ABA Section of Environment, Energy, and Resources
AMERICAN BAR ASSOCIATION

Water Quality and Wetlands Committee Newsletter

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MESSAGE FROM THE CHAIR

W. Blaine Early III

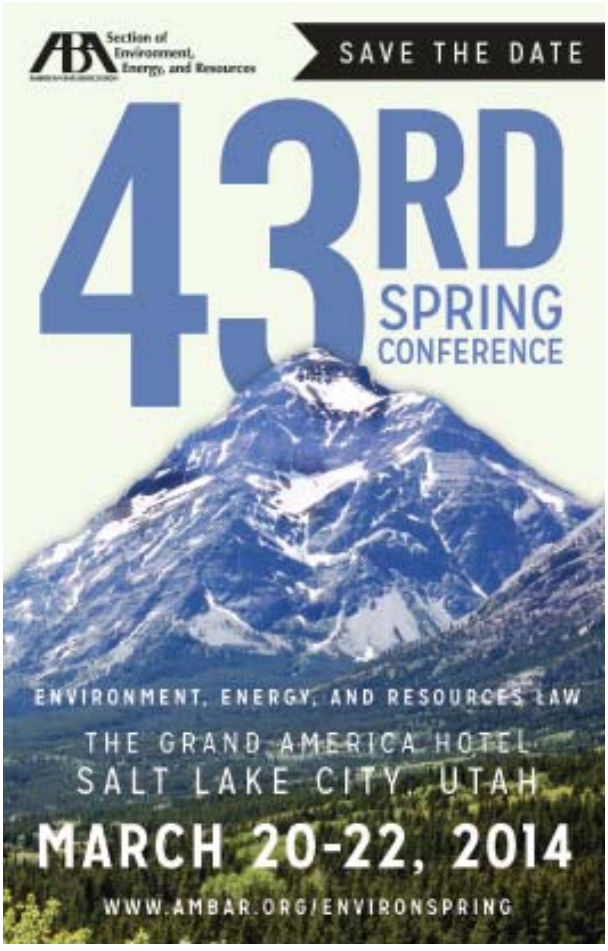
The Water Quality and Wetlands Committee strives to keep our members up-to-date on issues related to water quality, water pollution, and wetlands and provide a forum on these issues. While our primary focus is the Clean Water Act, we address other federal statutory and regulatory programs as well as a host of state and local laws and ordinances that involve water quality and wetlands.

With this edition of the newsletter we welcome our new editor, Winston K. Borkowski, of Hopping Green & Sams, P.A., in Tallahassee, Florida. Winston has assembled a broad mix of articles that we hope you find useful and informative. We invite you to contribute to the newsletter and all of the committee's activities.

Make sure that you are on the committee's e-mail list serve and that you join our LinkedIn discussion group. To obtain information about the committee, to sign up to receive updates on water quality and wetlands law, and to learn how to get involved, see the committee's webpage at http://apps.americanbar.org/dch/committee.cfm?com=NR350900.

Make plans now to attend the Section's 43rd Spring Conference in Salt Lake City, Utah, March 20–22, 2014, and the annual Water Law Conference in Las Vegas, Nevada, June 4–6, 2014.

The committee chair and vice chairs are listed on the Web site. On behalf of all of the committee leadership, we welcome your participation and feedback and we look forward to working with you on a regular basis. Please contact any one of us with your suggestions and ideas.



Water Quality and Wetlands Committee Newsletter
Vol. 12, No. 1, December 2013
Winston K. Borkowski, Editor

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AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

CALENDAR OF SECTION EVENTS

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ABA Midyear Meeting
Chicago

Mar. 20-22, 2014
43rd Spring Conference
The Grand America Hotel
Salt Lake City

April 10-11, 2014
ABA Petroleum Marketing Attorneys' Meeting
The Ritz-Carlton Hotel
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May 2-4, 2014
Spring Council
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32nd Annual Water Law Conference
The Red Rock Resort, Casino and Spa
Las Vegas

Aug. 7-12, 2014
ABA Annual Meeting
Sheraton Boston Hotel
Boston

Oct. 8-11, 2014
22nd Fall Conference
The Trump Doral Golf Resort & Spa
Miami

For full details, please visit www.ambar.org/EnvironCalendar

"DISCHARGES COMPOSED ENTIRELY OF STORM WATER" INTERPRETED TO INCLUDE POLLUTANTS INCIDENTAL TO STORMWATER RUNOFF

Brian G. Glass

The Clean Water Act (CWA) and its implementing regulations exempt certain "discharges composed entirely of storm water"—like those associated with specified small construction sites, 40 C.F.R. § 122.26(a)(9)(i)(B), (b)(15), oil and gas activities, *id.* § 122.26(c)(1)(iii), and mining operations, *id.* § 122.26(c)(1)(iv)—from the requirement to obtain a National Pollutant Discharge Elimination System (NPDES) permit. Neither the CWA nor its implementing regulations, however, defines the phrase "discharges composed entirely of storm water," which has created significant uncertainty for those seeking to avail themselves of these permitting exemptions. A district court opinion issued last summer may finally reduce some of that uncertainty.

In *Gallagher v. E. Buffalo Twp.*, No. 4:12-cv-00777 (M.D. Pa. Aug. 29, 2013), a property owner in Pennsylvania filed a CWA citizen suit against a municipality for discharging pollutants without an NPDES permit in violation of the CWA. The property owner alleged that a pipe and a ditch owned and maintained by the municipality as part of its stormwater management system discharges stormwater containing various pollutants, including sediment, garbage, animal waste, and petroleum products, onto her property and into a tributary of the Susquehanna River. There was no allegation that the township actively adds pollutants to the stormwater; the allegation was simply that during storm events pollutants are picked up and carried by the stormwater as it flows to and through the stormwater management system.

Among the NPDES permitting exemptions provided by the CWA and its implementing regulations is one for "discharges composed entirely of storm water" from specified small municipal separate storm sewer systems (MS4s). MS4s are only required to obtain a NPDES permit for "discharges composed entirely of storm water" when they are located in an "urbanized area" as defined by the latest census or when they are otherwise designated for regulation by the NPDES permitting authority. 40 C.F.R. §§ 122.26(a)(9)(i)(A), 122.32(a). Because the parties in this case agreed that the MS4 was neither located in an urbanized area nor designated for regulation, the only remaining question for purposes of determining whether the municipality was required to obtain a NPDES permit was whether its discharges qualified as "discharges composed entirely of storm water." On that particular question, however, the parties forcefully disagreed.

The municipality argued that "a discharge is 'composed entirely of storm water' even when it includes pollutants that are incidental to stormwater runoff," and that only by "actively adding pollutants" to the stormwater could the township disqualify its discharge as a discharge "composed entirely of storm water." *Gallagher*, slip op. at 10–11. In contrast, the property owner argued that the phrase "composed entirely of storm water" "means what it says, storm water, not pollutants." *Id.* at 11. While finding the property owner's interpretation "appealing in its simplicity," *id.* at 12, the court ultimately sided with the municipality on cross motions for summary judgment.

First, the court observed that the CWA only prohibits the discharge of pollutants from a point source without a NPDES permit. Therefore, if "composed entirely of stormwater" meant "storm water, not pollutants," discharges "composed entirely of storm water" would not require a NPDES permit in the first instance, and there would be no need for a permit exemption. Because Congress created an exemption from the existing permit requirement for "discharges composed entirely of stormwater," the court reasoned that it "must have contemplated that such discharges contained pollutants." *Id.* at 13.

The court also observed that the property owner's interpretation would render illogical other

provisions of the CWA and its implementing regulations, as follows:

> 33 U.S.C. § 1342(p)(2)(E) requires a permit for "[a] discharge [composed entirely of stormwater]" that the permitting agency determines "contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." 40 C.F.R. § 122.26(f)(2) allows any person to "petition the [appropriate permitting agency official] to require a NPDES permit for a discharge which is composed entirely of storm water which contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." The court found that "it would be more than odd for Congress to have provided, essentially, that discharges that add no pollutants to the waters of the United States require a permit when they are significant contributors of pollutants to the waters of the United States."
>
> 33 U.S.C. § 1342(p)(5) requires the EPA Administrator to conduct a study for the purposes of "determining . . . the nature and extent of pollutants in [discharges composed entirely of stormwater]." The court found that "it would be strange for Congress to have ordered the EPA to study . . . pollutant-free storm water discharges to determine 'the nature and extent of pollutants in such discharges.' "

Id. at 16. As part of its analysis, the court also evaluated legislative history, from which it divined that a major goal of the Water Quality Act of 1987, which created the exemption for "discharges composed entirely of stormwater," was to "substantially reduce storm water-related permit applications." *Id.* at 18. The court found it "hard to imagine legislators defining 'discharges composed entirely of storm water' as 'storm water, not pollutants,' when doing so would have undermined a major purpose of the [legislation]." *Id.*

On the meaning of the phrase "discharges composed entirely of storm water," *Gallagher* is likely to become an authoritative opinion. Although another district court has interpreted the phrase to exclude stormwater containing pollutants incidental to stormwater runoff, *see Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 301 F. Supp. 2d 1102, 1111 (N.D. Cal. 2004); *Humboldt Baykeeper v. Union Pac. R.R. Co.*, No. C 06-02560, slip op. at 4 (N.D. Cal. 2008), that court did not provide nearly as comprehensive an analysis as the one provided by the court in *Gallagher*. Indeed, the majority of the analysis provided by that court was contained in a single footnote, which betrayed a certain level of discomfort with the interpretation being provided. *See Envtl. Prot. Info. Ctr.*, 301 F. Supp. 2d at 1111 n.7 ("Loath as the court is to read statutory terms unreasonably—e.g., to read 'entirely' as synonymous with 'not completely'—the court is equally unwilling to provide potential polluters with a 'stormwater'-based excuse for non-permitted discharge of pollutants."). For that reason, future courts interpreting the phrase are likely to regard *Gallagher* as the more persuasive authority, which should provide some level of comfort for those availing themselves of one of the NPDES permitting exemptions for "discharges composed entirely of storm water," even when their discharges are not—strictly speaking—discharges composed entirely of storm water.

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FOR THE AGRICULTURAL STORMWATER EXEMPTION, THE CLEAN WATER ACT MEANS WHAT IT SAYS

W. Blaine Early III

The U.S. District Court for Northern District of West Virginia has held that the Clean Water Act's (CWA) agricultural stormwater exemption, 33 U.S.C. § 1362(14), applied to dust, litter, and manure released from poultry houses and carried by precipitation to a nearby stream. Therefore, the court determined, those discharges to surface water did not require a National Pollutant Discharge Elimination System (NPDES) permit. *Alt v. EPA*, No. 2:12-cv-00042, 2013 U.S. Dist. LEXIS 152263 (N.D.W.V. Oct. 23, 2013).

Plaintiff, Lois Alt, brought suit to challenge the U.S. Environmental Protection Agency's (EPA) issuance of Findings of Violation and Order for Compliance under the CWA that alleged her eight-house poultry operation had "discharged pollutants from man-made ditches via sheet flow to Mudlick Run during rain events generating runoff without having obtained an NPDES permit." This case focuses on the express statutory language of the Clean Water Act and highlights the evolving regulation of water pollution associated with concentrated animal feeding operations or "CAFOs." The case makes a clear determination that the agricultural exemption means what it says, that stormwater from agricultural operations is exempt from NPDES regulation, even if the source would otherwise be considered a point source.

Large-Scale Poultry Operations

Commercial production of poultry is an important component of agricultural economy and provides a valuable source of food. Poultry and egg sales account for over half of the agricultural sales in West Virginia. *Poultry*, W. Va. Dep't of Agric., http://www.wvagriculture.org/images/Enviro/Poultry.htm (last visited Nov. 19, 2013). While it produces about 90 million birds each year, West Virginia is not even in the top ten of poultry-producing states, a list that is led by Georgia. *See* Christina Richmond, W. Va. Dep't of Agric., *Poultry Industry Overview*, http://www.dep.wv.gov/WWE/watershed/wqmonitoring/Documents/Potomac-Intersex/WVDA_Poultry_Industry_Overview_Updated_2006.pdf (last visited Dec. 10, 2013); *see also,* Univ. of Ga. Coop. Extension, http://extension.uga.edu/agriculture/animals/poultry/ (last visited Nov. 19, 2013).

Alt's facility consists of "eight poultry confinement houses equipped with ventilation fans, a litter storage shed, a compost shed and feed storage bins." *Alt*, 2013 U.S. Dist. LEXIS 152263, at *5–6. This is typical of modern, large-scale operations to produce poultry for meat consumption where chickens are grown in houses, each containing 25,000 or more birds, with litter floors (commonly wood chips or shavings or rice hulls). *See* Richmond, *Poultry Industry Overview*; *see also, e.g.*, Ga. Poultry Fed'n, *How Are Chickens Grown?*, http://www.gapf.org/IndustryTour/default.cfm (last visited Nov. 19, 2013). Litter mixed with feces and other wastes is removed periodically, stored in covered sheds, and then applied to land as a fertilizer and soil amendment. *Id.* EPA's efforts to reduce water pollution from these facilities have focused primarily on control of the manure and runoff from uncovered manure storage or excess manure and litter applied to fields. *See, e.g.*, National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7176, 7179 (Feb. 12, 2003) (codified at 40 C.F.R. pts. 9, 122, 123, and 412).

Ventilation fans are commonly used in chicken production facilities where they help control environmental conditions, including temperature, moisture, and air quality. Air removed from the houses by the fans may contain ammonia and particulate matter or dust that may consist of manure, feather and skin scales, feed, and other materials. *See, e.g.*, Univ. of Ky. Coll. of Agric., Poultry Production Manual, ch. 7, *available at* http://www2.ca.uky.edu/poultryprofitability/production_manual.html (last visited Nov. 19,

2013). Emissions from the poultry houses via these ventilation fans have been the subject of litigation under the Comprehensive Environmental Response, Compensation, and Liability Act; the Emergency Planning and Community Right-to-Know Act; the Clean Air Act; and common law nuisance, but generally not the Clean Water Act. *See, e.g.*, Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 4958 (Jan. 31, 2005). For a review of fan emissions, see M. Rosewin Sweeney, *Regulation of Fan Emissions at Poultry CAFOs: An Ongoing Controversy*, AGRIC. MGMT. COMM. NEWSL., vol. 18, no. 1, Oct. 2013.

Sources of Water Pollution at Alt's Operation

In accordance with commonly accepted best management practices, the poultry growing houses, manure and litter storage, and stored feed and other supplies at Alt's facility were covered, under roof. *Alt*, 2013 U.S. Dist. LEXIS 152263, at *6. It appears that EPA did not find fault with these efforts. Nor did EPA complain of any water pollution from land application of manure. Instead, the source of pollutants lay with contamination that the court described as follows:

> Some particles of manure and litter from Ms. Alt's confinement houses have been tracked or spilled in Ms. Alt's farmyard. Some dust composed of manure, litter and dander, and some feathers, have been blown by the ventilation fans from the confinement houses into Ms. Alt's farmyard where they have settled on the ground.
>
> Precipitation has fallen on Ms. Alt's farmyard, where it contacted the particles, dust and feathers from the confinement houses, creating runoff that carried such particles, dust and feathers across a neighboring grassy pasture and into Mudlick Run, a water of the United States.

Id. (citations to the administrative record omitted). The court focused its analysis on how these particular pollutants fit the statutory language of the agricultural stormwater exemption.

Regulation of CAFOs Under the CWA

The focus of the court's analysis was the nature and location of the pollutants at issue and whether they fit within the statutory exemption for agricultural stormwater. The court thoroughly reviewed the CWA's general prohibition on discharge of pollutants from point sources except under authorization of a permit issued under the NPDES. *Id.* at *12. The CWA's definition of point source originally included "concentrated animal feeding operation," but Congress neglected to define that term. In 1987, however, after litigation on what kinds of animal feeding operations were required to have an NPDES permit, Congress amended the definition of point source stating: "[point source] does not include agricultural stormwater discharges and return flows from irrigated agriculture." *Id.* at *13 (citing 33 U.S.C. § 1362(14)). But Congress gave no indication of the scope of these exempt discharges.

Since the mid-1970s EPA and several states have attempted to define CAFOs and to implement CWA regulations applicable to them. *See, e.g.*, U.S. ENVTL. PROT. AGENCY, DEVELOPMENT DOCUMENT FOR EFFLUENT LIMITATIONS GUIDELINES AND NEW SOURCE PERFORMANCE STANDARDS FOR THE FEEDLOTS POINT SOURCE CATEGORY (1974). Within the last decade EPA, litigants, and the courts have further defined the scope of CWA regulation of animal feeding operations. In 2003 EPA released a final rule on CAFO permitting under the CWA (2003 Rule). National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7176 (Feb. 12, 2003) (codified at 40 C.F.R. pts. 9, 122, 123, and 412). Agricultural interests and environmental advocacy groups challenged the 2003 Rule. *See Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005). The Second Circuit struck down portions of the 2003 Rule, including the provision that required CAFO operators to apply for an NPDES permit unless the operator could prove that the CAFO would not discharge pollutants. *Id.* at 504. However, the court upheld provisions of the 2003 Rule that relied on the

agricultural stormwater exemption to allow the discharge of pollutants (manure, litter, etc.) from land areas where the manure had been applied, so long as the land application had been in compliance with a nutrient management plan developed for the site. *Id.* at 507. Therefore, EPA incorporated into the 2003 Rule, and the Second Circuit approved, the implementation of the stormwater exemption for these areas of land application of waste from the CAFOs.

In 2008, in response to the *Waterkeeper* decision, EPA issued a revised rule (2008 Rule). Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeeper Decision, 73 Fed. Reg. 70,418 (Nov. 20, 2008) (codified at 40 C.F.R. pts. 9, 122, and 412). After EPA issued the 2008 Rule, it also released three guidance letters that addressed, among other issues, whether poultry CAFOs needed to apply for NPDES permits for dust released via ventilation fans. Both the 2008 Rule and the guidance letters were challenged. *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011). The court in *Pork Producers* reiterated EPA's limited authority to require NPDES permits only from CAFOs that actually discharged pollutants into navigable waters. *Id.* at 751. But the Fifth Circuit declined to rule on the guidance letters because the letters were not reviewable as they only restated the well-established principle that forbids discharge of pollutants without a permit. *Id.* at 756.

Scope of the Agricultural Stormwater Exemption

Alt v. EPA presents the question that the Fifth Circuit avoided in *Pork Producers*: "Is an NPDES permit required for discharges related to pollutants from ventilation fans at a poultry operation?" The answer is no.

The court determined that in interpreting the exemption in section 1362(14), the terms "agricultural" and "stormwater" must be given their common meanings and that by these common meanings, they applied to Alt's poultry operation (agricultural) and the runoff that formed as a result of precipitation (stormwater). *Alt*, 2013 U.S. Dist. LEXIS 152263, at *24. Observing that the courts in *Waterkeeper* and *Pork Producers* had approved expanding the exemption to areas of land application of manure, the court differentiated between these areas of the land application and the areas of Alt's farm affected by the pollutants carried from the poultry houses by ventilation fans. *Id.* at *29. The court determined that areas adjacent to and between the poultry houses were part of the facility (part of the CAFO) and were agricultural in nature. *Id.* at *30–31. The court rejected arguments that the areas were not protected by the exemption because they were either part of the production area (40 C.F.R. § 122.23(b)(8)) or were industrial in nature. *Id.* at *31–35. Finally, relying on its application of plain reading of the statute, the court held that "litter and manure which is washed from [a] farmyard to navigable waters by a precipitation event is an agricultural stormwater discharge and therefore not a point source discharge, thereby rendering it exempt from the NPDES permit requirements of the Clean Water Act." *Id.* at *36.

Conclusion

Section 1362(14) excludes from the definition of "point source" all agricultural stormwater discharges. Alt operated a poultry operation where all production areas and storage areas were under roof to prevent contamination of precipitation. The only source of pollutants appeared to be the ventilation fans from the poultry houses or, perhaps, materials tracked by workers from the houses. The court in *Alt v. EPA* held that the operation in question was agricultural, the pollutants complained of were deposited in an agricultural area, and the source of water that carried pollutants to a nearby stream was limited to precipitation. Therefore, applying common sense and a plain reading of the statute, the court held that the agricultural stormwater exemption applied. Alt did not need an NPDES permit.

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GULF RESTORATION V. JACKSON—AN AMBIGUOUS DECISION ON EPA AUTHORITY TO REFRAIN FROM SETTING FEDERAL WATER QUALITY STANDARDS

Lester Sotsky and Jeremy Karpatkin

In an ambiguous ruling that seemed simultaneously to reduce and expand U.S. Environmental Protection Agency (EPA) discretion to decide whether to set federal water quality standards, the federal district court in New Orleans on September 20, 2013, found that (1) while EPA decisions regarding whether federal water quality criteria are "necessary" under the Clean Water Act (CWA) are subject to judicial review; and (2) while EPA is required to state with clarity whether water quality criteria are or are not "necessary"; (3) EPA may rely on a wide range of factors other than the environmental need for criteria, including cost, administrative burden, and policy considerations, in exercising its discretion to set federal standards. The court also declined an invitation by environmental group plaintiffs to render an unambiguous declaration of "necessity" that the plaintiffs claimed EPA was trying to avoid in the challenged action before the court.

The case, *Gulf Restoration Network v. Jackson*, 12-677 (E.D. La. Sept. 20, 2013), stems from EPA denial of a petition filed by environmental nongovernmental organizations (ENGOs) on July 30, 2008, demanding that EPA set federal water quality criteria for nutrients for the states in the Mississippi River basin. The ENGOs requested that EPA find that numeric nutrient criteria (NNC) were "necessary" under section 303(c)(B)(4) of the CWA, which would in turn trigger a federal obligation to initiate rulemaking to set federal criteria for all waters where nutrient criteria were found to be necessary.

EPA on July 29, 2011, denied the petition, but without directly stating whether NNC were or were not necessary. EPA agreed with the ENGOs that excessive nutrients were undermining water quality in the Mississippi River basin, but stated that the impacts of excessive nutrients could be best addressed through state efforts. EPA's denial letter stated that the agency was "not determining that numeric nutrient criteria are not necessary to meet CWA requirements," but the agency "is exercising its discretion to allocate its resources" to support state and local efforts to address the impact of nutrients in the Mississippi River basin.

The ENGOs filed suit March 13, 2013, making a series of claims against EPA, including that (1) EPA had violated a non-discretionary duty to make a conclusion one way or the other on the necessity of NNC; (2) EPA improperly had relied on non-scientific factors—such as cost and administrative burdens—in rejecting the ENGOs' petition; and (3) in the face of "undisputed evidence," EPA had failed to find NNC necessary for the waters of the Mississippi River basin. EPA, in a motion to dismiss, asserted that the agency's decisions regarding setting federal water quality criteria are completely discretionary, and consequently unreviewable. In cross motions for summary judgment, EPA and the environmental interests disputed, inter alia, whether EPA's rejection of the petition was arbitrary and capricious under the Administrative Procedures Act.

Louisiana Eastern District Court Judge Zainey's September 20, 2013, decision seems to have given each side half—or at least part of—a loaf. First, Judge Zainey rejected EPA's motion to dismiss, concluding that the issues in the ENGO complaint—EPA's obligation to address necessity and whether EPA could rely on non-scientific factors to do so—are questions of law subject to judicial review. Second, Judge Zainey, relying on the Supreme Court decision *Massachusetts v. EPA*, 549 U.S. 497 (2007) (where the Court found that EPA was required to reach a conclusion regarding whether greenhouse gases did or did not "cause or contribute to air pollution" as part of an endangerment finding under the Clean Air Act), concluded that EPA is required to address directly whether NNC are necessary for the Mississippi River basin. At the same time, Judge Zainey also ruled that EPA was free to rely on non-technical or non-scientific factors in reaching its decision on the petition,

including "the very factors that it cited in the Denial." Finally, Judge Zainey denied without much fanfare or explanation the petitioners' request that the court itself find that NNC are necessary for the Mississippi River basin.

While the CWA establishes that the states have the primary role in setting water quality standards, and EPA's role is principally to review and approve state standards, the scope of EPA's obligation or authority to step in and set federal standards essentially usurping the primary role of the states has been largely unaddressed by prior case law. The 2011 federal court decision in the Florida NNC litigation addressed EPA's discretion to find a necessity to set water quality standards, but did not address the issue presented in *Gulf Restoration Network v. Jackson*: When is EPA required to find necessity and what factors may it consider in doing so?

From a formalistic standpoint, Judge Zainey's decision perhaps narrowed EPA's unfettered discretion in making section 303(c)(4)(B) determinations. Judge Zainey concluded that EPA's decisions regarding necessity are subject to judicial review, and that EPA may not, as a matter of law, get away with the cumbersome and ambiguous double-negative that water quality standards are "not, not-necessary"—EPA must answer the question directly. EPA may be unsatisfied with this result, and is at the time of this writing preserving its right to appeal Judge Zainey's decision to the Fifth Circuit.

However, Judge Zainey's conclusion that EPA may rely on non-scientific factors in making determinations of necessity may confer on EPA more discretion than his other holdings arguably constrained or removed. EPA is now free to reissue its petition denial relying on the same rationale that it used in its 2011 denial, confident that the existence of some evidence of water quality problems in the Mississippi River Basin associated with nutrients does not alone obligate the agency to render an affirmative necessity finding. EPA can with greater confidence cite, for example, technical complexity, administrative burden and the CWA preference for state action as legitimate bases to refrain from acting federally, knowing that reliance on these non-technical factors has been affirmed by at least one federal judge.

Indeed, Judge Zainey's decision, coupled with EPA's recent proposed rulemaking clarifying that a section 303(c)(4)(B) determination requires a formal finding by the EPA Administrator or his designee and may not be construed from less formal communications with states, *see* Water Quality Standards Regulatory Clarifications, 78 Fed. Reg. 54,518, 54,521 (Sept. 4, 2013), should enhance the agency's discretion to elect to work with the states to address nutrient issues, or any other water quality standards, for that matter, because this court decision renders the agency less vulnerable to a challenge for failing to set federal standards.

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***Editor's Note*:** EPA filed a notice of appeal contesting Judge Zainey's order on November 18, 2013, after the authors submitted their article for publication.

JOINT AND SEVERAL LIABILITY IS THE FUTURE OF THE CLEAN WATER ACT

Steven L. Hoch and Christopher W. Smith

Unlike the codified provisions of joint and several liability in federal environmental statutes like the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Oil Pollution Act, the Clean Water Act (CWA) provides nothing. This presents a significant problem for those subject to liability under the CWA, particularly for those dealing with liability in the context of a commingled runoff. The answer to this problem may be interpleader. Interpleader, otherwise known as third-party practice, has been recently recognized as permissible practice in the context of the CWA. *See, e.g.*, *Mid-Valley Pipeline Co. v. S.J. Louis Const., Inc.*, 847 F. Supp. 2d 982 (E.D. Ky. 2012). This practice can and should be applied when applicable, using various forms of equitable federal and state common law claims to allocate assessed liability beyond the confines of the restrictive CWA.

Background

It is a settled point that "[t]he CWA contains no express provision allowing for contribution." *See Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n.*, 453 U.S. 1, 20 (1981). This point was made clear by the U.S. Supreme Court in *Middlesex*, and it is also settled by the statutory language of the CWA, which not surprisingly contains no express provisions for joint and several liability claims like contribution. Absence of express rights to federal (or state) common law equitable claims like contribution, equitable indemnity, and declaratory relief has led courts, including the U.S. Supreme Court, to strictly construe the CWA. This strict construction has led to relatively recent rulings like the one in *U.S. v. Savoy Senior Housing Corp.*, No. 06-cv-031, 2008 WL 631161 (W.D. Va. Mar. 6, 2008), where that district court held that:

> Federal Courts have consistently held that the CWA is an elaborate and all-encompassing program of water pollution regulation that "has occupied the field through the establishment of a comprehensive regulatory program . . . The establishment of such a self-consciously comprehensive program by Congress . . . strongly suggests that there is no room for courts to attempt to improve on that program with federal common law."

Savoy, 2008 WL 631161, at *5 (quoting, in part, *Milwaukee v. Illinois*, 451 U.S. 304, 317–32 (1981)). This type of strict construction, combined with the approach taken by parties pursuing equitable claims for joint and several liability in the context of the CWA, has led to a respectable group of cases making the point quite clear—joint and several liability is not permissible under the CWA. *See, e.g.*, *Savoy*, 2008 WL 631161; *Envtl. Conserv. Org. v. Bagwell*, No. 03-cv-807, 2005 U.S. Dist. LEXIS 22027 (N.D. Tex. Sept. 30, 2005) (with both district courts expressly disallowing efforts to pursue joint and several liability through "contribution" claims under the CWA). In light of these cases, and the historical U.S. Supreme Court cases in *Middlesex* and *Milwaukee*, one might believe that pursuit of joint and several liability is a lost cause, but this does not necessarily appear to be the case.

A number of countervailing cases have emerged permitting pursuit of joint and several liability in the context of the CWA. *See, e.g.*, *Mid-Valley*, 847 F. Supp. 2d 982; *U.S. v. Hammond*, No. 01-cv-5559, 2002 WL 31133177 (N.D. Ill. Sept. 25, 2002). Of the two countervailing cases, *Mid-Valley* emerges as the most significant. While *Hammond* reaches the same conclusion as *Mid-Valley*, it does not do so by careful consideration of the case law. Conversely, the district court in *Mid-Valley* carefully considered the case law and rested up unquestioned legal authority. Obviously, there is a level of disagreement within the circuits at least which is evident from the various district court decisions.

Some practitioners had hoped that consideration of this disagreement would come in the U.S. Supreme Court's recent decision of *L.A. Flood Control Dist. v. NRDC*, 133 S. Ct. 710 (2013). It did not. The

simple reason it did not was because the issue was not presented to the court. Nevertheless, the facts of *L.A. Flood* would have been ripe for addressing the issue of joint and several liability in the context of the CWA.

Los Angeles Flood Control District (LA Flood) operated what is commonly referred to as an MS4. An MS4 is a municipal separate storm sewer system. Essentially, it is a drainage system that collects, transports, and discharges stormwater. For those familiar with the Los Angeles area, LA Flood's MS4 includes the massive and lengthy concrete channel that is commonly known as the LA River. Because the stormwater that flowed through the LA River is oftentimes heavily polluted, LA Flood had a National Pollutant Discharge Elimination System (NPDES) permit for its MS4. This MS4 permit was issued by the state regulatory arm of the U.S. Environmental Protection Agency (EPA). Without going into detail, LA Flood was held strictly liable under the CWA for violations of the MS4 permit. These facts are not unique to those facilities that hold MS4 permits.

Where LA Flood differentiates itself from other facilities is its scale. The LA River is subject to stormwater contributions from various cities throughout the region. In fact, the U.S. Supreme Court noted that no one really knows where all the connections to the LA River are located as they are so vast in numbers. At the end of the LA River are LA Flood's monitoring stations for its MS4 permit. LA Flood is strictly liable under the CWA for any violations detected at its monitoring stations, which are located at the end of a massive concrete channel that has been contributed to by numerous cities commingling their contributions with that of the LA River. The reality of these facts is that LA Flood was and continues to be subject to strict liability under the CWA for violations of its MS4 permit based not just on what it contributes to the LA River, but also on what every other city upriver of the monitoring stations contributes. This seems inequitable in many ways and to any such system, unless there are some contractual obligations of sharing the responsibility, an inequity would appear to exist.

The Future May Be Joint and Several Liability

While LA Flood never pursued interpleader against the cities that contribute to the LA River that likely contributed in some manner to the exceedances of the levels in LA Flood's MS4 permit, it certainly could have.

A right to pursue federal equitable common law claims like contribution or indemnity "may arise in either of two ways: first, through the affirmative creation of a right of action by Congress, either expressly or by clear implication; or second, through the power of the federal courts to fashion a federal common law of contribution." *Mid-Valley*, 847 F. Supp. 2d at 987 (quoting *Tex. Indus. v. Radcliff Materials*, 101 S. Ct. 2061, 2066 (1981)). As to the first way, the statutory language of the CWA is clear in that it includes no express or implied right to contribution or indemnity. However, the second way is where pursuit of such equitable claims can be successfully achieved.

Federal courts have the authority to formulate federal common law under limited circumstances. There are two main situations in which such circumstances arise: (1) when "Congress has given the courts the power to develop substantive law"; and (2) when "a federal rule of decision is 'necessary to protect uniquely federal interests.' " *See Tex. Indus.*, 101 S. Ct. at 2067 (internal citations omitted). Regarding the first circumstances, the court in *Mid-Valley* said it would not permit pursuit of such claims. The second circumstance, however, did permit pursuit of equitable third-party claims in the context of the CWA.

The court in *Mid-Valley* reasoned that even though the second circumstance "exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting

rights of States or our relations with foreign nations, and admiralty cases[,]" discharges into navigable waters of the United States "create just such a 'narrow area.' " *Mid-Valley*, 847 F. Supp. 2d at 988 (quoting *Tex. Indus.*, 101 S. Ct. at 2067). The *Mid-Valley* court further reasoned that such equitable claims should be permitted in the context of the CWA because:

> The CWA is closely akin to CERCLA because the "pollution of land, groundwater, surface water and air as a consequence of . . . dumping presents interstate problems." *U.S. v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808–09 (S.D. Ohio 1983) (finding that the "language of the two statutes addressing liability and contribution is strikingly similar"). And federal courts interpreting the liability provisions of CERCLA have consistently concluded that "Congress did empower the federal courts to develop a common law of liability under CERCLA." [*State of Colorado v.*] *ASARCO*, 608 F. Supp. [1484,] 1492 [D. Colo. 1985]; *see* 42 U.S.C. § 9607. Moreover, Courts have relied on CWA jurisprudence in fashioning federal common law rules for contribution in CERCLA cases. *U.S. v. Conservation Chem. Co.*, 619 F. Supp. 162, 228 (W.D. Mo. 1985); *In re Complaint of Berkley Curtis Bay Co.*, 557 F. Supp. 335, 339 (S.D.N.Y. 1983).

Mid-Valley, 847 F. Supp. at 988 (internal citations omitted). Based on similarities between the CWA and CERCLA and the relevant authorities, the court in *Mid-Valley* concluded there in fact was a right to contribution (and presumably other federal equitable claims) under the CWA. *Id.*

The district court in *Mid-Valley* was quite careful in its reasoning. It relied upon settled authority from the highest courts to reach its conclusion. Since the ruling, which could turn out to become landmark, no court has addressed the reasoning. The results of these facts are a legal and procedural road map for pursuit of joint and several liability in the context of the CWA.

Another and important result from *Mid-Valley* is even though a facility subject to liability under the CWA may be strictly liable for its violations of the CWA, it is not solely responsible for fines or penalties assessed from those violations because it can use federal joint and several liability claims to distribute those damages to others. This result would seem to preserve the strict liability imperative in the CWA while also allowing for an equitable distribution of the fines or penalties by a facility for being the permit holder yet having to deal with commingled runoff.

For example, a facility with an NPDES permit may have been subject to an administrative action or pursued in federal court for alleged violations of its permit. Furthermore, if that facility believed that one of its surrounding properties in some way caused or contributed to the exceedances of its permit, it might ordinarily be left without recourse. The ruling in *Mid-Valley* changes that. It provides the legal basis upon which to make legitimate federal (and possibly state) equitable claims against the surrounding properties for their equitable share of whatever penalties are assessed against the NPDES permit holder. As noted, it would serve that NPDES permit holder well to clearly state that its equitable claims are not based on another parties "co-violation" of that facility's NPDES permit, something that would not likely withstand challenge, but rather to base those equitable claims on the penalties that may ultimately be assessed against the NPDES permit holder. The results of this approach would be that the NPDES permit holder has to admit sole responsibility for the permit violations, something that would not likely be challenged, and then once those penalties were assessed that permit holder could look to the surrounding properties for equitable relief. This possible approach avoids the challenges interpleaders faced in cases like *Savoy* and *Bagwell*, further ensuring that the equitable claims would survive challenge.

Of course, there may be practical reasons for not pursuing neighbors for joint and several liability in the context of the CWA. Neighbors may have long-standing business, community, and personal

relationships that must be taken into consideration when contemplating suit. Pursuing neighbors may also serve to direct unwanted attention on a geographical area, forcing further regulatory oversight and maybe even some interest from environmental organizations. As with all legal claims, the consequences of pursuing those claims must be carefully considered before moving forward with them. That said, the legal and procedural means appear to be there for the facility subject to liability under the CWA to spread that liability around amongst the parties that are truly responsible.

Conclusion

It remains to be seen whether the untested legal analysis in *Mid-Valley* will sustain equitable claims in the context of the CWA, but given the sound legal reasoning and the inequitable results that would flow from not permitting such claims, federal courts may just begin permitting more equitable claims be pursued. Clearly the traditional model of strict liability fails to account for commingled runoff, an increasingly common issue for permit holders not only in urban areas, but also in rural areas as well. Forcing the downstream permit holder to shoulder the entire burden certainly creates an imperative for compliance, but it also operates inequitably to force a downstream facility, like LA Flood, to shoulder responsibility for all of the upstream contributions. The reality of shouldering the responsibility and, of course, the costs involved may lead certain downstream permit holders to install monitoring stations at all major (or even minor connections) to its system to provide an impetus for those upstream to comply as well and to substantiate the claims in equity.

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COURT FINDS A "SIGNIFICANT NEXUS" IN VIRGINIA WETLANDS CASE

W. Blaine Early III

The U.S. District Court for the Eastern District of Virginia has held that the U.S. Army Corps of Engineers (Corps) presented evidence of a significant nexus between a suspected wetland and a navigable body of water, the Northwest River. *Precon Dev. Corp. v. U.S. Army Corps of Engrs.*, No. 2:08-cv-447, 2013 U.S. Dist. LEXIS 164612 (E.D. Va. Nov. 18, 2013). The decision came on cross motions for summary judgment after remand from the Fourth Circuit Court of Appeals and reconsideration by the Corps. The court's decision turned on evidence of the condition of the affected navigable water, the flow of tributaries from the suspected wetlands to the navigable water, and the important functions that wetlands have with regard to the river.

The dispute concerns 4.8 acres of suspected wetlands among over 300 acres of wetlands involved in a 600-plus-acre development in the southeastern Virginia city of Chesapeake. After the Corps asserted jurisdiction over the disputed acreage the developer, Precon Development Corporation (Precon), challenged the Corps' determination. The Fourth Circuit determined in 2011 that there was insufficient information in the administrative record to support the Corps' jurisdictional determination and remanded the case for additional consideration. *Precon Dev. Corp. v. U.S. Army Corps of Engrs.*, 633 F.3d 278 (4th Cir. 2011).

The Fourth Circuit expressed some doubt, but finally approved the Corps' determination that all of the hundreds of acres of wetlands, including the disputed area, consisted of wetlands "similarly situated." *Id.* at 292. Focusing on the significant nexus test advanced by Justice Kennedy in *Rapanos v. United States*, 547 U.S. 715 (2006), the Fourth Circuit found that information in the record was not sufficient to support finding significant impact of the suspected wetlands, which were approximately

seven miles from the Northwest River. *Precon*, 633 F.3d at 295. The court remanded the case for additional consideration of the "significance" question and stated as follows:

> In [remanding the case], we do not intend to place an unreasonable burden on the Corps. We ask only that in cases like this one, involving wetlands running alongside a ditch miles from any navigable water, the Corps pay particular attention to documenting why such wetlands significantly, rather than insubstantially, affect the integrity of navigable waters. Such documentation need not take the form of any particular measurements, but should include some comparative information that allows us to meaningfully review the significance of the wetlands' impacts on downstream water quality.

Precon, 633 F.3d at 296. This was the context of the case before the district court on remand.

The Corps made post-remand findings and again asserted jurisdiction. Precon and the Corps filed cross motions for summary judgment and had oral arguments before the magistrate judge, who issued an extensive, 33-page report and recommendation. *Precon Dev. Corp. v. U.S. Army Corps of Engrs.*, No. 2:08-cv-447, Docket No. 100 (E.D. Va. July 25, 2013) (the Report and Recommendation).

On remand, the district court described the standard of review in two parts. First, the court gave deference to the Corps' factual findings under the arbitrary and capricious standard. Next, regarding the ultimate question of finding a significant nexus, a determination that the court described as a "legal determination," the court gave the Corps deference "to the extent that the interpretation has the power to persuade." *Precon*, 2013 U.S. Dist. LEXIS 164612 at *5.

The district court found that facts in the administrative record supported the Corps' finding a significant nexus between the suspected wetlands and the Northwest River and, therefore, supported the Corps' finding of jurisdiction. The court reviewed evidence that the Northwest River was impaired due to low dissolved oxygen levels that are attributable to excess nutrients, including nitrogen and phosphorus, and that the Virginia Department of Environmental Quality had developed a total maximum daily load (TMDL) for phosphorus for the river. *Id.* at *7. Relying on a statement from the Fourth Circuit opinion regarding a wetland's role in trapping sediment and nutrients, the court concluded that the Corps' finding that the suspected wetland prevented additional nutrients from reaching the Northwest River was not arbitrary and capricious. The suspected wetland's function in preventing nutrients from reaching the river was consistent with a stated purpose of the Clean Water Act to "restore and maintain . . . the Nation's Waters." *Id.* at *9 (quoting 33 U.S.C. § 1251).

The court next found that the Corps had properly relied on flow data and hypothetical flow rates of tributaries to the Northwest River in concluding that the tributaries that drained the wetland contributed significantly to flow of the Northwest River. *Id.* at *12; *see also* Report and Recommendation at 19–21. Regarding the ultimate question whether a significant nexus existed between the suspected wetland and the Northwest River, the court identified the Corps' "reasonable and ample" support of the importance of the wetlands to the river and the numerous forms of evidence including aerial photographs, soil conditions, on-site inspections, wildlife records, and water flows. *Precon*, 2013 U.S. Dist. LEXIS 164612 at *15.

The district court gave much deference to the Corps' factual and legal determinations. Because in the earlier decision the Fourth Circuit accepted the unity of the entire wetlands system, the district court addressed broad facts about wetlands in the area and did not address facts related only to the small tract in question. It is uncertain what would have been the result if the district court had interpreted the facts in that more limited context. This decision comes at an interesting time in light of EPA's recent study titled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of*

the Scientific Evidence, which may support a proposed new rule by the Corps and EPA on the scope of "Waters" of the United States. The types of questions raised in the case are likely to be presented in many different courts before we arrive at an enduring answer.

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The Membership Diversity Enhancement Program (MDEP) is designed for lawyers who have been under-represented in our Section membership. The program's goal is to have its programs, publications, and other activities reflect the diverse perspectives and interests of all lawyers who practice in the environmental, energy, and natural resource law areas.

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EPA APPROVES FLORIDA STATEWIDE MERCURY TMDL

Winston K. Borkowski

By letter dated October 18, 2013, EPA approved the state of Florida's statewide mercury total maximum daily load (TMDL). Florida's mercury TMDL covers 441 waters listed as impaired for mercury based on fish tissue mercury levels. The TMDL "will not require specific allocations or require reductions from point sources; however, cost-effective mercury minimization programs will ensure mercury discharges from point sources, in total, will not exceed" the statewide wasteload allocation of 50.7 pounds (23 kilograms) per year. EPA notes that domestic wastewater treatment sources will continue to discharge under existing permitted levels in accordance with this wasteload allocation.

EPA's approval letter states that if Florida identifies any new waters to be listed as impaired for mercury, a new TMDL will not be required if the listing is caused by the factors addressed in the approved TMDL. Conversely, a new TMDL, addressing the newly listed water body, would be required if "local emission or effluent sources" are determined to be the cause of the elevated fish tissue levels that required the new listing.

Environmental advocates filed comments with EPA objecting to the statewide mercury TMDL based on alleged impacts to wildlife in the Everglades. EPA's approval letter includes a detailed discussion rejecting these concerns, reasoning that the TMDL end point includes an adequate margin of safety and is protective of wildlife.

Additional information is available at the Florida Department of Environmental Protection TMDL Web site at http://www.dep.state.fl.us/water/tmdl/.

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2014 Call for Nominations

The Section invites nominations for the following awards:

Environment, Energy, and Resources Dedication to Diversity and Justice Award

The Environment, Energy, and Resources Dedication to Diversity and Justice Award will recognize people, entities, or organizations that have made significant accomplishments or demonstrated recognized leadership in the areas of environmental justice and/or a commitment to gender, racial, and ethnic diversity in the environment, energy, and natural resources legal area. Accomplishments in promoting access to environment/energy/resources rule of law and to justice can also be recognized via this award.

ABA Award for Distinguished Achievement in Environmental Law and Policy

This award recognizes individuals and organizations who have distinguished themselves in environmental law and policy, contributing significant leadership in improving the substance, process or understanding of environmental protection and sustainable development.

Environment, Energy, and Resources Government Attorney of the Year Award

The Environment, Energy, and Resources Government Attorney of the Year Award will recognize exceptional achievement by federal, state, tribal, or local government attorneys who have worked or are working in the field of environment, energy, or natural resources law and are esteemed by their peers and viewed as having consistently achieved distinction in an exemplary way. The Award will be for sustained career achievement, not simply individual projects or recent accomplishments. Nominees are likely to be currently serving, or recently retired, career attorneys for federal, state, tribal, or local governmental entities.

Law Student Environment, Energy, and Resources Program of the Year Award

The Law Student Environment, Energy, and Resources Program of the Year Award will be given in recognition of the best student organized educational program or public service project of the year addressing on issues in the field of environmental, energy, or natural resources law. The program or project must have occurred during the 2013 calendar year [consideration may be given to allowing projects that occurred in the 2012-2013 or 2013-2014 academic years]. Nominees are likely to be law student societies, groups, or committees focused on environmental, energy, and natural resources issues.

State or Local Bar Environment, Energy, and Resources Program of the Year Award

The State or Local Bar Environment, Energy, and Resources Program of the Year Award will be given in recognition of the best CLE program or public service project of the year focused on issues in the field of environmental, energy, or natural resources law. The program or project must have occurred during the 2013 calendar year. Nominees are likely to be state or local bar sections or committees focused on environmental, energy, and natural resources issues.

Nomination deadlines: May 5, 2014.

These Awards will be presented at the ABA Annual Meeting in Boston in August 2014.

For further details about these awards,
please visit the Section Web site at www.ambar.org/EnvironAwards