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CLEAN WATER ACT

U.S. top court backs property owners over wetland permits

(Reuters) – U.S. Supreme Court dealt a setback to federal authorities on environmental law by ruling May 31 that property owners can challenge the government over the need for costly permits under a water protection statute in a Minnesota peat mine dispute.

U.S. Army Corps of Engineers v. Hawkes Co. Inc. et al., No. 15-290, 2016 WL 3041052 (U.S. May 31, 2016).

The court decided 8-0 in favor of North Dakota-based Hawkes Co. Inc., which challenged a U.S. Army Corps of Engineers finding that the property at issue includes wetlands protected by the 1972 U.S. Clean Water Act from potential pollution. That law mandates that property owners get permits in such situations.

REUTERS/Russel Cheyne

The defendant planned to mine peat, like the turf shown here, from property owned by two affiliated companies in northwestern Minnesota.

Hawkes planned to mine peat, which forms in wetlands and has agricultural, horticultural and energy uses, from property owned by two affiliated companies in northwestern Minnesota.

Chief Justice John Roberts wrote in the ruling that when the government decides a property falls under the Clean Water Act's jurisdiction, property owners can contest that finding in court. Previously, they could challenge that determination only at the end of the permitting process, which can last two years and cost up to $270,000, with owners facing penalties of up to $37,500 a day for noncompliance.

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EXPERT ANALYSIS

Potentially massive expansion of EPA's Spill Prevention, Control and Countermeasure program

Wayne D'Angelo and Joseph Green of Kelley Drye & Warren discuss rulemaking by the Environmental Protection Agency to expand the Spill Prevention, Control and Countermeasure program and how the expansion will impact thousands of facilities across the country.

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Potentially massive expansion of EPA's Spill Prevention, Control and Countermeasure program

By Wayne D'Angelo, Esq., and Joseph Green, Esq.
Kelley Drye & Warren

In a groundbreaking settlement announced Feb. 16, the U.S. Environmental Protection Agency agreed to initiate rulemaking to greatly expand the Spill Prevention, Control and Countermeasure program beyond oil to address other hazardous substances. Responding with remarkable alacrity to a lawsuit filed in July by several environmental groups, the settlement establishes an aggressive schedule for the EPA to issue the regulations under Section 311(j)(1) of the Clean Water Act.

Responding with remarkable alacrity to a lawsuit filed in July by several environmental groups, the settlement establishes an aggressive schedule for the EPA to issue the regulations under Section 311(j)(1) of the Clean Water Act.

The rulemaking, which is to be finalized by mid- to late 2019 under the terms of the consent decree, represents a massive expansion of the reach of the SPCC program and will impact thousands of manufacturing, industrial, commercial, retail and academic facilities across the United States.

The settlement does more than foreshadow an increasingly expansive and complex SPCC program; for many regulated industries, it reflects this administration's willingness to settle with environmental plaintiffs on terms dictated by those plaintiffs. Indeed, many observers have suggested that settlements like this one are based on interests the agency may share with the plaintiffs as opposed to the perceived risk of an adverse decision on the merits.

CLEAN WATER ACT BACKGROUND

The Clean Water Act contemplated the development of "hazardous substance SPCC" regulations over 40 years ago. The operative provision of the act requires that, "as soon as practicable after Oct. 18, 1972, and from time to time thereafter, the president shall issue regulations consistent with maritime safety and with marine navigation laws ... establishing procedures, methods, and equipment to prevent discharges of oil *and hazardous substances* from vessels and from onshore facilities and offshore facilities, and to contain such discharges."[1]

Though the EPA finalized regulations under Section 311(j)(1)(C) establishing SPCC requirements applicable to the storage of oil and petroleum products such as gasoline and diesel fuel, it proposed but never finalized regulations applicable to the storage of hazardous substances.

U.S. Environmental Protection Agency building

The decades-old SPCC regulations applicable to the storage of oil and petroleum products were limited to facilities that can store more than 1,320 gallons of oil above ground (or 42,000 gallons in underground tanks).[2]

These regulations required the development of SPCC plans that include a description of containment, drainage control and diversionary structures; proper liquid storage areas, container materials and secondary containment; drainage for raw material storage areas; control for other site features that could produce runoff; secondary containment and treatment processes for truck and railcar liquid loading and unloading areas; and equipment that prevents discharges for in-plant transfer, processing and materials handling areas.

SPCC plans must also address such issues as preventative maintenance, facility security and training. Plans must be reviewed and certified by a registered professional engineer. In addition, they must be updated every five years, and more frequently if material changes are made to the facility or its oil storage capacity.

The 1978 SPCC regulations for hazardous substances that the EPA proposed but did not finalize would have applied SPCC-like requirements to onshore facilities operating under National Pollution Discharge

Wayne D'Angelo and **Joseph Green** practice environmental law in the Washington office of **Kelley Drye & Warren**. They have substantial experience with the full range of environmental, health and safety statutes and regulatory programs, including the Clean Water Act, and they counsel a number of companies on regulatory compliance and enforcement matters.

Elimination System permits, requiring these facilities to develop and implement plans to prevent discharges of hazardous substances into or upon the navigable waters of the United States or adjoining shorelines.[3]

The proposal also included requirements for permittees to develop "best management practices" plans to prevent the release of toxic and hazardous pollutants to surface waters.

The EPA also indicated in its proposed rulemaking that it anticipated publishing additional regulations in the near future for all other facilities subject to the agency's authority. But it never finalized the proposal or any other rule specifically setting up a program to address spills of hazardous substances.

THE ENVIRONMENTAL GROUPS' SUIT

On July 21, 2015, the Environmental Justice Health Alliance for Chemical Policy Reform, People Concerned About Chemical Safety and the Natural Resources Defense Council brought suit in the U.S. District Court for the Southern District of New York against the EPA for failing to "issue regulations to prevent and contain hazardous-substance spills from non-transportation-related onshore facilities, including aboveground storage tanks." The groups alleged that such regulations are required by the CWA and that the EPA unreasonably delayed in promulgating them.[4]

The lawsuit was bolstered politically by a series of incidents that gained widespread media exposure. The short complaint filed by the groups cited four relatively recent chemical spills from aboveground storage tanks as examples of the need for regulation: a 2014 spill of 4-methylcyclohexane methanol in West Virginia's Elk River; a 2006 spill of sodium hypochlorite in Garyville, Louisiana; a 2007 spill of sodium hydroxide in Madera, California; and a 2013 spill of three chemicals in Petersburg, Virginia.

The groups alleged that onshore hazardous-substance storage facilities "subject to neither state nor federal regulation." They also said there are "thousands of self-reported hazardous-substance spills from onshore facilities each year," hundreds of which reach waters subject to CWA jurisdiction.

In addition, the complaint asserted that "hazardous-substance spills from non-transportation-related onshore facilities pose a disproportionate threat to low-income communities and communities of color," including the four mentioned above.

The EPA initially resisted the challenge by filing a motion to dismiss. The motion said the plaintiffs had failed to properly identify a nondiscretionary duty as to which the EPA had waived its sovereign immunity. The agency later withdrew the motion and completed settlement negotiations before even responding to the plaintiffs' motion for summary judgment.

Indeed, the EPA agreed to settlement negotiations less than five months after the plaintiffs filed their complaint and entered into a settlement agreement less than two months later. Given the complexity of the issues and the early stage of the litigation, the agency's haste to settle is notable.

The proposal included requirements for permittees to develop "best management practices" plans to prevent the release of toxic and hazardous pollutants to surface waters.

PREPARATION FOR RULEMAKING

The consent decree initially required the EPA to issue a proposed regulation within 18 months, That deadline has been extended by 10 months after the agency opted to first issue an information collection request in support of the rulemaking. A final rule must be issued within 14 months of the proposed rule, meaning that regulations will be in place by the end of 2019 (unless the parties agree to an extension).[5]

The pending rulemaking warrants the attention and involvement of a wide variety of potentially impacted stakeholders. EPA regulations, at 40 C.F.R. §116, identify hundreds of hazardous substances that could be subject to the new SPCC requirements. Many of these substances are in widespread use.

While it is impossible to surmise how comprehensive EPA's SPCC expansion will be, the sheer number of hazardous substances identified by the agency presage the potential complexity of the program. For instance, the applicability of the current SPCC program is established by comparing the total storage capacity of a single type of substance (oil) in all containers (55-gallon capacity and above) against thresholds for aboveground storage (1,320 gallons) or underground storage (42,000 gallons).

Assessing the applicability of the forthcoming expanded SPCC program would require the evaluation of hundreds of different hazardous substances at facilities, some of which may be ingredients in mixtures or commercial products or contained within certain operational equipment. After determining the hazardous substances present at a facility, the EPA could require owners and operators to calculate the storage capacity for these substances either individually or as a "hazardous substance" total.

In either case, these assessments will be burdensome. Individual capacity assessments are likely to be time-consuming, while calculations based on total "hazardous substance" capacity will certainly expand the universe of facilities subject to the SPCC program.

In addition to the inherent complexity of assessing even just the applicability of the SPCC program to an individual facility, the EPA will need to craft a rule that guides regulated facilities on how to plan and deploy spill prevention controls and countermeasures for a potentially large number of hazardous substances presenting different risks, used in different applications, and stored in varying amounts (often intermittently). Some substances may require specific types of controls.

Until the EPA provides information on the agency's vision for the expanded SPCC program, it is difficult to predict how expansive or complex the program will become. The rulemaking will have to address these key issues:

- The scope of "hazardous substances" covered.
- The storage capacity threshold for a facility to be included.
- The specific elements that a "hazardous substance SPCC" plan must include.

In particular, the EPA will have to examine whether the current thresholds and SPCC plan requirements for oil are appropriately applied to "hazardous substances," which vary widely in terms of relative toxicity and other hazard characteristics.

In preparation for the rulemaking, stakeholders should compile information on the chemicals stored at their facilities, the quantities typically stored, the size and location of storage tanks, spill history, and any existing spill containment procedures, equipment or plans that currently exist. Information on the identity and quantity of chemicals for some facilities may be available from Tier II Emergency and Hazardous Chemical Inventory reports filed annually under the Emergency Planning and Community Right-to-Know Act.

Potentially impacted industries should also consider providing information in response to the EPA's upcoming information request and throughout the rulemaking. SPCC requirements are already complex and are frequently the subject of facility inspections and enforcement activity.

Unless the added complexity inherent in expanding the SPCC program to potentially hundreds of new substances is fully considered and accounted for in the final rule, SPCC compliance will only become more difficult and more burdensome. WJ

NOTES

[1] 33 U.S.C.A. § 1321(j)(1)(C) (emphasis added). The president then delegated the authority and responsibility for those regulations to the EPA administrator, which was reaffirmed in 1991. Exec. Order No. 11,735, § 1(4), 38 Fed. Reg. 21, 243 (Aug. 7, 1973); Exec. Order No. 12,777, § 2(b)(1), 56 Fed. Reg. 54,757, 54,760 (Oct. 22, 1991).

[2] 40 C.F.R. Part 112.

[3] 43 Fed. Reg. 39,276 (Sept. 1, 1978).

[4] *Envtl. Justice Health All. for Chem. Policy Reform v. U.S. Envtl. Prot. Agency,* No. 15-cv-5705, *complaint filed* (S.D.N.Y. July 21, 2015).

[5] Because the consent decree requires the EPA to inform only plaintiffs of the agency's rulemaking plans, there is no information available publicly as yet on the status of the rulemaking. The authors learned of the planned information collection after calling the EPA.

KEYSTONE XL PIPELINE

Keystone pass-through states support building transcontinental pipeline

Attorneys general from each of the states that would serve as a pass-through for the controversial Keystone XL pipeline have filed an amicus brief supporting TransCanada Corp.'s lawsuit to reverse President Barack Obama's rejection of the project.

TransCanada Keystone XL Pipeline LP et al. v. Kerry et al., No. 16-cv-36, amicus brief filed (S.D. Tex. May 9, 2016).

The brief was filed in the U.S. District Court for the Southern District of Texas, where the pipeline would eventually terminate after transporting Canadian crude from Alberta through Montana, South Dakota, Nebraska, Kansas and Oklahoma.

The proposed 1,200-mile pipeline has been pending for seven years and would transport more than 800,000 barrels of petroleum per day from Canadian oil sands to refineries in the Gulf Coast. The pipeline would also create about 42,000 jobs and add $3.4 billion in gross domestic product, according to the brief.

Obama exercised his veto power to reject the project last November, however, saying it would undercut the nation's role as a global leader on climate change.

TransCanada Keystone XL Pipeline LP and TC Oil Pipeline Operations Inc. filed a joint lawsuit in January looking to invalidate that denial as "arbitrary and unjustified." The suit names Secretary of State John F. Kerry, Attorney General Loretta Lynch, Secretary of Homeland Security Jeh Johnson and Department of the Interior Secretary Sally Jewell as defendants. It does not name the president.

The attorneys general joining the suit on TransCanada's behalf were Derek Schmidt of Kansas, Tim Fox of Montana, Douglas Peterson of Nebraska, Marty Jackley of South Dakota, Ken Paxton of Texas and E. Scott Pruitt of Oklahoma.

The brief argues the president's decision to prohibit the pipeline's construction is an impermissible regulation of interstate and international commerce. The U.S. Constitution clearly delegates that regulatory power solely to Congress, it says.

This power has historically included the power to regulate the importation of foreign goods as well as the ability to regulate commerce with foreign governments and citizens, according to the brief.

"The pipeline is a commercial structure," the brief says. "Its sole purpose is to transport crude oil from one private commercial facility to another in order that citizens, both foreign and domestic, may profit from the fruits of their labor and engage in the mutually beneficial exchange of goods and services."

The brief acknowledges Congress did delegate power of approval on the project to the president in the Temporary Payroll Tax Cut Continuation Act of 2011, but it claims Obama failed to meet deadlines within that law. The legislation included a provision that the permit would be in effect if the president failed to approve or disapprove the project within 60 days of the act's enactment, according to the brief.

REUTERS/Joshua Roberts

Texas Attorney General Ken Paxton, shown here, along with the attorneys general of Kansas, Montana, Nebraska, South Dakota and Oklahoma, joined the suit on TransCanada's behalf.

The brief further argues that even if Congress did temporarily cede permitting power to the president, it has the ability to regain that power through affirmative action and in fact did so when it passed the Keystone XL Pipeline Approval Act in February 2015. The act failed to pass a veto override in March 2015, but the brief argues passage shows a clear intent by Congress to assert its authority over approval of the project.

The amici states also say the president's position that he has the power to halt the pipeline in order to bolster the nation's leadership role on climate change is untenable.

"If such tenuous connections to international stature and potential foreign negotiations is sufficient to provide the president constitutional authority to act, there is virtually no limit to the power of an enterprising president to dream up reasons to exercise authority far beyond what the constitution contemplates in a manner that could prove disastrous to the states," the brief says. WJ

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Related Court Document:
Amicus brief: 2016 WL 2941678

TOXIC DUMPING

$10 million settlement in Honeywell dumping suit finalized

A New Jersey federal judge has entered a final judgment approving a $10 million settlement agreement between Honeywell International Inc. and residents of Jersey City who claim they were harmed by decades of hexavalent chromium waste dumping.

Halley et al. v. Honeywell International Inc. et al., No. 10-cv-3345, order and final judgment issued (D.N.J. May 10, 2016).

Hexavalent chromium is used in several work processes, including welding, spray painting and chrome plating, according to the Occupational Safety and Health Administration.

The order from U.S. District Judge Esther Salas of the District of New Jersey indicates two sets of class members can expect to receive a net $6.1 million from the settlement.

The plaintiffs, who live along Route 440 on the west side of Jersey City, originally filed a class action suit in state court alleging Honeywell's predecessor dumped and then failed to clean up the waste products.

The class-action suit, filed in 2010, included anyone who owned property in certain designated areas between May 17, 2010, and Oct. 1, 2014, according to the order.

Honeywell established an escrow account in May 2015 of slightly more than $10 million, according to the order. Judge Salas approved the fund amount as well as reasonable attorney fees and incentive awards following a September 2015 fairness hearing.

Judge Salas dismissed the plaintiffs' claims as part of the final order, which calls for class members to release Honeywell from any future claims arising from hexavalent chromium dumping up to the settlement date. Class members will also be barred from commencing or joining any additional lawsuit or court action regarding those claims. The order specifically exempts personal injury, bodily injury and medical monitoring claims.

The judge's order indicates two sets of class members can expect to receive a net $6.1 million from the settlement.

The settlement amount includes $3.6 million in attorney fees and reimbursements, as well as more than $219,000 for claims administration expenses.

Class members who have submitted a claim and release form will be paid an amount determined by the claims administrator. Class members may appeal that amount by letter by June 15, but only to challenge an allegedly incorrect award sum calculation by the administrator, the order says. WJ

Class certification in General Mills TCE case was 'abuse of discretion,' panel says

By Alex Horowitz

A federal appeals panel has ruled that a judge abused his discretion when he granted class certification to Minneapolis homeowners who allege General Mills Inc. contaminated their neighborhood with trichloroethylene.

Ebert et al. v. General Mills Inc., No. 15- 1735, 2016 WL 2943193 (8th Cir. May 20, 2016).

The 8th U.S. Circuit Court of Appeals panel granted General Mills' challenge to class certification in the suit, saying the lower court judge improperly bifurcated the case to try the class claims on liability first and the damages claims separately once liability had been established.

The plaintiffs say TCE vapors around a former General Mills facility are threatening their health and driving down property values in the Como neighborhood of Minneapolis.

The homeowners assert tort claims and violations of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. § 9601, and the Resource Conservation and Recovery Act, 42 U.S.C.A. § 6901.

They sought and won class certification in the U.S. District Court for the District of Minnesota on two issues — whether General Mills is liable to property owners in the class area and whether an injunction requiring remediation should be granted — but not on their claims involving money damages, the appellate opinion says.

But the 8th Circuit said the class could not be considered cohesive because of their "disparate factual circumstances" and called the District Court judge's decision "problematic."

While the panel acknowledged that a ruling on General Mills' broad liability could affect the whole class, it said that was not reason enough for certification.

"That single determination, artificially narrowed by the District Court to achieve class status, does not advance the efficiencies necessary for such treatment in this case," the opinion said.

GENERAL MILLS FACES TCE CASE

The dispute stems from an industrial facility General Mills owned in the Como neighborhood between 1930 and 1977, the opinion said.

The company buried up to 1,000 gallons of hazardous substances per year in perforated drums in the facility grounds, the panel explained.

In 1984, under a consent order with Minnesota, General Mills began three decades of remediation of TCE in groundwater below or near its facility, the opinion said.

In October 2013 the company discovered that TCE had migrated from groundwater to soil in the form of vapor, according to the opinion.

A General Mills expert told the District Court that under a modification to the consent order, the company had installed vapor mitigation systems in 118 Como homes and had found 327 Como homes it tested to have no detectable TCE, the appeals court noted.

The named plaintiffs, all of whom received vapor mitigation systems, filed their initial complaint in December 2013, saying the systems did not effectively resolve the problem and that General Mills had not adequately investigated and remediated vapor contamination.

U.S. District Judge Donovan W. Frank granted certification on the two issues of liability and injunctive relief in February 2015 for "all persons and nongovernmental entities that own residential property within the 'class area.'"

General Mills appealed, arguing that the District Court "exceeded the limits on Rule 23," the Federal Rule of Civil Procedure governing class actions, because injuries within the class area vary from property to property and therefore common issues will not predominate over individual issues as required by Rule 23(b)(3).

REUTERS/Rick Wilking

'HYBRID CERTIFICATION'

The 8th Circuit panel sided with General Mills, saying "commonality is the heart of the matter here" and that class members must allege the same injury.

Here, the plaintiffs' unique properties, purchase dates, and varying levels of contamination and stages of remediation affect each claim, the panel said.

When Judge Frank bifurcated the action and certified a class on liability that would be separate from the case's money damages portion, he used "an available approach that is gaining ground," the panel said.

But the strategy fails in this case because the plaintiffs' claims lack the requisite cohesiveness, the panel said.

"In reality," it said, "the issue of liability and the relief sought by these homeowners is, at bottom, highly individualized."

The panel reversed and remanded. WJ

Related Court Document:
Opinion: 2016 WL 2943193

See Document Section B (P. 24) for the opinion.

Oklahoma regulators raise concerns on quake insurance rate hikes

(Reuters) – Oklahoma regulators grappling with a massive increase in small earthquakes in the state linked to growing oil and gas production said May 24 they were concerned with spiking rates for earthquake insurance coverage and diminishing competition among insurers.

At a public hearing on the rate hikes, Oklahoma Insurance Commission officials warned they may begin requiring companies to submit proposed rate hikes for prior commission approval due to heavy market concentration, a proposal opposed by insurance industry representatives in attendance.

"We think that, at present in Oklahoma, the competition is not sufficient or adequately regulated," said Gordon Amini, the commission's senior attorney.

Oklahoma, which used to have a couple of earthquakes above magnitude 3.0 a year prior to 2009, is now struck with two a day or more. Officials blame the increased seismic activity on oil and natural gas disposal wells.

Most of the hundreds of quakes that now strike the state each year have caused relatively little damage but homeowners have been rushing to insure property.

The hearing comes as concerns about earthquake risk exposure has prompted several insurers, including some market share leaders, to either hike rates or stop covering earthquakes.

As insurance levels rose, 12 companies filed rate increases of between 4 percent and 300 percent since 2011, and "market concentration has significantly increased," said the commission's chief of market regulation Brian Gabber.

While that is a small portion of the 119 companies actively writing earthquake insurance in Oklahoma in 2016, the market share held by the top seven players has grown to 66.5 percent in 2015 from 62.8 percent in 2012, data presented at the hearing showed. The total number of companies writing earthquake insurance had also fallen from 140 in 2014.

The commission did not identify the 12 companies that had raised rates but regulatory filings seen by Reuters show that as No. 2 earthquake provider Farmers Insurance's market share steadily increased to 17.5 percent in 2015, concerns about risk exposure prompted it to hike premiums and deductibles in 2014 and 2015.

Travelers Indemnity, the No. 1 writer of earthquake insurance between 2010 and 2012, saw its market share shrink dramatically after it stopped offering new earthquake coverage in 2014, a move filings show was based on concerns about earthquake exposure. Travelers' retreat helped boost the market shares of Farmers and market leader State Farm.

Since 2010, homeowners have filed 1,094 earthquake claims, though most were not paid as often they were for less than their deductibles. WJ

(Reporting by Heide Brandes; writing by Luc Cohen in Houston; editing by Terry Wade and Sandra Maler)

Nuclear weapons plant litigation to settle for $375 million

(Reuters) – The companies that operated the Rocky Flats nuclear weapons plant in Colorado have agreed to a $375 million settlement with nearby property owners over alleged plutonium contamination, bringing a 26-year-old lawsuit closer to an end.

Cook et al. v. Rockwell International Corp. et al., No. 90-cv-181, settlement filed (D. Colo. May 23, 2016).

The U.S. Department of Energy has authorized the settlement and is expected to indemnify the full $375 million cost agreed to by Rockwell Automation and Dow Chemical to conclude the federal class action filed in 1990, the companies said.

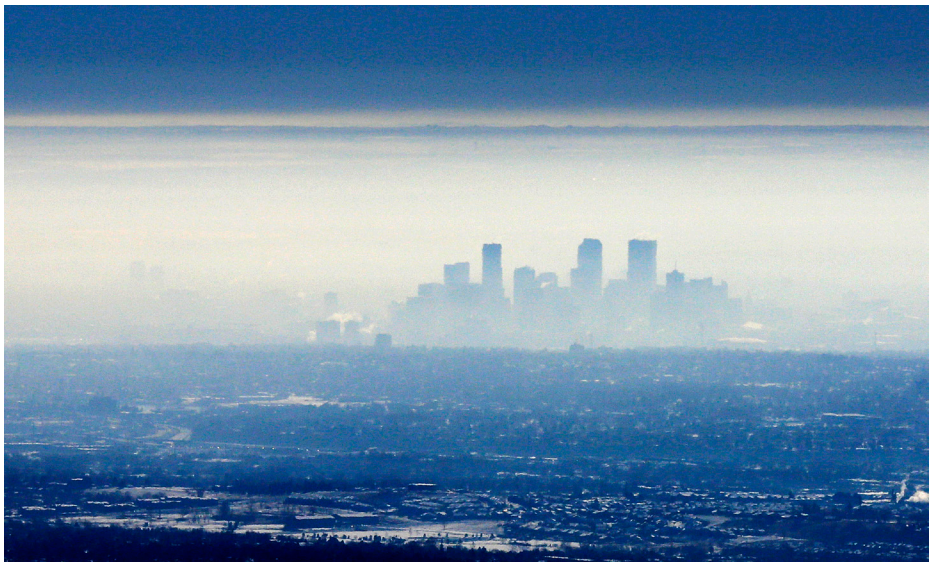
Rockwell Automation agreed to pay $243.75 million and Dow Chemical $131.25 million for the settlement, which was reached on May 18 and filed with the U.S. District Court in Colorado May 23. U.S. District Judge John Kane must approve the settlement.

The plant made triggers for nuclear bombs about 16 miles northwest of downtown Denver. Dow ran the government-owned plant from 1952 to 1975 and Rockwell International, a predecessor to Rockwell Automation, ran the facility from 1975 to 1989, when it closed.

Rockwell Automation agreed to indemnify Boeing Co, which acquired Rockwell International's defense businesses in 1996, for plant-related liabilities.

The settlement class includes about 15,000 individuals who, as of June 7, 1989, owned land up to about six miles from the center of the plant. The lawsuit alleged plutonium releases from the plant exposed class members to radiation, contaminated their property, increased their cancer risk, and damaged enjoyment of their property.

A four-and-a-half-month jury trial ended in 2006 with a $926 million judgment for the property owners, including punitive damages and interest. *Cook et al. v. Rockwell Int'l Corp. et al.,* No. 90-cv-191, *verdict returned* (D. Colo. 2006). The 10th U.S. Circuit Court of Appeals vacated the judgment, finding the plaintiffs failed to prove a "nuclear incident" took place under the terms of the federal Price-Anderson Act. *Cook et al. v. Rockwell Int'l Corp. et al.,* 790 F.3d 1088 (10th Cir. 2015).



The plant made triggers for nuclear bombs about 16 miles northwest of downtown Denver, shown here. REUTERS/Rick Wilking

But the property owners countered that they had proved a nuisance claim under state tort law and the appeals court held in a second appeal in 2015 that jury's judgment on the plaintiffs' state nuisance claims could stand.

At the time of the settlement, the plaintiffs had a motion pending for entry of a judgment on the 2006 nuisance verdict.

However, the parties were seeking U.S. Supreme Court review and the risk that adverse decisions could leave the plaintiffs with no recovery made the settlement proposed in the best interest of the class, court papers said.

"We had 15 years of scorched earth litigation leading up to the trial in 2005, which we won," said attorney Merrill Davidoff, who has been lead attorney from the start.

The case also went through two rounds of appeals to the Circuit Court and petitions to the U.S. Supreme Court.

Other unresolved issues could have extended litigation five more years, Davidoff said.

Attorney fees and costs for the long-running litigation would come out of the proposed $375 million settlement.

"We are not going to get the kind of premium that some class actions get, but we would expect to get a considerable fee on the case," Davidoff said.

Dow said the settlement resolves 26 years of litigation and is the right decision for the company and its shareholders. WJ

(Reporting by David Bailey).

Supreme Court upholds $236 million MTBE verdict against Exxon

By Rita Ann Cicero

The U.S. Supreme Court has declined to review a $236 million jury award against Exxon Mobil Corp. in a case alleging the company contaminated some of New Hampshire's drinking water supply with the gasoline additive MTBE.

Exxon Mobil Corp. et al. v. New Hampshire et al., No. 15-933, cert. denied (U.S. May 16, 2016).

Exxon Mobil argued in its petition to the high court that its due process rights were violated when New Hampshire courts allowed the state to prove its case using aggregate statistical evidence of water wells contaminated with MTBE.

The company said the state relied on findings of actual contamination at just six wells to conclude that 5,543 additional unidentified wells were also tainted.

MTBE (methyl tertiary butyl ether) is a chemical compound designed to increase the oxygen content of gasoline. However, it can infiltrate underground water reservoirs and contaminate wells drawing from underground aquifers.

CLEAN AIR ACT

In 1990 Congress amended the Clean Air Act, 42 U.S.C.A. § 7401, to require gasoline used in specific geographical areas to have a minimum oxygen content. Manufacturers met this requirement by adding an oxygenate to their gasoline.

The U.S. Environmental Protection Agency did not mandate the use of just one specific oxygenate. Some gas producers chose to use MTBE, which turned out to be a far-reaching water pollutant because it is highly soluble and travels faster and farther in water than other gasoline additives.

New Hampshire originally sued more than two dozen oil companies in 2003, seeking cleanup costs relating to the contamination of the state's drinking water with MTBE. The state sought to hold Exxon Mobil liable for its share of the cleanup costs.

The state estimated that more than 40,000 drinking water wells near gas stations in New Hampshire were contaminated with MTBE from the 1980s to 2007, when the state banned the additive.

THE JURY AWARD

The state settled with all the other defendants, including Irving Oil Co. and Citgo Petroleum Corp., collecting more than $130 million in cleanup costs. Its claims against Exxon went to trial in the Merrimack County Superior Court.

REUTERS/Mike Blake

At trial, the company argued that the use of MTBE was the only feasible choice to curb air pollution in the state.

New Hampshire countered that Exxon Mobil could have used other additives because the company knew MTBE would contaminate groundwater.

A jury awarded the state more than $816 million, of which $236 million was apportioned to Exxon Mobil. *State v. Hess Corp. et al.*, No. 03-C-550, *verdict returned* (N.H. Super. Ct., Merrimack Cty. Apr. 9, 2013).

The jury found that Exxon Mobil designed a defective product, failed to warn about the increased dangers of MTBE and disregarded the advice of its environmental experts.

Exxon Mobil appealed to the New Hampshire Supreme Court, which affirmed the jury verdict.

In its petition to the U.S. Supreme Court, Exxon argued that using MTBE in its gasoline was the only feasible means of complying with the federal mandate in New Hampshire in the 1980s.

"Exxon presented overwhelming evidence that the only theoretical alternative to MTBE — ethanol — suffered from a host of practical, technical and environmental obstacles that rendered it wholly infeasible in the Northeast," the petition said.

The high court denied review without comment May 16, essentially upholding the award. WJ

Army Corps: Court lacks jurisdiction in California dredging suit

By Gregory Gethard

The U.S. Army Corps of Engineers says a federal court should dismiss on jurisdictional grounds the California Regional Water Quality Control Board's suit that alleges the Army Corps conducted dredge and fill operations without obtaining required certifications.

California Regional Water Quality Control Board, Los Angeles Region v. U.S. Army Corps of Engineers et al., No. 16-cv-1091, motion to dismiss filed (C.D. Cal. May 23, 2016).

In a motion to dismiss filed in the U.S. District Court for the Central District of California, the Army Corps argues the court lacks jurisdiction over the suit because it fails to allege ongoing violations of effluent standards or any conduct indicating continued or renewed violations of water pollution laws.

The board alleges the Army Corps violated the Clean Water Act, 33 U.S.C.A. § 1251, by completing two projects in 2011 and 2012 without first notifying the state agency.

According to the complaint, the Army Corps dredged vegetation and sediment from a 6.5-acre area of the Verdugo Wash, a tributary of the Los Angeles River in Glendale, California, in October and November 2011.

The board says it did not learn of the project until after it was completed because the Army Corps failed to seek or obtain a certificate from the state under Section 401 of the CWA, 33 U.S.C.A. § 1341.

The federal agency also undertook allegedly improper actions in December 2012 in the Sepulveda Basin, described as a 2,000-acre flood management area and wildlife reserve on the upper portion of the Los Angeles River in the San Fernando Valley.

During that project, the Army Corps used heavy equipment to remove 43 acres of vegetation from a large portion of the basin that served as habitat for numerous species, again without a permit, according to the complaint.

CITIZEN SUIT JURISDICTION

The Army Corps contends the citizen suit provision in Section 505(a)(1) of the CWA, 33 U.S.C.A. § 1365(a)(1), authorizes only suits that allege ongoing violations of effluent standards or facts indicating a likelihood of a recurring violation.

"Without an allegation of an ongoing CWA violation, jurisdiction over a Section 505(a)(1) claim is lacking," according to the motion to dismiss.

The motion says the board's complaint made clear that the Army Corps' projects were completed several years before the filing of the complaint.

The Army Corps says the only allegations of violations that are likely to recur pertain to "broad categories of potential maintenance activities" that are insufficient to state a CWA violation.

According to the motion, maintenance activities do not violate the CWA if they do not involve the discharge of a pollutant into a body of water or otherwise require a permit.

The board's complaint does not allege facts showing the likelihood of the Army Corps discharging a pollutant or failing to obtain any required regulatory authorizations in the future, the motion says.

"Even assuming the Regional Water Board has alleged a past violation, it does not allege any conduct indicative of continuing or renewed violations sufficient to establish this court's jurisdiction," the motion says. WJ

Related Court Document:
Motion: 2016 WL 2979814

7th West Coast city files Monsanto PCB tort claims

By Alex Horowitz

Long Beach, California, is the latest municipality on the West Coast to file common law claims against Monsanto Co., seeking to make the agribusiness giant pay for PCB contamination in city waters.

City of Long Beach v. Monsanto Co. et al., No. 16-cv-3493, complaint filed (C.D. Cal. May 19, 2016).

The city's suit, which alleges the company hid the dangers of PCBs and should have to pay for cleaning up the chemical, is the first of the recent spate of Monsanto tort cases to be filed in the U.S. District Court for the Central District of California.

It follows similar complaints filed by Seattle and Spokane, Washington, and by San Jose, Berkeley, Oakland and San Diego, California.

"Monsanto's conduct was malicious, oppressive, wanton, willful, intentional, and shocks the conscience, warranting punitive and exemplary damages, because Monsanto callously decided to increase sales and develop new ways to promote PCBs, knowing PCBs are toxic, cannot be contained, and last for centuries," Long Beach's complaint says.

In addition to Monsanto, the case names as defendants New Jersey-based Pfizer subsidiary Pharmacia Corp. and Missouri-based Solutia Inc., which took over Monsanto's pharmaceutical and chemicals businesses in the late 1990s.

The same day Long Beach filed its suit, the defendants filed a motion to dismiss Seattle's complaint in the U.S. District Court for the Western District of Washington, saying all the suits are "test cases" attempting to discover new ways to recover the cleanup costs.

Monsanto says the cities are taking this route because the company cannot be held responsible under the Clean Water Act, 33 U.S.C.A. § 1251, or the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. § 9601, since it did not directly discharge PCBs into the plaintiffs' water.

Long Beach's complaint follows the U.S. Judicial Panel on Multidistrict Litigation's April decision not to consolidate the other six suits. *In re Monsanto PCB Water Contamination Litig.*, MDL No. 2697, 2016 WL 1383500 (J.P.M.L. Apr. 7, 2016).

LONG BEACH'S COMPLAINT

Like the other suits, Long Beach's complaint notes that Monsanto was the only U.S. manufacturer of PCBs from about 1935 to 1979, when use of the chemical was banned by the Toxic Substances Control Act.

PCBs were used in many products, including paint, coolants, hydraulic fluids and sealants.

The Environmental Protection Agency has deemed PCBs probable human carcinogens, and studies have linked PCBs to cancer risks and other toxic effects on the immune, reproductive, nervous and endocrine systems, the suit says. The chemical can cause developmental problems including lower IQ scores in children who are exposed to it, Long Beach adds.

The suit alleges Monsanto knew about the dangers of PCBs since the 1930s but hid the effects and continued manufacturing and promoting the chemical.

Long Beach says PCBs have reached its waters by leaching off or otherwise escaping "their intended applications" during rain events, entering stormwater and other runoff.

PCBs reach Long Beach waters "through no fault of the city," which says it lawfully discharges water in accordance with a National Pollutant Discharge Elimination System permit.

The city says Long Beach waters that are considered impaired because of PCB contamination include the Port of Long Beach, Colorado Lagoon and Dominguez Watershed.

Under California water quality standards, Long Beach cannot exceed maximum limits for PCBs in its stormwater discharges, the suit says.

The city says it has spent money to monitor and reduce PCBs in impaired waters to meet those standards.

Long Beach's suit alleges public nuisance and equitable indemnity. It seeks punitive damages, costs and fees, and pre- and post-judgment interest. WJ

Related Court Document:
Complaint: 2016 WL 2942307

See Document Section C (P. 33) for the complaint.

Wetland permits

CONTINUED FROM PAGE 1

"Today's ruling marks a long-awaited victory for individual liberty, property rights and the rule of law," said Reed Hopper of the conservative Pacific Legal Foundation, who argued the case before the court for Hawkes.

"Everyone who values property rights and access to justice should welcome this historic victory," Hopper added.

The Army Corps had decided the company must obtain a permit from the federal government because the property was a wetland.

Whether a specific parcel of land comes under the law's jurisdiction is critical to developers and other property owners because such a finding sets in motion the time-consuming and expensive permitting process.

A federal district court dismissed Hawkes' suit but the St. Louis-based 8th U.S. Circuit Court of Appeals in 2015 reversed that action. *Hawkes Co. et al. v. U.S. Army Corps of Eng'rs et al.*, 782 F.3d 994 (8th Cir. 2015).

President Barack Obama's administration then appealed to the Supreme Court.

Business groups including the National Association of Home Builders and the U.S. Chamber of Commerce, as well as 29 states, filed court papers backing Hawkes.

The case follows the justices' 2012 ruling that property owners facing enforcement action under the Clean Water Act can ask a court to intervene before being forced to comply or pay financial penalties. *Sackett v. EPA et al.*, 132 S. Ct. 1367 (2012).

The Obama administration last year issued a new regulation to clarify which bodies of water are covered by the Clean Water Act. A federal appeals court put that rule on hold after it was challenged by 18 states. WJ

(Reporting by Lawrence Hurley)

Related Court Document:
Opinion: 2016 WL 3041052

See Document Section A (P. 15) for the opinion.

NEWS IN BRIEF

UNION CARBIDE WINS APPEAL IN BHOPAL LAWSUIT

The 2nd U.S. Circuit Court of Appeals has declined to revive a class action brought by residents living near a former pesticide plant in Bhopal, India, who claimed that pollution from the factory damaged their property and polluted their drinking water in the 1970s and 1980s. The case has been litigated since 2004. The factory was owned and operated by Union Carbide India Ltd. In granting summary judgment to Union Carbide Corp., the U.S. District Court for the Southern District of New York ruled that the company did not play a direct role in causing the pollution. The judge said Union Carbide India designed and built the waste-disposal system at the facility. The litigation is not connected to the deadly 1984 toxic gas explosion at the same plant that killed 3,000 people.

Sahu et al. v. Union Carbide Corp. et al., No. 14-3087, 2016 WL 2990941 (2d Cir. May 24, 2016).

Related Court Document:
Opinion: 2016 WL 2990941

SUIT OVER VIRGINIA COAL MINE CONTAMINATION STAYED

A federal judge in Virginia has stayed a $50 million lawsuit by landowners who say an affiliate of Consol Energy dumped large amounts of contaminants into mine voids on their properties for over 20 years. U.S. District Judge James P. Jones of the Western District of Virginia granted the defendants' unopposed motion to stay the suit pending the outcome of consolidated appeals in in related cases currently before the 4th U.S. Circuit Court of Appeals. The plaintiffs, who own interests in properties in Buchanan County, Virginia, also name Island Creek Coal Co. and CNX Gas Co. as defendants. In addition to the $50 million in damages, the plaintiffs have asked the court to order the defendants to remove the alleged contamination.

George Belcher Trust et al. v. Consolidation Coal Co. et al., No. 16-cv-16, order granting motion to stay issued (W.D. Va. May 13, 2016).

FOREST SERVICE ASKS HIGH COURT TO REVIEW CHALLENGE IN LYNX CASE

The U.S. Forest Service has asked the Supreme Court to review a 9th Circuit decision that it says allows an environmental group to challenge a general, programmatic agency decision concerning designated habitat for a threatened lynx population. The agency filed a petition for writ of certiorari after the 9th U.S. Circuit Court of Appeals ruled in favor of Cottonwood Environmental Law Center, affirming a lower court decision. The Forest Service says the appeals court should have nixed the group's challenge because there are no allegations of direct harm resulting from its programmatic action. Cottonwood's lawsuit alleges the Forest Service violated the Endangered Species Act when it chose not to reinitiate consultation on a conservation plan for a distinct population segment of the Canada lynx after the Fish and Wildlife Service designated critical habitat on national forest lands.

U.S. Forest Service et al. v. Cottonwood Environmental Law Center, No. 15-1387, petition for cert. filed (U.S. May 13, 2016).

Related Court Document:
Petition: 2016 WL 2866086

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