Environmental Update

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Article One

State Was A Clean Water Act "Operator" Of Reclaimed Surface Mining Cites, Subject To NPDES Requirements
West Virginia Highlands Conservancy, Inc. v. Randy C. Huffman
(Case No. 09-1474, 4th Cir., Nov. 8, 2010)

The West Virginia Highlands Conservancy and West Virginia Rivers Coalition ("Conservancy") filed a citizen suit under 33 U.S.C. § 1365, alleging that Randy Huffman, in his official capacity as the Secretary of the West Virginia Department of Environmental Protection ("WVDEP") had failed to obtain a Clean Water Act ("CWA") National Pollution Discharge Elimination System ("NPDES") permit for discharges of pollutants from 18 bond forfeiture sites in northern West Virginia. In 2007, the Conservancy requested water data from all sites. Based on this data, the Conservancy determined that each of these WVDEP managed and controlled sites were discharging acid mine drainage into waters of the United States. The Conservancy also filed suit in 2007 against WVDEP under the CWA alleging declaratory and injunctive relief to include a demand that WVDEP obtain an NPDES permit at the bond forfeiture sites. The district court granted the Conservancy's motion for summary judgment to which WVDEP timely appealed. The Fourth Circuit affirmed holding that the state was an "operator" of the mine reclamation sites and, therefore, subject to NPDES requirements.

Background

The Clean Water Act is set up to allow states to assume an active role in enforcing the Act, along with the federal EPA. State enforcement programs do not have to be identical to the federal program. A state must, however, demonstrate that its environment control program has adequate powers of enforcement, somewhat equivalent to those exercised by the EPA under the Act. As a starting point, authorized states must have civil and criminal enforcement authority, which customarily includes some form of administrative enforcement authority.

The Clean Water Act also allows any person "having an interest which is or may be

adversely affected" to commence a civil action against any person for violation of any effluent standard, order, or against the EPA for its failure to perform a nondiscretionary duty. Citizen suits frequently target dischargers for violations of NPDES permits.

A hallmark of the Clean Water Act is the NPDES permit program. An NPDES permit is required for any discharge of a pollutant from a point source to waters of the United States. An NPDES permit is required for waste streams from industrial practices, such as mining, and discharges such as collected or channeled storm water runoff, to name a few permitting instances. The Clean Water Act allows states to issue NPDES permits is such states have received permitting authority from the EPA.

A citizen suit based on any Clean Water Act violation may be pursued if neither EPA nor a state is "diligently prosecuting" the violation. A citizen plaintiff must provide the alleged violator, EPA, and the state 60 days notice prior to initiation of the lawsuit. A lawsuit must then be filed within 120 days of this notice.

WVDEP operated 13 bond forfeiture sites actively discharging acid mine waste into West Virginia streams. WVDEP operated these sites pursuant to the Surface Mining Control and Reclamation Act (the "Act"). WVDEP administers a federally-approved state program that regulates and permits mining operations in the state, comprising CWA compliance as well. Under the State's program, when a mining company fails to satisfy its permit obligations to reclaim the polluted water and the disturbed land at the mine site, WVDEP can force the mining company's performance bond into forfeiture. If the bond is insufficient to cover the reclamation costs, WVDEP must draw upon its Special Reclamation Fund ("Fund") to cure the deficiency. Precedent requires WVDEP to utilize Fund moneys to treat bond forfeiture sites in the case of a deficiency.

EPA regulations require CWA discharge permits for Act mine sites, to include coverage under the NPDES scheme. In its regulations, EPA "'reemphasize[d] that post-bond release discharges are subject to regulation under the [CWA]," observing that '[i]f a point source discharge occurs after a bond release, then it must be regulated through an NPDES permit.'" *West Virginia Highlands Conservancy, Inc., infra,* citing to 50 Fed. Reg. 41296, (Oct. 9, 1985), at 41304.

The CWA is broadly worded such that it may also regulate point source discharges occurring after a bond release. The CWA states that "the discharge of any pollutant by any person shall be unlawful." Such releases must be regulated through an NPDES permit under sections 301(a) and 402 of the CWA. *West Virginia Highlands Conservancy, Inc, infra,* citing to 33 U.S.C. § 1311(a). The CWA defines a "person" to include states, municipalities and political subdivisions of the State (33 U.S.C. § 1365(5)) and further describes a point source as "any discernable, confined and discrete conveyance" (33 U.S.C. § 1362(14)). Finally, the CWA's scope bans "any addition of any pollutant to navigable water from any point source" (33 U.S.C. § 1362(12)(A)).

The Conversancy argued that EPA's regulations and the CWA both require WVDEP to obtain discharge permits for discharges from Act mine sites. After filing its suit, WVDEP stipulated that it had measured the pH, iron, manganese and aluminum in discharges from its forfeiture sites in amounts that frequently exceeded technology-based and water quality based effluent standards. WVDEP also stipulated that the CWA defines those chemicals as pollutants, and that they are being discharged into streams the CWA defines as waters of the

United States. Finally, WVDEP stipulated that it had issued permit to the former mine operators for discharges from these sites, but had not issued permits to itself for any of these sites.

Court's Rationale

Both the CWA's statutory language and the EPA issued regulations establish that post-mining discharges are covered by NPDES permitting requirements. WVDEP's principal argument was a policy one- -that it could have no liability for an unpermitted discharge under the CWA as it did not cause the generation of the pollutants that are being discharged. WVDEP alleged that the acid mine drainage was caused by the defunct mine operator when it developed the abandoned mine site and that WVDEP argued that, as a result, it could not be deemed to have discharged pollutants. The CWA act, however, is indifferent about who initially polluted a water-body as long as the pollution continues to occur. As the Fourth Circuit noted, the CWA "…takes the water's point of view. *Id.* EPA's regulation also confirms this point. The regulations clearly state that it is the current operator of a mine site, rather than the initial owner, who must obtain a permit. In enacting the CWA, Congress could have adopted a permitting scheme more favorable to WVDEP's arguments, but did not. Congress could have required NPDES permits only where a new mine operator increases pollution levels over and above those of the previous operator, but it did not do so. Instead, Congress invoked a permitting scheme to allow for gamesmanship among polluters.

The Court rejected WVDEP's "absurd" argument claiming that the district court's decision will create the absurd result of WVDEP applying to itself for a permit, finding it impossible to comply with the permit's water-quality based standards, to then issue penalties to itself for permit violations. The Court rejected this argument noting that WVDEP had previously issued itself a permit for one bond forfeiture site, and did not claim any difficulty when it reported to the district court that it was preparing the applications for the other sites as well. As there was no statutory basis to allow WVDEP to argue differential treatment, it had no statutory basis for now presenting such an argument.

Conclusion

WVDEP's failure to obtain NPDES permits for discharges from most of its bond forfeiture sites has an important collateral consequence - - WVDEP was only treating discharges from the forfeiture sites to technology-based standards, not the more stringent, and required, water-quality based standards.

Article Two

The Tenth Circuit Upholds The Northwest Interstate Compact's Exclusionary Authority Of Member States To Preclude Importing And Disposal Of Low-Level Radioactive Waste
EnergySolutions, LLC v. Utah
Case Nos. 09-4122, 09-4126, 09-4124 (10th Cir., Nov. 9, 2010)

Plaintiff EnergySolutions, LLC ("EnergySolutions") filed suit against Defendant Northwest

Interstate Compact on Lower-Level Radioactive Waste Management ("Northwest Compact") on the grounds that the Northwest Compact had no statutory authority to deny permission of EnergySolutions to permanently dispose of waste imported from Italy. EnergySolutions asserted that federal law preempted Northwest Compact's denial, and, additionally, violated the dormant Commerce Clause by unreasonably restricting interstate commerce. The state of Utah and the Rocky Mountain Low-Level Radioactive Waste Compact intervened as defendants. The district court determined on summary judgment that the Northwest Compact lacked statutory authority to regulate the disposal of waste. On appeal, the Tenth Circuit reversed and remanded the district court judgment on the grounds that the terms of the Compact controlled and the member states were within their authority to deny disposal.

Background

EnergySolutions owned and operated a facility for the permanent disposal of low-level waste located in Clive, Utah ("Clive Facility"). Utah is a member state of the Northwest Compact and required EnergySolutions to obtain permission to import and dispose of low-level radioactive waste ("LLRW") from a decommissioned reactor in Italy.

In January 1986, Congress authorized the states of Alaska, Hawaii, Idaho, Montana, Oregon, Utah, Washington, and Wyoming to enter into the Northwest Compact in furtherance of the Low-Level Radioactive Waste Policy Act of 1980 ("1980 Act"). As a member state, it can regulate disposal at a "facility" defined as "any site, location, structure, or property used or to be used for the storage, treatment, or disposal of LLRW, excluding federal waste facilities." Additionally, the member states reserved exclusionary authority to preclude any facility from accepting LLRW generated outside the region unless otherwise permitted by the member states.

The Low-Level Radioactive Waste Policy Amendments Act of 1985 ("1985 Act") provided a detailed process for disposal of LLRW by issuing penalties for states failing to provide disposal capacity as well as increased financial benefits for states complying with a series of benchmarks regarding new LLRW disposal sites. The 1985 Act also created a gradual transition period during which non-host states were required to take steps towards providing disposal capacity and host states could begin collecting higher surcharges for disposal.

In 1991, Utah issued a license to allow the Clive Facility to begin disposal of LLRW. EnergySolutions was required to obtain permission from the Northwest Committee before disposing of any radioactive waste. It was precluded from accepting LLRW generated outside the region unless otherwise approved. The Clive Facility is the only currently operating LLRW disposal site that began disposal operations after the 1980 and 1985 Acts processing over 97 percent of the national value of disposed LLRW from 2005 to 2008. The Northwest Compact was formed around the pre-existing disposal site in Richland, Washington, which was the primary regional disposal facility in the region. EnergySolutions, therefore, understood the Clive Facility to undertake out-of-region LLRW.

In 2007, EnergySolutions applied to the Nuclear Regulatory Commission ("NRC") for permit to import LLRW based on an agreement to decommission a series of nuclear power plants in Italy. The NRC deferred judgment to the Northwest Committee. Under political scrutiny, the Northwest Committee voted to deny permission to import the waste. In response, EnergySolutions filed suit against the Northwest Compact. The district court on

summary judgment determined that the Northwest Compact lacked statutory authority to regulate LLRW disposal at the Clive Facility because it was not a "regional disposal facility" in accordance with the 1985 Act.

Court's Rationale

On appeal, the Tenth Circuit determined that the district court erred on multiple levels. The district court erred by limiting its scope of review to the 1980 and 1985 Acts only to determine the limitations of burdening interstate commerce as intended by Congress. The district court concluded that it did not find that Congress intended unlimited exclusionary authority by the Northwest Compact. The dormant Commerce Clause precludes states from discriminating against articles of commerce based on the article's state of origin.

The Tenth Circuit determined that district court should have instead sought to interpret the Northwest Compact by first reviewing the language of the Compact itself, rather than the 1980 and 1985 Acts. Also, the district court should have given no weight to the 1980 Act, which was replaced and supplanted by the 1985 Act.

Congress extended broad authority to member states by consenting to the Northwest Compact. Under the Consent Act, Congress expressly determined that the Compact was in furtherance of its legislative objectives. The Compact expressly affords members states exclusionary authority to the Northwest Committee. As approved by Congress, the Northwest Compact must be interpreted like any other federal statute. The court determined that a compact, which is a contract, becomes the law of the United States when approved by Congress. As reinforced by *Alabama v. North Carolina* (2010) -- U.S. --, 130 S.Ct. 2295, the terms of the Compact controlled, not the 1985 Act.

Accordingly, the Tenth Circuit determined that the district court erred on relying on the 1980 and 1985 Acts, and should have relied on the language of the Compact, which is tantamount to any other federal statute approved by Congress. Congress' consent of the Northwest Compact by the 1985 Act waived any dormant Commerce Clause objections that would preclude member states from operating under the terms of the Northwest Compact.

The Tenth Circuit then determined that the Northwest Compact granted exclusionary authority over the Clive Facility. The Northwest Compact plainly falls within the definition of "facility". Further, the Compact expressly provides, "[n]o facility located in any party state made accept low-level waste generated outside of the region comprised of the party states, except as provided in article V." The Northwest Committee therefore has authority to exclude the importation of LLRW from Italy or any other waste generated outside the region.

EnergySolution's appeal was premised on its assertion that the "saving clauses" of the Consent Act and the 1985 Act did not consent to the broad grant of exclusionary authority as exercised by the Northwest Compact. The Tenth Circuit found reliance on either saving clause unpersuasive.

Under the Consent Act, EnergySolutions contended that the Northwest Compact was approved as to the explicit provisions provided for in the 1985 Act only. The 1985 Act did not expressly provide for member states' exclusionary authority; rather, such authority was provided for in the language of the Compact. In reliance on *Alabama, supra,* the Tenth

Circuit determined that compacts are not limited only to the authority conferred by the 1985 Act. When Congress conditioned its consent on compliance with the 1985 Act, it intended to strike any provisions inconsistent with the 1985 Act. The Consent Act did not intend to limit the Northwest Compact's in addition to and in furtherance of the 1985 Act, as the case here.

The court further determined EnergySolution's assertion that the 1985 Act indirectly limited the Compact's express grant of authority also unpersuasive. EnergySolution failed to make a sufficient showing that Congress intended to contradict the Consent Act. The court determined that Congress would have adopted express language providing for limitations to the Northwest Compact's authority, more specifically, its authority to grant member states' exclusionary authority relating to importing and disposing LLRW. The lack of such express language renders EnergySolution's argument futile.

Like the U.S. Supreme Court in *Alabama, supra,* the Tenth Circuit refused to order relief inconsistent with the express terms of a compact. The Tenth Circuit held that the Northwest Compact was statutorily and constitutionally permitted to exercise exclusionary authority over the Clive Facility. As such, the Tenth Circuit reversed the district court judgment and remanded the matter for further proceedings consistent with its holding.

Conclusion

The Tenth Circuit upheld express exclusionary authority conferred by the Northwest Compact, which was authorized by Congress under the Consent Act. The Northwest Compact is not only a contract between the parties, but must also be interpreted as any other federal statute approved by Congress. Despite EnergySolution's assertions that the broad exclusionary authority violated constitutional restraints on interstate commerce, the Tenth Circuit afforded broad discretion to the authority conferred by the Northwest Compact. The Northwest Compact is consistent with legislative objectives to regulate and facilitate disposal of waste by agreement of member states, including, member states' exclusionary authority to preclude entities from importing and disposing of LLRW without approval by member states.

Article Three

Consent Decree Between State and BNSF on CECRA Claims Does Not Bar Pursuit of Private Common Law Restoration Claims
Montana v. BNSF Railway Company
(Case No. 08-35667, 9th Cir., Nov. 1, 2010)

A group of 151 Livingston, Montana residents ("Private Plaintiffs") filed a state court action in September 2007. The Private Plaintiffs allege that property they own was contaminated by diesel fuel, solvents, and other toxic substances they allege originated from BNSF's Livingston, Montana facility. Previously, the Montana Department of Health and Environmental Sciences ("DEQ"), filed an action against BNSF under various environmental statues, including the Comprehensive Environmental Cleanup and Responsibility Act ("CECRA"). In 1990, DEQ and BNSF agreed to a Partial Consent

Decree ("Decree"), which bound only DEQ and BNSF, and specifically stated that it did not apply to any claim by any person other than those bound by the Decree. BNSF filed a motion in federal court seeking to enjoin the Private Plaintiffs from proceeding with their action to protect or effectuate the district court's Decree and its jurisdiction over the Decree. The Private Plaintiff's intervened. The federal district court concluded that the Anti-Injunction Act applied, thereby barring BNSF's injunction. The 9th Circuit affirmed.

Background

The Anti-Injunction Act is "designed to prevent friction between federal and state courts by barring federal intervention in all but the narrowest of circumstances." *Sandpiper Village Condominium Ass'n, Inc. v. Louisiana-Pacific Corp.*, 428 F.3d 831, 842 (9th Cir. 2005). Because the statutory prohibition in the Anti-Injunction Act is based on the constitutional independence of states and their courts, "the limited exceptions to the Anti-Injunction Act will not 'be enlarged by loose statutory construction.'" *Sandpiper Village Condominium Ass'n, Inc., infra,* 428 F.3d at 842 (quoting *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs.*, 398 U.S. 281, at 287 (1970)). "Proceedings in state court should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through that state appellate courts and ultimately [the United States Supreme Court]." *Atlantic Coast Line, infra,* 398 U.S. at 287. "Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to determine the controversy." *Atlantic Coast Line, infra,* 398 U.S. at 297.

The Anti-Injunction Act's exception authorizing a federal court to stay proceedings in state court where necessary "to protect or effectuate its judgments" is commonly referred to as the relitigation exception. To prevail, BNSF must demonstrate that the action in state court is barred by *res judicata* based on a final judgment in the federal court. *Blalock Eddy Ranch v. MCI Telecomms. Corp.*, 982 F.2d 371, 375 (9th Cir. 1992).

Court's Rationale

BNSF could not establish that the relitigation exception applied as the Private Plaintiffs were not parties to the Decree; the Decree did not involve identical issues to the Private Plaintiff's common law claims; and the prior proceedings did not finally resolve the unrelated CECRA issues.

BNSF argued that the Private Plaintiffs' investigation and restoration claims are identical to the State's earlier claims under Montana's CECRA claim pursued in federal court. This issue was previously decided in *Sunburst School District No. 2 v. Texaco, Inc.*, 338 Mont. 259 (2007) ("Sunburst"). Sunburst confirmed that Montana law allows property owners to claim restoration damages as an independent remedy. Neither CECRA nor DEQ's enforcement thereof, precludes restoration damages under Montana's common law.

The defendant in Sunburst, Texaco, claimed it had performed a sufficient cleanup to remove source material from its facility site. However, the Texaco facility remained heavily polluted which affected the neighboring area for which Texaco did not address the contamination. In Sunburst, Texaco proposed, and DEQ granted, preliminary approval for, monitored natural attenuation as the CECRA remedy for contamination in the residential neighborhood. Although Texaco and DEQ agreed on a Partial Consent Decree, it did not

involve the Sunburst residents who properties were also contaminated by Texaco. The Sunburst plaintiff's common law restoration claims seeking to force Texaco to remediate contamination beyond the statute's health-based standards, are distinct from CECRA's focus on cost effectiveness and limits on health-based standards.

The similarities between the BNSF contamination and that in Sunburst convinced the federal court to impose the Anti-Injunction Act. In both matters, the Private Plaintiffs were not parties to the Decree, and; like Texaco, BNSF agreed to cleanup its facility but did not address the surrounding area;

The doctrine of *res judicata* could not be applied as the Private Plaintiffs held claims based on distinct rights which could not be asserted in the prior litigation. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 322 F.3d 1064 (9th Cir. 2003).

Conclusion

This issue arises in the environmental cleanup arena. For instance, the 9th Circuit previously held that private parties harmed by environmental pollution were not in privity with the government based on a prior action by the government relating to the pollution. *In re Exxon Valdez*, 270 F.3d 1215, 1227-28 (9th Cir. 2001). Exxon, like BNSF here, contended that the private plaintiffs were in privity with the government parties to the consent decree because the government parties were acting as parens patriae on behalf of all citizens. The 9th Circuit noted that the consent decree explicitly stated, "nothing in this agreement, however, is intended to effect legally the claims, if any, of any person or entity not a Party to this Agreement." Because the plaintiffs had private interests which were not addressed by the consent decree and had not been represented by the government, the plaintiffs' claims were not barred.