

FIGHTING CITY HALL: DEVELOPERS' RIGHTS IN THE FACE OF GOVERNMENT'S REFUSAL TO ACT

By David Paget and Steven C. Russo

The rules for judicial review are straightforward when a party seeks to challenge a governmental action. A more vexing problem arises when a project proponent faces governmental inaction, *i.e.*, a refusal to make any decision approving or disapproving a project. This article discusses potential legal strategies for developers faced with a recalcitrant governmental entity that refuses to complete an environmental review, or take action necessary to permit a development project to move forward.

Compelling Governmental Action

The environmental review process, including the preparation and review of an Environmental Impact Statement

(EIS) and adoption of governmental findings is, in the best of circumstances, a complex and lengthy process. It is also a process that must be completed before a governmental agency can vote on the permit application or other action that triggered such environmental review. Unfortunately, some governmental decision makers, when faced with a politically controversial development project, have used the complexity of the process as a tool to simply avoid making any decision at all. This can be effectuated when an agency simply refuses to find that a draft or final EIS is complete, and instead just makes countless demands for more information and additional studies.

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* FIGHTING CITY HALL: DEVELOPERS' RIGHTS IN THE FACE OF GOVERNMENT'S REFUSAL TO ACT *(cont'd)*

* Please note that one of the cases discussed in "Fighting City Hall," Home Depot, U.S.A. v. Dunn, was recently reversed by the Appellate Division, Second Department. 305 A.D.2d 459 (2d Dept. 2003).

The regulations issued pursuant to New York's State Environmental Quality Review Act (SEQRA), in theory, require an agency to prepare or cause to be prepared a final EIS (FEIS) within 45 days after holding a hearing on a draft EIS (DEIS), or 60 days after the acceptance and filing of the DEIS, whichever is later.¹ In practice, it invariably takes more time than that to prepare a proposed FEIS for a complex and controversial project. Moreover, SEQRA's regulations permit an agency to take additional time to act on an FEIS where it reasonably determines that additional time is necessary to prepare the statement adequately or identifies "problems with the proposed action" requiring "material reconsideration or modification".² Thus, in order to avoid the supposedly strict deadlines contained in SEQRA's regulations, an agency simply needs to find that the proposed FEIS is not adequate, or that the project or proposed mitigation measures need additional reconsideration or modification. An abuse of these prerogatives can draw out the review of a project (and thus avoid the need to vote on the proposed action) for years, often in the hope that the developer will abandon the project altogether.

A developer faced with an agency attempting to effectuate a pocket veto of its project is not without legal recourse. In New York, the project proponent can seek to compel the completion of the environmental review process by bringing a mandamus action pursuant to Article 78 of the Civil Practice Law and Rules. Courts have found that it is an abuse of discretion to delay acceptance and filing of an FEIS for an unreasonable length of time, and will compel an agency to perform its duty under SEQRA.³ The remedy of mandamus to compel a final determination, however, is an extreme remedy that courts do not impose lightly. Therefore, it is critical that the developer make a comprehensive record that chronicles the abuse of the review process and the fact that the request for additional studies or other actions is unreasonable. For example, in a recent decision, a State Supreme Court Justice found that a SEQRA review that had continued for over 900 days was unreasonable, and that the voluminous record had demonstrated that the developer had "gone to extraordinary lengths to comply with the demands of an insatiable planning board."⁴ Relying on the rule of reason that governs the requirements imposed by SEQRA, the court found that the developer had performed "what in all reason it could be expected to do."⁵

The fact remains, however, that courts still afford great deference to determinations of governmental decision makers. Therefore, before attempting to compel a completion of an environmental review over the objection of the government agency, the developer must be sure that the additional studies that are demanded are demonstrably unnecessary for a reasonably exhaustive analysis of potential significant environmental impacts. The remedy of mandamus must be reserved for those extreme cases where an agency truly seeks to study a project to death in order to avoid ever making a substantive determination concerning the application under review.

Seeking Damages For Abuse Of The Review Process

The type of extraordinary circumstances that would lead to the imposition of a mandamus remedy compelling governmental action may also be the type of governmental abuse that could support a constitutional claim seeking damages pursuant to 42 U.S.C. § 1983. For example, courts have held that differential treatment in the review of similar applications seeking governmental approvals can violate the equal protection clause of the United States Constitution. Courts have also found a denial of the right to substantive due process under the U.S. Constitution where the applicant can show an arbitrary or irrational deprivation of a protectable property interest. However, in order to show a protectable property interest, the plaintiff must show more than a mere expectation or hope to obtain a permit or approval. The plaintiff must show that pursuant to state or local law they had a legitimate claim of entitlement to the permit or approval.

In order to establish an equal protection claim it is critical that the plaintiff establish that the alleged differential treatment is in connection with the review of substantially similar applications. That can often be a fact-specific issue that may require a trial. For example, in one relatively recent case, Home Depot, U.S.A. v. Dunn,⁶ the plaintiff alleged that a municipality's failure to issue a road widening permit that would permit the applicant to implement a traffic mitigation measure required in an EIS constituted unequal treatment in violation of the equal protection clause. The facts in that case were extremely compelling because the record established that the municipality itself had requested the road widening mitigation measure during the SEQRA review process for the project conducted by a neighboring municipality, but then withheld its permission to implement the measure in order to derail the project. Despite that fact, the court denied the plaintiff summary judgment on its claim, finding that a trial was required "to determine whether or not the other applications were sufficiently similar . . . to find a violation of the equal protection clause."⁷

A DEVELOPER OR PROJECT APPLICANT IS NOT WITHOUT RECOURSE WHEN FACED WITH A GOVERNMENTAL ENTITY THAT REFUSES TO COMPLETE AN ENVIRONMENTAL REVIEW OR TAKE A FINAL ACTION ON AN APPLICATION FOR A PERMIT OR OTHER GOVERNMENTAL APPROVAL. IN APPROPRIATE CIRCUMSTANCES, A PLAINTIFF MAY CONVINCE A COURT TO COMPEL THE GOVERNMENTAL ACTION SOUGHT AND ALSO MAY BE ABLE TO OBTAIN RECOMPENSE FOR DAMAGES INCURRED BY THE ABUSE OF GOVERNMENTAL AUTHORITY.

The court in that case, however, granted the plaintiff summary judgment on its due process claim. First, the court noted that the voluminous record in that case (and a previous mandamus action) had clearly established that the refusal to grant the street-widening permit lacked any rational basis, and that the municipality had failed to identify any problems with the widening plan. Accordingly, the court found that the plaintiff had a property interest in the issuance of the permit, which is a prerequisite to finding a due process violation for failure

to issue such permit. After it found the existence of a property right, the court then went on to determine whether the government's conduct was so outrageously arbitrary as to constitute a gross abuse of governmental authority. It found that the municipality's conduct in that case rose to the level of an abuse of governmental authority, based on a record that demonstrated that the defendant had no rational basis to withhold its approval and that it acted "for purely improper political reasons."⁸ The court went on to reject defendant's assertion of legislative immunity, finding that the refusal to issue a permit was an administrative rather than legislative act, and it reserved for trial the question of damages, including plaintiff's demand for punitive damages.

The Home Depot case demonstrates the viability of applying the due process and equal protection clauses of the United States Constitution to seek redress for abusive governmental conduct. Proving such cases, however is not easy. To establish a violation of equal protection, the plaintiff must obtain extensive discovery probing the review of applications seeking similar permits or governmental approvals. The equal protection clause, however, will not likely prove helpful in cases where the development project that is seeking approvals is unique within the municipality, and therefore lacking a sound basis for comparison with other projects. Suits alleging violation of the due process clause may be easier to establish in cases where the plaintiff has established a clear right to the permit or approval and can establish that an improper political motive, rather than legitimate governmental reason, was the catalyst for a refusal to act. Such a remedy will not be available, however, where a clear right to the approval or permit cannot be established.

Conclusion

A developer or project applicant is not without recourse when faced with a governmental entity that refuses to complete an environmental review or take a final action on an application for a permit or other governmental approval. In appropriate circumstances, a plaintiff may convince a court to compel the governmental action sought and also may be able to obtain recompense for damages incurred by the abuse of governmental authority.

The plaintiff, however, must be prepared to come forward with overwhelming evidence establishing the unreasonable and outrageous nature of the governmental conduct. The cases where courts have awarded this type of relief have been in instances where the record clearly established that the decision-maker had no rational basis for its continued demands or refusal to act, and that other, improper political motives were the true driving force behind the conduct at issue. **SPR**

LITIGATING THE ADMINISTRATIVE LAW CASE

By Daniel Riesel and Elizabeth Read

Environmental regulation increasingly depends on an agency's informal promulgation of rules, interpretations and "guidance." These "actions," often taken without public input, can dictate the initiation or even the outcome of enforcement proceedings. Moreover, government agencies have been quick to assert that many of these pronouncements are not subject to judicial scrutiny because they are internal guidance and therefore not final agency action reviewable by a Court. When agency actions are subject to judicial review, the agency often demands and receives "substantial deference" from the reviewing court. In addition, agency action is reviewed "on the record," that is, on the papers before the agency at the time it made its decision

Examples of agency efforts to avoid review or to cloak their decisions in "deferential" armor abound.¹ Indeed, one reviewing court noted that this attempt at insulation from scrutiny has led to a "let them eat cake" attitude among some regulators.² However, the regulated community is not without recourse. Some courts have recently attempted to place limitations on administrative agencies' attempts to frustrate meaningful judicial review through the use of informal agency "guidance" documents and "interpretive decisions." This article reviews those decisions and the ways that parties can maximize their opportunity to ensure that agency action is subject to meaningful judicial review.

Government Attempts To Avoid The APA

The Administrative Procedure Act ("APA"),³ and its state counterparts provide that legislative or substantive rules must be preceded by public notice and an opportunity for public comment, resulting in a fairly identifiable administrative record. Substantive rule-making occurs when the agency is carrying out the statutory mandate to make rules to implement the statute.⁴ A familiar example of such rule-making is the congressional directive to the U.S. Environmental Protection Agency ("EPA") to promulgate rules implementing the broad mandates of the major environmental statutes.

Administrative agencies, particularly the EPA, have recently been prone to publish "guidance" and "interpretative" decisions without offering an opportunity for public comment. When such decisions are challenged in court, agencies will often argue that they are not "rules" requiring compliance with APA procedures, and that they do not constitute "final agency action" subject to judicial review under Section 706 of the APA.

A plaintiff can surmount the finality defense if it can show that the challenged decision changes the legal regime affecting the plaintiff or establishes a new public standard. In Bennett v. Spear,⁵ the Fish and Wildlife Service had issued a Biological Opinion letter to the Bureau of Reclamation, asserting that particular minimum water levels should be maintained in reservoirs relied upon by the petitioners, in order to avoid endangerment to a particular species of fish. The Supreme Court held that the Opinion was a reviewable final agency action because it had direct and immediate legal consequences, as it altered the legal regime controlling the Bureau of Reclamation's decision-making (the Bureau would be subject to legal penalties if the reservoir levels were not enforced). In Appalachian Power Co.,⁶ EPA released a so-called "guidance" regarding state implementation of the Clean Air Act

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¹ 6 N.Y.C.R.R. § 617.9(a)(5)

² 6 N.Y.C.R.R. § 617.9(a)(5)(ii).

³ Gordon v. Town of Bedford Planning Board, Index No. 14653/89 (Sup. Ct. Westchester Cty.); see also 383 Madison Associates v. New York City Planning Commission, Index No. 2501-88 (Sup. Ct. N.Y. Cty.), *aff'd n.o.p.*, 144 A.D.2d 1044, 535 N.Y.S.2d 287 (1st Dept. 1988).

⁴ Pilot Corp. v. Planning Board of the Town of Newburgh, Index No. 5399/00 (Sup. Ct. Orange Cty. June 28, 2001).

⁵ *Id.*

⁶ N.Y.L.J., December 19, 2001 (Sup. Ct. Westchester Cty.).

⁷ *Id.* (citations omitted).

⁸ *Id.*

that required states to enforce periodic monitoring by state permit holders. The court held that the guidance in and of itself constituted final agency action with direct legal consequences in the form of the obligations it imposed on states to implement the requirements. In *Barrick Goldstrike Mines, Inc. v. Browner*,⁷ EPA issued a guidance stating that chemicals in waste rock were ineligible for the regulatory de minimis exception to reporting requirements of the Emergency Planning and Community Right-to-Know Act. The court held that the guidance, in concert with a regulatory preamble applying the reporting requirements to the mining industry, served to “crystallize an agency position into final agency action.”⁸

The federal courts have also shown a willingness to reject agencies’ arguments that APA public notice and comment requirements do not apply to determinations simply because they are denominated “guidance” or “policy statements.” For example, the D.C. Circuit held in *Community Nutrition Institute v. Young*⁹ that the Food and Drug Administration’s establishment of an “action level” for a contaminant in corn required notice and comment although the agency characterized it as an interim standard.

Both of these issues arose in a recent Southern District of New York litigation in which Sive, Paget & Riesel represented the United States Gypsum Company in its challenge to an agreement between the EPA and the Army Corps of Engineers (“ACOE”) setting new standards for PCB levels in dredged material to be disposed in designated dumping grounds.¹⁰ In that case, the plaintiff had applied for a permit from the ACOE to dredge sediment from a channel adjoining one of its plants and place it in a designated ocean disposal site. The sediment contained PCBs, but below the 400 parts per billion (“ppb”) bioaccumulation level that had been deemed the maximum acceptable by both the ACOE and the EPA. A few days before the permit was to be granted, however, the ACOE entered into a Memorandum of Agreement (“MOA”) with the EPA which immediately lowered the maximum level to 113 ppb, without public notice or opportunity for comment. With that, it became apparent that the ACOE would deny the permit, and the plaintiff sued EPA and the ACOE.

The federal agencies moved to dismiss on the grounds that the new PCB standard was merely “guidance” and therefore did not amount to “final agency action.” The government also relied on the terms of the MOA, which declared that it was “intended exclusively for the internal management of the Executive Branch, and does not establish or create any enforceable rights, legal or equitable, on behalf of any person not a signatory....”¹¹ The District Court for the Southern District of New York denied the motion, finding that “as a practical matter, the new PCB standard... was binding and resulted in tangible legal consequences for plaintiff....”¹² The court disregarded the MOA’s recitation that the new PCB number would be subject to revision, noting that all standards are subject to revision.

THIS NOTION OF VARYING DEGREES OF DEFERENCE IS A USEFUL TOOL FOR THE PRIVATE LITIGANT. FOR EXAMPLE, INTERNAL GUIDELINES AND OTHER PRONOUNCEMENTS NOT SUBJECT TO PRIOR PUBLIC SCRUTINY, OR POSITIONS ADVANCED FOR THE FIRST TIME IN THE COURSE OF THE LITIGATION, ARE ONLY ENTITLED TO SOME OR LITTLE DEFERENCE, AS OPPOSED TO SUBSTANTIAL DEFERENCE UNDER CHEVRON.

The plaintiff and the agencies cross-moved for summary judgment. In opposition to the plaintiff’s argument that the APA’s procedural requirements had been violated, the government argued that the MOA’s interim standard was not a legislative rule requiring prior notice and an opportunity for comment but an “interpretive rule,” which is subject to judicial review but does not require prior notice

and comment.¹³ Interpretive rules are decisions that do not have controlling effect on parties not before the agency in the particular proceedings.¹⁴ The District Court again ruled for the plaintiff, finding that the new standard, being binding and outcome-determinative, was a rule subject to the notice and comment requirements of the APA. The court therefore required the ACOE to review the plaintiff’s permit application according to the previous standard.

Accordingly, courts apply a functional test in determining whether an agency decision is final and therefore reviewable, and whether it essentially promulgates a legislative rule requiring an opportunity for public comment.¹⁵ An agency's description of a decision as "guidance" or "interim" will not shield it from judicial challenge.

Demands For Deference To Agency Action

Even if an agency action is deemed reviewable, members of the regulated community face two substantial hurdles in obtaining relief through judicial review. First, agency decisions will not be overturned unless they are procedurally defective, arbitrary or capricious in substance or manifestly contrary to the statute.¹⁶ Second, agencies lay claim to judicial "deference" to their actions. Indeed, the incantations of deference would make the Lord High Executioner blush. Historically, the courts applied the Skidmore v. Swift & Co.¹⁷ deference doctrine, wherein a reviewing court will give respectful consideration to the agency's views in light of the agency's experience and informed judgment. However, the decision that has dominated judicial review of agency action for the last 20 years has been Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.¹⁸ The Chevron doctrine provides for a two-step judicial analysis. The first step is to determine whether the statute is clear and unambiguous; if it is, then deference to an agency interpretation is not appropriate. Where the statute is silent or "ambiguous," then the court must accept the agency's interpretation of the statute so long as it is reasonable.

While Chevron arose in the context of rule-making, agencies have tended to invoke it in a wide variety of circumstances.¹⁹ The Supreme Court has placed those attempts in perspective in several recent decisions. In Christensen v. Harris County,²⁰ the Court held that a statutory interpretation contained in an opinion letter, which was not arrived at after a formal adjudication or notice-and-comment rule-making, did not warrant Chevron-style deference.²¹ In the following year, the Court decided United States v. Mead Corp.,²² in which it attempted to sort through the various types of deference. Justice Souter writing for the Court suggested that whereas informal agency interpretations or opinions should not receive Chevron deference, they were at least due "respect" under the Skidmore doctrine:

Chevron did nothing to eliminate Skidmore's holding that an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires.

A [U.S. Customs Service] classification ruling in this situation may therefore at least seek a respect proportional to its 'power to persuade.' Such a ruling may surely claim the merit of its writer's thoroughness, logic and expertness, its fit with prior interpretations, and any other sources of weight.²³

This notion of varying degrees of deference is a useful tool for the private litigant. For example, internal guidelines and other pronouncements not subject to prior public scrutiny, or positions advanced for the first time in the course of the litigation, are only entitled to some or little deference, as opposed to substantial deference under Chevron.²⁴

The advantages to this approach are illustrated by the case Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York,²⁵ in which the plaintiff alleged that the City had violated the Clean Water Act with an unpermitted discharge from a dam. The City argued that no permit was required, relying on an EPA policy, articulated in opinion letters, reports to Congress, and litigation positions over the years, that the Act's discharge permit requirement did not apply to discharges from dams. The Second Circuit, following Mead and Christensen, held that because the EPA policy was never formalized in a notice-and-comment rulemaking or formal adjudication under the APA, it was not due Chevron deference, and need not be

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¹ Compare Appalachian Power Co. v. Environmental Protection Agency, 208 F.3d 1015 (D.C. Cir. 2000) with Flue-Cured Tobacco Cooperative Stabilization Corp v. EPA, 313 F.3d 852 (4th Cir. 2002).

² Chemical Manufacturers Ass'n v. Environmental Protection Agency, 28 F.3d 1259, 1266 (D.C. Cir. 1994): "And, we may add, it bespeaks a 'let them eat cake' attitude that ill-becomes an administrative agency whose obligation to the public it serves is discharged if only it avoids being arbitrary and capricious."

³ 5 U.S.C. § 553.

⁴ Professionals and Patients For Customized Care v. Shalala, 56 F.3d 592 (5th Cir. 1995); American Mining Congress v. Mine Safety & Health Administration, 995 F.2d 1106 (D.C. Cir. 1993).

⁵ 520 U.S. 154 (1997).

⁶ 208 F.3d 1015.

⁷ 215 F.3d 45 (D.C. Cir. 2000).

⁸ *Id.* at 49.

⁹ 818 F.2d 943 (D.C. Cir. 1987).

¹⁰ United States Gypsum Co. v. Muszynski, 161 F.Supp.2d 289 (S.D.N.Y. 2001).

¹¹ *Id.* at 292.

¹² *Id.*

¹³ Prior notice and comment are only required for legislative rules within the meaning of the APA. 5 U.S.A. §551(4); see General Electric Co. v. EPA, 290 F.3d 377 (D.C. Cir. 2002); Community Nutrition Institute, supra.

¹⁴ General Electric, supra.

¹⁵ See note 2, *supra*.

¹⁶ United States v. Morton, 467 U.S. 822 (1984); 5 U.S.C. §706.

¹⁷ 323 U.S. 134 (1944).

¹⁸ 467 U.S. 837 (1984).

¹⁹ See, e.g., National Ass'n of Broadcasters v. Librarian of Congress, 146 F.3d 907 (D.C. Cir. 1998) (distribution of royalties collected from cable television systems); Bamidele v. Immigration and Naturalization Service, 99 F.3d 557 (3d Cir. 1996) (Board of Immigration Appeals determination to deport the plaintiff); Pyramid Lake Paiute Tribe of Indians v. United States Dept. of Navy, 898 F.2d 1410 (9th Cir. 1990) (Navy practices of leasing acreage and contiguous water rights to local farmers).

²⁰ 529 U.S. 576 (2000).

²¹ *Id.* at 587.

²² 533 U.S. 218 (2001).

²³ *Id.* at 234-35 (citations omitted).

²⁴ *Id.*

²⁵ 273 F.3d 481 (2d Cir. 2001).

²⁶ *Id.* at 489-91.

²⁷ *Id.* at 491-94.

adopted by the court unless it was “persuasive.”²⁶ Thus, the court engaged in its own interpretation of the statute and rejected the City’s position.²⁷

Conclusion

All of the foregoing leads to the ineluctable conclusion that the real fight should be before the agency as opposed to a reviewing court. However, when the dispute has progressed to the courts, careful attention should be paid to whether the challenged decision should have undergone public comment and whether the record docketed by the agency’s lawyers reflects what the agency actually considered. In addition, issues should be framed in a manner that avoids an application of maximum judicial deference.

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MUDDY WATERS IN THE WAKE OF SWANCC

By Mark A. Chertok and Kate Sinding

In Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (“SWANCC”), 531 U.S. 159 (2001), the Supreme Court declared invalid the federal government’s authority under Section 404 of the Clean Water Act (“CWA”) to regulate activities in so-called “isolated waters” based on their use, whether actual or potential, by migratory birds. Despite its seemingly straightforward holding, both the courts and the agencies charged with implementing the CWA have struggled to make sense of what exactly constitutes an “isolated water” under SWANCC and what, if any, federal jurisdiction remains over isolated waters based on other factors.

As a result, there is substantial uncertainty as to whether certain activities that affect federally-defined waters, including wetlands, are regulated and subject to the need for federal approval. This uncertainty, while to some extent confounding potential permit applicants, also affords opportunities to avoid the need for federal approval of proposed activities. In addition, because the same terminology is used under other sections of the CWA as well as the Oil Pollution Act of 1990 (“OPA”), the ramifications of post-SWANCC interpretations will be far-reaching.

The Scope Of Federal Jurisdiction Under The Clean Water Act

Section 404(a) of the CWA authorizes the U.S. Army Corps of Engineers (the “Corps”) to issue permits “for the discharge of dredged or fill material into the navigable waters at specified disposal sites.”¹ The U.S. Environmental Protection Agency (“EPA”), as well as the Corps, has enforcement authority under the CWA. Although the term “navigable waters” was traditionally interpreted to include only those waters affected by tidal flow, or which have been used, or are susceptible to use, for interstate or foreign commerce, the term has taken on a broader meaning under the CWA. The Act defines this term to include “waters of the United States...” 33 U.S.C. § 1362(7), which the Corps’ regulations define to include not only traditional “navigable waters,” but also tributaries thereto, interstate waters and wetlands, intrastate waters (including intermittent streams, mudflats, ponds, and isolated wetlands) where a discharge could affect interstate or foreign commerce, tributaries of these intrastate waters, and wetlands adjacent to any of these waters.²

Although the SWANCC decision set down a bright-line rule regarding the assertion of jurisdiction over isolated, non-navigable, wholly intrastate waters based solely on the presence of migratory birds, it raised a host of other questions. For instance, it was unclear whether a wetland adjacent to a non-navigable, as opposed to a navigable, tributary could be subject to regulation if that tributary eventually leads to a navigable river.

The Agencies’ Reaction To SWANCC

In the immediate aftermath of SWANCC, the Corps and EPA issued a joint memorandum to provide guidance to their field staffs concerning the implications of the Supreme Court’s ruling on their jurisdiction over isolated waters. The agencies expressed

their view that “the Court’s holding was strictly limited to waters that are ‘non-navigable, isolated, [and] intrastate [sic].’ With respect to any waters that fall outside of that category, field staff should continue to exercise CWA jurisdiction to the full extent of their authority under the statute and regulations and consistent with court opinions.”³

Nonetheless, the agencies’ field staffs -- and, as addressed below, the courts -- continued to render inconsistent interpretations of SWANCC. In response, and to address the ensuing confusion among the regulated community, in January 2003, the Corps and EPA issued a proposed rule-making setting forth a new guidance document that purports to clarify the extent of federal jurisdiction over isolated water bodies following SWANCC.⁴

The proposed guidance focuses on four categories of waters: (i) isolated, intrastate waters that are non-navigable; (ii) traditional navigable waters; (iii) adjacent wetlands; and (iv) tributaries. As to the first category, the agencies reiterated that non-navigable, isolated, intrastate waters for which the sole basis for asserting an interstate connection is the presence of migratory birds are non-jurisdictional in accordance with SWANCC. With respect to isolated waters for which the basis of asserting federal jurisdiction is one of the other factors set forth in 33 C.F.R. § 328.3(a)(3), the field offices are to make a case-by-case determination with approval from Corps headquarters.

The second and third categories -- traditional navigable waters and wetlands adjacent to such waters -- remain subject to federal jurisdiction. With respect to the fourth category of waters, tributaries of navigable waters appear to remain generally within federal jurisdiction under the proposed guidance, however, a case-by-case determination is apparently required in the case of intermittent, ephemeral or man-made tributaries to jurisdictional waters.

Whether the proposed guidance, if formally promulgated, will provide for greater uniformity in the agencies’ regulation of isolated wetlands remains to be seen. Similarly, it remains to be seen whether it will provide greater consistency in the case law emerging post-SWANCC.

Post-SWANCC Judicial Decisions

The Supreme Court limited its decision to the narrow issue of the legality of the Corps’ interpretation of its own authority to regulate non-navigable, intrastate, isolated waters under the CWA. Because it declined to rule on the broader constitutional question of the scope of Congress’ authority under the Commerce Clause to regulate wholly intrastate isolated bodies of water, the courts have been tasked to conduct case-by-case determinations of federal jurisdiction of such waters. The result has been significant deviations among judicial interpretations of which waters remain jurisdictional following SWANCC.

The larger group of courts has given SWANCC a relatively restricted interpretation, generally upholding the Corps’ traditional bases for asserting jurisdiction over isolated waters other than migratory bird use. For example, in United States v. Buday, 138 F.Supp.2d 1282 (D. Mont. 2001), the district court held that wetlands adjacent to non-navigable tributaries to navigable waters were jurisdictional because, although the tributaries did not connect with a navigable-in-fact waterway for at least 235 miles, discharges of pollutants into these waters would eventually have an impact on waters affecting interstate commerce.⁵

Some courts have held that even waters whose connection to navigable waters is intermittent or ephemeral remain jurisdictional. For instance, in United States v. Lamplight Equestrian Center, Inc., 2002 U.S. Dist. LEXIS 3694 (N.D. Ill. 2002), the court held that wetlands were jurisdictional based on the defendant’s concession that, at least at times, there was an unbroken “drainage connection” between the wetlands and a non-navigable tributary to a navigable river. In Idaho Rural Council

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¹ 33 U.S.C. § 1344(a).

² 33 C.F.R. § 328.3(a)(3).

³ Memorandum from Gary S. Guzy, General Counsel, U.S. EPA, and Robert Anderson, Chief Counsel, U.S. Army Corps of Engineers, re: Supreme Court Ruling Concerning CWA Jurisdiction Over Isolated Waters (Jan. 19, 2001).

⁴ 68 Fed. Reg. 1991 (2003).

⁵ Headwaters, Inc. v. Talent Irrigation District, 243 F.3d 526 (9th Cir. 2001); United States v. Interstate General Co., 39 Fed. Appx. 870 (4th Cir. 2002), *affirming*, 152 F.Supp.2d 843 (D. Md. 2001); Community Ass’n for Restoration of the Environment v. Henry Bosma Dairy, 305 F.3d 943 (9th Cir. 2002).

v. Bosma, 143 F.Supp.2d 1169 (D. Idaho 2001), the court held that the defendant farm violated CWA § 303 because (a) the springs into which it had discharged without a permit were “sufficiently connected with [navigable waters] to be regarded as waters of the United States” (id. at 1179) and (b) the farm’s “discharge of pollutants into groundwater hydrologically connected to [non-navigable tributaries] constitutes a violation of the CWA” (id.) as long as EPA could trace the discharged pollutants from their source to the surface waters. Id. at 1180-81.

A smaller group of courts has chosen to read SWANCC as more broadly limiting the agencies’ jurisdiction over isolated waters. The Fifth Circuit held, for example, that a defendant could not be held liable under the OPA for discharges to “navigable waters” where the only demonstrable discharge was to groundwater. Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001). The court refused to conclude that “a discharge onto dry land, some of which eventually reaches groundwater and some of the latter of which still later may reach navigable waters, all by gradual, natural seepage, is the equivalent of a ‘discharge’ ‘into or upon the navigable waters.’” Id. at 271. The court further held that a number of intermittent streams were not “waters of the United States” because the appellants failed to demonstrate that these streams were “sufficiently linked to an open body of navigable water...” Id. at 270-71.

IT REMAINS TO BE SEEN WHETHER THE AGENCIES’ PROPOSED GUIDANCE CONCERNING POST-SWANCC FEDERAL JURISDICTION WILL REDUCE THE INCONSISTENCY OF THE COURTS’ AND THE AGENCIES’ REGULATION OF ISOLATED WATERS. BECAUSE THE GUIDANCE WOULD APPEAR TO REQUIRE CASE-BY-CASE DETERMINATIONS IN A GREATER NUMBER OF INSTANCES, WHAT IS CLEAR IS THAT THE PARTICULAR FACTS OF EACH CASE WILL BE CRUCIAL AND THE POTENTIAL FOR INCREASED ADMINISTRATIVE AND JUDICIAL APPEALS SIGNIFICANT.

The court in United States v. Newdunn Associates, 195 F.Supp.2d 751 (E.D. Va. 2002), held that the Corps lacked jurisdiction because it had failed to meet its burden of “factually proving a sufficient connection” between 38 acres of wetlands on the landowner’s property and navigable waters or waters of the United States. Id. at 765. The court rejected the Corps’ argument that a “surface water connection” or “hydrological connection” sufficient to establish jurisdiction existed where water had to pass from the wetlands through a

spur ditch, a series of man-made ditches and culverts, and non-navigable portions of a creek before finally reaching navigable waters. Id.

A growing subset of both schools of thought has latched onto the Supreme Court’s language in SWANCC concerning the requirement that a “significant nexus” be demonstrated between the water over which jurisdiction is claimed and a navigable water to uphold a jurisdictional determination even where no regular surface or subsurface hydrological connection exists. See San Francisco Baykeeper v. Cargill Salt Division, 2003 U.S. Dist. LEXIS 8247 (N.D. Cal. Apr. 29, 2003) (official citation unavailable at time of publication) (pond separated by berm from tributary to bay was jurisdictional because water from pond regularly leaked through berm and thus could affect water quality of adjacent navigable waters); United States v. Hummel, 2003 U.S. Dist. LEXIS 5656 (N.D. Ill. Apr. 8, 2003) (wetlands adjacent to non-navigable tributaries to navigable water had “significant nexus” to navigable water and thus were jurisdictional).

Conclusion

As noted, it remains to be seen whether the agencies’ proposed guidance concerning post-SWANCC federal jurisdiction will reduce the inconsistency of the courts’ and the agencies’ regulation of isolated waters. Because the guidance would appear to require case-by-case determinations in a greater number of instances, what is clear is that the particular facts of each case will be crucial and the potential for increased administrative and judicial appeals significant. **SPR**

BRIEF NOTES

Sive, Paget & Riesel co-ranked #1 Environmental Law Firm in New York

Chambers & Partners USA said:

“[SPR is] well known for its long-term involvement in the environmental regulatory arena and was noted by interviewees for its broad-based practice. It continues to maintain its position as one of the few purely environmental firms in New York City, and was recommended for the quality of its counseling and its litigation capabilities. In particular, commentators underlined the group's local knowledge and “ability to provide a cost-efficient service.” An eclectic client base comprises community and environmental groups, as well as Fortune 500 companies.

The Lawyers: David Paget was thought to be “strong in a variety of environmental areas,” but is best known for his work on environmental impact statements. Formerly chief of the environmental protection unit at the US Attorney's office in NY, Dan Riesel maintains his reputation as a “leading litigator.” An assorted workload has included success in several multiparty toxic tort cases. The group also defended a Fortune 500 corporation against multimillion-dollar claims for the cleanup of hazardous waste.

The Clients: Duracell; Kraft Foods; Cooper Industries; Goodyear; CIGNA and the Commonwealth of Puerto Rico.

Chambers & Partners is an independent, objective legal directory. Researchers spent a year canvassing clients and lawyers across the US to obtain a consistent market view of which firms and attorneys are considered leaders in their field. (www.chambersandpartners.com)

Court Dismisses Toxic Tort Lawsuit as Untimely

SPR obtained a dismissal of a toxic tort lawsuit brought against the Village of Liberty and other defendants, including ExxonMobil, seeking compensatory and punitive damages for exposure to MTBE found in the Village's water supply in 1992. The New York State Supreme Court, Sullivan County, held that the plaintiffs' claims were barred by the statute of limitations because the contamination of the Village's water supply had been widely reported in 1992. In addition, they noted that the plaintiffs' allegations of infliction of emotional distress and fear of future injury generated as a result of their exposure to toxins neither reflected a rational basis for fear of contracting a disease, nor were they accompanied by any corroborating medical evidence. This decision makes clear that plaintiffs cannot revive a stale claim based on recently-issued governmental reports where such reports simply build on widely-reported, prior investigations of a hazardous condition that occurred outside the applicable limitations period for such claims. The Court's ruling also makes clear that plaintiffs cannot maintain fear of future injury claims without credible proof linking their alleged exposure to the presence of a toxin in their body, or to the existence of a toxin-induced disease. Daniel Riesel and Steven C. Russo represented the Village of Liberty in this action.

Court Denies Summary Judgment in ERISA Action

The U.S. District Court for the Southern District of New York denied a motion for partial summary judgment against SPR clients in a lawsuit alleging ERISA violations against employee benefit funds and the third-party administrators to those funds. The plaintiffs' claimed, among other things, that the trustees of the benefit funds and the third-party administrator to the benefit funds had breached its fiduciary duty in connection with agreements with the third-party administrators. The court rejected the plaintiffs' argument that provisions of the agreements constituted per se violations of ERISA because of the agreements' duration, absence of an express provision allowing the trustees to terminate the agreement on short notice, and delegation of non-delegable duties to the service providers. The Court found that the plaintiffs had not provided sufficient evidence that the duration of the agreement, the lack of a termination provision in such contracts and other specific provisions of the contract were facially unlawful. The Court agreed with SPR's argument that the third-party agreements were not facially invalid because the requirements of the applicable ERISA regulations are incorporated into such agreements even if such incorporation is not expressly stated therein. Daniel Riesel and Steven C. Russo represented Steven Barasch and Churchill Administrators, Inc.

METROZONE IS LAUNCHED!

ON JUNE 25TH, METROZONE CONDUCTS ITS INAUGURAL "SEMINAR-ON-WHEELS" ABOUT NYC REAL ESTATE AND DEVELOPMENT. DEVELOPED BY TWO SPR LAWYERS, STEVEN BARSHOV AND SUZANNE JOYCE, METROZONE TREATS THE CITY ITSELF AS THE CLASSROOM AND INTEGRATES ITS MOST EVOCATIVE SITES, STRUCTURES, AND NEIGHBORHOODS INTO A FASCINATING FULL-DAY FIELD STUDY FOCUSING ON THE CUTTING EDGE ISSUES THAT AFFECT THE CITY'S FUTURE AND GROWTH. FOR MORE INFORMATION, LOG ONTO WWW.METROZONENYC.COM OR CALL STEVEN OR SUZANNE AT SPR.

Court Finds That Restrictive Covenant Not Enforceable Against Successors

A State Supreme Court Justice in Westchester recently held that a not-for-profit corporation represented by SPR was not restricted in its ability to sell land that had been purchased with funds previously donated to it to pursue its environmental and scientific education mission. The donors, after the land had been purchased, had recorded a restrictive covenant prohibiting development of the land except in limited circumstances, then later purported to transfer the covenant to a neighboring town. The contract vendee sued to obtain a declaratory judgment that the covenant did not run with the land. SPR was instrumental in establishing this the donors had never owned an interest in the property benefited or burdened by the restrictive covenant. The Westchester County Supreme Court, Justice Emmett Murphy, agreed that the covenant could not be enforced against successive purchasers because it did not "touch and concern" the land. The court rejected the town's urging that it uphold the covenant on equitable principles, which would upend settled principles of real property law and undermine the policy against restraints upon alienation. The not-for-profit Rene Dubos Center was represented by Steven C. Russo and Allison Walsh.

SIVE, PAGET & RIESEL

has been a pioneer in environmental law for over forty years and continues to be a leader in Environmental Law, Litigation, Development & Land Use, and Municipal Law.

Whether guiding a development project through the government approval process, or trying complex civil and criminal cases, Sive, Paget & Riesel brings an unparalleled depth of experience and insight to its corporate, government and individual clients.

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