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Environmental Plaintiff Dealt a Blow in Storm Water Case

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A recent decision from the U.S. District Court for the Northern District of California clarifies the plaintiff's burden of proof in citizen suits brought under the Clean Water Act (CWA). In the long-running *Environmental Protection Information Center v. Pacific Lumber Company* (*EPIC*) case, Judge Marilyn Hall Patel's recent decision denying the plaintiff's motion for summary judgment illuminates precisely what a citizen plaintiff must show to carry its burden of proving that alleged discharges are from a "point source" and go to "navigable waters."

The *EPIC* case involved a CWA challenge to a timber company's forest road system in the mountainous terrain of northern California. The road system reflected state-of-the-art best management practices, including ditches and other features, to drain storm water off the road surface and, where possible, onto the hillslope and forest floor below the road. The purpose of the system was to "disconnect" the roads from the watercourses and to prevent the concentration of runoff on the road to minimize erosive forces. With these features, runoff would leave the road surface and enter into watercourses, if at all, as diffuse, rather than channeled, flow.

The plaintiff, an environmental group, alleged that this forest road system and associated drainage features were "point sources" that ultimately discharged polluted storm water to watercourses that drained to Bear Creek, a "navigable water." The plaintiff also claimed that the timber company defendant needed a permit for such discharges. The plaintiff made these allegations despite a regulation adopted by the Environmental Protection Agency (EPA) specifying that forest roads and other silvicultural features were not point sources.

With that long-standing regulation, consistently interpreted by EPA for nearly 30 years, on the books, it would appear that the plaintiff's case was over before it began. However, in 2003, the district court held that EPA's silviculture regulation could not be interpreted to exempt forest roads consistent with the CWA. The plaintiff was given the opportunity to prove the defendant timber company was in violation of the CWA, even if the regulation said such silvicultural features could not be point sources under the Act.

Following several years of discovery, the plaintiff filed a motion for summary judgment in 2006 to establish the timber company defendant's liability for discharging pollutants from a point source to navigable waters without a permit. In January 2007, the court denied the motion and found that the plaintiff had failed to make "an evidentiary showing sufficient to demonstrate that the ditches and culverts" in issue are point sources. The court explained that if the water enters watercourses that flow to Bear Creek in diffuse form, then the ditches and culverts are not point sources. On the other hand, if the plaintiff demonstrated that the ditches channeled water into the watercourses, the ditches were likely to be point sources. Significantly, the court ruled that the plaintiff had to show *how* storm water enters a watercourse. Unless the plaintiff could show that storm water is channeled at the point it enters a watercourse, it could not meet its burden under the CWA and establish a point source.

The court also took on the issue of whether the hillside watercourses were properly considered "navigable waters." In one of the first decisions within the Ninth Circuit to apply the Supreme Court's

2006 decision in *Rapanos v. United States* and the Ninth Circuit's decision in *Northern California River Watch v. City of Healdsburg*, the court concluded that, under Ninth Circuit precedent, Justice Kennedy's significant nexus test in *Rapanos* was controlling. Under the significant nexus test, the court explained, while "the party seeking to invoke the court's jurisdiction must present evidence of a hydrologic connection" between a tributary and a traditionally navigable water, that alone does not always "show . . . the significance of that connection for downstream water quality" as required for the tributary itself to be deemed a navigable water. Judge Patel concluded that while the plaintiff had shown the necessary hydrologic connection, it had failed to show that the watercourses had an impact on the "chemical, physical or biological integrity" of Bear Creek.

Judge Patel also made other rulings curtailing plaintiffs' case. The court rejected the plaintiff's claim that section 402(p), the storm water provision of the CWA, creates a duty to apply for a permit that gives rise to an independent cause of action under section 301 of the Act for discharging without a permit. In other words, the plaintiff had attempted to create two causes of action from one—one for discharging without a permit and another for not applying for a permit. While the court's ruling would seem apparent from the text and structure of sections 301 and 402 of the CWA, citizen suit plaintiffs have for years alleged a "duty to apply" for a permit as a separate cause of action under section 402, typically alleging violations of this duty on each day from the day the statute of limitations began to run (usually, five years before the requisite notice letter was received by the defendant to the day the defendant was issued a permit (if ever)). This now-discredited cause of action allowed plaintiffs to instantly claim hundreds of days "in violation" at the outset. At a civil penalty under the CWA of up to $32,500 per day, the potential exposure would be staggering. This ruling should discourage citizen suit plaintiffs from trying to manufacture duplicative causes of action to increase the settlement value of their suits. The court also rejected the plaintiff's attempt to establish the standing of one of its members to sue by evidence that the member observed Bear Creek from a moving car, concluding that such evidence was insufficient to show a personal and particularized injury.

The outcome of the case clarifies plaintiff's burden of proof in cases brought under the CWA and highlights plaintiff's obligation to introduce specific admissible evidence as to each element of liability under the CWA. A pollutant must be shown to enter a watercourse via a discernible, confined, discrete conveyance—in a channeled rather than diffuse manner—and such watercourse must "significantly affect" the water quality of a traditionally navigable water. Standing requires actual use, or at least physical visits, to a watershed. For defendants, the showings necessary to establish liability should also inform the proper design and implementation of best management practices for their road systems and other features that are subject to storm water runoff.

Note:

Morrison & Foerster LLP represented Pacific Lumber Company in the case.

Citations:

Envtl. Prot. Info. Ctr. v. Pac. Lumber Co., 2007 U.S. Dist. LEXIS 3715 (N.D. Cal. Jan. 8, 2007)

Rapanos v. United States, 126 S. Ct. 2208 (2006)

No. Cal. River Watch v. City of Healdsburg, 457 F.3d 1023 (9th Cir. 2006)

33 U.S.C. §§ 1311, 1342