issue in the motion to dismiss is whether the manure constitutes a "solid waste" for the purposes of the statute.

RCRA defines "solid waste" as:

> …any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid or contained gaseous material resulting from . . . agricultural operations . . . . 42 U.S.C. § 6903(27).

The dairies argue that, because the manure is used as fertilizer, it is not "discarded" within the meaning of the statute. CARE alleges that the dairies apply too much manure to their agricultural fields, making the process no longer "agronomic" because manure nutrients become ineffective when they are over-applied. It further argues that when the manure is over-applied to fields or allowed to leak from lagoons, it no longer fulfills a useful purpose and has been "discarded." The District Court agreed with CARE that it is plausible for manure to become "solid waste" after it has ceased to be useful or beneficial when over-applied to fields or leaked from lagoons. Accordingly, the District Court denied the dairies' motion to dismiss.

In March 2013, the U.S. Environmental Protection Agency (EPA), entered a Consent Order with the dairies to address the high level of nitrates in the underground drinking water. The goal of the order was to achieve drinking water quality that meets EPA's maximum contaminant level. However, if it continues to be successful, CARE's lawsuit could impose even more stringent restrictions on the dairies. (Melissa Cushman)

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

•EPA and the DOJ reached a settlement with XTO Energy Inc., a subsidiary of Exxon Mobil Corporation, resolving an alleged violation of the federal Clean Water Act (CWA) related to the discharge of wastewater generated by natural gas exploration and production at XTO's Penn Township, Lycoming County, Pennsylvania facility. The settlement requires XTO to pay a penalty of $100,000 to the United States and spend a federal government-estimated $20 million on a comprehensive plan to improve wastewater management practices to recycle, properly dispose of, and prevent spills of wastewater generated from natural gas exploration and production activities in Pennsylvania and West Virginia. Among other things, XTO must install a continuous, remote monitoring system for all of its permanent production located throughout Pennsylvania and West Virginia with alarms that will be triggered to alert operators immediately in the event of any future spills and implement a program to actively monitor interconnected wastewater storage tanks located throughout Pennsylvania and West Virginia. The discharge was discovered by a Pennsylvania Department of Environmental Protection (PADEP) inspector who observed wastewater spilling from an open valve from a series of interconnected tanks. At the time, XTO stored wastewater generated from energy extraction activities conducted throughout Pennsylvania at its Penn Township facility and, at the time of the release, stored produced fluid from its operations in the area. Pollutants from the release were found in a tributary of the Susquehanna River basin. EPA, in consultation with PADEP, conducted an investigation and determined that wastewater stored in the tanks at the Penn Township facility contained the same variety of pollutants, including chlorides, barium, strontium, and total dissolved solids, that were observed in those surface waters. The federal government estimates that the substantial improvements to XTO's wastewater management required by the terms of the settlement will reduce discharges of total dissolved solids by 264 million pounds over the course of the next three years. In addition, XTO will implement a region-wide program of operational best management practices which include: secondary containment for tanks used to store wastewater, improved standard operating procedures designed to reduce the risk of a spill, a prohibition on using pits or open-top tanks to store wastewater which will prevent air emissions, remote monitoring of tank volumes to prevent overfilling and spills, and proper signage on all tanks with safety information and a manned, 24-hour emergency phone number.

•The San Antonio Water System (SAWS) has agreed to make significant upgrades to reduce overflows from its sewer system and pay a $2.6 million civil penalty to resolve CWA violations stemming from illegal discharges of raw sewage. The state of Texas is a co-plaintiff and will receive half of the civil penalty. To come into compliance with the CWA, including remedial measures taken during the parties' negotiations and the comprehensive measures required under the settlement, SAWS is expected to spend $1.1 billion to achieve compliance. The DOJ, on behalf of EPA, filed a complaint against SAWS alleging that between 2006 and 2012 SAWS had approximately 2,200 illegal overflows from its sanitary sewer system that discharged approximately 23 million gallons of raw sewage into local waterways in violation of its CWA discharge permit. The cause of these overflows stems largely from system capacity problems that result in the sewer system being overwhelmed by rainfall, causing it to discharge untreated sewage combined with stormwater into local waterways. EPA confirmed these violations during a 2011 field

inspection and record review. As part of the settlement, SAWS will conduct system-wide assessments, identify and implement remedial measures to address problems that cause or contribute to illegal discharges found during those assessments, and initiate a capacity management, operation and maintenance program to proactively reduce sanitary sewer overflows. The plan must be fully implemented by 2025. The SAWS wastewater treatment plant serves approximately 1.3 million people in Bexar County, which includes the city of San Antonio. Its wastewater collection and treatment system consists of approximately 5,100 miles of gravity sewer lines, including approximately 100,000 manholes and 170 lift stations.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•Hercules Inc. will pay $2 million to settle alleged violations of its Consent Decree with EPA at the Resin Disposal Superfund Site in Jefferson Borough, Allegheny County, Pennsylvania. The settlement pertains to the company's failure to notify EPA about three uncontrolled releases of hazardous substances from the site's treatment system, one of which bypassed the treatment system and resulted in the hospitalization of a worker at the West Elizabeth Sanitary Authority (WESA) treatment plant and a four-day plant closure. The two other releases that bypassed the treatment system were on March 31, 2011 and July 19, 2011. The WESA treatment plant, located on the Monongahela River approximately one half mile from the site, receives the liquid portion of leachate treated at the site. The Resin Disposal Site encompasses 26 acres and includes a former two-acre landfill that received approximately 85,000 tons of industrial waste from the Pennsylvania Industrial Chemical Corporation between 1949 and 1964. Hercules acquired the Resin Disposal Site in 1973. Under a Consent Decree with EPA, Hercules is required to operate an on-site leachate collection and treatment system. The cleanup also includes a multi-layer cap for the landfill and a fence around the perimeter of the landfill. The $2 million penalty takes into account the company's failure to notify EPA of the releases. Hercules is working to upgrade the leachate collection and treatment system and has increased its monitoring of the system. EPA continues to oversee the site and assess the remedy's effectiveness.

Indictments, Convictions, and Sentencing

•Brian Raphael D'Isernia, 69, of Panama City Beach, Florida, and Lagoon Landing, LLC, a corporation controlled by D'Isernia, were sentenced in federal court in the Northern District of Florida for illegal dredging and felony wetlands violations in Panama City. The two defendants were ordered to pay a criminal fine totaling $2.25 million dollars, the largest criminal fine assessed for wetlands-related violations in Florida history. D'Isernia was sentenced to pay a $100,000 criminal fine, while Lagoon Landing, LLC was sentenced to pay a $2.15 million criminal fine, a $1 million community service payment, and three years of probation. D'Isernia pleaded guilty to knowingly violating the Rivers and Harbors Act. D'Isernia was charged with dredging an upland cut ship launching basin in Allanton and the channel connecting it to East Bay between December 2009 and February 2010 without obtaining a permit. Lagoon Landing pleaded guilty to a felony violation of the CWA for knowingly discharging a pollutant into waters of the United States without a permit. Between 2005 and 2010, Lagoon Landing, through its agents and employees in conjunction with persons using tractors and other heavy equipment, altered and filled wetland areas of property it controlled in Allanton without obtaining a permit. The wetland areas were adjacent to and had a significant nexus to East Bay. Lagoon Landing, LLC was also ordered to pay a $1 million community service payment to the National Fish and Wildlife Foundation, which will use the money to fund projects for the conservation, protection, restoration and management of wetland, marine and coastal resources, with an emphasis on projects benefiting wetlands in and around St. Andrew Bay. In a separate but related civil settlement, Northwest Florida Holdings, Inc., a Florida holding corporation controlled by D'Isernia, entered into an Administrative Compliance Order with the EPA that will result in the restoration of approximately 58.63 acres of wetlands and upland buffers. The corporation also agreed to study the water quality in and around the Allanton and Nelson Street Shipyards; upgrade stormwater protection for the Allanton Shipyard; withdraw applications to convert the launching basin to a marina and create a Planned Unit Development at the Allanton Shipyard; and hire someone to oversee environmental compliance. In a second sepa-

rate but related civil settlement, Northwest Florida Holdings, Inc. entered into a Consent Order with the Florida Department of Environmental Protection (FDEP) and agreed to conduct stormwater corrective actions and water quality studies at the Allanton Shipyard. The corporation will pay a $9,750 civil fine to the Ecosystem Management and Restoration Trust Fund, and $94,718.25 in severed dredge materials fees to the Florida Internal Improvement Trust Fund. In a third separate but related civil settlement, Bay Fabrication, Inc., a corporation controlled by D'Isernia, entered into a Consent Order with FDEP and agreed to conduct stormwater corrective actions and water quality studies at the Nelson Street Shipyard. The corporation will pay a $6,000 civil fine to the Ecosystem Management and Restoration Trust Fund and will pay $76,923 in severed dredge materials fees to the Florida Internal Improvement Trust Fund. In a fourth separate but related civil settlement, Peninsula Holdings, LLC, a corporation controlled by D'Isernia, entered into a Consent Order with FDEP and agreed to conduct stormwater improvements at property it owns located at 2500 Nelson Street, Panama City, Florida 32401. The corporation will pay a $1,500 civil fine to the Ecosystem Management and Restoration Trust Fund. Lastly, in a fifth separate but related civil settlement, D'Isernia and his wife Miriam D'Isernia entered into a Consent Order with FDEP to remove unauthorized fill materials from property located in Panama City Beach, Florida that requires them to pay a $250 civil fine to the Ecosystem Management and Restoration Trust Fund. (Melissa Foster)

JUDICIAL DEVELOPMENTS

U.S. SUPREME COURT PLACES SIGNIFICANT LIMITATIONS ON THE IMPOSITION OF MONETARY EXACTIONS AS A CONDITION OF ISSUING LAND USE PERMITS

Koontz v. St. Johns River Water Management District, 570 U.S. ___, 133 S.Ct. 2586 (June 25, 2013).

With little fanfare, the U.S. Supreme Court issued a decision on June 25, 2013 that could have wide-ranging impacts on the ability of government agencies to impose fees when exercising the power to regulate land use. Although the ruling was overshadowed by two high-profile decisions at about the same time (striking down the federal Defense of Marriage Act and key portions of the Voting Rights Act of 1965), in *Koontz v. St. Johns River Water Management District*, the Court held in a 5-4 decision that the government's imposition of conditions on a land-use permit applicant in exchange for permit approval must satisfy heightened constitutional scrutiny under the takings clause, even when the demand is for money.

Regulatory and Legal Background

As developers are well aware, conditions imposed by local agencies in exchange for approving land-use permits are becoming increasingly burdensome. Such conditions may take many forms, including requiring dedication of property, construction of off-site improvements, or payment of in-lieu fees, ostensibly to offset public impacts of a project. The question that often arises is whether the condition imposed truly reflects those impacts, or whether the government is leveraging a legitimate interest in mitigation to pursue additional governmental ends, the cost of which ought to be borne by the public at large.

Nollan/Dolan Decisions

Under the doctrine of unconstitutional conditions as set forth in the cases of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (collectively: *Nollan/Dolan*), the government cannot condition the receipt of a government benefit on waiver of a constitutionally protected right. This doctrine has special application in the area of land use regulation, protecting the Fifth Amendment right to just compensation for property taken by the government when the owner applies for a land-use permit. Both *Nollan* and *Dolan* involved excessive demands for dedication of property in exchange for permit approvals. In *Nollan*, the California Coastal Commission conditioned approval of a coastal development permit on the grant of a public easement along the mean high tide line and across the owner's beachfront property, in order to protect the public's "visual access" to the beach. The Court failed to see how allowing people who were already on the beach to walk across the property would offset obstacles to viewing the beach created by the house, and held that the condition lacked the "essential nexus" to the claimed justification for the condition. In *Dolan*, a city planning commission conditioned approval of an application to enlarge a retail store on the dedication of portions of the owner's lot as a greenway and a pedestrian/bicycle pathway. The Court held that although an essential nexus existed between the permit conditions and legitimate state interests, the city failed to show that the dedications required were "roughly proportional" to the projected impact of the proposed development.

Ehrlich Decision

Following *Dolan*, the California Supreme Court granted review in *Ehrlich v. City of Culver City*, 12 Cal.4th 854 (Cal. 1996), a case addressing whether the *Nollan/Dolan* test applied to monetary exactions imposed as a condition of permit issuance. The owner of a sports complex applied to the city for a zoning change and amendments to the city's general and specific plans to allow construction of a 30-unit condominium project. As a condition of approval, the city required the payment of $280,000 to partially replace lost recreational facilities occasioned by the specific plan amendment. The developer sued, contending that imposition of the fees violated California's Mitigation Fee Act, Government Code § 66000 *et seq.* (Fee Act), which requires a "reasonable relationship"

between the fee imposed and the development's public impact, and also amounted to an unconstitutional taking of property.

The Court held in *Ehrlich* that, under the circumstances of the case, the *Nollan/Dolan* test applied to the fee imposed. And, to avoid determining the constitutional sufficiency of the Fee Act's "reasonable relationship" standard, the Court also concluded that, as applied to individualized exactions imposed as a condition of issuance of a development permit, the Fee Act's standard "embod[ied] the standard of review formulated by the high court in its *Nollan* and *Dolan* opinions." (*Id.* at 860.) However, the Court restricted the scope of its holding, finding that *Nollan/Dolan* heightened scrutiny applied only to conditions imposed on an individual and discretionary basis, and not to legislatively-enacted impact fees of general application, which would be subject to a lesser, more deferential standard of review. (*Id.* at 876.)

San Remo Decision

This distinction was upheld in *San Remo Hotel v. City and County of San Francisco*, 27 Cal.4th 643 (Cal. 2002). There, a developer challenged in lieu fees imposed by the city under its Hotel Unit Conversion and Demolition Ordinance, which required developers seeking to convert residential hotel units to tourist use to replace the lost residential units by constructing replacement housing or paying an in lieu fee equal to replacement site acquisition and construction costs. The Court held that the *Nollan/Dolan* test did not apply, because the fee was a legislatively enacted, generally applicable fee that provided city staff with no discretion as to imposition or size of the fee.

The "sine qua non" for application of *Nollan/Dolan* scrutiny is thus the "discretionary deployment of the police power" in the "imposition of land-use conditions in individual cases." [Citation.] Only "individualized development fees warrant a type of review akin to the conditional conveyances at issue in *Nollan* and *Dolan*." (*Id.* at 670.)

Key Facts of the *Koontz* Case

Coy Koontz owned 14.9 acres of undeveloped Florida land, much of which qualified as wetlands under state law. Mr. Koontz wanted to develop 3.7 acres of his land, a proposal that involved filling and grading portions of the land, and installing facilities to retain and gradually release stormwater runoff. Under Florida's Water Resources Act and Henderson Wetlands Protection Act, to dredge or fill in, on, or over surface waters, a Wetlands Resource Management permit was necessary, requiring applicants to offset environmental damage resulting from the project by creating, enhancing or preserving wetlands elsewhere.

To mitigate the environmental effects of his proposed development, Koontz offered to deed to respondent St. Johns River Water Management District (District) a conservation easement on the remaining 11 acres. The District rejected the proposal as inadequate, and proposed two alternatives: (1) reduce the project to one acre and deed a conservation easement to the District on the remainder; or (2) build the 3.7 acre project, deed a conservation easement on the remainder, and hire contractors to make improvements on 50 acres of District-owned wetlands several miles away. Believing the District's demands to be excessive, Koontz filed suit, claiming that the permit conditions imposed by the District were an unconstitutional taking of property.

The Supreme Court's Decision

Regulatory Fees as an Unconstitutional Taking of Property

The District argued that Koontz's claim failed, first because the District had denied the permit application, and thus no taking had occurred, and second, because a demand for money could not give rise to a claim under *Nollan/ Dolan*. Rejecting the District's argument, the Court held that any mitigation a government may choose to impose must have an essential nexus and be roughly proportional to the impacts of a project. These requirements do not depend on whether the permit is approved with a condition that the proposed mitigation is undertaken, or is denied because the mitigation was refused. Even though no property is technically taken in the latter case, an extortionate demand, even though rejected, impermissibly burdens the right not to have property taken without just compensation. And it doesn't matter if the government could deny the permit application outright without attaching conditions; it cannot condition permit approval on the landowner's forfeiture

of constitutional rights.

The Court also held that the fact that the government asked the landowner to spend money rather than require a dedication of property was irrelevant. Such in lieu fees are the functional equivalent of other types of land use exactions and must satisfy the heightened scrutiny requirements of essential nexus and rough proportionality established by *Nollan/Dolan*. Because of the direct link between the government's monetary demand and the specific property, the condition was a taking and did not cross over into the realm of the government's taxing power. In her dissent, Justice Kagan argued that the Court's scrutiny into monetary payments created uncertain boundaries between takings and ordinary financial obligations that the government has the power to impose, and that a vast array of land use regulations, applied daily throughout the country, would now be subject to heightened scrutiny. Observing "the intrusion into local affairs that [the Court's] holding will accomplish," Justice Kagan commented (citing *Ehrlich*) that perhaps, in the future, the Court might curb this intrusion by, for example, approving a rule that *Nollan* and *Dolan* apply only to permitting fees that are imposed ad hoc, and not to fees that are generally applicable. But the opinion itself makes no such distinction.

Conclusion and Implications

The implications of *Koontz* are particularly significant in California because of the distinction the California courts have long made between real property and monetary exactions, and between individual fees and legislatively imposed fees of general impact. This decision will likely lead to many more challenges to the significant impact fee programs that have been and will continue to be adopted in California. In imposing fees under these programs and in defending challenges, the government entities will have to try to develop much more concrete support for these programs in order to meet the heightened scrutiny of the "essential nexus" and "rough proportionality" requirements. (Kathryn Horning)

NINTH CIRCUIT DECIDES THAT WATER QUALITY MEASUREMENTS ESTABLISH NPDES STORMWATER PERMIT VIOLATIONS IN LOS ANGELES—COULD OTHER CIRCUITS ADOPT A SIMILAR INTERPRETATION?

Natural Resources Defense Council vs. County of Los Angeles, ___F.3d___, Case No. 10-56017 (9th Cir. Aug. 8, 2013).

In a decision that has to send shivers down the spines of many municipal stormwater systems operators , the Ninth Circuit U. S. Court of Appeals has ruled that under the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) permit terms of Los Angeles municipal stormwater districts, measured water quality standards exceedances in the receiving water body suffice to establish liability of the stormwater district, without proof concerning the quality of water being discharged from the districts' storm sewers or other outfalls to the water body. , Case No. 10-56017 (9th August 8, 2013).

Background

Los Angeles County and the Los Angeles County Flood Control District were sued several years ago by Natural Resources Defense Council (NRDC) and other environmental group plaintiffs. A federal District Court had granted summary judgment to the defendants on the grounds that a water quality violation is not sufficient to establish liability for individual defendant dischargers under the federal Clean Water Act. Essentially, some proof of outfall water quality was needed to make a determination of whether defendants' storm water discharges "cause or contribute" to water quality violations.

The U.S. Supreme Court's Decision in *L.A. County Flood Control District*

Earlier this year, the U.S. Supreme Court issued an opinion in this same case, ruling that the initial judgment of the Ninth Circuit was faulty because it

treated monitoring stations in channelized reaches of the Los Angeles and San Gabriel rivers as if the concrete channels were outfalls themselves. In line with its prior ruling in the case (*S. Florida Water Mgmt. Dist. v. Miccosuke*, 541 U.S. 95 (2004)), water that comes through a concrete channelized segment of a river is not being "discharged," as the water flow is all part of the same river. ___U.S.___, 133 S.Ct. 710, 713 (2013).

Not addressed in the Supreme Court's January ruling was the issue that the Ninth Circuit has now decided, . whether under the permits at issue, measurements of water quality in-stream were sufficient to establish violations of the permits in and by themselves.

The Ninth Circuit's Decision

The Ninth Circuit determined that there were provisions of the defendant districts' NPDES permit, which were central to the determination of whether Water Quality Standards (WQS) violations alone sufficed to show NPDES permit violations. The defendants apparently agreed with this analysis, but they strongly disagreed with the court on what the central terms mean.

In Part 2 of the lengthy permit, entitled "Receiving Water Limitations," there is a prohibition against discharges from the defendants' systems that "cause or contribute to the violation of Water Quality Standards or water quality objectives." Water Quality Standards are defined with reference to other specified Plans and rules. A section of the permit entitled "Monitoring and Reporting Program" goes on to state that the permittees must regularly monitor and publish water quality test results. One form of tests must be mass-emission monitoring. The Ninth Circuit noted that "the primary objectives of the monitoring program include 'assessing compliance' with the Permit."

After dismissing arguments about whether aspects of its prior ruling favorable to the defendant districts were binding (they were not), the Ninth Circuit's opinion then boiled down to an interpretation of the permit language.

Focusing on the Permit Language

The Ninth Circuit focused on the language in the permit indicating that one of the purposes of the water quality monitoring program is to "assess compliance." The defense argued that what assessing compliance means is a judgmental and analytical process that uses monitoring data, and that the mere fact of WQS exceedances in the midst of the river does not alone establish whether a permit holder is causing or contributing to a violation. However the Ninth Circuit reasoned that since national regulations require permits to separate sewer systems to include "monitoring programs necessary to determine compliance and non-compliance," the Los Angeles permits in dispute would be "unlawful" under the Clean Water Act unless the WQS monitoring provisions determine compliance.

No Ambiguity in the Term ' Assessing Compliance'

In addition to this questionable line of reasoning, the Ninth Circuit went on to state that there is no ambiguity in what the term "assessing compliance" means:

> No reasonable person could find even the slightest ambiguity in the phrase '[t]he primary objectives of the Monitoring Program include, but are not limited to: Assessing compliance with this [Permit].' Consequently, we decline to embrace the County Defendants' initial argument that 'the mass-emission monitoring stations, as a matter of fact, do not assess the compliance of any permittee with the Permit.'

Conclusion and Implications

The Ninth Circuit's opinion essentially equates the word "assess" with the word "determine," although its reasoning does not do so straightforwardly. It also claims that the opinion it reaches is necessitated by the purpose of the law, and that it would render the monitoring provisions of the permit pretty meaningless if it reached a different result.

Detractor's to the opinion have pointed out that aspects of the Ninth Circuit opinion lack real believability—it continually asserted it was compelled to its result by the law governing interpretation of rules and contracts, yet the result seems to run contrary to legitimate expectations of due process and science that are involved in the complex subject of water

quality law. Supposing the Ninth Circuit is correct to state that the permit terms regarding monitoring would lack the minimum specificity needed to be lawful under the federal NPDES regulations, then would not the NRDC's remedy be to sue the State of California, rather than a permittee? Also, for the court to say that a section of the permit dealing with water quality monitoring that has a that includes assessment of compliance means, that the verb "to assess" is unambiguously the same as "to determine" or "to decide" there is a NPDES permit violation is to some seems illogical. A quick check of the Miriam Websters Dictionary shows five alternative meanings of "assess," some of which involve use of judgment and information in a process of decision.

Whether Los Angeles County will seek further review by the U.S. Supreme Court remains to be seen. (The county has received newly revised permits since the litigation began, and presumably, the issues presented for Ninth Circuit review may not be the same going forward.) The Supreme Court might welcome yet another chance to make sense of this increasingly federally determined national water law. The language discussed in the context of Los Angeles area permits is the same or quite similar to language in permits in many other states. The cost-of-compliance implications are staggering. (Harvey Sheldon)

FIFTH CIRCUIT FINDS SIX MILLION DOLLAR CLEAN WATER ACT PENALTY IMPOSED AGAINST CITGO DID NOT 'REASONABLY APPROXIMATE' CITGO'S ECONOMIC BENEFIT

U.S. (on behalf of Administrator of Environmental Protection Agency) v. Citgo Petroleum Corporation, ___F.3d___, Case No. 11-31117 (5th Cir. July 17, 2013).

The U.S. Environmental Protection Agency (EPA) pursued this federal Clean Water Act (CWA), enforcement action against Citgo Petroleum Corporation, seeking a civil penalty and injunctive relief all arising from a June 2006 oil spill at Citgo's Lake Charles refinery in Louisiana. Following a bench trial, the District Court held that Citgo was at fault for a "massive…[and] tragic" oil spill, that could only have been avoided but for Citgo's negligence. The U.S. District Court issued an injunction against Citgo but ordered it to pay a paltry penalty of $6 million-an amount the EPA described as amounting to one day's profit for Citgo at the time of this spill. The appeal focuses on whether the District Court erred in failing to make findings as to a "reasonable approximation" of the economic benefit to Citgo of its violation. The Fifth Circuit agreed with EPA, holding that in determining the amount of the penalty, the lower court was required to estimate economic benefit to Citgo from foregoing maintenance projects that caused the failure of the wastewater storage tanks.

Background

In 2006, a severe rainstorm caused two wastewater tanks at Citgo's Lake Charles, Louisiana refinery to fail-releasing some two million gallons of oil that flooded into the surrounding waterways. The spill forced the closure of a nearby navigational channel for ten days, and disrupted recreational activities in the surrounding area for weeks. Local businesses sustained losses due to the closure of the navigational channel. This spill damaged the surrounding marsh habitat, killing birds, fish, and aquatic life.

In April 2007, the Louisiana Department of Environmental Quality, (Department), issued a compliance order, citing Citgo for violations of water quality laws resulting from the 2006 spill. The Department demanded correctional activities and warned Citgo of potential penalties, but suspended its action in response to an investigation conducted by EPA.

On June 24, 2008, the Department and EPA filed the subject complaint under which the EPA sought injunctive relief and civil penalties under the CWA arising from the 2006 spill. On March 15, 2011, Citgo filed a motion to dismiss EPA's claims, alleg-

ing that the District Court lacked jurisdiction over the government's civil penalty claim by virtue of the "diligent prosecution" requirement. The diligent prosecution bar precludes federal prosecution where a "State has commenced and is diligently prosecuting" an action under comparable state law. 33 U.S.C. § 1319(g)(6)(A)(ii). The District Court dispatched this argument quickly as the Department was not diligently pursuing oil-spill claims in its administrative proceeding at the time EPA filed its civil penalty claim in District Court. As there was no diligent prosecution by the State or the Department, the Fifth Circuit did not need to address whether the diligent prosecution bar was a procedural or jurisdictional issue.

Clean Water Act Statutory Background—Penalties

Under the CWA:

> …it is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States [or] adjoining shorelines. 33 U.S.C. §1321(b)(1) (emphasis added).

This is an "unequivocal declaration" of federal policy. *U.S. v. Coastal States Crude Gathering Co.*, 643 F.2d 1125, 1127 (5th Cir. 1981). CWA § 311(b), 33 U.S.C. §1321(b), has long provided for civil penalties to serve the purposes of punishment and deterrence. *See*, *Coastal States*, 643 F.2d at 1127-28; *Tull v. U.S.*, 481 U.S. 412, 422-23 (1987).

In 1990, Congress amended CWA § 311(b)'s civil penalty provisions through the Oil Pollution Act (OPA), Pub. L. No. 101-380, §4301, 104 Stat. 484, 533-37 (1990). The Senate Report on the OPA stated:

> [A]ny oil spill, no matter how quickly we respond to it or how well we contain it, is going to harm the environment. Consequently, preventing oil spills is more important than containing and cleaning them up quickly. S. Rep. No. 101-94, at 2-3 (1989), as reprinted in 1990 U.S.C.C.A.N. 722, 724.

As amended, CWA § 311(b) authorizes a civil penalty for an oil spill on a per-barrel basis. A violator is subject to a penalty "in an amount up to $25,000 per day of violation or an amount up to $1,000 per barrel of oil discharged." 33 U.S.C. §1321(b)(7)(A). This is an area of strict liability. Coastal States, 643 F.2d at 1127 ("absolute liability standard" for assessment of penalty).

At the time of CITGO's oil spill, the inflation-adjusted penalty under §1321(b)(7)(A) was $1,100/barrel. 40 C.F.R. §19.4.

As amended, CWA § 311(b) provides eight factors that a District Court must consider in determining the amount of a civil penalty:

[T]he court shall consider [1] the seriousness of the violation or violations, [2] the economic benefit to the violator, if any, resulting from the violation, [3] the degree of culpability involved, [4] any other penalty for the same incident, [5] any history of prior violations, [6] the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, [7] the economic impact of the penalty on the violator, and [8] any other matters as justice may require. 33 U.S.C. §1321(b)(8).

The Fifth Circuit's Decision

The Supreme Court described the process of weighing the penalty factors as "highly discretionary." *Tull* , supra, at 412, 427. A court's review of these factors is conducted under the highly deferential abuse-of-discretion standard. The Fifth Circuit previously found error in this type of instance where a:

> District Court had failed to articulate with some precision how it had relied on different facts to compute the penalty, we needed to vacate and remand for the District Court to calculate the fine again. *U.S. v. Marine Shale Processors*, 81 F.3d 1329, 1339 (5th Cir. 1996).

The court's lack of penalty support in *Marine Shale*, *infra*, was analogous to this case:

> The economic benefit to Citgo that resulted 'from the violation' is the critical factor in this appeal, critical in part because the District Court made no finding of it. Though the 'violation' in its most limited sense was the oil spill from which Citgo obtained no economic benefit, [g]enerally, courts consider the financial benefit to the offender of delaying capital ex-

penditures and maintenance costs on pollution-control equipment. *Id.*, citations omitted.

The Fifth Circuit found that whil;e there is no bright line test on how to calculate economic benefit, regardless, at a minimum a District Court must "make a 'reasonable approximation' of economic benefit when calculating a penalty under the CWA." *Id.*, quoting *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 576 (5th Cir. 1996).

Economic Benefit Analysis

Turning to the District Court's analysis, it held that the penalty was to recoup any benefit gained by Citgo's failure to comply with the law. The District Court held that Citgo did forgo certain maintenance projects that could have prevented the spill in an effort to minimize costs and increase profits. However, the Fifth Circuit found that lower court did not determine the amount of the cost savings as it was:

> …almost impossible to determine given the numerous and conflicting estimations of economic benefit presented by the parties at trial:

Instead of calculating the amount of economic benefit, the lower court simply provided a range-

> the amount of [economic] gain to Citgo was less than the $83 million argued by the government, but more than the $719.00 asserted by Citgo.

In the end, the Court of Appeals found that this fails to meet the court's burden of having to make an estimate, despite the difficulty.

Conclusion and Implications

The "top-down" method represents an appropriate means for calculating civil penalties as per *Marine Shale, supra*, 81 F.3d at 1337. This method involves "calculating the maximum possible penalty, then reducing that penalty only if mitigating circumstances are found to exist." Here, the Fifth Circuit found that the District Court did not articulate any basis for why it did not apply a "top-down" method, or what alternative method it selected-and why. The District Court really did not articulate any method at all as required by *Atlantic States Legal Found. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1142 (11th Cir. 1990) holds that-on remand of a CWA penalty, a District Court must "clearly indicat[e] the weight it gives to each of the [penalty] factors in the statute and the factual findings that support its conclusions." (Thierry Montoya)

DISTRICT COURT HOLDS EPA HAS CLEAN WATER ACT JURISDICTION OVER PRIOR-CONVERTED CROPLANDS

Huntress, et al v. U.S. Department of Justice, ___F.Supp.2d___, Case No. 12-CV-1146S (W.D. NY 2013).

This is the fourth case arising from William L. Huntress, and his companies, Acquest Development LLC, Acquest Transit LLC, and Acquest Werhle LLC, (Huntress or Acquest), Clean Water Act, (CWA), dispute arising from allegations that Huntress dumped soil into wetlands in Amherst, New York. In this most recent case, Huntress sought to enjoin the Department of Justice and the U.S. Environmental Protection Agency (EPA), (collectively: the government), from proceeding with the current CWA enforcement action against Huntress and his companies, and from initiating any future criminal action, as the EPA lacked CWA jurisdiction over Huntress' property. Huntress' declaratory relief claim alleged: (i) that his property did not contain "waters of the United States" as defined by the CWA; (ii) that Huntress' § 402 permit shielded him from any CWA enforcement action; and, (iii) that the property's "prior-converted cropland" designation excluded it from wetlands determination could not be lost due to abandonment. The U.S. District Court for the Western District of New York converted Huntress' motion for a preliminary injunction into a motion for summary judgment, subsequently holding that: further discovery would be necessary to rule on the factual issue of whether Huntress' property contained "waters of the United States"; Huntress' § 402 permit did not shield him from § 404 liability; and, that the Food Security Act's abandonment of the "prior-converted cropland" exception did not apply to the CWA.

Background

On July 14, 2009, the government commenced its action against Acquest to enjoin it from placing additional fill or performing additional earthmoving work at the subject property, without a § 404 permit. On July 15, 2009, the government obtained an Order for preliminary injunction. In May 2010, Acquest conducted further earthmoving activities in violation of that Order, forcing the government to file a motion to enforce the preliminary injunction. The court granted the government's motion and awarded it reasonable attorneys' fees and costs. This action was subsequently stayed following the government's pursuit of a criminal case against Acquest.

On November 9, 2011, a grand jury returned a seven-count indictment against Huntress and Acquest based on the unpermitted discharge of pollutants in the form of fill and storm water into "wetlands," as defined under the CWA. That case was closed, however, following a Magistrate's Report recommending dismissal of the indictment, without prejudice, based on an evidentiary issue.

On June 15, 2012, Acquest filed suit against the government and six of its employees alleging improprieties in the government's CWA case against Huntress and his companies. This case is pending.

The fourth case is the present action filed by Huntress to present "…an opportunity…to litigate what [Huntress calls] the 'threshold question'-whether the [CWA] applies…" to his property.

Huntress received two prior CWA § 402 permits from the New York State Department of Environmental Conservation of relevance to this court's ruling. The first permit in 2006 covered storm water discharges associated with the construction of a nursery on 3.9 acres of Huntress' property. In 2007, Huntress received a second § 402 permit for storm water discharges associated with construction activities of up to four acres of the property adjacent to the nursery.

Also relevant to this decision is the fact that in 1987, the Soil Conservation Service determined that some 67.7 acres of Huntress' property "contained hydrolic soils [that] were converted [to farming] prior to" December 23, 1985. This related to the CWA's exemption of:

> …'prior-converted croplands…[l]ands that qualify for prior-converted croplands, or wetlands converted to farming prior to December 23, 1985, are categorically excluded from the definition of 'waters of the United States' and are therefore beyond the jurisdiction of the [CWA].'

The District Court's Decision

Injunctive Relief—Irreparable Harm Prong

The U.S. District Court first addressed Huntress' preliminary injunction to enjoin the government from pursuing its current enforcement action and initiating any future criminal suit. To demonstrate irreparable harm, Huntress alleged that:

> …despite extensive litigation concerning the property at 10880 Transit Road, they had been deprived of due process.

This argument was quickly dispatched as this being the fourth case on this subject-Huntress has a lengthy history of due process on this matter. Huntress:

> …can contest the merits of the [d]efendants' case within the action pending against it (or, if it comes to it, a future criminal case); their due process rights have been, and will continue to be, vindicated in those forums.

Huntress also maintained to have suffered irreparable harm:

> …under a continuous threat of potential criminal prosecution….[cases] where injunctive relief has been sought to restrain an imminent, but not yet pending, prosecution for past conduct, sufficient injury has not been found to warrant injunctive relief. (quoting from *Steffel v. Thompson*, 415 U.S. 452, 463, n.12, (1974)).

Huntress' case did not compel a different holding as Huntress cited to a case in which a plaintiff obtained an injunction in the course of challenging a state statute that allegedly violated plaintiff's First Amendment rights. Huntress' CWA violations do not involve the potential chilling of First Amendment rights:

> …for which there is an exception to the general rule that courts should not enjoin criminal prosecution. [Citations omitted.]

Moreover, the CWA is not a state law.

Huntress' final irreparable harm argument alleged that he "had been deprived of their property rights and are subject to daily accrual of potential fines." This argument was similarly unavailing as Huntress would be afforded a forum to litigate his property rights and penalty concerns should a criminal case be brought. Moreover, the other pending cases on the subject of Huntress' CWA violations also provide him with an adequate forum to seek vindication for any unlawful property deprivation-in fact, the pending civil case is the proper avenue for doing so.

Declaratory Relief

The court then addressed Huntress' declaratory relief claims that CWA enforcement actions could not be pursued because: "(1) the property did not contain any 'waters of the United States'…(2) Huntress' § 402 permits shield from the reach of the CWA; and (3) the property, once determined to be "prior-converted cropland," could lose that designation through abandonment, based upon the Food Security Act.

The court could not rule on the first point as discovery and the filing of the then appropriate motions would have to frame the argument of whether Huntress' property did indeed contain "waters of the United States," as the CWA defines. Moreover, a declaratory relief judgment is not the means for obtaining:

> …piecemeal adjudication of defenses that would not finally and conclusively resolve the underlying controversy. (citations omitted).

Summary Judgment Motion

Despite Huntress' protestations that a declaratory judgment would resolve all CWA enforcement actions, the court held that the issue warranted further discovery. However, the court treated Huntress' remaining two issues as one for summary judgment and ruled on them.

Huntress obtained two § 402 permits for storm water discharges associated with specific construction activity on the property. Huntress argued that these permits are a "*prima facie*" defense to all CWA § 1319 civil and criminal enforcement actions" relative to his property. However, Huntress' argument fails as being inconsistent with Congress' specific delineation of the two types of CWA permits at issue. Section 402 gives:

> …EPA authority to issue permits for the discharge of any pollutant, with one important exception; the EPA may not issue permits for fill material that fall under the Corps' § 404 permitting authority. (quoting from *Coeur Alaska, Inc. v. Se. Alaska Conservation Council,* 557 U.S. 261, 273 (2009)).

In spite of the clear distinction between these two permits, Huntress argued that any *one* permit, issued for any one purpose, bars the government from exercising any authority on Huntress' property-a argument that is "discordant with settled principles of statutory interpretation." Huntress offerd no authority to the contrary and failed to consider that the government's action also pursues § 402 violations.

Clean Water Act Jurisdiction—Prior Converted Cropland

Finally, Huntress argued that his property was not subject to CWA jurisdiction as it was "prior-converted croplands" that were converted to farming prior to December 23, 1985, a categorical exemption to the definitions of "waters of the United States." Huntress' property was indeed so converted, but this argument ignores the Federal Register's holding that:

> …such a designation can be lost if the land is not used for farming purposes for five consecutive years.

Huntress' property, arguably, lost this prior exemption. Huntress argued that assuming abandonment:

> …the abandonment rule was repealed by the 1996 amendments to the Food Security Act, and is no longer in effect.

This USDA authority is not binding on EPA in that it is congressionally empowered with the authority to issue rules implementing the CWA. 33 U.S.C. § 1251(d) states that:

> It is inconsequential that the USDA's rule was subsequently amended by statute. In other words, simply because the rule on which the EPA based its own rule was changed, does not, *ipso facto*, render the EPA's rule changed.

EPA's implementing regulations remain unchanged, and there is no evidence that Congress intended to alter EPA's rule through the Food Security Act.

Conclusion and Implications

This decision relied upon *Sackett v. U.S. EPA*, 132 S.Ct. 1367 (2012), which dealt with the timing for challenging CWA compliance orders. *Sackett* is another case following *Rapanos v. United States*, 547 U.S. 715 (2006) that could have addressed the critical issue of what exactly is the federal government's CWA § 404 jurisdiction. *Sackett* concerned the EPA's jurisdiction to regulate fill on a small portion of Sackett's property. In *Huntress* the court resolved the issue of CWA jurisdiction over prior converted croplands in EPA's favor, but leaving for discovery the larger issue of what constitutes waters of the United States within the context of Huntress' property. So the larger issue of CWA jurisdiction over ephemeral drainages or isolated wetlands awaits resolution. (Thierry Montoya)

PENNSYLVANIA HIGH COURT ORDERS STATE PUBLIC UTILITY COMMISSION TO STOP REVIEWING LOCAL ZONING RELATED TO OIL AND GAS DRILLING IN VIOLATION OF LOWER COURT INJUNCTION

Robinson Twp. v. Commonwealth of Pennsylvania, Case No. 100 MAP 2012 (Penn. *filed* July 25, 2013).

The Pennsylvania Supreme Court recently ruled in a *per curiam* decision that the state's Public Utility Commission (PUC) must stop reviewing municipal ordinances to determine whether the ordinances comply with the state's drilling law, which the Pennsylvania Supreme Court is currently reviewing. The drilling law, or Act 13 (the Act) is controversial because, among other things, it prohibits municipalities from regulating natural gas drilling by preempting all municipal zoning and environmental laws relating to oil and gas operations. Under the Act, every zoning district would be open to natural gas drilling, even residential districts.

If the State Supreme Court upholds the validity of the Act, the PUC would play a part in reviewing and approving local zoning ordinances to ensure that the local ordinances did not conflict with state laws on oil and gas operations. The lower court ruling that the State Supreme Court is currently reviewing is *Robinson Twp. v. Commonwealth*, 52 A.3d 463 (Pa. Commw. Ct. 2012) (hereinafter *Robinson*).

Background

The recent Pennsylvania Supreme Court ruling stems from the lower court ruling on the Act, which is a codified statutory framework regulating oil and gas operations in the state. The Act preempts local regulation, including environmental laws and zoning code provisions except in limited instances, regarding setbacks in certain areas involving oil and gas operations. However, the Act also provides that impact fees would be distributed to municipalities in which oil and gas drilling took place. The Act gives the power of eminent domain to corporations that are empowered to transport, sell or store natural gas.

Opponents of the Act, as represented in the *Robinson* case, are made up of seven municipalities, council members, and various organizations that claimed the Act prevented the municipalities from fulfilling their constitutional and statutory obligations to protect the health, safety, and welfare of citizens, as well as natural resources from oil and gas drilling. The Act's proponents, including the state and PUC, countered that the Act was written by the state legislature to "modernize and bolster environmental protections in light of the increased drilling likely to occur throughout [the state]," and the Act fostered environmental predictability and investment in the oil and gas drilling industry by "increasing statewide uniformity in local municipal ordinances that impact oil and natural gas operations."

The Lower Court Decision

The *Robinson* court struck parts of the Act, including the state's ability to preempt all local zoning laws as applied to oil and gas drilling and operations. Despite the lower court ruling, the PUC began to review local zoning ordinances to determine whether they complied with the Act. The lower court ordered the PUC to stop violating the injunction, and the PUC appealed. The State Supreme Court recently rejected the PUC's appeal, and the State Supreme Court is considering the *Robinson* opinion.

The Pennsylvania Supreme Court may consider on appeal a number of *Robinson's* holdings, which are addressed below.

Standing

The *Robinson* court addressed whether the various petitioners had standing to sue the state regarding the Act. The lower court found that the petitioner municipalities had standing because the Act:

> …imposes substantial, direct and immediate obligations [on the municipalities] that affect [the municipalities'] government functions.

Specifically, the lower court held that the Act requires municipalities to enact uniform local ordinances to allow for the development of oil and gas resources. Under the Act, the municipalities would have to take actions to allow an owner or operator of an oil or gas operation to utilize areas permitted in certain zoning districts. Should the municipalities refuse to enact such ordinances, they would not be entitled to impact fees from the oil and gas companies.

The lower court also held that two petitioner council members also had standing to challenge the Act. Under the Act, these council members would be required to enact ordinances that they believed were unconstitutional and against the interests of their constituents.

Justiciability

One of the state's contentions was that the lower court could not review the Act, because the Act is a non-justiciable political question. In other words, the state argued that it was in the Legislature's purview to exercise the state's police powers, including deciding how to best manage the state's natural resources. Therefore, the judicial branch had no authority to review the Act.

However, the lower court rejected this argument and found that it had the authority to review the Act. The *Robinson* court reasoned that it had the authority to determine whether the Act was constitutional, and in doing so, the court was not making a specific legislative policy determination.

Zoning Issues

The lower court then went into a lengthy analysis of whether the Act was constitutionally infirm because it requires municipal zoning ordinances to be amended to include oil and gas operations in all zoning districts. Specifically, the *Robinson* court considered whether such requirement violated the principles of due process.

The lower court held that yes, the Act's zoning ordinance requirements violated due process because by requiring municipalities to violate their comprehensive plans for growth and development in order to accommodate oil and gas drilling, property owners' interests would not be protected, the character of neighborhoods would become altered, and irrational classifications would be promulgated because drilling would be allowed in all zones—even residential zones. Because the Act did not serve the police power purpose of local zoning ordinances, the Act violated municipalities and their residents' rights to substantive due process. As such, the lower court enjoined the state from enforcing portions of the Act that required municipalities to pass zoning ordinances that would allow oil and gas drilling in all zoning districts.

Eminent Domain

The lower court rejected petitioners' challenge to the portion of the Act that allowed private corporations to exercise the power of eminent domain. As such, the lower court found that the petitioners had failed to demonstrate that any of their property had been taken or was being threatened through the eminent domain process, and that the only way to challenge the condemnor power to take property was to file preliminary objections to a declaration of taking. Neither had happened.

Conclusion and Implications

Despite the lower court's ruling, which prevented the state from preempting local zoning ordinances (pending the appeal to the State Supreme Court), the state PUC moved forward in reviewing some municipalities' zoning ordinances to determine whether the ordinances complied with the Act. In 2012, the lower court ordered the PUC to stop reviewing the local zoning ordinances, because it violated the lower court injunction. In turn, the PUC appealed to the State Supreme Court for relief. The State Supreme Court's recent order denied the PUC's appeal, effectively stopping the PUC from continuing to review those local zoning ordinances in violation of the lower court injunction, and pending the State Supreme Court's review of the lower court decision.

The Pennsylvania Supreme Court's ruling on the lower court's grant of injunction is widely anticipated. Should the lower court decision be overturned, municipalities would be required to overhaul their environmental and zoning laws in order to make way for oil and gas interests. If the State Supreme Court affirms the lower court decision, the Pennsylvania Legislature and the oil and gas industry will have to find other ways to facilitate oil and gas drilling in municipalities that each have differing land use ordinances and statutes. (HongDao Nguyen, Mala Subramanian)

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