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NewsREEL

June 2011

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

Message from the Executive Committee

SONREEL members,

We are very pleased to send out our first newsletter for this year. After being dormant for several years, we are back. Many people have contributed time and effort into producing this update on environmental law. I hope you find it helpful in your practice.

This has been another busy year for environmental lawyers in the state, with continuing efforts to address issues related to the Gulf oil spill and the initiation of energy projects utilizing new technologies in the state requiring legal assistance from environmental lawyers. The past year has also seen considerable activity related to regulatory changes as well as litigation in the arena of environmental law, as you will see from the articles enclosed in this newsletter.

I would like to remind you about the Section's "Meet and Greet" social scheduled for Thursday, June 23, from 5:00 p.m. to 7:00 p.m. at Hal and Mal's in Jackson. This will provide an excellent opportunity to get caught up with your counterparts in the field of environmental law.

Thank you all for being members of the SONREEL section, and I look forward to seeing you on June 23.

Ted Lampton, President,
SONREEL Executive Committee

Fifth Circuit Rejects Clean Water Act CAFO Rule

Niki L. Pace

In March, the Fifth Circuit considered industry challenges to an EPA rule regulating concentrated animal feeding operations (CAFOs) under the Clean Water Act (CWA). The rule, referred to as the 2008 Rule, sought to impose new liability on CAFOs that failed to apply for pollutant discharge permits. After carefully reviewing the new rule and previous regulation of CAFOs under the CWA, the Fifth Circuit rejected EPA's new liability scheme as exceeding EPA's statutory authority.

Background

The CWA authorizes EPA regulation of pollutant discharges from facilities into navigable waters through the National Pollutant Discharge Elimination System (NPDES) permit program. Only facilities considered to be "point sources" under the statute must obtain NPDES permits and maintain discharges within the parameters set by

the permit. Notably, agricultural stormwater discharge, the result of rainwater coming into contact with manure that then flows into navigable water, is excluded from the definition of point source.

While agricultural stormwater discharges in general are exempt from the NPDES permit requirement, farms meeting the definition of CAFOs must obtain a NPDES permit to lawfully discharge. The EPA has implemented regulations for CAFOs under this program three times : 1976, 2003, and 2008. The initial 1976 regulations focused on what type of CAFO *must have* a permit. The 2003 Rule shifted focus to explain, within a broader regulatory framework, "what type of CAFO *must apply* for a permit." The 2003 Rule required all CAFOs, regardless of whether or not they discharged, to apply for a NPDES permit due to the CAFO's potential to discharge. The 2003 Rule also mandated that all CAFOs seeking a permit develop and implement site-specific Nutrient Management Plans (NMP) which include best management practices (BMPs). The goal of BMPs was to "ensure adequate storage of manure and wastewater, proper management of mortalities and chemicals, and appropriate site-specific protocols for land application." However, the BMPs were not reviewed by EPA or included in the CAFO's permit.


Photograph from the USDA Natural Resources Conservation Service.

The 2003 Rule came under attack from both environmentalists and industry. In *Waterkeeper Alliance, Inc. v. EPA*, the Second Circuit found that EPA was without authority to mandate all CAFOs apply for a permit on the basis of "potential to discharge." 399 F.3d 486 (2nd Cir. 2005). In addition, the court considered the NMPs to be effluent limitations within the context of the CWA and therefore should be included in the NPDES permits and reviewed by the EPA. After *Waterkeepeer*, the EPA issued the 2008 Rule at issue in this litigation. Again, both industry and environmental groups challenged the rule. Because similar lawsuits were filed in numerous jurisdictions, the cases were consolidated and randomly assigned to the Fifth Circuit by the Judicial Panel on Multi-district Litigation.

Duty to Apply Liability

Under the 2008 Rule, CAFOs "that discharge or propose to discharge" must apply for a NPDES permit – known as the duty to apply. A CAFO that discharges without a permit will be liable for both the discharge and for failing to apply for a permit. This failure-to-apply liability can be avoided if a CAFO operator establishes that "the CAFO was designed, constructed, operated, and maintained in a manner such that the CAFO will not discharge." Industry challengers argued that the requirement to apply and the imposition of liability for failure to apply exceed EPA's statutory authority. Specifically, the petitioners raised three issues: 1) whether a discharging CAFO must apply for a permit; 2) whether a CAFO proposing to discharge must apply for a permit; and 3) whether EPA can impose liability for failure to apply for a permit.

In assessing these claims in *Nat'l Pork Producers Council v. EPA*, the Fifth Circuit was guided by the Second Circuit's previous decision. 635 F.3d 738 (5th Cir. 2011). When reviewing the 2003 Rule, the Second Circuit considered a similar duty to apply scheme that mandated all CAFOs apply for a NPDES permit or show they lacked the potential to discharge. There, the Second Circuit unequivocally determined that "without a discharge, the EPA has no authority and there can be no duty to apply for a permit."

Under the 2008 Rule, the EPA distinguished between CAFOs that discharge and CAFOs that propose to discharge. Turning first to CAFOs that propose to discharge, the 2008 Rule required that all such CAFOs apply for a NPDES permit. However, EPA's interpretation of "proposes" did not depend on whether the operator sought to discharge but rather focused on the CAFO's ability to discharge based on its design, construction, operation, and maintenance. Under this definition, CAFOs not discharging are still obligated to seek a permit. Because EPA's authority under the CWA is not triggered until an actual discharge occurs, the Fifth Circuit found this requirement exceeded EPA's statutory authority.

The court then examined whether EPA could require a discharging CAFO to apply for a NPDES permit. The court found that not only was this requirement permissible but that "it would be counter to congressional intent for the court to hold that requiring a discharging CAFO to obtain a permit is an unreasonable construction of the [CWA]." Concluding that a discharging CAFO was obligated under the CWA to seek a permit, the court finally addressed whether the EPA can impose

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EPA's Veto of Yazoo Pumps Upheld by District Court

Terra Bowling

In March, the U.S. District Court for the Northern District of Mississippi upheld the EPA's veto of the $220 million Yazoo Backwater Area Pump Project. The project, originally authorized by Congress in 1941 as part of the Flood Control Act, would have resulted in a levee system and a system of pumps to reduce flooding between the Mississippi and Yazoo Rivers. The EPA used its veto power under CWA § 404(c) to halt the project after the agency determined that it would have a negative impact on area wildlife and other natural resources.

Since its inception in 1941, the project underwent a series of environmental reviews, but ultimately stalled when the Water Resources Development Act of 1986 (WRDA) required a local cost-share. Congress reauthorized the WRDA in 1996 without the cost-sharing provision, and work on the project resumed. In 2000, the Corps of Engineers issued a Draft Supplemental Environmental Impact Statement (EIS) responding to concerns over impacts the pump project would have on urban and agricultural areas, as well as other adverse impacts to the environment.

Throughout review of the project, EPA expressed concerns over the project's impact and ultimately initiated the CWA § 404(c) process in 2008. Section 404(c) authorizes the EPA, after notice and opportunity for public hearings, to deny or restrict discharges into certain waters that "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." In 2008, the EPA vetoed the pump station, finding that it would degrade over 60,000 acres of wetlands and other U.S. waters, resulting in unacceptable adverse impacts. According to the court, the EPA has only issued a § 404 (c) veto action thirteen times since 1972.

The Board of Mississippi Levee Commissioners filed suit challenging the EPA decision. The Board alleged that the EPA's veto was barred by CWA § 404(r). Section 404(r) exempts federal construction projects from CWA regulations if an EIS is submitted to Congress prior to construction on the project and before either Congressional authorization or appropriation of funds. The Board argued that the pump project fell within the § 404(r) exemption, citing two cover letters referencing an attached final EIS that were sent to the Chairmen of the Public Works Committees prior to Congressional approval of the project. In *Bd. of Miss. Levee Comm'rs v. U.S. EPA*, the court rejected this argument, concluding that the reference to a final EIS in the letter was not in reference to the pump project. 2011 U.S. Dist. LEXIS 32676 (N.D. Miss. Mar. 28, 2011). Finally, the court noted that even if the EIS had been submitted to Congress the EIS was not considered adequate because the letter indicated that the review process for the project was still underway.

The court granted the EPA's motion for summary judgment. The court found no evidence that a final and adequate EIS was submitted to Congress and concluded that the project did not fall under the § 404(r) exemption. The court's decision stopped the project; however, in April, the Board filed notice of intent to appeal in the U.S. Court of Appeals for the Fifth Circuit.

Terra Bowling is senior research counsel for the National Sea Grant Law Center based at the University of Mississippi School of Law.

Photograph of the Yazoo River in flood stage from the USACE.

Permit Board Upholds Air Permit for New IGCC Power Plant

Travis Clements

On April 4th, the Mississippi Environmental Quality Permit Board held a hearing to consider challenges to an air permit issued for Mississippi Power Company's IGCC (integrated gasification combined cycle) coal fired power plant in Kemper County, Mississippi. The Permit Board initially approved an air permit for the site in October 2008; however, shortly after that time, the Sierra Club requested this hearing. In the meantime, MDEQ required MS Power to re-start its air permitting process due to the fact that the company changed the types of turbines being used. In March 2010, the final modified air permit was issued.

At the hearing, the Sierra Club alleged that MDEQ issued the permit to MS Power based on inadequate and unsupported information. Krystal Rudolph, an environmental engineer and permit writer for the MS Power project, was the first witness for MDEQ. Rudolph testified that the permit was issued based on a subset of data that was representative of the whole, which is a common practice and permissible in the permitting process. Bruce Ferguson, an environmental engineer and supervisor of the modeling branch, also testified for MDEQ.

Mississippi Power produced three witnesses. First, Tommy Anderson, vice president of generation development, and then Randall Rush, general manager of gasification technology, testified on the company's behalf. Brian Toth, of the Southern Company (MS Power's parent company), followed. Mr. Toth serves as an environmental strategy manager. Mr. Toth was heavily questioned on cross-examination by the Sierra Club on the potential emissions of formaldehyde from the IGCC plant and the effectiveness of carbon capture and sequestration. Mr. Toth testified that carbon capture and sequestration was a well demonstrated technology that would work effectively at the plant.

Sierra Club's engineering expert, Mr. Powers, challenged much of the science supporting MS Power's air report. Mr. Powers charged that MS Power left out vital data statistics and that the MDEQ failed to verify the expected permit limitations. However, despite these accusations, the Permit Board ruled that the air permit was valid and that the construction on the IGCC power plant in Kemper County could go forward. The Sierra Club has filed a separate lawsuit in Harrison County Chancery Court challenging the Mississippi Public Service Commission's approval of the project. After a lengthy procedural fight, Harrison County Chancery Judge Jim Parsons upheld the Mississippi Public Service Commission's approval of the new facility. According to the Sierra Club's website, it plans to appeal the decision to the Mississippi Supreme Court. In addition, the Sierra Club has filed a federal lawsuit against the U.S. Department of Energy for providing taxpayer incentives to the plant.

The minutes from the Mississippi Environmental Quality Permit Board meetings can be found at http://www.deq.state.ms.us/MDEQ.nsf/page/About_PermitBoard?OpenDocument

Travis Clements is a third year law student at Mississippi College School of Law.

Photograph from Nova Development Corp.

Commission on Environmental Quality Holds Enforcement Hearing

Travis Clements


Photograph of landfill waste disposal from Remi Jouan.

The Mississippi Commission on Environmental Quality convened March 24th, at the Mississippi Department of Environmental Quality (MDEQ) headquarters in downtown Jackson. Led by Chairman Jack Winstead, the Commission held an enforcement hearing for Diamond Disposal, Inc. and its Owner/operator John Diamond. Mr. Diamond requested the hearing to appeal Administrative Order No. 5878 II, a Cease-and-Desist Notice issued by MDEQ pertaining to his operation of a Class I Rubbish Site.[1] After the hearing, the Commission unanimously affirmed the Order and assessed a $25,000 fine.

During the hearing, MDEQ staff attorney Chris Wells presented Diamond Disposal's 12-year history of noncompliance. Since the Class I Rubbish Site opened, Diamond received 26 Notices of Violation. Six violations resulted in enforcement hearings and penalties totaling $103,000. MDEQ observed Diamond Disposal accepting unauthorized waste on several site inspections. In 2006, Diamond applied for renewal of its Class I Rubbish Site permit. Over the next five years, the Permit Board sent Diamond multiple Notice of Deficiency letters for omitting critical documentation and filing late applications.

Recently, Mr. Diamond operated the site without a permit, due to Diamond Disposal's corporate dissolution by the Secretary of State. MDEQ maintained the permit was issued to the corporation, not Mr. Diamond, and the corporate dissolution terminated the permit. MDEQ cited Mr. Diamond for operation without a Class I permit, but despite this, he continued to operate the facility. On January 4, 2011, MDEQ issued a Cease-and-Desist Notice to Mr. Diamond, ordered the site to refuse new waste, and prepare for closure. In preparation for the enforcement hearing, MDEQ personnel visited the site on March 14th and observed Diamond's continued waste acceptance. Personnel observed mass unauthorized waste acceptance, including used tires, paint thinner canisters, insecticides, and other chemicals.

Mr. Diamond testified he lacked knowledge of Diamond Disposal's corporate dissolution, and he believed that he could accept waste after the Cease-and-Desist Notice, as long as it was placed in dumpsters and transported away. Diamond further stated he completed the renewal application attempts in good faith, and that MDEQ unfairly targeted his site with repeated inspections.

The Commission unanimously adopted MDEQ staff recommendations to assess a $25,000 fine for operation without a permit and affirmed the Cease-and-Desist Order until the Permit Board can approve Diamond's completed application.

Endnotes

1. Class I Rubbish Site regulations permit acceptance of construction and demolition debris; masonry and asphalt; cardboard materials; natural vegetation; some appliances with motors removed; furniture; plastic, glass, crockery, and metal, except containers; and sawdust, wood shavings, and wood chips.

Travis Clements is a third year law student at Mississippi College School of Law.

2011 LEGISLATIVE SUMMARY

Al Sage

Below are summaries of enactments by the 2011 Legislature that may be of interest to SONREEL members. These summaries include bills passed, noteworthy bills that did not pass, and appointments to various state environmental councils. To view the full text of a bill, visit http://billstatus.ls.state.ms.us/ and choose "Bill Status" from the left-hand column.

AGRICULTURE:

HB 1148 – Emerging Crops Fund
Provides for a separate loan program for agribusinesses engaged in poultry production.
Approved by Governor, March 16, 2011.

SB 2450 – Agriculture
Conforms state organic certification program to USDA National Organic Program.
Approved by Governor, April 4, 2011.

CONSERVATION (HOUSE)/ENVIRONMENTAL PROTECTION (SENATE)

HB 105 – Mississippi Individual On-site Wastewater Disposal System Law
Reenacts and amends the law, Miss. Code § 41-67-1 through 41-67-29 and 41-67-33 through 41-67-39.
Approved by Governor, April 26, 2011.

HB 345 – Water Wells
Extends repealer on licensing exemption for wells constructed for irrigation on driller's farm.
Approved by Governor, March 3, 2011.

HB 180 – Irrigation Wells
Would require meters to be placed on irrigation wells.
Died in House Committee, February 1, 2011.

JUDICIARY

HB 702 – Rural Water Systems or Associations
Would include rural water systems and associations under the Open Meetings Act and Public Records Act.
Died in Senate Committee, March 1, 2011.

SB 2199 – Public Waterways
Would immunize landowner from liability arising from the legal use of ATVs in public waters.
Died in Senate Committee, February 10, 2011.

MARINE RESOURCES

HB 761 – Coastal Wetlands Permits
Revised public hearing procedure for coastal wetland permits.
Approved by Governor, March 11, 2011.

HB 762 – Coastal Wetlands Permits
Revised the review period of coastal wetlands permit applications.
Approved by Governor, March 11, 2011.

OIL, GAS AND OTHER MINERALS

SB 2723 – Carbon Dioxide Sequestration
Enacted Mississippi Geologic Sequestration of Carbon Dioxide Act.
Approved by Governor, March 23, 2011.

2011 LEGISLATIVE SUMMARY (CONTINUED)

APPOINTMENTS:

Commission on Environmental Quality
Charles Dunagin, term ending June 30, 2017.

Linda Kay Kell, currently serving a term that expires on June 30, 2011, term extended through June 30, 2018.

Forestry Commission
Floyd "Buck" Hobbs, term ending January 19, 2017.

Neil Black, term ending June 30, 2016.

Additional appointments were made to the Board of Registration of Foresters.

Marine Resources Council:
Vernon Asper (environmental organization), term ending June 30, 2014.

Jimmy Taylor (charter boat operator), term ending June 30, 2014.

Oil and Gas Board:
David Scott, term ending April 7, 2016.

Photograph of the Mississippi State Capitol Building in Jackson from Chuck Kelly.

Al Sage is the owner of Sage Advice, Inc., based in Jackson, MS.

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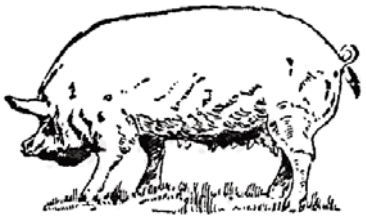
liability upon CAFOs that fail to apply. On this point, the court agreed with the industry petitioners that such an imposition of liability exceeded the EPA's statutory authority. The CWA sets out specific instances when EPA may impose liability and failure to apply for a NDPES permit is not one of the listed conditions.

Ultimately, the court upheld the requirement that discharging CAFOs apply for NPDES permits while clearly rejecting the other two provisions of the 2008 Rule: "Here, the 'duty to apply', as it applies to CAFOs that have not discharged, and the imposition of failure to apply liability is an attempt by the EPA to create from whole cloth new liability provisions. The CWA simply does not authorize this type of supplementation to its comprehensive liability scheme."

Conclusion



Although the court struck down EPA's duty-to-apply liability, the court dismissed other claims on procedural grounds. Specifically, challenges to EPA's NMP and associated land application protocols were time barred. Likewise, the court dismissed industry objections that related EPA guidance letters were unauthorized rulemaking for lack of jurisdiction.

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Case Notes

April Kilcreas

***U.S. Technology Corp. v. Ramsay*, 2011 WL 1225736 (S.D.Miss. March 30, 2011).**

U.S. Technology (USTC), under a contract with Hydromex, Inc., shipped spent abrasive blast material to a site in Yazoo City. Hydromex leased the site from Defendant Delta Logging Company. Hydromex agreed to recycle the hazardous material into commercial concrete blocks and pads, but, instead, buried the product underground. MDEQ issued a cease and desist order, and USTC sought permission to remove the improperly recycled hazardous material from the site. USTC then filed for reimbursement under CERCLA and sought relief under the Mississippi Waste Disposal Law and the Mississippi Air and Water Pollution Control Law. Defendants moved for summary judgment based on an indemnity agreement in their contract with USTC. The district court denied summary judgment, finding that genuine issues of material facts remained. https://ecf.mssd.uscourts.gov/doc1/10512796033

***Gulf Restoration Network v. Hancock County Development, LLC*, 2011 WL 719586 (S.D.Miss. Feb. 22, 2011).**

Gulf Restoration Network (GRN) filed a citizen suit against Hancock County Development alleging Clean Water Act (CWA) Sections 402 and 404 violations and then moved for partial summary judgment on the issues of standing and liability. The district court established that, through its individual members, GRN satisfied requirements for Article III standing. As to CWA liability, the court found that the developer had violated the CWA during planned community development projects by causing stormwater associated with industrial activities to be discharged into waters of the U.S. without a permit. Hancock County Development dredged and filled ditches, built berms, mounds, dams, canals, and roads, all of which contributed to increased stormwater runoff into an adjacent bayou. https://ecf.mssd.uscourts.gov/doc1/10512758498

***Fortenberry v. City of Jackson*, 2011 WL 448354 (Miss. 2011).**

Jackson homeowners, the Fortenberrys and Wallaces, brought suit against the City of Jackson when raw sewage overflowed the municipal sewer system and flooded their homes. In a closely decided decision, the Mississippi Supreme Court found that the operation and maintenance of the sewer system were discretionary functions and the City was immune from suit under the Mississippi Tort Claims Act. Homeowners have moved for rehearing. This decision has not been released for publication. http://www.mssc.state.ms.us/Images/Opinions/CO66428.pdf

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NewsREEL is a newsletter reporting on legal issues affecting natural resources in Mississippi. We welcome suggestions for topics or articles of your own for NewsReel.

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