CLIENT ALERT

CITIZEN SUIT WATCH: Federal District Court Opens the Door to Clean Water Act Regulation of Agricultural Tile Drainage Systems

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In *Pacific Coast Federation of Fishermen's Ass'ns v. Glaser*, -- F. Supp. 2d -- , 2012 WL 3778963 (E.D. Cal. 2012), the court declined to dismiss a citizen suit that, if successful, would expand the reach of the Clean Water Act (CWA) to previously unregulated subsurface agricultural tile drainage systems. The plaintiffs seek to classify the Grassland Bypass Project's agricultural subsurface tile drainage system as a "point source" discharge under the CWA subject to National Pollutant Discharge Elimination System (NPDES) permitting. They allege that water diverted through that system is partially composed of contaminated groundwater that Congress did not intend to include in the CWA's exemption of agriculture irrigation return flows from the definition of "point source" in 33 U.S.C. § 1362(14). After examining the language of the exemption, its legislative history, and applicable case law, the court held that it could not conclude at this point in the proceedings that intentional drainage of contaminated groundwater is subsumed in the agricultural irrigation return flows exemption. Accordingly, the court allowed the case to proceed.

Background

This case was brought by recreational and commercial fishing organizations and various environmental groups under the CWA's citizen suit provision (33 U.S.C. § 1365(a)) against Donald Glaser, Regional Director, U.S. Department of the Interior, Bureau of Reclamation and the San Luis and Delta-Mendota Water Authority ("the Authority"), which jointly administer the Grassland Bypass Project. In the 1950s and '60s, farmers in California's San Joaquin Valley tiled their land to lower the subsurface water table and to drain irrigation and groundwater, allegedly polluting nearby wildlife refuges and wetlands. The Project was developed to divert the discharge of that water away from refuges and wetlands through a tile drainage system. The tiles not only drain irrigation water but also catch and drain groundwater that would otherwise rise above the tiles and reach the root zone of crops. That groundwater allegedly is contaminated with naturally occurring selenium, among other pollutants.

EPA and the Corps have long believed that "[g]roundwater drained through subsurface drainage systems" is "generally not protected by the Clean Water Act" and is not required to have an NPDES permit.[1] The Project therefore does not have an NPDES permit but is regulated instead by the California Regional Water Quality Control Board, Central Valley Region. The Board specifies the maximum monthly and annual loads of selenium that the Project may discharge and requires weekly and monthly monitoring for other parameters for review by federal and state agencies. The Use Agreement between the Bureau of Reclamation and the Authority further specifies the maximum monthly and annual loads of salt that may be discharged by the Project. The Project's website touts its success and reports that all discharges of drainage water from the Grassland Drainage Area into central California wetlands and wildlife refuges have been eliminated, the Project has reduced the load of selenium discharged from that Area by 61%, and the Project has reduced the load of salt by 39%.[2]

Plaintiffs allege, however, that the Project is a point source that discharges contaminated groundwater into jurisdictional waters of the United States without an NPDES permit in violation of the CWA.[3] Plaintiffs accuse the agencies of merely "kicking the can

down the road" by diverting harmful pollution away from refuges and wetlands to the San Luis Drain and Mud Slough and argue that, although agricultural irrigation return flows are exempt from the CWA's definition of a point source,[4] the exemption does not apply to the Project because its discharges consist mostly of contaminated groundwater, not surface irrigation return flows.

The Authority moved to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The court denied the motion on August 31, 2012.[5]

The District Court Decision

The parties disagree over whether the underground tile drainage system is a point source or nonpoint source. The district court preliminarily resolved that dispute in the plaintiffs' favor, denying the Authority's motion to dismiss because the plaintiffs' narrow reading of the irrigation flow return exemption from the CWA's definition of a point source was sufficiently plausible to allow the case to go forward. Although both sides claimed that the language of the statute and its legislative history supported their position, the court carefully examined that history and concluded that it did not preclude the plaintiffs' claims. The court did acknowledge that its holding was constrained by its procedural context, stating that "[o]n a fully developed record, drainage may be determined to be part of the irrigation process; at the pleading stage, however, where the court must make every inference in favor of plaintiff, the court finds the statutory text and legislative history do not preclude plaintiffs' claims from moving forward."[6]

When the CWA was enacted, Congress considered exempting irrigated farmlands from the CWA's point source definition, but that exemption was rejected by the House of Representatives. Nevertheless, in its 1975 implementing regulations, EPA exempted return flows farmlands that were less than 3,000 acres from the definition of point source and explicitly identified tile drainage systems as included in that exemption. However, the district court in this case found that "singular occurrence" of the phrase "tile drainage" insufficient to preclude the plaintiffs' claims because, "outside of this usage, there is little that confirms the Authority's reading" of the Act.[7]

In any event, EPA's regulation was challenged and declared to be invalid in the 1970s by the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the D.C. Circuit.[8] Subsequently, EPA revised its regulations to apply the NPDES permitting requirement to agricultural activities, identifying "irrigation return flow" as consisting of surface water containing pollutants resulting from the controlled application of water to land primarily used for crops, forage growth, or nursery operations.[9] Congress then amended the CWA to add the irrigation return flow exemption to the statute in 1977. The district court in this case interpreted the accompanying Senate Report as suggesting that Congress intended that exemption to apply only to surface waters and did not contemplate including groundwater or subsurface drainage systems in that exemption.[10]

The district court also distinguished this case from other cases interpreting the irrigation flow return exemption because these plaintiffs alleged that the tile system drains groundwater unrelated to the application of irrigation water.[11] The court therefore denied the motion to dismiss and allowed the case to proceed.

Implications

This case has potential regulatory consequences for agricultural tile drainage systems. The district court opened the door to new NPDES permitting that, if plaintiffs succeed, would erode a long-standing statutory exemption, requiring a close watch on the case as it moves forward to the merits.

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[1] Draft Guidance on Identifying Waters Protected by the Clean Water Act at 5, 21 & n.xii (Apr. 2011), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf. The agencies define "subsurface drainage system" as "an agricultural practice designed to drain subsurface water through a below ground pipe system in order to maintain the groundwater table below the root zone to facilitate crop production." *Id.* at 21 n.xii.

[2] *See* U.S. Department of the Interior, Bureau of Reclamation, Grassland Bypass Project, *available at* http://www.usbr.gov/mp/grassland/ (last visited Sept. 25, 2012).

[3] *See* 33 U.S.C. §§ 1342(a)(1), 1362(6), (12), (14), (19).

[4]The CWA defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Notably, "[t]his term does not include agricultural stormwater discharges and return flows from irrigated agriculture." *Id.; see also id* U.S.C. § 1342(l)(1) (stating that an NPDES permit is not required "for discharges composed entirely of return flows for irrigated agriculture"); 40 C.F.R. § 122.3(e), (f). By contrast, the U.S. Court of Appeals for the Ninth Circuit has defined nonpoint source pollution as "the type of pollution that arises from many dispersed activities over large areas, and is not traceable to any single discrete source. Because it arises in such a diffuse way, it is very difficult to regulate through individual permits." *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002).

[5] Because the Bureau of Reclamation already had filed an answer to the Complaint, it moved for judgment on the pleadings under Rule 12(c). Because the Authority had yet to file an answer, the court determined that the pleadings were not closed and denied the Bureau's motion without prejudice. *Pac. Coast Fed'n of Fishermen's Ass'ns*, 2012 WL 3778963, at *7.

[6]*Id.* at *6.

[7] *Id.* at *5 (citing citing *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1072-73 (9th Cir. 2011); 40 C.F.R. § 125.4(j)(4) (1975)).

[8]*Id.* (citing *Natural Res. Def. Council, Inc. v. Train*, 396 F. Supp. 1393 (D.D.C. 1975), *aff'd sub nom*, *Natural Res. Def. Council v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977)).

[9]*Id*. (citing *Brown*, 640 F.3d at 1074;40 C.F.R. § 125.53(a)(2) (1976); 41 Fed. Reg. 28,491, 28,493-96 (July 12, 1976)).

[10] *Id*. at *6 (citing *Brown*, 640 F.3d at 1085; S. Rep. No. 95-370 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4360).

[11] *Id.* at *6 (discussing *Fishermen Against the Destruction of the Env't, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294 (11th Cir. 2002); *Hiebenthal v. Meduri Farms*, 242 F. Supp. 2d 885 (D. Or. 2002)).

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