

Survey of Recent Cases

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This paper provides an overview of 2002's significant court decisions regarding water law. Although the paper focuses on the Clean Water Act and other water programs, the paper discusses selected major decisions in other areas of environmental law as well.

SWANCC and Waters of the U.S.

Several cases have followed up on the Supreme Court's 2001 decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*.¹ In *SWANCC*, the Corps had claimed jurisdiction over isolated waters based on the Migratory Bird Rule. The court rejected the Corps of Engineers' claim of jurisdiction. The Court stated that the Clean Water Act does not allow an interpretation of "navigable waters" that causes the "jurisdiction of the Corps [to] extend to ponds that are not adjacent to open water."² The lower courts have not been consistent in whether *SWANCC* will be read narrowly or broadly.

In *United States v. Rapanos*, a landowner was convicted of filling wetlands in violation of the Clean Water Act.³ The wetlands occupied approximately one-third of an acre of a 175 acre parcel. Neither the wetlands nor the property were directly adjacent to navigable water.⁴ The property was over 20 miles from the nearest body of navigable water.⁵ The government argued that the wetlands had a "surface hydrological connection" through a ditch which emptied to a creek, which in turn "winds its way" to a river.⁶ On these facts, the court found that under *SWANCC* the filled wetlands were not, as a matter of law, navigable waters.⁷

United States v. Krilich, another post-*SWANCC* case, came before the Seventh Circuit in an unusual manner.⁸ Krilich was asking the Seventh Circuit to set aside a consent decree he had entered into with EPA prior to the *SWANCC* decision. The Seventh Circuit ultimately denied Krilich's request on a variety of grounds, but also discussed its views on the *SWANCC* holding in dicta. The Seventh Circuit rejected Krilich's argument that the Supreme Court narrowed the Corps jurisdiction to only those waters adjacent to bodies of open water.⁹ The court read *SWANCC* narrowly, stating that the decision only held that the definition of "waters of the United States as clarified by the Migratory Bird Rule" exceeded the Corp's authority under the CWA.¹⁰

¹ 121 U.S. 675 (2001).

² *Id.* at 680.

³ 190 F.Supp. 2d 1011 (E.D.Mich. 2002).

⁴ *Id.* at 1012.

⁵ *Id.*

⁶ *Id.* at 1014-15.

⁷ *Id.*

⁸ 2002 WL 31007698 (7th Cir. 2002).

⁹ *Id.* at *6.

¹⁰ *Id.*

In *United States v. Newdunn Associates*, the Army Corps of Engineers was denied jurisdiction over wetlands on a 43 acre parcel.¹¹ In developing its property, Newdunn discharged dredged or fill material into wetlands on the property.¹² In finding no jurisdiction, the court focused on the connection between the property and the navigable portion of a nearby river. The court noted that from Newdunn's property, water must pass through several ditches, a culvert, another ditch, and non-navigable parts of the river.¹³ The district court focused on the *SWANCC* language regarding the Commerce Clause and seemed to indicate a willingness to severely restrict the Corps' jurisdiction.¹⁴

Clean Water Act – Exemptions and Defenses

In *Piney Run Preservation Association v. County Commissioners of Carroll County*, the Fourth Circuit elaborated on the “permit shield” defense under the Clean Water Act.¹⁵ Piney Run challenged Carroll County's discharge of heated effluent as an illegal discharge not covered by or in compliance with an NPDES permit.¹⁶ Carroll County's NPDES permit contained discharge limits for certain pollutants but did not list heat.¹⁷ During the application process, the county disclosed it was discharging heat. Even though the permit was silent on heated discharges, the discharges were within the “reasonable contemplation” of the permitting authority, according to the court.¹⁸ Applying EPA's interpretation of the permit shield, the Court held that “all discharges adequately disclosed to the permitting authority are within the scope of the permit's protection.”¹⁹ Thus, the discharge of heated effluent was not a violation.

In *Fishermen Against the Destruction of the Environment, Inc. v. Closter Farms, Inc.*, the Eleventh Circuit gave guidance on the agricultural exemptions to the Clean Water Act.²⁰ Closter Farms grew sugar cane on land adjacent to a lake. Closter operated a water management system to provide drainage for its operations as well as for several adjacent properties (including an airport, a waste water treatment facility, a state road and vacant land).²¹ The system pumped excess water from Closter's irrigation canals into the lake. The farm's contributions to the discharge were exempted from the definition of a point source under the CWA's exemption for “agricultural storm water discharges and return flows from irrigation agriculture.” The court found the pumping, rather than the natural flow, of storm water to have no effect on its analysis of the exemption. The court also found that groundwater seepage (which was part of the discharge) was covered by “the return flow from irrigation” exemption because the groundwater seepage could be the result of the process of flood irrigation. In considering the discharges from the adjacent properties, the court found that there was insufficient evidence to conclude that they supplied any of the pollutants discharged to the lake.

Clean Water Act - Criminal Law

The Supreme Court declined to review the felony conviction of three corporate officers under the “responsible corporate office” doctrine for violations of the Clean Water Act, as well as for violations of

¹¹ 195 F.Supp. 2d 751 (E.D.Va. 2002).

¹² *Id.* at 754.

¹³ *Id.* at 765.

¹⁴ *Id.* at 767.

¹⁵ 268 F.3d 255 (4th Cir. 2001), *cert. denied*, 122 S.Ct. 1960 (U.S. May 0,1 2002) (No. 01-1172).

¹⁶ *Id.* at 260.

¹⁷ *Id.*

¹⁸ *Id.* at 264.

¹⁹ *Id.* at 269.

²⁰ 2002 WL 1804952 (11th Cir. 2002).

²¹ *Id.*

RCRA and CERCLA.²² In the underlying case, Hansen, the primary defendant, was charged with conspiracy to commit environmental crimes and violations of various provisions of environmental law, including the Clean Water Act.²³ Hansen had founded the company and had served as its president, chief executive officer and chairman of the board.²⁴ In determining that the defendant acted “knowingly” (as required for conviction), the defendants need not have “directly” caused the violation.²⁵ It was enough that a defendant “permitted the plant employees to process the hazardous wastes as they had in the past despite his knowledge that the procedures were in violation of environmental regulations . . .”²⁶

Clean Water Act – Other

In a recent Ninth Circuit case, the court faced the question of whether biological materials emitted from mussels grown on harvesting rafts were “pollutants,” for which a discharge permit was required.²⁷ The court recognized that the CWA defines pollutant to include “biological materials” but found the statutory definition to not be clear from the statute.²⁸ In light of other items enumerated as pollutants, the court determined that biological materials means “waste material of a human or industrial process.”²⁹ The court also recognized that an explicit purpose of the CWA is the “protection and propagation” of shellfish.³⁰ As a result of the court’s decision, no permit was required for the operation.

In *Pronsolino v. Nastri*, the Ninth Circuit upheld EPA-promulgated TMDLs for waters polluted only by non-point sources.³¹ The Pronsolinos owned 800 acres of heavily logged land in the Garcia River watershed in California.³² EPA added the Garcia River to California’s section 303(d)(1) list of impaired waters in 1992 when California failed to list it.³³ California also failed to promulgate TMDLs for the Garcia River.³⁴ Subsequently, EPA established a TMDL for the river, allocating the yearly load among four categories of non-point source pollution.³⁵ When the Pronsolinos applied for a harvesting permit from the California Department of Forestry, they were required to perform mitigation measures to comply with the TMDL.³⁶ The Pronsolinos challenged the TMDL, asserting that the Clean Water Act did not require TMDLs for waters polluted only by non-point sources, such as the Garcia River. The Ninth Circuit discussed the history of TMDLs at length. The court ultimately concluded that the Clean Water Act included in both the section “303(d)(1) listing and TMDLs requirements waters impaired only by non-point sources of pollution.”³⁷

In a Clean Water Act citizen’s suit, the Ninth Circuit held that certain equipment used by the Henry Bosma Dairy in handling wastes falls into the definition of a concentrated animal feeding operation

²² *United States v. Hansen*, 262 F.3d 1217, 1231 (11th Cir. 2001), cert. denied, 122 S.Ct. 2326 (U.S. June 3, 2002) (No. 01-1104).

²³ *Id.*

²⁴ *Id.* at 1225.

²⁵ *Id.* at 1248.

²⁶ *Id.* at 1248.

²⁷ *Assoc. to Protect Hammersley, Eld and Totten Inlets v. Taylor Resources, Inc.*, 299 F.3d 1007 (9th Cir. 2002).

²⁸ *Id.* at 1016.

²⁹ *Id.*

³⁰ *Id.*

³¹ 291 F.3d 1123 (9th Cir. 2002).

³² *Id.* at 1129.

³³ *Id.* at 1129.

³⁴ *Id.* at 1129.

³⁵ *Id.* at 1129.

³⁶ *Id.* At 1129-30.

³⁷ *Id.* At 1140-41.

(“CAFO”), and thus required a Clean Water Act discharge permit.³⁸ Bosma argued that although parts of its operations are point sources under the definition of a CAFO,³⁹ other parts, such as the fields where manure is stored – are not CAFOs.⁴⁰ The Court disagreed, reasoning that including “any manure spreading vehicles, as well as manure storing fields, and ditches used to store or transfer the wastes” in the definition of CAFO “serves the purpose of the CWA.”⁴¹

Bosma also discussed the sufficiency of notice under the Clean Water Act’s citizen suit provisions. The Association alleged discharges without a permit, discharges in violation of a permit, and discharges causing violation of water quality standards. The notice sent to Bosma did not list every violation that was ultimately alleged in the complaint. The Court found that the plaintiffs were not required “to provide an exhaustive list of all violations.”⁴² The violations added in the complaint are “sufficiently similar to those contained in the notice” in that the violations originated from the same sources, involved the same materials, impacted the same waters, and originated in the same time frame as the violations in the notice.⁴³

Upcoming Clean Water Act Cases

The Supreme Court has agreed to hear a case involving whether a developer violated the Clean Water Act when he “deep ripped” large portions of his ranch.⁴⁴ The case potentially raises issues regarding the CWA’s farming exemption, calculation of penalties and the regulation of “incidental fallback.” In the underlying case, the Ninth Circuit required a farmer to obtain a permit for “deep ripping” in jurisdictional wetlands.⁴⁵ Borden “deep ripped” areas of grazing lands to convert the area to orchards and vineyards. Deep ripping involved a tractor or bulldozer dragging four to seven-foot long metal prongs through the soil. The result of the activity was that the disturbed soil allowed drainage of several wetland areas. The Ninth Circuit rejected Borden’s arguments that there was no “addition” of a “pollutant” because the soil was being redeposited where it came from.⁴⁶ The court found that: activities such as deep ripping “are not immune from the Clean Water Act merely because they do not involve the introduction of material brought in from somewhere else;”⁴⁷ the bulldozers and tractors used in deep ripping can fall within the “extremely broad” definition of “point sources;”⁴⁸ and the farming exceptions did not apply because the deep ripping was designed to bring the land “into a use to which it was not previously subject.”⁴⁹ The Ninth Circuit also found that each pass of the ripper through the wetlands was a separate violation for which a penalty could be assessed.⁵⁰

Texas

³⁸ *Community Association for Restoration of the Environment v. Henry Bosma Dairy*, 2002 WL 31051547 (9th Cir. 2002).

³⁹ CAFO is defined to be an animal feeding operation where animals are stabled or confined for a total of 45 days or more in any 12 month period in an area where neither crops, vegetation or crop residue is sustained. 40 C.F.R. § 122.23(a)(3).

⁴⁰ *Id.* at *10.

⁴¹ *Id.* at *10.

⁴² *Id.* at *5.

⁴³ *Id.* at *6-*7.

⁴⁴ *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001), *cert. granted*, 122 S.Ct. 2355 (U.S. June 10, 2002) (No. 01-1243).

⁴⁵ *Id.*

⁴⁶ *Id.* at 814.

⁴⁷ *Id.* at 814-815.

⁴⁸ *Id.* at 815.

⁴⁹ *Id.* at 815.

⁵⁰ *Id.* at 818.

In *Bragg v. Edwards Aquifer Authority*,⁵¹ the Texas Supreme Court upheld rules adopted by the Edwards Aquifer Authority (“EAA”) for well permitting.⁵² The EAA had adopted rules governing when and in what amounts its initial issuance of permits for groundwater withdrawal would be issued. The Braggs, commercial pecan growers, filed suit to challenge the EAA’s proposed action on their permit application and to the EAA’s rules, claiming that the EAA was required to prepare a takings impact assessment (“TIA”) under the Private Real Property Rights Preservation Act.⁵³ The Court held that the EAA rules were not subject to the Property Rights Act requirement of a TIA because the EAA acted “to prevent waste or protect the rights of owners of interest in groundwater” – an exception to the Act.⁵⁴ More importantly, the Court found that the EAA did not have to prepare TIAs before acting on applications for individual permits.⁵⁵ The Court reasoned that the EAA’s action was “‘enforcement’ of a governmental action ‘through the use of permitting’” which is not subject to the TIA requirement.⁵⁶

Regulatory Takings

In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, the U.S. Supreme Court upheld a city’s ability to temporarily block development.⁵⁷ At issue in the case were the rights of landowners on the shores of Lake Tahoe to build on their land. The Tahoe Regional Planning Authority stopped development on the land in 1981 and continued the building moratorium for 32 months until 1984.⁵⁸ The planning authority used the moratorium to study run-off issues and to develop a land-use plan. The landowners brought suit claiming the moratorium constituted a taking. The Court found, in a 6-3 decision, that the temporary suspension on development was not a taking requiring compensation to the landowners. The Court found that there is a “fundamental distinction” between government regulation limiting use and government’s seizure of property; “land-use regulations are ubiquitous and most of them impact property values in some tangential way – often in completely unanticipated ways.”⁵⁹

The Court recognized that in appropriate circumstances, a moratorium could be a taking and applied a Penn Central analysis.⁶⁰ The Court mentioned several factors in determining whether a moratorium is a taking including: the duration of the moratorium; the actual impact of the moratorium on property values; the landowner’s reasonable expectations; and the regulatory agencies’ good faith. The determination is, however, a fact specific inquiry to be determined on a case-by-case basis.

Walcek v. United States applies the principles of *Tahoe-Sierra*.⁶¹ The Walceks owned 14.5 acres in Delaware. Prior to purchase in 1971, the Walceks did no “due diligence” on physical or regulatory limitations on development.⁶² In 1972, 13.2 acres became subject to section 404 of the Clean Water

⁵¹ 71 S.W.3d 729(Tex. 2002)

⁵² The challenge was to rules which, prior to the Courts consideration, were replaced by another set of rules. The EAA did not prepare a TIA before adopting the new rules and thus the Court found that the dispute is not moot.

⁵³ *Id.* at 732-3.

⁵⁴ *Id.* at 735.

⁵⁵ *Id.* at 737.

⁵⁶ *Id.*

⁵⁷ 122 S.Ct. 1465 (2002).

⁵⁸ *Id.* at 1470, 1473.

⁵⁹ *Id.* at 1479.

⁶⁰ Under the Penn Central doctrine, whether a taking has occurred involves consideration of the regulation’s economic impact on the owner, the regulation’s interference with reasonably investment-backed expectations and the nature of the regulatory action. *See, Palazzolo v. Rhode Island*, 121 S.Ct. 2448 (2001).

⁶¹ 2002 WL 3102744 (Fed.Cir. 2002).

⁶² *Id.* at *1.

Act.⁶³ The Walceks sought a permit from the Army Corps of Engineers to fill the wetlands and develop the property. The Corps initially denied the permit but proposed alternatives. The Corps ultimately issued a permit that allowed the creation of a 28 home development (as opposed to the 77 homes proposed by the Walceks) and allowed the filling of 2.2 acres of wetlands provided that 4.4 acres of wetlands were created as mitigation.⁶⁴ The court found that no compensable taking had occurred.

First the court determined that the appropriate portion of land to consider in determining whether a categorical taking occurred is the 13.2 acres of wetlands rather than only the 11 acres of wetlands on which no development was permitted.⁶⁵ Second, the court found that the correct analysis for a regulatory taking was the *Penn Central* analysis.⁶⁶ In *Penn Central Transportation Co. v. New York City*, the Supreme Court set out three factors: (1) the regulation's economic impact on the landowner, (2) the extent to which the regulation interferes with reasonable investment-backed expectations, and (3) the character of the government's action.⁶⁷ In determining the economic impact, the Court considered the entire parcel of land, including areas with no wetlands.⁶⁸ The Court found that the Walceks would still make a profit on the sale of the developed land.⁶⁹ The lower court opinion found that although the wetlands regulations deprived the property of 59.8 percent of its value, the profit was nearly twice their initial investment.⁷⁰ The lower court was critical of the Walceks lack of "due diligence" prior to purchase. In determining the reasonable investment-backed expectations, the court stated that a purchaser who "reasonably should have been aware of the existence or impending existence" of regulations are "deemed to have assumed the economic risk" of the regulations."⁷¹ Although the Walceks were not required to predict the passage of all the regulations which ultimately affected their property, certain regulations were in effect or were reasonably foreseeable.⁷²

Other Programs

Expanding a recent Supreme Court case to environmental justice suits, the Third Circuit ruled that regulations issued under Title VI of the Civil Rights Act of 1964 are not enforceable in a private suit.⁷³ In 2001, the Supreme Court ruled, in the context of an English-only licensing exam, that a private individual could not sue to enforce disparate impact regulations issued under section 602 of Title VI.⁷⁴ In *South Camden*, the plaintiffs, all of whom reside near a cement plant, brought suit to enjoin the operation of the plant. The plaintiffs claimed that the permitting decision constituted disparate impact discrimination in violation of regulations promulgated under section 1983 of Title VI.⁷⁵ The Third Circuit held that the plaintiffs had no rights enforceable through a section 1983 action.⁷⁶ The decision has the possibility of further restricting environmental justice suits.

⁶³ *Id.* at *2.

⁶⁴ *Id.* at *3.

⁶⁵ *Id.* at *4.

⁶⁶ *Id.* at *5.

⁶⁷ 438 U.S. 104 (1978).

⁶⁸ *Id.* at *5.

⁶⁹ *Id.* at *5.

⁷⁰ *Walcek v. United States*, 49 Fed. Cl. 248, 267 (Fed. Cl. 2001).

⁷¹ *Id.* at 268.

⁷² *Id.* at 269.

⁷³ *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, 274 F.3d 771(3rd Cir. 2001), *cert denied*, 122 S.Ct. 2621 (U.S. June 24, 2002) (No. 01-1547).

⁷⁴ *Alexandar v. Sandoval*, 121 S.Ct. 1511(2001).

⁷⁵ 274 F.3d at 774.

⁷⁶ *Id.*

In *United States v. Power Engineering Company*, the Tenth Circuit allowed EPA to “overfile” – that is, to proceed with suit on violations which were the subject of a state enforcement action.⁷⁷ Power Engineering had been the subject of a Colorado enforcement action relating to the disposal of hazardous wastes without a permit.⁷⁸ EPA asked Colorado to require Power Engineering to post financial assurance under RCRA. When Colorado did not require financial assurance, EPA brought an enforcement action.⁷⁹ The Tenth Circuit allowed the EPA suit to proceed, finding that the delegation of the RCRA program to Colorado and the Colorado enforcement action were not a bar to EPA’s suit. This decision is in conflict with the Eight Circuit’s decision in *Harmon Industries v. Browner*.⁸⁰ In *Harmon*, the Eight Circuit found that overfiling under RCRA is allowed only if EPA withdraws authorization for the state program or if the state fails to take enforcement actions after receiving notice.⁸¹

In a case impacting recovery of clean up costs under CERCLA, a panel of the Fifth Circuit Court of Appeals held that Aviall Services, a potentially responsible party (“PRP”), can maintain CERCLA contribution claims against another PRP only if it has a pending or adjudicated administrative order under Section 106 or cost recovery action under Section 107(a) against it.⁸² Aviall had cleaned up contamination “voluntarily” after the Texas Natural Resource Conservation Commission notified it that it was in violation of state law.⁸³ Aviall’s cleanup spanned a decade and cost millions of dollars.⁸⁴ Cleanup at the behest of the state was not a federal action under CERCLA according to the Fifth Circuit.⁸⁵ The court focused on a “plain language reading” of Section 113, allowing a party to file a contribution claim only “‘during or following’ a federal CERCLA action against it.”⁸⁶ Rehearing has been granted in the case and argument was heard by the Fifth Circuit en banc. If upheld, *Aviall* will severely restrict a party’s ability to obtain contribution for remediation it conducts.

⁷⁷ 2002 WL 2017134 (10th Cir. 2002).

⁷⁸ *Id.* at *1.

⁷⁹ *Id.* at *1.

⁸⁰ 191 F.3d 894 (8th Cir. 1999).

⁸¹ *Id.*

⁸² *Aviall Services, Inc. v. Cooper Industries, Inc.*, 263 F.3d 134,137 (5th Cir. 2001), rehearing en banc granted, 278 F.3d 416 (5th Cir. 2001).

⁸³ *Id.* at 136.

⁸⁴ *Id.* at 136.

⁸⁵ *Id.* at 138.

⁸⁶ *Id.* at 138.