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NewsREEL

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A Newsletter for the Mississippi Bar Section on
Natural Resources, Energy and Environmental Law

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Comments, suggestions, contributions?
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NewsREEL
A Newsletter for the Section on Natural Resources, Energy and Environmental Law of the Mississippi Bar

Bankruptcy Court Can "Make It Rain"

Betty Ruth Fox

Will the remediation of bankrupt brownfield properties be a priority in this legislative session? The answer could be "YES" with the introduction of Senate Bill No. 2147, which proposes amendments to the Mississippi Economic Redevelopment Act (Act), Miss. Code Ann. §57-91-1 to -11. This bill was previously introduced last year and died in committee. The current bill could serve several purposes. First, the amendment is needed to revive the Act, as it expired on December 31, 2009. Also, the eligibility requirements under the Act are narrowly defined to focus on a "contaminated site that has been

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Editor's Note:

We hope that you find the articles within this issue of NewsREEL of interest. There has been no shortage of important judicial decisions over the past year and several more are expected in 2013. While we continue to provide analysis and comments on the federal and state court activity, one area we hope to improve upon is reporting on administrative actions from our state agencies. If you are interested in assisting us with this task please contact us by email. We particularly would like to improve our coverage of natural resources and energy activity within Mississippi, so please consider writing on these subjects. We know there are many resources on environmental, energy and natural resource topics so if you have any recommendations or suggested changes to improve NewsREEL we would appreciate your comments.

Keith Turner

abandoned from a bankruptcy estate," which is only a small subset of the universe of brownfields. Modifying the Act to make all brownfields eligible should encourage economic development on and around environmentally contaminated properties. The amendments will also promote the safe redevelopment of brownfields to the benefit of the health and environment of all citizens of Mississippi, including improving the tax base of local governments and creating job opportunities for citizens in the vicinity of the brownfields. Further, this type of legislation is needed in order to encourage the reuse of environmentally impaired properties, whether abandoned, under-utilized or subject to bankruptcy proceedings. Finally, the amendments proposed in Senate Bill No. 2147 lead directly into a discussion of Disposal Systems, Inc., an environmental success story achieved through the bankruptcy court.

My dad always told me that a bankruptcy court could "make it rain." My appreciation for this fundamental principle did not fully mature until experiencing *In re Disposal Systems, Inc.* No. 64-0659363, Chapter 7 (Bankr. S.D. Miss. filed March 11, 1988). This article is a tribute to the late Edward R. Gaines, United States Bankruptcy Judge for the Southern District of Mississippi, whose guidance resulted in the remediation of three bankrupt contaminated sites on the Mississippi Gulf Coast and their return to either productive use or maintained status protective of human health and the environment.

DSI Bankruptcy

Disposal Systems, Inc. (DSI) began operations in the early 1980s with three sites located in Harrison County, Mississippi involved in the treatment, storage and disposal of offshore drilling waste and other waste. Waste was initially deposited, treated and stored at either the Clay Point (Fifth Street) site or Lee Street site. Thereafter, some of the waste was transported to the Woolmarket site where it was further processed or disposed. Note that both the Clay Point and Lee Street waste operations took place within feet of the Back Bay of Biloxi, rendering them particularly environmentally sensitive.

During 1988, the United States Environmental Protection Agency (EPA) determined that the Clay Point site posed an imminent threat to public health and the environment and initiated an emergency abatement action in order to prevent the overflow of waste into the Biloxi Back Bay. Shortly thereafter, DSI filed for protection under Chapter 7 of the bankruptcy code and H. S. "Duffy" Stanley was appointed as Chapter 7 Trustee.

The bankruptcy estate had no money, and the debtor intended to surrender the three contaminated sites. The Chapter 7 Trustee determined that he was not able to abandon the properties as a burden to the bankruptcy estate until measures were taken to protect human health and the environment in accordance with *Midlantic National Bank v. New Jersey Dep't of Environmental Protection*, which held that "a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards." 474 U.S. 494, 507 (1986). On January 5, 1990, the trustee filed an adversary proceeding in bankruptcy court against more than sixty parties, including the Mississippi Department of Environmental Quality (MDEQ), seeking equitable, declaratory and injunctive relief in order to remediate the DSI sites. Robert (Bob) Byrd represented the Chapter 7 Trustee and recalls over 150 individuals in the courtroom on the first day the adversary hearing was set. Many parties argued that the bankruptcy court had no jurisdiction over the cleanup of the DSI sites or should abstain in favor of MDEQ or EPA, neither of which at that time had ordered cleanup of the DSI sites. Shortly after the adversary proceeding was filed, MDEQ joined the trustee's efforts to clean up the sites and was realigned as a party plaintiff in the adversary proceeding by an order entered by the bankruptcy court on March 26, 1992. Through the Mississippi Commission on Environmental Quality (MCEQ), MDEQ issued over sixty orders in October 1997 against the named defendants in the adversary proceeding, which required the parties to proceed with remediation of the DSI sites and requested relief almost identical to that sought by the trustee in the bankruptcy.

After many meetings, letters and telephone conferences, several of the defendant parties stepped up and agreed to finance the waste removal, investigation and cleanup of the DSI sites. These defendants formed the "DSI Technical Group" and were realigned as plaintiffs in the adversary proceeding by order of the bankruptcy court entered March 1, 2000. The DSI Technical Group identified approximately 75 former customers of DSI as potentially responsible parties (PRPs) and consummated settlements with 49 PRPs for a net settlement amount of $1,916,648.

Remediation of DSI Sites

The remediation of the DSI sites was not without its share of excitement, particularly at Lee Street. First of all, on March 13, 1995, MDEQ advised the trustee that its Emergency Response Section had dispatched a contractor to the Lee Street site to pump enough water from the tanks and lagoons to avert an emergency overflow into Biloxi Bay. After the Lee Street site was returned to the City of Biloxi and Biloxi Port Commission, the contractor excavating material in order to construct a boat ramp at the site uncovered a barge that had been buried some years before. The barge and its contents presented an emergency situation at the site. MDEQ was notified and allowed the Biloxi Port Commission to remove the barge and dispose of the potentially hazardous materials it contained.

The Lee Street site was located in the Back Bay of Biloxi on real property owned by the City of Biloxi and maintained by the Biloxi Port Commission (BPC). DSI had operated the site pursuant to an agreement with BPC, and after the remediation was completed, the Lee Street Site was returned to the City of Biloxi and BPC. The site was operated from about 1980 to 1988, during which time wastes were received and treated in two concrete pits, known as the North and South Pits. The most significant environmental concerns at this site were metals detected in the solids, sediment and groundwater samples. The cleanup of the Lee Street facility was approved by MDEQ, which issued a "no further action" letter with respect to the site on November 3, 1998. Thereafter, as discussed above, the trustee returned the Lee Street site to the City of Biloxi and BPC, and it has been redeveloped into a commercial fishing dock and boat ramp on the Back Bay of Biloxi.

The Clay Point site was located on Fifth Street in Biloxi and is bounded by a navigable canal to the south, which leads to the Biloxi Back Bay. The site operated from approximately 1981 to 1988, with two warehouse buildings, a railroad spur, dock facilities, vertical and horizontal steel tanks and three large concrete pits. Wastes were received and treated in concrete pits and liquids were sent to the wastewater treatment system for treatment. EPA conducted an interim cleanup action at the site from July through October 1988. Similar to the Lee Street site, the most significant environmental concerns involved metals detected in the solids, sediment and groundwater samples. The cleanup of the Clay Point site was approved by MDEQ, which issued a "no further action" letter regarding the site on July 12, 1999. Through an order of the bankruptcy court entered on August 29, 2002, the Clay Point site was sold through an auction process to W. C. Fore, LLC for $1,700,000.

The remediation and closure of the Woolmarket site, located off Old Highway 67, north of the Back Bay of Biloxi, proved to be the most challenging of all the DSI sites. The site consists of 8.21 acres of disposal area located in the northern portion of a larger 22-acre parcel and served as a landfill for oily wastes and drilling mud between 1982 and 1988. Wastes were moved to the site from the Lee Street and Clay Point sites. Woolmarket consisted of approximately thirty earthen excavated pits. The closure plan for Woolmarket was approved by MDEQ during 2004 and 2005. The bankruptcy trustee settled the remediation issues related to the Woolmarket site by having one party handle the remediation and groundwater monitoring of the south side of the site and having the DSI Technical Group oversee the remediation and monitoring of the north side of the site.

Conclusion

On January 31, 2008, the DSI Technical Group filed its proof of claim in the DSI bankruptcy proceeding for administrative expense pursuant to 11 U.S.C. §507(a)(2) in the amount of $3,999,517 for costs incurred by the group in remediating the DSI sites. An administrative expense in a bankruptcy proceeding has priority over and is paid before most other types of unsecured claims. The proof of claim reports the total past and projected future remediation costs of the DSI sites as approximately $5,916,165. The total projected costs of $5,916,165 less the net settlement amount of $1,916,648 received by the group resulted in the claim for $3,999,517. The bankruptcy court closed the adversary proceeding on May 5, 2008. The Chapter 7 Trustee distributed $739,366.22 to the DSI Technical Group on its administrative expense claim. The DSI Chapter 7 bankruptcy was closed by order of the bankruptcy court entered on August 25, 2010.

The amazing part of the DSI story is that the bankruptcy court worked with the bankruptcy trustee, MDEQ and the parties to achieve remediation of three properties which otherwise could have been abandoned and left as blighted threats to human health and the environment. This story could have been so different. DSI is a model that demonstrates how environmental issues can be resolved with the guidance and creative solutions available in the bankruptcy court to the benefit of not only the creditors in the bankruptcy estate, but also the surrounding community and environment. Senate Bill No. 2147 mentioned at the beginning of the article is a big step toward dealing with abandoned or under-utilized brownfield properties. The amendments proposed in that bill provide additional tools to accomplish the goal of safe and viable brownfield redevelopment. Finally, the bankruptcy court really can "make it rain."

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Southern District Vacates MDOT Wetlands Fill Permit

Ward Gulfport Properties v. U.S. Army Corps of Eng'r, No. 1:10-cv-8-HSO-JMR (S.D.Miss. Nov. 21, 2012).

Travis M. Clements

Last November, the U.S. District Court for the Southern District of Mississippi ruled on legal challenges to the U.S. Army Corps of Engineers' (Corps) issuance of a Clean Water Act § 404 permit to the Mississippi Department of Transportation to fill 162 acres of wetlands in Gulfport. The Plaintiffs Ward Properties alleged that the Corps violated the Clean Water Act (CWA), the National Environmental Policy Act (NEPA) and the Administrative Procedure Act (APA) in issuing the permit. After a thorough analysis of all parties' motions, the court granted summary judgment for Ward Properties, vacated the § 404 wetlands permit and remanded the matter to the Corps to fulfill its statutory requirements.

Permit History

The CWA prohibits any discharge of dredged or fill material into waters of the United States, including wetlands, without issuance of a § 404 permit. NEPA imposes procedural requirements on all federal agencies, including the Corps, directing them to prepare an Environmental Impact Statement (EIS) when engaging in a "major federal action significantly affecting the quality of the environment." Agencies may prepare a more limited Environmental Assessment (EA) in lieu of an EIS in certain circumstances. The EA aims to determine whether an EIS is necessary, and the agency must issue a Finding of No Significant Impact (FONSI) if the EA reflects that an EIS is unnecessary. The FONSI must state why the proposed agency action will not have a significant impact on the environment.

In June 2007, the Mississippi Department of Transportation (MDOT) applied for a § 404 permit to fill 162.09 acres of wetlands and construct a five-mile long arterial connector road between the Port of Gulfport at U.S. Highway 90 and Interstate 10. MDOT proposed to mitigate the loss of these wetlands through nearly 400 acres of wetlands credits it purchased from two different wetlands mitigation banks. Accompanying MDOT's application was a February 2003 Final EA/FONSI, Supplement to Preliminary EA, submitted by it and the U.S. Federal Highway Administration (FHWA).

After the Corps issued a Joint Public Notice of MDOT's application, the Mississippi Department of Environmental Quality (MDEQ) issued a letter expressing various concerns that MDOT needed to address before MDEQ could issue a § 401 Water Quality Certification – a prerequisite to the § 404 permit. EPA also expressed concern that the wetlands in the proposed project are aquatic resources of national importance and that MDOT should explore options to offset their destruction within the same Turkey Creek watershed, as opposed to using the wetland credits from the mitigation banks. EPA recommended denial of the project as proposed.

MDOT submitted its Re-Evaluation of FONSI in April 2008, stating that it had "made every effort to acquire in-kind wetlands tracts adjacent" to the land, but could not acquire the land from private landowners. EPA urged MDOT to undertake a more thorough analysis and reiterated its concerns for the project. In September 2008, MDEQ issued its § 401 Water Quality Certification. Subsequently, MDOT issued another Re-Evaluation of FONSI, proposing a higher, 3:1 mitigation ratio, totaling 486.3 wetlands credits from the same two mitigation banks.

On December 23, 2008, the Corps issued its EA/FONSI, indicating that it believed an EIS was unnecessary. On December 30th, the Corps informed EPA that it believed MDOT had "adequately addressed all of the EPA's concerns" in its September 2008 FONSI Re-Evaluation. The Corps advised EPA that, despite EPA's concerns, it intended to issue the permit to MDOT and included a draft permit requiring mitigation bank credits consistent with MDOT's proposal. On January 14, 2009, EPA renewed its objections, suggesting that MDOT exercise eminent domain authority to acquire wetlands within the Turkey Creek watershed. At MDOT's request, the Corps withdrew its December 2008 Notice of Intent letter to allow MDOT to address EPA's growing concerns.

After subsequent meetings, MDOT and FHWA submitted an Addendum to MDOT's September 2008 Re-Evaluation of the EA/FONSI, which included a new proposed mitigation plan, consisting of the purchase of over 1,600 acres of priority land within the Turkey Creek watershed. The Corps, believing that MDOT now satisfied EPA's objections, issued the final permit in August 2009. The Corps included its prior December 23, 2008 EA/FONSI in the permit, but found it unnecessary to prepare an EIS. The EA/FONSI incorporated in the final permit was the same document previously used in support of the withdrawn December 2008 draft permit.

Procedural History and Opinion

Ward Properties, which owns over 1,300 acres of the proposed mitigation land, filed suit against the Corps, asserting the Corps violated NEPA, the CWA and the APA. Ward Properties sought to have the permit withdrawn and the Corps enjoined from issuing a similar permit to MDOT prior to the Corps' compliance with NEPA and the CWA. The City of Gulfport intervened, asserting claims against the Corps pursuant to NEPA and the CWA.

The Corps moved to dismiss the case under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of standing and for failure to state a claim. The court denied the motions and granted Ward Properties and the City of Gulfport leave to amend their complaints, which were re-filed in March 2011. Ward Properties sought a declaratory judgment that the Corps violated NEPA in failing to prepare an EIS and adequately address the direct, indirect and cumulative impacts the project will have on the environment. Ward also sought a declaration that the Corps violated the CWA by allowing destruction of wetlands without any assurance that appropriate mitigation would occur, and to declare that the Corps' decision to require the specific wetlands mitigation was arbitrary and capricious under the APA. Similarly, the City of Gulfport asked the court to withdraw the permit and declare that the Corps violated NEPA and the CWA. All parties filed competing Motions for Summary Judgment.

The court applied the summary judgment standard in determining whether it was appropriate to grant summary judgment to any of the parties. The court observed that no private right of action under NEPA exists, but a party may seek relief under the APA's general review provisions. Despite the Corps' arguments, the court found that Ward Properties had both constitutional and prudential standing to bring an APA claim against the Corps, primarily due to Ward's ownership of the proposed mitigation lands in the path of the permitted highway project.

Analyzing the NEPA claim, the court found that the Corps' EA/FONSI as a whole suggested that the Corps would have determined that, unmitigated, the proposed project would have had a significant effect on the environment, such that an EIS would have been required. The court found that the Corps' most recent EA and FONSI did not address, nor did they appear to contemplate, the mitigation measures which were ultimately included in the August 2009 Permit. The court stressed that the permit's underlying EA and FONSI are premised upon an outdated mitigation proposal, which uses 486.77 credits from mitigation banks and fails to consider MDOT and FHWA's April 2009 Addendum proposing to use 1,659.1 acres within the Turkey Creek watershed. Notably, the permit requires mitigation of a "different character, quality, and amount" than that upon which the permit's EA and FONSI were based. As the court reasoned, "the Permit required, without explanation, an approximately 10:1 real property mitigation ratio, and the Administrative Record is devoid of evidence explaining whether any of the 1,637.9 acres of real property earmarked for mitigation actually constitute 'wetlands.'" This made it impossible to determine from the record whether the permit's required mitigation preserves any wetlands, or what their character, quality or actual mitigation ratio entails.

The court found that the Corps acted arbitrarily and capriciously, and abused its discretion by issuing the § 404 Permit. In short, the court found that the administrative record was insufficient to support the permit's wetlands mitigation requirement or FONSI determination. Following Fifth Circuit precedent, the court vacated the permit and remanded the matter to the Corps to reassess whether a new EA, FONSI, EIS or other appropriate disposition is required.

Conclusion

Although the court granted Ward Properties' Motion for Summary Judgment and vacated the permit, it did not address the parties' CWA arguments. In light of the vacated permit, the court found the CWA claims, all pending motions and the City of Gulfport's arguments to be moot. Finally, the Corps has filed an appeal in this case.

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Koontz and Decker: A Supreme Court Preview

Catherine M. Janasie

The U.S. Supreme Court will hear several environmental cases during its current term. While the Court has already issued decisions on some of these cases, it has yet to issue its opinions in *Koontz v. St. Johns River Water Management District* and *Decker v. Northwest Environmental Defense Center*.

Koontz v. St. Johns River Water Management District

In *Koontz v. St. Johns River Water Management District*, the Court will decide the extent of its previous rulings in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), which provide tests for whether an exaction amounts to a taking under the Fifth Amendment of the U.S. Constitution. Both *Nollan and Dolan* involved landowners who brought takings claims based on the government requiring a condition or exaction, specifically the dedication of or over real property, in a building permit. In *Nollan*, the Court created what is known as the "essential nexus" test, which states that in order for a government entity to place a condition in a permit, the condition must serve "the same governmental purpose as the development ban." Otherwise, the condition is a taking. In *Dolan*, the Court added to the "essential nexus" test by requiring a "rough proportionality" between the proposed development's impact and the condition.

Since the Court decided these cases, lower courts have been uncertain whether to apply *Nollan* and *Dolan* to situations outside the facts of those cases. The Supreme Court of the United States granted certiorari in *Koontz* to decide: (1) whether *Nollan* and *Dolan* apply to a permit denial, when the denial is based on a landowner not accepting permit conditions; and (2) whether *Nollan* and *Dolan* are limited to dedications of or over real property or apply to dedications of money or other personal property as well. *See Koontz v. St. Johns River Water Management District*, 133 S.Ct. 420 (2012).

In this case, Koontz owned a 14.2-acre vacant parcel of land in a commercial zone, but the parcel was also located in a habitat protection zone under the jurisdiction of the St. Johns River Water Management District (District). Koontz wished to develop 3.7 acres of the land, of which 3.4 acres were wetlands and 0.3 acres were uplands. When Koontz applied for a permit from the District to dredge and fill 3.25 acres of the wetlands, the District replied that it would grant the permit if Koontz dedicated the remaining 11 acres of his property into a conservation area and performed offsite mitigation, or if Koontz would reduce the size of his development to one acre and dedicate the remaining portion of the land. Koontz agreed to dedicate 11 acres, but refused to pay for and perform the off-site mitigation or reduce the size of his development. In response, the District denied the permit, claiming that the development would adversely impact the habitat protection zone and it had required mitigation to offset that impact.

Koontz subsequently sued the District for inverse condemnation in the Florida trial court, claiming that the District's offsite mitigation requirement was a taking. The trial court applied *Nollan* and *Dolan* and found that a taking had occurred. On appeal, the Fifth District Court of Appeal concluded that *Nollan/Dolan* apply both when a permit is denied because the landowner refused to fulfill a permit condition and when the condition involves the expenditure of money instead of the dedication of land.

Photograph of St. John's River in Jacksonville, FL, courtesy of Jon Dawson.

The Supreme Court of Florida held that the District's permit denial was not an exaction, and thus, not a taking. *St. Johns River Management District v. Koontz*, 77 So.3d 1220 (Fl. 2012). The court stated that the Supreme Court of the United States had not extended the *Nollan/Dolan* test to non-real property exactions, citing *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) and *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005). Further, the court held that the holdings of *Nollan* and *Dolan* apply only to dedications of or over real property and when a permit containing an exaction is actually issued. The court stated that even if *Nollan/Dolan* applied, Koontz's exactions challenge would fail since the District "did not issue permits, Mr. Koontz never expended any funds towards the performance of offsite mitigation, and *nothing was ever taken from Mr. Koontz*" (emphasis in the original).

Decker v. Northwest Environmental Defense Center

In *Decker v. Northwest Environmental Defense Center*, the Supreme Court will look at two questions concerning the application of the Clean Water Act. First, the Court will consider whether a citizen can challenge a National Pollutant Discharge Elimination System (NPDES) permitting rule in a citizen suit under the Clean Water Act, or if the challenge should have been brought under the judicial review procedure of §509 of the Act. Second, the Court will decide whether discharges from logging roads are point source

discharges that require a NPDES permit under the Act when the Environmental Protection Agency (EPA) has promulgated rules that it interprets as excluding these types of discharges from the NPDES permit program. In connection to this issue, the defendants in the case have also asked the Court to consider whether the Ninth Circuit should have deferred to EPA's position that these discharges do not require a NPDES permit. *See Decker v. Northwest Environmental Defense Center*, 133 S.Ct. 22, 132 S.Ct. 865 (2012).

The Northwest Environmental Defense Center (NEDC) brought a suit against some timber companies and Oregon officials, claiming that they were violating the Clean Water Act by not having a NPDES permit for discharging stormwater into the waters of the United States from ditches besides logging roads. The Ninth Circuit ruled that the ditches on the side of the logging roads were point sources under § 502(14) of the Clean Water Act, emphasizing that EPA did not have the authority to exempt certain discharges from the NPDES permit program if the discharge was from a point source under the Act. *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063 (9th Cir. 2011). Defendants tried to argue that these discharges were exempt from the definition of point source under the Silvicultural Rule, which stated that silvicultural activity discharges from natural runoff were nonpoint source discharges, and thus, not point source discharges. The Ninth Circuit held that if natural runoff from silvicultural activities was later "collected and channeled in a system of ditches, culverts, and conduits before being discharged into streams and rivers," these were point source discharges under § 502(14).

Defendants also tried to argue that the 1987 amendments to the Clean Water Act also exempted the discharges from the definition of point source. First, the Ninth Circuit decided that there was no evidence that Congress knew of the Silvicultural Rule when it adopted the amendments, and therefore, could not be said to have accepted the rule when it passed the 1987 amendments. Further, the court reasoned that the discharges were covered by the 1987 stormwater amendments found in § 402(p) and the Phase I stormwater regulations adopted by EPA under that provision, which require permits for stormwater discharges "associated with industrial activity." Although the Ninth Circuit stated that it was undisputed that logging was an industrial activity, once again, EPA thought that the discharges were exempted because its rules stated that permits were not required for certain silvicultural activities. The court held that § 402(p) requires "that stormwater runoff from logging roads that is collected in a system of ditches, culverts, and channels is a 'discharge associated with industrial activity,' and that such a discharge is subject to the NPDES permitting process."

Also at issue in this case is whether NEDC could bring suit under the citizen suit provision of § 505(a) of the Clean Water Act, which allows any person to bring a suit against those who are illegally discharging pollutants into the waters of the United States without having a NPDES permit. However, § 509(b) limits the citizen suits that can be brought under § 505(a), as it requires that suits reviewing the actions of the EPA Administrator, such as the promulgation of the Silvicultural Rule, must be brought within 120 days, unless the reason for the suit came about after the 120 days have passed. If a person could have brought a suit under § 509(b), then the person cannot bring a citizen suit under § 505(a).

Here, the NEDC challenged the defendants' discharges without a NPDES permit, when the EPA believed a permit was not needed under the Silvicultural Rule, more than 120 days after EPA promulgated the rule. However, the Ninth Circuit found that NEDC was still able to bring a citizen suit because the basis for its suit arose after the 120 days. The court based this on the fact that the Silvicultural Rule was subject to more than one reading and EPA did not convey its reading of the rule, that defendants were exempted from getting a NPDES permit under the rule, until filing an amicus brief in this case.

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Supreme Court Rejects Flooding Exception to 5th Amendment Takings Clause

Arkansas Game & Fish Comm'n v. United States, 133 S.Ct. 511 (2012).

Cullen Manning

The Supreme Court reversed a decision by the United States Court of Appeals for the Federal Circuit that made temporary flooding an exception to claims under the 5th Amendment Takings Clause. Generally, "Takings Clause" claims apply to both permanent and temporary takings of property, but the Federal Circuit Court believed that precedent only allowed takings clause claims that involve flooding that is permanent. After reviewing the case law, the Supreme Court unanimously rejected the Federal Circuit Court's interpretation stating that a taking of property by flooding is virtually no different than any other type of taking.

Background

The U.S. Army Corps of Engineers (Corps) manages Arkansas' Clearwater Dam (Dam), which is located upstream from the Dave Donaldson Black River Wildlife Management Area (Wildlife Area). The Corps uses the Dam to regulate the amount of water that is released downstream. Their Water Control Manual (Manual) determines how much water to release and the time at which to release water, but the Manual does permit deviations for certain purposes. At the request of the farming community the Corps altered the release of water in order to extend the farming season. To do this, the Corps would release less water from the Dam during the fall and more water during the spring and summer months.

The Corps's decision to cater to farmers did not go unopposed. The Arkansas Game and Fish Commission (the Commission) oversaw the Wildlife Area and persistently objected to the deviation. Despite their protests, from 1993 to 2000, the Corps continued its practice of deviating from the Manual when it released water from the dam. The Wildlife Area is primarily composed of hardwood oak trees that provide migratory birds with shelter. When the Corps altered the water release pattern, the increased water resulted in an abnormal amount of flooding in the Wildlife Area in the spring and summer, and the ecosystem changed dramatically as a result. The hardwood trees were killed during a drought because the increased flooding weakened their root systems. The damages led the Commission to file a claim against the U.S. government.

5th Amendment Takings Clause and Flooding

The 5th Amendment Takings Clause states that "private property [shall] [not] be taken for public use, without just compensation." The purpose of the Takings Clause is to prevent the government from unfairly burdening private property owners when the public should bear the burden. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Few bright-line rules regarding takings exist because the situation in which a taking occurs is highly fact dependent. One rule that has developed in takings jurisprudence is that a government taking of private property can be permanent or temporary. The issue before the Supreme Court was whether flooding was unique from other takings situations and was therefore an exception to a "temporary" taking.

In *Arkansas Game & Fish Comm'n v. United States*, the Federal Circuit Court believed that an exception for flooding applied to Takings Clause claims under *Sanguinetti v. United States*,

264 U.S. 146 (1924). A similar case that involved a government taking through flooding, the *Sanguinetti* opinion stated "government-induced flooding can give rise to a taking claim only if the flooding is 'permanent or inevitably recurring.'" The Federal Circuit Court read the statement to mean that temporary government flooding was exempt from Takings Clause claims.

In an opinion written by Justice Ginsburg, the Supreme Court unanimously rejected the Federal Circuit Court's formation of a flooding exception to the Takings Clause. The Court believed that the Federal Circuit Court's interpretation of the word "permanent" in *Sanguinetti* was misguided and inconsistent with ruling precedent. While the Circuit Court placed significant weight on *Sanguinetti*'s description that flooding needs to be permanent to be a taking, the Court stated that this portion of the *Sanguinetti* opinion was ancillary to the main decision and that the Federal Circuit Court took the statement out of context. Instead, the Court stated here, the 1924 Supreme Court decided that the government did not take private property because the flooding was unforeseeable and not likely caused by the government's actions.

Photograph of flood waters in Arkansas, courtesy of Melissa Jones.

The Court also rejected the argument that every flooding would result in a compensable injury. Since flooding is subject to the same fact dependent test as other types of takings cases and there are not an overwhelming amount of takings cases in the courts, the Court decided that flooding would not result in incalculable amounts of litigation. Finally, the Court reasoned that even if *Sanguinetti* had been written to include a flooding exception, the case was outdated in light of the post WWII litigation that later defined Taking Clause cases. *Sanguinetti* dated back to 1924, a time in which the distinction between temporary takings and permanent takings was not yet recognized. Therefore, the Court reversed the decision of the Federal Circuit Court and remanded the case back to them for further proceeding.

Conclusion

The Supreme Court's decision made clear that a taking of private property through flooding is not special. The same rules that apply to the infinite amount of ways that the government can take one's property also apply to flooding. The Court's stance against maintaining a flooding exception reinforces the general rule that Takings Clause cases will be decided on a case-by-case basis.

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U.S. Supreme Court Reaffirms the Water Transfer Rule

Los Angeles County Flood Control District v. Natural Resources Defense Council, 568 U.S. ___, 2013 WL 68691 (Jan. 8, 2013).

Bailey Smith

Photograph of the U.S. Supreme Court, courtesy of Chris Phan.

In a recent decision, the U.S. Supreme Court considered this narrow question: "Under the Clean Water Act …, does the flow of water out of a concrete channel within a river rank as a 'discharge of a pollutant'?" The Ninth Circuit had concluded that a pollutant was discharged when the stormwater at issue left the concrete-lined sections of river and emptied into unlined sections of the same river. The Supreme Court reversed the Ninth Circuit decision because it could not be squared with precedent. The Court held that a discharge, as defined by the Clean Water Act, must be into a separate body of water.

Background

The Los Angeles County Flood Control District (District) operates a "municipal separate storm sewer system" classified as a MS4 for Clean Water Act regulatory purposes, which indicates that the District is operating a drainage system that ultimately discharges stormwater. Because stormwater can be heavily polluted, an NPDES permit must be attained to legally discharge the water. The District has held a NPDES permit for its particular drainage system since 1990 and has renewed it several times. The current state of the drainage system consists of concrete lined portions of a river and non-lined portions of the same river. Monitoring stations have been established at the point at which the concrete lining stops.

Defining a Discharge

Under §505 of the Clean Water Act, Natural Resources Defense Council (NRDC) and Santa Monica Baykeeper (Baykeeper) brought a citizen suit against

the District for the discharge of pollutants in excess of the District's NPDES permit limits. NRDC and Baykeeper alleged that the monitoring stations had indicated a sub-standard water quality level due to high amounts of aluminum, copper and other pollutants contained in the discharge. The district court, as well as the Supreme Court, found the water quality argument without merit and focused on the definition of a discharge under the Clean Water Act. The district court settled the issue in favor of the District.

The Ninth Circuit did not address the issue of water quality, but focused on the definition of a discharge of a pollutant. The Ninth Circuit determined that, when the water left the concrete channels, it entered a new waterway. The court reasoned that the District exercises control over the concrete channels and is thus responsible for what exits those channels. Therefore, the Ninth Circuit found that a discharge of a pollutant had occurred.

On certiorari, the Supreme Court reassessed the issue of what is a discharge of a pollutant and found that flow from one part of a river through a channel and into the same river is not a discharge of a pollutant under the Clean Water Act. The Court relied on the *Miccosukee* decision that created the Water Transfer Rule, which establishes that a transfer of pollutants within the same water body does not fit the Clean Water Act definition of discharge of a pollutant. *Fla. Water Management Dist. v. Miccosukee Tribe*, 541 U.S. 95 (2004). The Court reasoned that there must either be some addition and not simply a transfer of a pollutant, or the water bodies must be meaningfully distinct. Removing polluted water and depositing it back into another portion of the same body of water does not constitute a discharge—only a transfer. Based on this, the Court held that the Ninth Circuit judgment cannot be squared with the *Miccosukee* holding and reversed the Ninth Circuit.

Conclusion

Under the Water Transfer Rule, a discharge of a pollutant does not include the moving of polluted water from one point in a water body to a different point in the same water body. Thus, under the Clean Water Act, no NPDES permit violation can be found unless there is a discharge of a pollutant. A discharge cannot be within the same body of water.

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