Wetlands/Clean Water Act Enforcement: Federal Court Considers Whether Cessation of Discharges Renders Action Moot

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The United States District Court for the Southern District of Illinois ("Court") addressed issues arising in a Clean Water Act ("CWA") enforcement action in which the United States is alleging discharges of pollutants into waters of the state without United States Corps of Engineers ("Corps") authorization. See *United States of America v. Petroff Trucking Company, Inc.*, 2021 WL 2435748).

The Court considered in the context of a Motion to Dismiss the defendant's arguments that:

1. The alleged unpermitted discharges of pollutants had ceased, rendering the enforcement action moot.
2. Certain jurisdictional elements necessary to bring a CWA action are absent.

The United States (U.S.) alleged Petroff Trucking Company, Inc. ("Petroff") made unauthorized discharges of pollutants (dredged or fill material) into wetlands located on its construction site. Such pollutants allegedly entered the Mississippi River by way of the Cahokia Canal. The discharges allegedly violated Section 308 and 309 of the Clean Water Act in the absence of Corps authorization.

Petroff argued in support of its Motion to Dismiss that the action was moot because the work on the construction site had ended. The Court rejected this argument. Dismissing an enforcement action as moot as a result of defendant's voluntary cessation of activity would simply allow the defendant to resume the alleged illegal activity at any time in the future.

Petroff also argued that no pollutants were discharged at the site. Instead, the defendant argued there may have been only incidental dirt spilled during the removal.

Section 1362(12) of the CWA defines the phrase "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." Included in the definition of "point source" is mechanized equipment, such as excavators, bulldozers, and dump trucks. Incidental fallback, however, is not included in the scope of this definition. See Section 1362(14).

The Court found that the dirt, spoil, rot, and/or sand allegedly moved from Petroff's "earth-moving equipment" constituted a discharge of a CWA pollutant. Further, the issue of whether the materials were

actually incidental fallback was held to be an affirmative defense. As a result, raising this issue at this state of the litigation was held to be inappropriate.

The final question addressed by the Court was whether the wetlands on the site constituted navigable waters.

Petroff argued for the application of a test articulated in Rapanos v. United States. See 547 U.S. 715 (2006). The Court applied the test in Judge Kennedy's concurring Opinion in Rapanos. This was deemed the narrowest ground to which a majority of Justices would have agreed.

Under Justice Kennedy's test, a wetland constitutes "navigable waters" is it possesses a significant nexus to waters that are more readily understood as navigable. This nexus is established if the wetlands significantly affect the chemical, physical, and biological integrity of other navigable waters. In applying Justice Kennedy's test, the Court found that the wetlands in question changed the chemical, physical, and biological integrity of the adjacent Cahokia Canal. The waterbody is a tributary to the Mississippi River. Tributaries are considered navigable waters if they feed into a traditional navigable water and possess an ordinary high-water mark. Thus, the wetland was considered a "navigable water" under the CWA because of its ecological impact on the Canal and the Mississippi River. Both waterbodies are traditional navigable waters.

The Court therefore denied Petroff's Motion to Dismiss based on its finding that the United States sufficiently alleged that there was a violation of the CWA due to the discharge of pollutants, which included rocks, sand, and soil into wetlands adjacent to the Mississippi River.

A copy of the Opinion can be downloaded here.