Client Advisory

KELLEY DRYE

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Part 4: Environmental Policy Under Obama: A Changing Climate in Washington

Below is the fourth in a four-part series examining how environmental policy, regulation, legislation, and jurisprudence is set to change under the Obama Administration, and how these changes might affect regulated industry. The Kelley Drye & Warren Environmental/Occupational Health and Safety Practice Group counsels clients on legislative and regulatory policy, and compliance and litigation strategies under the full range of environmental and OSHA programs.

SERIES 4. Recent Legal Developments – Making it Easier to Sue?

Building on the prior three client advisory series, which assert that President Obama's environmental team is poised to increase environmental regulation and enforcement to levels unseen over the past eight years, the last part of this four-part series examines several recent judicial decisions across several different environmental areas which have potentially made it easier for both federal and state governments, and private citizens, to pursue lawsuits against industry.

Of course, any federal agency regulation would be meaningless without the ability to enforce its rules; in the courts if necessary. With approximately 678 authorized federal district court, and 179 authorized federal appellate court judgeships in the United States, each dependant on Presidential appointment and Congressional confirmation, broad trends regarding how the federal judiciary has ruled, or might rule, on environmental cases, especially at the district court level, are difficult to discern. Nonetheless, judges are not wholly insulated from the outside world. They read the newspapers and pay attention to the broader societal trends taking place outside of the courtroom. With the potential sea change coming under the Obama Administration, new judicial appointments, and the dawning of a new era in environmental policies, laws, and regulations, the federal court system is bound to be affected.

Helping to facilitate this change may be a new perspective coming from the lawyers at the Department of Justice ("DOJ"). Several high-ranking former DOJ officials have publicly urged the environment division to reconsider several ongoing defenses of contentious EPA rules once Obama takes office.[1] Given President Obama's vastly different outlook on environmental matters from the former Administration, it is not unreasonable to conclude that DOJ will be much more aggressive in prosecuting environmental non-compliance and supportive of what will likely be more heavy-handed EPA regulation. Discussed below are several recent cases which illustrate how decisions by the federal courts may make it easier for the federal and state governments, and private citizens, to prosecute industry for non-compliance with environmental laws and regulations.

CLEAN WATER ACT

Black Warrior Riverkeeper, Inc. v. Cherokee Mining, LLC

Recently, the Eleventh Circuit ruled in a Clean Water Act ("CWA") citizen-suit involving the discharge of

[1] *See* Winston, Kate, "Former DOJ Officials Urge Major Rethink on Defending Key EPA Rules," InsideEPA.com, November 4, 2008.

excessive pollutants by Cherokee Mining, LLC (Cherokee) into nearby creeks and tributaries. The issue in *Black Warrior*, involved section 309 of the CWA, part of which bars citizen-suits when either EPA or a state agency has "commenced and is diligently prosecuting a civil or criminal action." 33. U.S.C. § 1319(g)(6)(A)(ii). Amendments to the CWA in 1987 extended this citizen-suit "bar" to enforcement actions that have been commenced through an administrative penalties process.

In this case, Cherokee exceeded its pollutant discharge limit under its state-administered National Pollutant Discharge Elimination System ("NPDES") permit in connection with mining operations in Alabama. Upon learning of Cherokee's violations, Black Warrior sent Cherokee a notice of intent to sue under the citizen-suit provision of the CWA. Approximately two months later, the Alabama Department of Environmental Management ("ADEM") began an administrative enforcement action offering to resolve the violations through a Consent Order and a civil penalty. Seven days after ADEM began its enforcement proceedings, Black Warrior filed a citizen-suit in federal court. Black Warrior's citizen-suit filing was within 120 days of its notice of intent to sue, as required under the CWA. Soon thereafter, Cherokee agreed to the Consent Order proposed by ADEM, requiring it to pay a fine of $15,000. The Consent Order was finalized following a thirty-day public notice and comment period.

Cherokee sought to dismiss Black Warrior's citizen-suit under section 309 of the CWA, arguing that ADEM had already commenced and was diligently prosecuting an administrative enforcement action against it. Therefore, Cherokee argued that ADEM's enforcement action is precisely the type of agency action section 309 contemplates as barring a parallel citizen suit. Black Warrior, in turn, argued that its citizen-suit was not barred by section 309 because it had served the notice of intent to sue prior to ADEM's commencement of its enforcement action, and timely filed suit within 120 days of the notice.

Reading the entire § 309(g)(6) section together, the court agreed with Black Warrior. Specifically, the court stated that § 309(g)(6) covers both EPA and state-initiated administrative enforcement actions. Such a reading of the statute, the court reasoned, is consistent with Congress' purpose that citizen-suits act as an enforcement tool to spur government enforcement actions, and obstacles in the path of such suits should be avoided. The court did note, however, the need to avoid subjecting polluters to duplicative prosecution. The court concluded that all of the limitations ("bans") against a citizen-suit (including federal and state administrative enforcement actions) are lifted so long as the notice and filing requirements of a CWA citizen-suit are met. Thus, Black Warrior's private litigation was allowed to proceed alongside ADEM's enforcement action (*i.e.*, the $15,000 penalty).

While the court's holding in *Black Warrior* is arguably in line with the plain text of the statute, practically, it does not make much sense, and may serve as precedent in other circuits for similar holdings that could result in more CWA citizen-suits. One remarkable outcome from this case is that even though EPA or a state agency has commenced an enforcement action, even resulting in a substantial civil penalty, a parallel citizen suit for the same violation may proceed so long as the citizen group has met the statute's procedural requirements (timely notice and filing). Thus, despite Congress' admonition to avoid duplicative prosecution, *Black Warrior* has created a landscape that encourages both administrative enforcement and private litigation for the same violation. Practically, because it takes some time once a violation is discovered for a party to meet with an enforcing agency and begin the consent order process, it will almost always be easier for a citizen group like *Black Warrior* to file a notice of intent to sue. Then, so long as suit is filed within 120 days of the notice, the citizen-suit may proceed regardless of whether there has been an agency enforcement proceeding in the meantime.

Equally as troubling, the *Black Warrior* holding results in a large disincentive for companies with CWA violations to seek resolution through consent orders with the enforcing agency if they have previously been served a notice of intent to sue under the citizen-suit provisions. Such a move might subject the company to penalties owed to the agency at the same time they are defending their activities in litigation. Moreover, under such a scenario, there is no finality associated with the Consent Order. In sum, the *Black Warrior* case, at least in the Eleventh Circuit, has made it easier for citizens to sue under the CWA and has increased the potential ramifications of a CWA violation for companies.

RCRA

RCRA remains a powerful tool, used by both private citizens, and federal and state enforcement agencies to abate ongoing pollution. A recent First Circuit case highlights that courts now, more than ever, are willing to give RCRA provisions the broadest possible reading in order to impose injunctions on polluters.

Maine People's Alliance v. Mallinckrodt, Inc.

Similar to the holding in *Black Warrior*, the First Circuit's opinion in *Maine People's* reaffirmed that RCRA's citizen-suit provision is a powerful private corollary even when federal enforcement actions have played a role in a RCRA clean-up site. *Maine People's* involves Mallinckrodt's contribution to the mercury-laden pollution in the Penobscot River in Orrington, Maine.

Mallinckrodt operated a chlor-alkali plant on the banks of the river from 1967 to 2000. During its operations, it deposited mercury-laden waste into the river. EPA began investigating the site in 1986, ultimately leading to a consent decree with Mallinckrodt in 1993. In 2000, EPA and the Maine Department of Environmental Protection ("MDEP") directed the company to conduct a further study of the effects of mercury downriver from the plant. Mallinckrodt undertook the investigation, twice, meeting with EPA disapproval both times. Subsequently, two environmental groups filed suit under RCRA § 7002, alleging that the mercury contamination downriver may present an imminent and substantial endangerment and that Mallinckrodt had made only minimal efforts to undertake the studies requested by EPA and MDEP. The district court held in favor of the environmental groups, concluding that the citizen-suit did not conflict with EPA's action. Importantly, the court cited RCRA's "lenient" standard under the citizen-suit provision.

On appeal, the First Circuit upheld the district court in all respects, and reinforced several important principles underlying RCRA citizen-suits. First, the court found the environmental groups had standing to sue (*i.e.*, that they had suffered an injury) based on the testimony of several of its members that they could no longer eat fish or shellfish from, or recreate on or near, the river. With respect to Mallinckrodt's standing argument, the court also concluded that the citizen-suit was not an impermissible collateral attack on agency action (specifically, EPA's risk assessment process).

Second, the court denied Mallinckrodt's argument that sanctioning the citizen-suit would violate the separation-of-powers doctrine by making it possible for a private citizen, supported by judicial interpretation, to second-guess, or supplant EPA's decisions. The court said that, where EPA is undertaking an "activity," but has not yet made any final remedy decisions or issued other such administrative orders, Congress has expressly left room for some judicial involvement.

Finally, and perhaps most critically, the First Circuit upheld the district court's remedy – ordering Mallinckrodt to fund a comprehensive study, at a price tag of many millions. In upholding the expensive remedy, the First Circuit reinforced that courts have extremely broad authority under RCRA to fashion many types of injunctive remedies, not just those that require cleanup. Given the magnitude of the pollution in the Penobscot and the remedy ultimately upheld by the First Circuit, *Maine People's* is an important case in that it demonstrates that courts often rely on their broad authority under RCRA to impose significant injunctive relief at the request of citizen-suits notwithstanding ongoing agency involvement. Much like *Black Warrior*, *Maine People's*, reinforces that RCRA's citizen-suit pro-

vision is a very effective enforcement tool for environmental groups, and will continue to be used.

CERCLA

U.S. v. Burlington Northern & Santa Fe Railway Co.

The U.S. Supreme Court has accepted *certiorari* in a Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") case from the Ninth Circuit, which has the potential to determine whether companies at the apportionment of liability stage of a CERCLA cost recovery action under § 107 are subject to joint and several liability. The underlying facts involve contamination through the storage and use of agricultural chemicals. The case is fairly complex and will involve the analysis of how the different circuits interpret the possibility of joint and several liability under CERCLA § 107, and more specifically, how a court should undertake to determine when joint and several liability is appropriate and when it is not when apportioning liability among multiple potentially responsible parties ("PRPs"). The outcome of this case will help determine how easy it will be (*i.e.*, how much evidence will be required) for a PRP to demonstrate other parties' liability under CERCLA § 107 at a site with multiple PRPs.

CLEAN AIR ACT

State of North Carolina v. TVA

In *North Carolina v. TVA*, North Carolina brought a common-law nuisance action against the Tennessee Valley Authority ("TVA"), alleging that various TVA-owned coal-fired power plants in Tennessee, Alabama, and Kentucky were emitting a variety of pollutants which were traveling into North Carolina and adversely impacting human health and the environment, even though these emissions are regulated by and in compliance with the CAA and State law. The State sought an injunction prohibiting TVA from operating its plants in a harmful manner and requiring it to abate the nuisance.

While the case primarily involves peculiar issues unique to TVA's status as a quasi-governmental entity, and the ultimate outcome was simply to uphold the district court's denial of TVA's motion to dismiss permitting the litigation to move forward, it highlights the ever-increasing reliance on common-law nuisance claims by those seeking to control or abate environmental pollution, and inter-state air pollution in particular. With significant uncertainty regarding the status of EPA's Clean Air Interstate Rule ("CAIR") and Clean Air Mercury Rule ("CAMR"), as well as climate change regulation or legislation, it is reasonable to assume that environmental groups (and states) will continue to rely on common-law nuisance claims as a means of enforcing environmental laws and mitigating pollution.

CONCLUSION

These cases highlight how the judicial system is being used to hold polluters accountable. A growing trend in environmental litigation seems to be the use and acceptance of private citizen-suits as a corollary to state and federal enforcement. *Black Warrior* and *Maine People's* epitomize the power citizen-suit provisions wield under different environmental statutes. The TVA case highlights the important role common-law nuisance claims will play in environmental litigation. With environmental regulation and enforcement set to increase during Obama's Administration, and the slow trickle of more liberal Obama-appointed judges reaching the bench, it is not unrealistic for regulated industry to expect such suits to see more success than during the past eight years.

Environmental Law/Occupational Health and Safety Practice

Kelley Drye's Environmental/Occupational Health and Safety Practice Group specializes in providing comprehensive solutions for complex problems to facilitate effective business strategies. We provide both advice and representation for clients participating in rule-making and policy-making activities by federal regulatory agencies, including the U.S. Environmental Protection Agency, the Occupational Safety and Health Administration, the U.S. Fish and Wildlife Service, and the U.S. Army Corps of Engineers.

Litigation Practice

Kelley Drye's national litigation team focuses on successfully resolving disputes in a manner that advances clients' business objectives while holding a firm line on the runaway costs commonly associated with modern litigation. We have successfully handled cases for both plaintiffs and defendants, in many state and federal jurisdictions. This comprehensive perspective allows us to create and execute a more effective litigation strategy that advances clients' interests.

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