

## CLIENT ALERT

### CITIZEN SUIT WATCH: Third Circuit Reverses Lower Court's Dismissal of Citizen Suit on Abstention Grounds

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Earlier this month, the U.S. Court of Appeals for the Third Circuit vacated a district court's dismissal of a citizen suit under the Resource Conservation and Recovery Act (RCRA) and the Clean Water Act (CWA), finding that the district court had improperly abstained from adjudicating the case. The case, *Raritan Baykeeper v. NL Industries, Inc.*, was filed by two environmental groups seeking to compel the remediation of contaminated sediments in the Raritan River. On appeal, the Third Circuit held that the case does not call for abstention under either the primary jurisdiction doctrine or under *Burford v. Sun Oil Co.*<sup>1</sup>

#### Background

This case involves a 440-acre plot of land in New Jersey surrounded on three sides by the Raritan River. For several decades (1930s to 1982), one of the Defendants, NL Industries, Inc. ("NL"), manufactured titanium dioxide on the site. NL ceased operations in 1982, but it continued to own and lease portions of the site to other companies, which manufactured sulfuric acid on the site from 1982 to 2005. In 2005, the site was acquired through eminent domain by the Sayreville Economic and Redevelopment Agency for sale and redevelopment. The agreement controlling the sale of the site specified that NL would remain liable for contamination of sediments in the Raritan River. The agreement did not, however, call for remediation of those sediments.

NL had begun to address some environmental issues on the site prior to 2005. NL undertook an investigation of the site in 1988 pursuant to state law,<sup>2</sup> and it also entered into an agreement with the New Jersey Department of Environmental Protection ("NJDEP") requiring it to investigate contamination and to remediate certain areas at the site. Although NL's investigation and sampling revealed elevated levels of certain substances, NL concluded that sources other than the site were contributing to the pollution of the river. Importantly, NJDEP agreed in 2004 that off-site sources were contributing to contamination of the river sediments and that any remediation should be part of a regional approach. No such regional approach has been proposed.

In August 2009, Plaintiffs filed this citizen suit in the U.S. District Court for the District of New Jersey against several private and public entities and government officials seeking to enforce provisions of the Resource Conservation and Recovery Act and the Clean Water Act. Plaintiffs sought, among other things, an injunction requiring the defendants to remediate sediments in the Raritan River. Defendants moved to dismiss the suit on abstention grounds. The district court granted the defendants' motion, holding that abstention was appropriate under the primary jurisdiction doctrine and under the Supreme Court's *Burford* decision.

#### The Decision on Appeal

The Third Circuit held that abstention was not appropriate under either doctrine, and it vacated and remanded the district court's dismissal. The Third Circuit first outlined a four-part test for determining whether abstention was appropriate on primary jurisdiction grounds: (1) whether the issues are within the conventional experience of judges or whether it involves matters

within an agency's expertise; (2) whether the issues are particularly within the agency's discretion; (3) whether there is a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency has been made.<sup>3</sup>

Applying this test, the Third Circuit held that the factors "weigh against the application of primary jurisdiction." First, it found that federal courts are competent to decide citizen suits such as this case, emphasizing that Congress specifically authorized such citizen suits to be brought in federal district courts. Second, while the court recognized that the NJDEP generally has discretion over environmental matters, it noted that the agency is not charged with enforcing the requirements of RCRA or the CWA. Federal courts, on the other hand, are authorized to address environmental issues arising under both statutes. Third, the Court found that there was minimal risk of inconsistent rulings. NJDEP had most recently taken a position on remediation of river sediments in 2004. Given the agency's silence since that time, the Third Circuit saw "little danger" that court-ordered remediation would conflict with the agency's directives. It further emphasized a recent district court holding that more stringent, court-ordered remediation standards are "not a reason to invoke the primary jurisdiction doctrine."<sup>4</sup>

The Court found that the final factor – whether a prior application to the agency has been made – weighed in NL's favor because NJDEP had previously considered contamination of sediments in the Raritan River and agreed with NL that a regional approach was appropriate. But, the Court again emphasized that the agency had not taken any action since, and it ultimately held that the balance of factors weighed against abstention on primary jurisdiction grounds.

In reaching its holding, the Third Circuit had little difficulty distinguishing two cases that the defendants relied on in arguing for abstention.<sup>5</sup> In the first case, the plaintiffs had participated actively in extensive hearings at the agency level; thus, the lawsuit brought by those plaintiffs amounted to little more than a collateral attack on agency proceedings by dissatisfied parties. In the second case, the plaintiffs' requested injunctive relief would have conflicted directly with the requirements of a prior settlement agreement.

The Third Circuit next turned to whether abstention is appropriate under *Burford*, which provides for abstention where: (1) timely and adequate state court review is available; and (2) the case involves difficult questions of state law impacting on the state's public policy or the court's exercise of jurisdiction would disrupt state efforts to establish a coherent public policy on a matter of important state concern.

On the first factor, the Court doubted whether the plaintiffs could obtain timely state court review. While the defendants acknowledged that this action could not be brought in state court because citizen suits under RCRA and the CWA must be brought in federal district court, they argued unsuccessfully that New Jersey law<sup>6</sup> provides a functionally equivalent cause of action. Emphasizing the language of the state statute, which bars suits where "the conduct complained of constitutes a violation of a statute . . . which establishes a more specific standard for the control of pollution, impairment or destruction of the environment," the Court concluded that RCRA and the CWA supply the specific standards that plaintiffs are alleging were violated and that the New Jersey statute does not authorize an action to enforce those standards.

On the second factor, the Court went on to note that even if it found that the plaintiffs could obtain timely state court review, it would not find that this action would disrupt any state efforts to establish a coherent public policy on a matter of public concern.

Although the Third Circuit reversed the district court's dismissal of this particular action, it rejected the plaintiffs' request for a holding that abstention is never appropriate in RCRA and CWA citizen suits.

## **Implications**

This decision illustrates how dismissal on abstention grounds will be a rare result absent a formal state administrative proceeding on the same subject matter, at least in the Third Circuit. Given the facts in this case – namely, that the state agency had not taken a position on the issues in the case since 2004 – the outcome of the decision is not surprising. But, the decision is important in that it sets forth the Third Circuit's construction of two important abstention doctrines. In particular, the Court's analysis of the primary jurisdiction doctrine suggests that the first two factors – *i.e.*, whether the issues are within the conventional experience of judges or whether it involves matters within an agency's expertise; and whether the issues are particularly within the agency's discretion – will always weigh against abstention in cases brought pursuant to the citizen suit provision of *any* federal environmental statute.

To the extent abstention on primary jurisdiction grounds is ever available in such cases, there may have to be a strong showing of potentially inconsistent rulings or of extensive parallel proceedings at the agency level. Finally, although the Third Circuit reviewed the lower court's decision to abstain for abuse of discretion, the decision shows no obvious deference to the lower court's decision.

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<sup>1</sup> 319 U.S. 315 (1943).

<sup>2</sup> At the time, the law was named the Environmental Cleanup Responsibility Act. Since that time, it was renamed the Industrial Site Recovery Act. *See* N.J. Stat. Ann. § 13:1K.

<sup>3</sup> *See Global Naps, Inc. v. Bell Atl.-N.J.*, 287 F. Supp. 2d 532, 549 (D.N.J. 2003).

<sup>4</sup> *Interfaith Cmty. Org. Inc. v. PPG Indus.*, 702 F. Supp. 2d 295, 312 (D.N.J. 2010).

<sup>5</sup> *See Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333 (D.N.M. 1995); *Davies v. Nat'l Coop. Refinery Ass'n*, 963 F. Supp. 990 (D. Kan. 1997).

<sup>6</sup> *See* Environmental Rights Act, N.J. Stat. Ann. § 2A:35A-4.

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