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HIGH COURT ADDRESSES CLEANWATER ACT PERMIT DISPUTE

On March 23, 2004 the United States Supreme Court decided South Florida Water Management District v. Miccosukee Tribe of Indians, No. 02-625. The dispute involved water rights with respect to the Everglades Restoration Program. The South Florida Water Management District operates a pumping facility that transfers water from a canal into a reservoir a short distance away. An Indian tribe and the Friends of the Everglades brought a citizens suit against the District under the Clean Water Act, contending that the pumping was illegal because it was not subject to a water discharge permit under the Clean Water Act's NPDES permit program. The citizens won below at a district court on summary judgment and again in the Eleventh Circuit, but the Supreme Court on review reversed and remanded the case.

The Central and South Florida Flood Control Project consists of a vast array of levees, canals, pumps, and water impoundments in the land between South Florida's coastal hills and the Everglades. Historically, the land was part of the Everglades and its surface and ground water flowed south in a uniform and unchanneled sheet flow. In the 1900's, the state began to build canals to drain the wetlands to make them suitable for cultivation. The canals lowered the water table and allowed salt water to intrude upon coastal wells. Congress established a project in 1948 to address the Everglades. The Corps of Engineers had the task of constructing a network of levees, water storage areas, pumps and canal improvements that would serve several purposes, including flood control, water conservation and drainage. These improvements fundamentally altered the hydrology of the Everglades and changed the natural sheet flow of ground and surface water.

The 1948 project consists of several discreet elements, one of which is a canal that collects ground and rainwater from a one hundred plus square mile area. The area drained by this canal includes urban, agricultural and residential development. At the west end of the canal is a second project that consists of a large pump station. When the water level at the canal rises above sea level, the pumping station begins operating and pumps water out of the canal. The water does not travel far, sixty feet from the pump station, and empties into a large undeveloped wetland which is the third element of the project. These wetlands consist of several water conservation areas that are remnants of the original South Florida Everglades. The water management district impounds water in these water management areas to conserve fresh water that might otherwise flow directly into the ocean and to preserve wetland habitat.

The pumping stations allow the water district to maintain the water level in the water conservation areas at levels significantly higher than undeveloped lands. Absent human intervention, that impounded water would simply flow back east where it rejoined the waters in the canal and flood the otherwise populated areas of the basin. That return flow is prevented or slowed by levees. The levees are the final element of the project. The combined effect of these project elements is to artificially separate the canal basin from the water conservation areas. Left to nature, the two areas would be a single wetland covered by undifferentiated surface and groundwater flow.

The project has resulted in large scale hydrologic and environmental change in South Florida. One impact was to convert what was once wetlands into areas suitable for human use. But the project also affects areas that remain part of the wetland ecosystem, as

JONES WALKER

E*ZINES
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rain on the eastern side of the levees falls on agricultural, urban and residential land and absorbs contaminants produced by human activities. The waters in the canal are contaminated with levels of phosphorous from fertilizers which flow into the water conservation areas by the pumps. This stimulates the growth of algae and plants far into the Everglades ecosystem. A number of initiatives for the Comprehensive Everglades Restoration Program (CERP) are underway to reduce these impacts and restore the ecological integrity of the Everglades. However, the environmental groups, impatient with the progress of CERP, brought suit against the water district because it did not have a water discharge permit to pump the contaminated storm water from the canal into the water conservation areas.

As complex as this history appears, the main issue in the case was rather focused. The water district, as well as the United States government who intervened, argued that the unless the pumps added pollutants into the water that discharged from the pumps into the water conservation areas, the pumping was not subject to an NPDES water discharge permit. That is, because the pumping station did not "add" pollutants to the water, no permit was required. The Clean Water Act defines "discharge of a pollutant" to mean any addition of a pollutant to navigable waters from any point source.

The Supreme Court agreed with the lower court insofar as it ruled that a point source, namely the canal and pumping station, need not add pollutants to the water in order to be subject to regulation under the Clean Water Act. Here, pollutants simply flow from storm water in the canal through the pumping station into water outside. The Court said that for an addition of pollutants to be from a point source, the relevant inquiry is whether, but for the point source, the pollutants would have been added to the receiving body of water. The Court concluded that an addition from a point source occurs if a point source is the cause in fact of the release of pollutants into navigable waters. Although the Court found there to be a dispute of facts and therefore that a summary judgment below was unwarranted, it also concluded that a point source need not be the original source of pollutant; it need only convey the pollutant into a navigable water. The Supreme Court concluded that the discharge of pollutants included point sources that do not themselves generate pollutants but that may have pre-existed in an adjacent body of water upstream of the pumping station.

The Court also did not resolve the government's and district's arguments of the "unitary water" concept of the Clean Water Act. That argument is that Congress did not intend the NPDES program to be required for pollutants caused by the engineered transfer of one navigable water into another. All such connected navigable waters must be viewed as one for purposes of the statute. In other words, the government viewed the discharge of pollutants from a canal through a pumping station into a wetland as not akin to taking a spoonful of soup from one bowl and passing into another, but rather by viewing the two bowls as one. This would have negated the application of the NPDES permit to the project in question; however, as stated, the Court did not resolve this legal argument. It will be heard on remand as well as facts to determine whether the two bodies of water -- the canal and wetland -- are merely one for purposes of the permit program, and thereby not subject to permitting.

By: Stan Millan

JONES WALKER

E*ZINES
April 2004 Vol. 12

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LOUISIANA FEDERAL DISTRICT JUDGE REFUSES TO CERTIFY CLASS AGAINST CCA TREATED WOOD DEFENDANTS

Ardoin v. Stine Lumber Co., 2004 U.S. Dist. LEXIS 4670 (E.D. La. 3/17/04)

Recently appointed United States District Judge Patricia Minaldi has ruled that a purported class action filed against CCA treated wood defendants will not be certified as a class.

The plaintiffs filed this suit on the basis that wood they had purchased from various retailers contained CCA – a product containing chromium and arsenic as active ingredients. Plaintiffs claimed that these chemicals would leach from the treated wood and contaminate nearby surfaces and users of the wood products. The defendants denied these claims, arguing that the risks of CCA treated wood are minimal, especially when compared to its benefits. At issue in this opinion was whether the plaintiffs' case should be certified as a class of all Louisiana purchasers of CCA treated wood.

In a carefully reasoned opinion, Judge Minaldi found that plaintiffs satisfied only one of five factors necessary for class certification. The proposed class met the test of numerosity, but failed the tests of commonality, typicality, adequacy of representation, and predominance/superiority.

Numerosity. The first requirement for class certification under Rule 23 of the Federal Rules of Civil Procedure is numerosity: the number of potential class members must be so numerous as to make joinder of all these persons impractical. Judge Minaldi agreed that the number of Louisiana purchasers of CCA treated wood was "substantial" and found that the plaintiffs had met their burden on the numerosity requirement.

Commonality. The commonality requirement is met when there is at least one issue whose resolution will affect all or a significant number of the putative class members. Although this requirement is a generalized one, and the burden of proof is "light," the court found that the plaintiffs had failed to meet the requirement. The court found that variations in wood, soil, usage, and environmental conditions prevented a common resolution of any large number of claims, "because some pieces of wood may pose more of a potential threat than other pieces." Further, the defendants had individualized defenses against each plaintiff depending upon whether the plaintiff installed the wood himself or worked through a contractor raising further individualized issues of comparative fault. Lastly, differences in the compensation sought raised additional individual questions. "As the potential class members' claims are examined closely, the common links between them dissipate into many distinctive categories."

Typicality. This factor requires that the representative plaintiffs possess claims which are typical of the class. Judge Minaldi found that the plaintiffs failed to show that the class representatives' circumstances and the degree of exposure they received were typical. Here the court examined the testimony of scientific experts in detail. The court found that the defendants had shown that the plaintiffs' complaints were individualized

based on at least 17 variables. For example, soil has significant variations in the naturally occurring background chemicals found in treated wood. Additionally, many other human activities have resulted in deposits of arsenic in the soil. Further, significant variations between neighbors and even within a single yard may be due to "varying landscaping habits of homeowners 50 years ago, when they applied arsenic-based pesticides to their yards." As one expert put it, "No simple theoretical model will allow prediction of expected concentrations of these constituents in soil associated with CCA-treated wood structures." Even assuming uniform distribution of CCA, individual human exposure will depend upon a further set of detailed criteria including amount of time spent outdoors, type of clothing, work performed, etc. Additionally many individual variables affect whether CCA will leach from treated wood: "no two pieces of CCA treated wood are identical and no two structures are the same." Finally, the court rejected plaintiffs' argument that the EPA had banned CCA treated wood, thus treating all CCA wood as one category of product. To the contrary, the court noted that EPA did not ban treated wood, but rather wood treaters voluntarily stopped producing CCA wood, because there was a new treatment available. "Thus, a class of products were not singled out for regulatory sanctions." The court noted that EPA had specifically advised consumers not to replace or remove existing structures made with CCA-treated wood and had not concluded that CCA treated wood posed any unreasonable risk to the public or the environment. The court concluded that it could not be said that all of the wood belonging to class members was defective and therefore the claim of each member was significantly different from other members.

Adequate representation. Although the court found that plaintiffs' counsel were capable, the court expressed concern that they would not fairly and adequately represent the class members under the present litigation arrangement. By waiving all tort claims including personal injury claims, they exposed certain class members to the argument that any of these potential claims would be forever barred under the doctrine of *res judicata*. The disparity of claims that prevented the plaintiffs from satisfying commonality also had consequences preventing the class members from adequately representing the class.

Predominance/superiority. For the reasons discussed in the commonality and typicality sections the court concluded that common questions did not predominate over individual ones, and a class action would not be "the superior method for adjudicating this dispute."

The denial of class action status in this case was in keeping with a previous denial of class certification in the *Jacobs* case in the Southern District of Florida.

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JONES WALKER

E*ZINES
April 2004 Vol. 12

Environmental and Toxic Torts
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DEFENDANTS LIABLE FOR DEATH TRIGGERED BY STRESS CAUSED BY A CHEMICAL RELEASE, EVEN THOUGH THE DECEDENT WAS NOT EXPOSED TO THE CHEMICAL

In *Simmons v. CTL Distribution, et al.,* 03-1301 (La. App. 5th Cir., 02/23/04), 2004 La. App. Lexis 320, the Louisiana Fifth Circuit Court of Appeal decreased an award of survival damages but otherwise affirmed the trial court's ruling that extreme stress caused by an evacuation triggered plaintiff's acute flare-up of pre-existing health problems, which ultimately led to her death. The defendants argued that the trial judge erred in finding that the stress of the evacuation was the legal cause of the decedent's death because she was not exposed to any sulphur from the spill and because she had a long history of pulmonary and cardiac disease. Disagreeing, the Louisiana Fifth Circuit found that the defendants breached their duty to the public when their employee truck driver failed to execute an "S" curve. The failure to negotiate the curve resulted in a spill of molten sulphur, requiring the evacuation. After reiterating the axiom that the tortfeasor takes his victim as he finds her, the court also decided that, given the decedent's medical history, her physical response to the accident and the stress caused thereby was foreseeable. The court accordingly found no manifest error in the finding that the accident and evacuation caused the plaintiff's death.

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JONES WALKER

E*ZINES
April 2004 Vol. 12

Environmental and Toxic Torts
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EPA ISSUES GUIDANCE ON CONTIGUOUS PROPERTY LIABILITY

On January 22, 2004, EPA issued guidance called Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners.

To be protected from Superfund (CERCLA) liability, landowners whose property is contaminated by a release from a neighboring site must not have caused, contributed to, or consented to the release. The contamination on a contiguous landowner's site must come from a release or threatened release from adjacent property.

Additionally, eligible contiguous property owners must also take steps to stop any continuing releases according to the EPA Guidance. Taking steps to stop continuing releases, includes conducting all appropriate inquiry into past uses of the sites, taking the steps to prevent any continuing releases, limiting any exposure to contamination, and complying with any land use restrictions.

EPA recognizes there may be multiple releases on a site, some of which originated on the property owner's property and others that the landowner did not contribute to or cause. EPA said it would exercise its enforcement discretion and not pursue the landowner with respect to a release that migrated from the other site.

EPA's guidance also includes relief to owners of sites that have groundwater contaminated from a neighboring source that is some distance away. That scenario will also be covered by the EPA's enforcement discretion.

By: Stan Millan

JONES WALKER

E*ZINES
April 2004 Vol. 12

Environmental and Toxic Torts
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EPA ISSUES GUIDANCE ON PREPARING

"Ready-for-Reuse Determinations for Brownfield Sites"

On February 12, 2004, EPA released Guidance for Preparing Superfund Ready-For-Reuse Determinations.

A Ready-For-Reuse Determination is an environmental status report that documents a technical determination by EPA that all or a portion of a Superfund site can support specified types of uses and remain protective of human health and the environment. The Guidance is intended to assist EPA personnel in deciding when reuse determinations are appropriate for Superfund sites or portions of such sites. The Ready-For-Use Determinations can apply to sites on the National Priority List, to non-time critical removal action sites, and to Superfund alternative sites. To date, only a handful of sites have been labeled ready-for-reuse under the Ready-For-Use Determination Program.

Ready-For-Use Determinations do not address Superfund enforcement, liability for other legal matters. Furthermore, the Ready-For-Reuse Determinations are not mandatory for redevelopment activities of the site but may help facilitate reuse. The EPA hopes that the Ready-For-Reuse Determinations will tell the developers and other buyers that sites are safe to use and that the determination will facilitate "Brownfield Redevelopment."

EPA will not maintain an active monitoring program to review the continuing status or accuracy of Ready-For-Reuse Determinations but will reevaluate the site when a 5-year Superfund review is mandated under CERCLA for the site.

By: S tan Millan

JONES WALKER

E*ZINES
April 2004 Vol. 12

Environmental and Toxic Torts
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EPA APPROVES LOUISIANA'S HAZARDOUS AIR POLLUTANT PROGRAM

On March 26, 2004, the EPA proposed direct final rules of delegating authority to LDEQ for new source performance standards and certain national emission standards for hazardous air pollutants, under 40 CFR parts 60, 61, and 63. 69 Fed. Reg.15687. These various standards relate to air quality measures for certain newer facilities or existing facilities that are being modified, for controls over various hazardous air pollutants, and for other facilities listed and regulated under EPA's categories of industry that emit hazardous air pollutants.

The EPA proposed a direct final rule delegating additional authority to the LDEQ for certain programs under the Clean Air Act in addition to the operating permit program that has already been delegated to the LDEQ for both clean air (prevention of significant deterioration) and dirty air (non-attainment) programs under the Title V operating air permit program. The rulemaking would delegate all new source performance standard regulations (except for new residential wood heaters) to LDEQ as well as national emission standards for hazardous air pollutants including for synthetic organic chemical manufacturing, storage vessels, transfer operations and waste water, equipment leaks, process equipment leaks, vinyl chloride and copolymer production, oven batteries, dry cleaning, chromium electroplating, ethylene oxide sterilizing, industrial process cooling towers, gasoline distribution, pulp and paper industry halogenated solvent cleaning, polymers and resins, secondary lead smelting, marine tank vessel loading, phosphoric acid, phosphate fertilizers, petroleum refineries, off-site waste recovery, magnetic tapes, aerospace manufacturing and re-work, shipbuilding and ship repair, wood furniture manufacturing, printing and publishing, primary aluminum reduction, tanks, surface impoundments, closed vent systems, equipment leaks, oil water separators, storage vessels, steel pickling, mineral wool production, hazardous waste combustion, natural gas transmission and storage, Portland cement manufacturing, pesticide active ingredient production, publicly owned treatment works, vegetable oil production, boat manufacturing, etc. Certain standards listed in the regulation, including for radon and residential wood heaters are not being delegated.

It is noted that the federal government has no authority to issue a direct final rule, as opposed to notice and comment rulemaking; therefore, if anyone objects, EPA will withdraw the direct final rule and re-propose the rule under normal rulemaking procedures. Comments are due to EPA by April 26, 2004.

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Please contact your Jones Walker's Environmental Toxic Tort Practice Group contact for additional information on or copies of any of the cited matters.

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding this E*Zine or this practice group, please contact:

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