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ENVIRONMENTAL NOTES

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U.S. SUPREME COURT TO DECIDE WHETHER JURISDICTIONAL DETERMINATIONS MAY BE APPEALED

BY: RYAN W. TRAIL

The U.S. Army Corps of Engineers determines the presence or absence of wetlands and other "waters of the United States" on a particular site by issuing a "jurisdictional determination" (JD). A JD is of great significance to property owners because it often dictates the extent to which their property can be developed. That's why the development community has taken a big interest in *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, a case now before the U.S. Supreme Court. The issue before the Supreme Court is straightforward: To what extent can property owners who disagree with the JD obtain immediate review of it in court?

The case concerns a dispute arising from Hawkes' 2010 application for a permit to mine peat on property in Minnesota. The Corps derailed Hawkes' plan by issuing a JD that found the property contained significant wetlands subject to federal jurisdiction. Hawkes did not agree; its position was that the wetlands on the property were not subject to federal jurisdiction. Hawkes appealed the JD to a federal district court seeking review under the Administrative Procedures Act (APA). The court found that, although the JD was the consummation of the Corps' decision-making process, it was not a "final agency action" within the meaning of the APA. Hawkes lost. The decision meant Hawkes had two options: either (i) proceed with the project without a wetlands permit from the Corps and face the prospect of civil and criminal liability, or (ii) spend significant time and money to apply for a wetlands permit *and then* finally have access to a court to contest the JD once a permit was issued or formally denied. So naturally, Hawkes appealed.

The Eighth Circuit reversed the district court's decision. Using similar reasoning to that advanced by the U.S. Supreme Court in *Sackett v. EPA*, the Eighth Circuit held that a JD is "final agency action" subject to review under the APA because it is a conclusive determination by the Corps. The appeals court said the Corps' assertion that an approved JD is merely advisory and has no more effect than an environmental consultant's opinion "ignores reality." It found that, "in reality, it has a powerful coercive effect" and that the inability of property owners to obtain judicial review of it "leaves most property owners with little practical alternative but to dance to …the Corp's [*sic*] tune."

The Corps appealed to the U.S. Supreme Court, and that Court accepted the appeal. It did so to resolve the split among the circuit courts of appeal created by the Fifth Circuit's 2014 decision in *Belle Co., LLC v. Corps*. There, the Fifth Circuit reached the opposite result. Although the Supreme Court declined to hear *Belle* in March, 2015, it will hear oral arguments in *Hawkes* on March 30, 2016.

The Supreme Court in *Sackett* made clear that property owners have an immediate right to judicial review of a compliance order issued by EPA because such orders are "final agency action." The decision of the Court in that case was unanimous, something that does not bode well for the Corps' position in *Hawkes*.

Briefs filed in *Corps of Engineers v. Hawkes Co, Inc.* (U.S. Sup Ct.)

TEXAS GROUNDWATER CASE OPENS NEW FRONT IN REGULATORY TAKINGS CLAIMS

BY: JESSICA J.O. KING

Water rights lawsuits are not new. But a recent ruling in Texas sets new precedent in the fight for groundwater. There, a Texas trial court recently awarded pecan farmers Glenn and JoLynn Bragg $2.5 million for their lost use of groundwater from the Edwards Aquifer in South Texas.

The Braggs own two commercial pecan orchards that are irrigated using two wells, one drilled in 1980 without a permit and one drilled in 1995 with a permit from the former Medina Groundwater Conservation District. Both wells withdraw groundwater from the Edwards Aquifer. In 1993, Texas passed the Edwards Aquifer Act (the "Act") and formed the Edwards Aquifer Authority (EAA) to manage competing uses for the aquifer. In early 2000, the Braggs applied for permits from EAA to use groundwater from the aquifer to irrigate the same two pecan orchards. EAA denied the request for one orchard, and gave only limited access to groundwater for the other. In 2006, the Braggs sued the EAA for taking their right to the use and enjoyment of both properties without adequate compensation in violation of the Texas State Constitution. The trial court held the Braggs were entitled to damages for the takings claims and calculated the damages based on the market value of the groundwater they were denied, not the lost value of the properties.

Both sides appealed the trial court's ruling, and on August 28, 2013, the Texas Fourth Court of Appeals affirmed the Braggs right to damages, holding the regulatory scheme imposed by the Act resulted in a regulatory taking of both orchards. However, the court remanded the case to the trial court to recalculate damages based on the diminution in the values of their properties, not the market value of the groundwater they were denied. It said:

> *[W]e conclude the 'property' actually taken is the unlimited use of water to irrigate a commercial-grade pecan orchard, and that 'property' should be valued with reference to the value of the commercial-grade pecan orchards immediately before and immediately after the provisions of the Act were implemented or applied [to the orchards].*

EAA appealed the decision to the Texas Supreme Court, but the court denied its request. On remand, the trial court jury awarded the Braggs $2.5 million plus pre-judgment interest, bringing the total award to over $4 million.

In most instances, water users on the east coast have ready access to sufficient quantities of surface and groundwater to meet their needs. That's not the case in the southwest and west where access to water can mean the difference between commercial success and failure. Whether this case will set precedent elsewhere is hard to say, but the Texas plaintiffs certainly had an advantage that plaintiffs in other states may not have: The Act explicitly states that the Texas legislature intended "just compensation be paid" if implementation of the Act causes a taking of private property or impairment of a contract. Considering that our nation's aquifers are subjected to increasing demands, it won't be surprising if other groundwater-dependent industries sue to test the waters in their jurisdiction and request compensation for groundwater permit denials.

Bragg vs. Edwards Aquifer Authority, No. 06-11-18170-CV (Tex. Dist. Ct., Medina Cty., Feb. 22, 2016); *Edwards Aquifer Authority v. Bragg*, No. 04-11-00018-CV (Tex. Ct. App. Nov. 13, 2013).

EPA SEEKS TO ADD SUBSURFACE INTRUSION TO CERCLA HAZARD RANKING SYSTEM

BY: HENRY R. "SPEAKER" POLLARD, V

The National Priorities List ("NPL") is EPA's list of the most contaminated sites in the country that warrant cleanup under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, ("CERCLA" a/k/a "Superfund"). NPL sites usually require extended, extensive and expensive remediation due to the nature of the contamination. To determine if a site should be listed on the NPL, EPA ranks the relative risk of contaminated sites using its Superfund Hazard Ranking System ("HRS"). While rare, when EPA revises the HRS, that change can have a substantial effect on which sites are ranked high enough for inclusion on the NPL. EPA has just proposed such a change by adding subsurface intrusion as a component of the HRS contaminated soil exposure pathway.

Subsurface intrusion ("SI") typically involves the direct transmission of hazardous substances into a structure, usually through at-grade or below-grade floors and/or through below-grade walls. SI exists in two main forms: vapor intrusion and groundwater intrusion. The concerns presented are largely human health-related, whether by inhalation of volatile compounds entering the structure or by direct contact with contaminated groundwater or residual contaminants left after intruding groundwater evaporates or recedes.

The HRS considers four exposure pathways: groundwater, surface water, air and soil. The HRS has never considered SI separate and apart from these four pathways. The proposed regulation would change that by folding SI risk into the soil exposure pathway – to be renamed the soil exposure and subsurface

intrusion pathway – and not change the other existing pathway factors. This change may cause some sites that otherwise would not rank high enough to now be considered for inclusion on the NPL. Due to the nuances of the HRS calculation, this is true even for sites with only a single SI-related soil exposure pathway. EPA says that sites currently listed or proposed to be listed on the NPL would be unaffected by the proposed regulation.

To justify its proposed action, EPA says there has been inconsistent treatment of SI by the states in evaluating site risk. It sees this revision as a model for states to use in their cleanup programs and as something that may lead to a more consistent nationwide approach to SI risk. EPA also believes that hazardous waste regulatory programs under the Resources Conservation and Recovery Act and brownfields program do not always have sufficient legal authority to address all SI risks, especially where SI is the only key exposure pathway. Further, in EPA's thinking, SI mitigation measures, such as vapor extraction systems, do not necessarily further CERLA's goal of remediation of "uncontrolled hazardous waste sites" even though they may protect human health. It is also noteworthy that this proposal comes on the heels of revised EPA guidance issued last summer that addresses risk assessment for vapor intrusion.

Clearly, EPA is pressing forward with a more focused and deliberate effort to address SI for NPL ranking and related coordinated federal oversight. Though EPA downplays the scope of the proposed addition of SI into the HRS, the ripple effects of this proposal may be felt more broadly in state brownfield and voluntary remediation programs. Whether contaminated facilities with SI concerns will now face greater scrutiny before being allowed to enroll in these programs is unclear. Regardless, the proposed regulation may create practical hurdles, if not regulatory ones, for property owners and operators if site project delays result from additional HRS consideration. Comments on the proposed regulation must be filed with EPA by April 29, 2016.

81 Fed. Reg. 10372 (February 29, 2016)

CHESAPEAKE BAY TMDL HERE TO STAY

BY: A. KEITH "KIP" MCALISTER, JR.

The U.S. Supreme Court has declined to consider an appeal challenging EPA's Chesapeake Bay Total Daily Maximum Load (TMDL), thereby bringing to an end the contentious years-long litigation over its legality. The Court's decision late last month effectively upholds a July 6, 2015 decision by the U.S. Court of Appeals for the Third Circuit affirming EPA's authority under the Clean Water Act to develop a TMDL for the entire Chesapeake Bay watershed.

The Bay TMDL was issued in 2010. It's essentially a "pollution diet" designed to reduce discharges of nitrogen, phosphorus and sediment to the Bay, all of which have been shown to adversely affect water quality in the 64,000 square mile watershed. The American Farm Bureau Federation (AFBF), National Association of Homebuilders, and many others filed suit challenging EPA's authority to issue such a sweeping plan. They lost in the district court and in the Third Circuit, so their last hope was that the Supreme Court would hear their appeal.

In their briefs to the Supreme Court, these parties argued that EPA usurped state authority in establishing waste load allocations, compliance deadlines, and other key criteria. They also said the TMDL imposed inflexible waste load allocations over small geographic areas and that the states were better suited in deciding how water quality goals should be attained based on local economic and social impacts. Finally, they argued that EPA made significant miscalculations in the TMDL by failing to consider overall load from a variety of sources and sectors.

It did them no good. Despite potentially conflicting rulings from the Ninth and Tenth Circuits, the Supreme Court denied AFBF's petition for appeal on February 29. That means the Bay TMDL remains on course and arguably will be used as a blueprint by EPA for other large watersheds it concludes are impaired.

Briefs filed in American Farm Bureau v. EPA (U.S. Sup. Ct.)

SELLING PROPERTY "AS IS" WON'T PROTECT SELLER FROM SUPERFUND LIABILITY

BY: CHANNING J. MARTIN

Everyone is familiar with the two little words - "as is" - that pop up in real estate contracts. The "as is" clause is a means of allocating risk between seller and buyer. Generally, a seller who sells property "as is" will not be liable to the buyer for the condition of the real estate at the time of transfer. There are limitations, however, on the degree of protection the "as is" clause provides, and these limitations are particularly important when the property being transferred is contaminated.

Section 107(e)(1) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, commonly known as Superfund) addresses the issue of contractual allocation of environmental liabilities by buyers and sellers of real estate:

> No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any facility ... to any other person the liability imposed under [CERCLA]. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under [CERCLA].

Courts have interpreted this section as precluding a responsible party from divesting itself of liability. In other words, a seller who is liable under CERCLA remains fully liable to third parties, such as the federal government, regardless of language to the contrary in the contract between the buyer and seller. The seller, however, can shift the cost of that liability to the buyer by having the buyer agree to reimburse it for any environmental costs incurred in connection with the property after closing.

How is that best done? Many believe an "as is" clause is an effective way to shift CERCLA liability from seller to buyer, but that's not always the case. This point is illustrated by *M & M Realty Company v. Eberton Terminal Corporation*, a case decided years ago by a federal court in Pennsylvania.

The case concerned a 7-acre parcel of industrial property that M & M Realty purchased from Eberton after receiving a favorable environmental report for the site. Five months later, M & M Realty discovered the soil and groundwater at the property were contaminated with petroleum and various hazardous chemicals. M & M Realty then sued Eberton under CERCLA to recover its cleanup costs.

The property was transferred pursuant to a purchase agreement that contained an "environmental contingency" clause. This clause provided that the buyer would be allowed the opportunity to perform a Phase I environmental site assessment and other appropriate investigations to determine the condition of the property. If contamination was detected, M & M Realty would have the right to walk away from the deal. If, however, M & M Realty decided to purchase the property, the clause stated that M & M Realty was accepting the property "as is."

Eberton moved to dismiss M & M Realty's lawsuit because, among other reasons, the property was sold "as is." Eberton took the position that the buyer had assumed the risk of environmental liability and could not use CERCLA to circumvent the "as is" clause.

The court disagreed. Following the reasoning of the majority of federal courts to consider this question, it concluded that there can be no allocation of CERCLA liability between a buyer and seller without explicit language of indemnification clearly manifesting the parties' intent to transfer environmental liability. In the absence of clear and explicit language stating that the buyer agreed to indemnify the seller, the "as is" clause was held ineffective to bar a lawsuit for cleanup costs.

M & M Realty highlights the need to consult environmental counsel in real estate and corporate transactions when parties define their future responsibilities for environmental liabilities. Each transaction is different and requires well-designed environmental provisions that anticipate unknown environmental liabilities.

M & M Realty Co. V. Eberton Terminal Corp., 1997 WL 580591 (M.D. Pa. Sept. 11, 1997).

AUTHORS FOR THIS ISSUE

Jessica J.O. King
Partner
Columbia, SC
T: 803.567.4602

Channing J. Martin
Partner, Chair
Richmond, VA
T: 804.420.6422

A. Keith "Kip" McAlister, Jr.
Associate
Columbia, SC
T: 803.567.4604

Henry R. "Speaker" Pollard, V
Partner
Richmond, VA
T: 804.420.6537

Ryan W. Trail
Associate
Columbia, SC
T: 803.567.4605