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Legal Reporter for the National Sea Grant College Program

The Flint Water Crisis – Is Anyone Legally to Blame?

Also,

NOAA's Gulf Aquaculture Plan: Past, Present, and Future

U.S. Supreme Court: Are CWA Jurisdictional Determinations Immediately Appealable?

Microbead-Free Waters Act of 2015

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Cover page photograph of the Hamilton Dam on the Flint River in Flint, Michigan courtesy of George Thomas.

Contents page photograph of gulls on the Detroit River in Detroit, Michigan's Mariner Park courtesy of Protopian Pickle Jar Photos.

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The Flint Water Crisis - Is Anyone Legally to Blame?

Catherine Janasie[1]

This past winter, the crisis in Flint over lead in its drinking water became national news. Flint residents had been concerned with the water's quality for months, and as the issues with lead contamination came to light, questions began to swirl about who was responsible. Many throughout the country asked how such a crisis could even happen in the first place, questioning whether the U.S. Environmental Protection Agency (EPA), State of Michigan, and Flint officials acted legally. In January, a group filed a class action lawsuit against the City of Flint, the state treasurer, and the emergency managing board that was governing the City during the water crisis. The legal questions in Flint revolve around a city's water system's duty to protect the city's pipes from corrosion, sample its drinking water, and notify the public of elevated lead levels under the Safe Drinking Water Act (SDWA) and its implementing rules.

The Dangers of Lead

Lead is a toxic metal that persists and accumulates in a person's body over time. As such, it can be extremely harmful to humans even at low levels. Lead exposure in adults can cause hypertension and reproductive problems, as well as decreased kidney function. While lead exposure can be dangerous to adults, fetuses, infants, and young children are the most vulnerable to lead exposure. Even a low dose can damage a child's nervous system, affect growth, and impair hearing. In addition, lead exposure can be the cause of learning and behavioral problems, as well as lowered IQs and hyperactivity.[2]

Lead is also a risk to pregnant women, as lead is stored in one's bones along with calcium. When pregnant, a woman's bones will release the lead stored in her bones with calcium to help the fetus's bone development, and lead can also reach the fetus through the placenta. Lead exposure of an unborn fetus can reduce the growth of the fetus and cause premature births.[3]

The Lead and Copper Rule

Through the SDWA, Congress directed the EPA to regulate contaminants in drinking water that can adversely affect health and are known to or could occur in public water systems.[4] For each contaminant, the SDWA directs the EPA Administrator to adopt "maximum contaminant level goals" or MCLGs that "shall be set at the level at which no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety."[5]

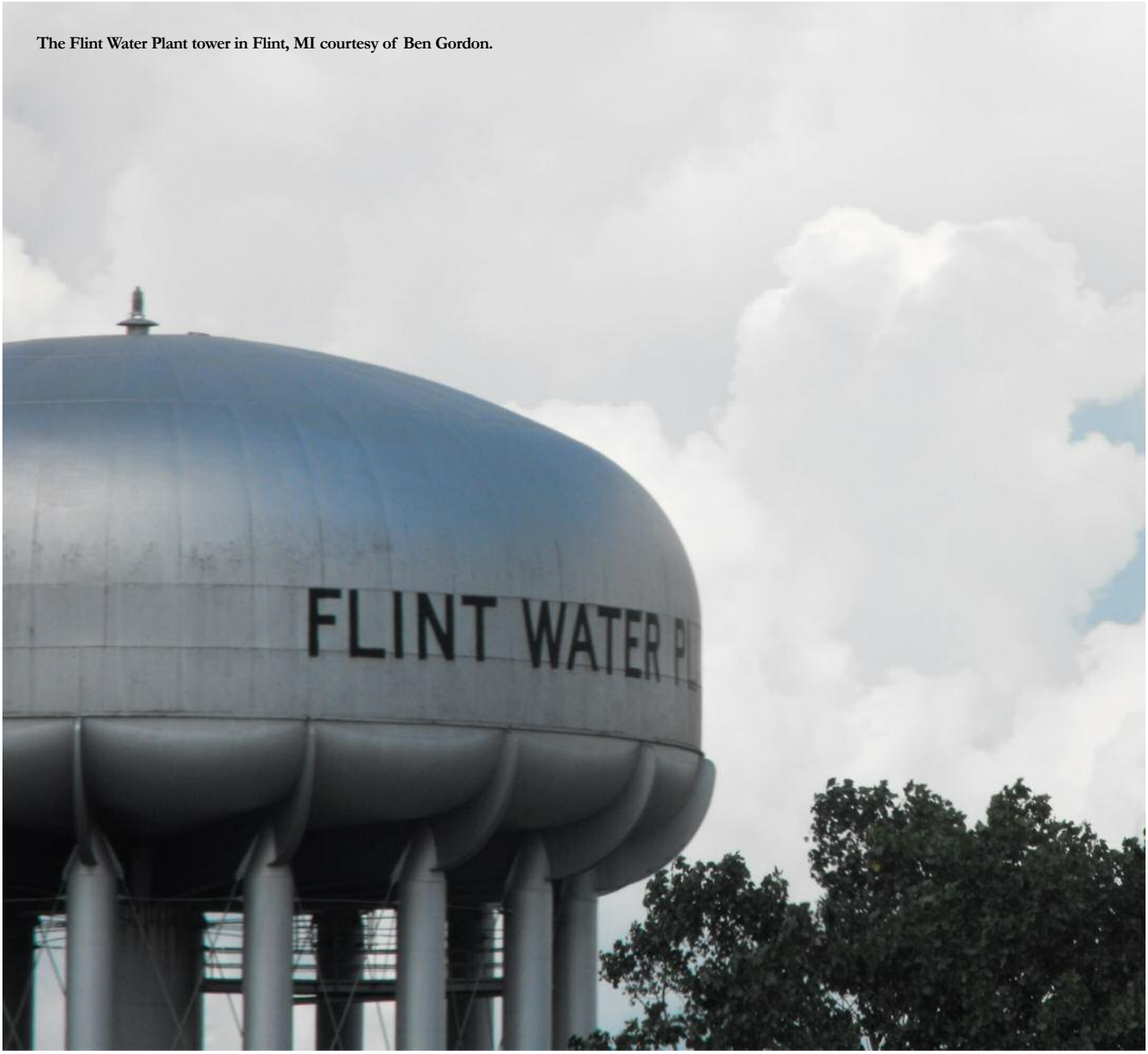
Under the SDWA, the EPA has issued regulations covering lead and copper contamination in drinking water, known as the Lead and Copper Rule (the Rule). Through the Rule, the EPA has set the MCLG for lead at zero, since there is no safe level of exposure to lead.[6] However, under the Rule, the lead action level is met when lead concentrations "in more than 10 percent of tap water samples collected during any monitoring period … is greater than 0.015 mg/L."[7]

Water systems monitor lead levels by sampling household tap water. If these samples show that more than 10% of samples are above the lead action level, certain legal requirements are triggered. A water system, for example, may be required to optimize its corrosion control treatment, engage in public education, or even replace lead service lines under its control.[8]

The Rule also focuses on preventing lead in plumbing from leaching into the drinking water supply.[9] Since a lot of lead exposure is actually caused by lead leaching out of old plumbing, the Rule requires the use of an "optimal corrosion control treatment." Once such treatment option is determined by the state, the water system is required to install and operate the corrosion control throughout the distribution system.[10]

The Problems in Flint

Responsibility for ensuring that citizens have safe water to drink is split in Flint, as in all municipalities, between



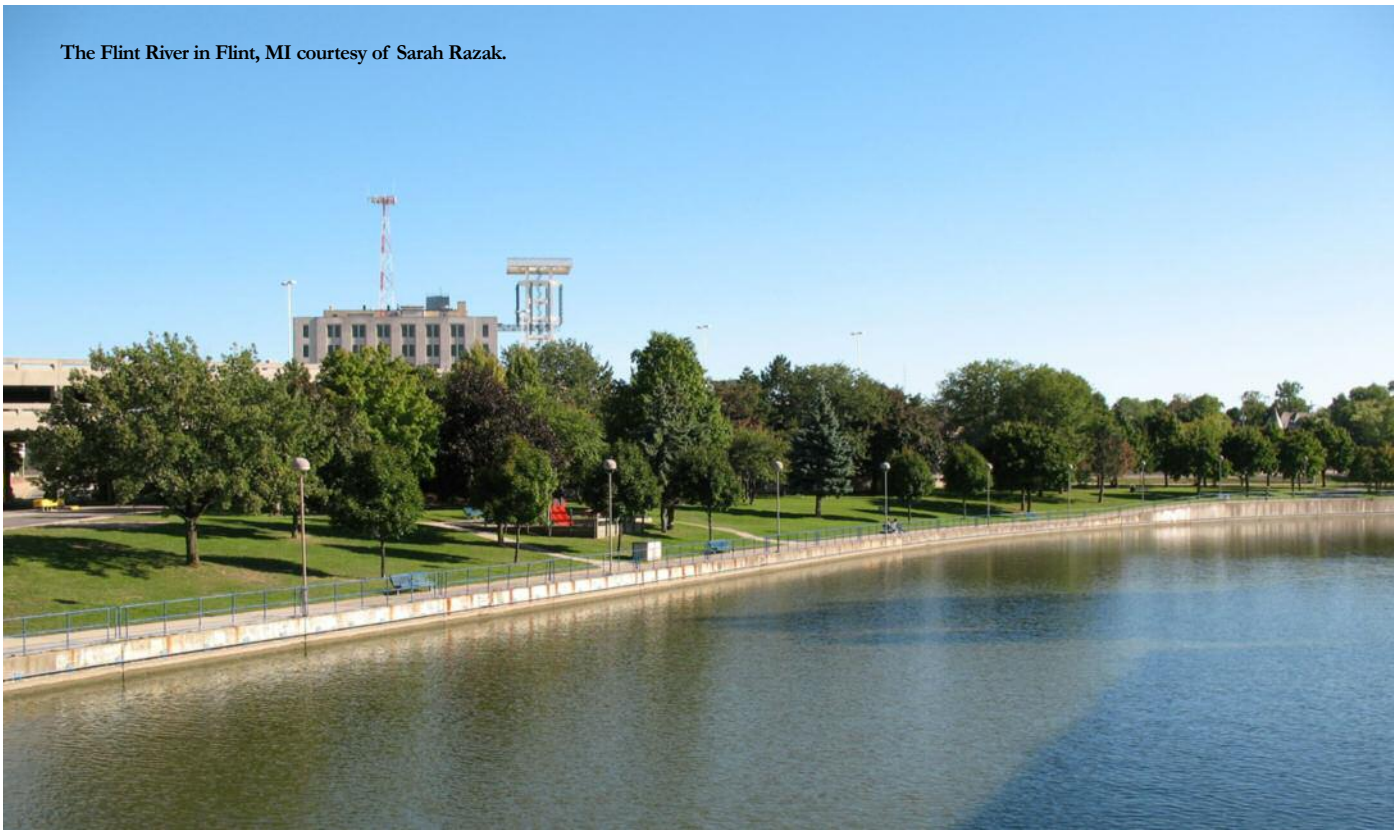
The Flint Water Plant tower in Flint, MI courtesy of Ben Gordon.

the City's water system, state officials, and the EPA. Finger pointing among the major players began immediately after problems were revealed. While the SDWA directs the EPA to regulate drinking water contaminants, if certain standards are met, states have the primary authority to enforce the EPA's drinking water regulations.[11] In Michigan, the Michigan Department of Environmental Quality (MDEQ) is the entity responsible for the enforcement of the SDWA in the state.[12]

The EPA still plays a role, however, in the enforcement of these regulations. Under the SDWA, when the EPA discovers that a state is not meeting the requirements of the Act, the EPA Administrator is required to take certain actions, including ordering the public water system to comply or instituting a civil action.[13] The EPA also has emergency powers under the SDWA, such as the ability to issue an order to protect the health of the public water system's users or bring a civil suit.[14]

Corrosion Control

The problems in Flint were caused by the decision not to institute corrosion control immediately when the City switched from treated Detroit water to a new water source, the Flint River. At the time of the switch, the Michigan DEQ did not require that optimal corrosion-control be instituted immediately; rather, only initial monitoring of the water was required. This decision allowed the water from the Flint River to corrode lead plumbing in Flint, causing lead to leach into the water.



The Flint River in Flint, MI courtesy of Sarah Razak.

In November, the EPA issued a memo clarifying that optimal corrosion control was required under the Rule when a water system switched from a treated water source, like water from the Detroit water system, to a new drinking water source, like the Flint River.[15] The memo states that this situation "rarely arises" and the Rule "does not specifically address such circumstances." While noting "that there are differing possible interpretations" of the Rule, the EPA takes the position in the memo that large water systems (systems providing water to more than 50,000 people) that have met the optimal corrosion control treatment requirements are required "to continue operating and maintaining the treatment" when switching water sources. The memo also notes the need for water systems to consult with their state agency and the importance of monitoring the water after a source change. Thus, under the clarification in the memo, Flint would have had to work with the state in continuing to use a corrosion control when it switched water sources, instead of merely monitoring the water after the change.

Sampling

Another issue in Flint revolved around how the sampling of the city's water occurred after the city switched to using water from the Flint River. If the City's water system did not sample the drinking water correctly, these mistakes could have affected whether the water samples met the lead action level. For instance, sampling done by Virginia Tech researchers showed much higher levels of lead than the city's water system's monitoring.[16]

Under the Rule, samples are supposed to be collected from sites that are more likely to have lead in their plumbing materials, which the water system is directed to identify in order to have sufficient sampling sites.[17] Specifically, samples are supposed to be split between sites with lead service lines and sites with lead plumbing. If the system doesn't have a sufficient number of sites with lead service lines, the system is directed to obtain samples from all the identified sites with lead service lines.[18] Public water systems that serve greater than 100,000 people are required to test the water at 100 sites "during two consecutive six-month periods,"[19] and samples are supposed to be from the same sites during the two monitoring periods.[20]

There are allegations that the city's water system failed to comply with the Rule's monitoring requirements. The water system collected samples between July and December 2014 and between January and June 2015. The complaint in the recently filed class action lawsuit alleges, however, that the system collected samples without regard for whether the site contained lead plumbing or was served by a lead service line, nor did it identify a targeted sampling pool as required by the Rule or even know where lead service lines are

located in the city.[21] Further, the complaint alleges that the system did not use all of the same sampling sites for the two periods, but instead only re-sampled 13 sites with "lead levels below the lead action level during the previous monitoring period."[22] If true, these deficiencies in sampling could have affected whether the lead action level was triggered, as discussed above.

Conclusion

At the time of publication, issues still remain about how the crisis in Flint will be resolved, and whether anyone will be held responsible. The crisis has resulted in the resignation of officials at all levels of government, and many are calling for the resignation of Michigan's governor Rick Snyder. Further, the issues of lead in Flint's drinking water and its potential health effects on the city's youth have brought to light issues of lead poisoning in other areas of the country, including Cleveland, OH and Jackson, MS. The only thing that is clear is that the long-term welfare of Flint and its residents will continue to be an issue of concern for the foreseeable future.

Endnotes

1 Research Counsel, National Sea Grant Law Center.

2 EPA, Basic Information about Lead in Drinking Water, http://www.epa.gov/your-drinking-water/basic-information-about-lead-drinking-water#regs.

3 *Id.*

4 42 U.S.C. § 300g-1.

5 *Id.* § 300g-1(E)(4)(A).

6 EPA, Basic Information about Lead in Drinking Water, *supra* note 2.

7 40 C.F.R. § 141.80(c)(1).

8 *Id.* § 141.86(c) and (d).

9 EPA, Basic Information about Lead in Drinking Water, *supra* note 2.

10 40 C.F.R. § 141.82(e).

11 42 U.S.C. § 300g-2.

12 MICH. COMP. LAWS § 325.1003, *Concerned Pastors for Social Action*, No. 16-10277 (D. Mich. filed Jan. 27, 2016).

13 42 U.S.C. § 300g-2(a)(1)(B).

14 *Id.*

15 EPA Memo, https://www.epa.gov/sites/production/files/2015-11/documents/occt_req_memo_signed_pg_2015-11-03-155158_508.pdf.

16 Anna Maria Barry Jester, *What Went Wrong in Flint*, FiveThirtyEight, (Jan. 26, 2016). http://fivethirtyeight.com/features/what-went-wrong-in-flint-water-crisis-michigan/.

17 40 C.F.R. § 141.86(a)(1).

18 *Id.* § 141.86(a)(8).

19 *Id.* § 141.86(c) and (d).

20 *Id.* § 141.86(b)(4).

21 *Concerned Pastors for Social Action*, *Supra* note 12 at 45-46.

22 *Id.* at 48.

LITIGATION UPDATE: N.C. COURT RULES ON BEACH CASE

In *Nies v. Town of Emerald Isle*, four beachfront property owners filed an inverse condemnation lawsuit against the Town of Emerald Isle. The property owners' claims were based on two town ordinances that restrict when and where oceanfront property owners can leave beach equipment on the "beach strand," which is defined as "all land between the low water mark of the Atlantic Ocean and the base of the frontal dunes." The case required the court to balance public trust and private property rights over dry sand beaches. The court ultimately ruled in favor of the town. In April 2014, *The SandBar* previewed this case. To view the SandBar article, visit http://nsglc.olemiss.edu/SandBar/pdfs/SandBar13.2.pdf.

Recently, a North Carolina appellate court heard the case and affirmed the trial court's decision. In making its decision, the court held that "the ocean beaches of North Carolina … are subject to public trust rights." This decision was recently appealed to the North Carolina Supreme Court. The Winter 2016 issue of *Legal Tides*, a publication of the North Carolina Coastal Resources Law, Planning and Policy Center, provides an analysis of the appellate court ruling. To access the newsletter, please visit: https://ncseagrant.ncsu.edu/ncseagrant_docs/coastallaw/LT/lt_winter_2016.pdf.

NOAA's Gulf Aquaculture Plan: Past, Present, and Future

Stephanie Showalter Otts[1]

On January 13, 2016, the National Oceanic and Atmospheric Administration (NOAA) published final regulations to implement the Fishery Management Plan for Regulating Offshore Aquaculture in the Gulf of Mexico (Aquaculture FMP). The Gulf of Mexico Fishery Management Council developed the Aquaculture FMP to regulate finfish aquaculture in federal waters in the Gulf of Mexico. There are currently no commercial finfish aquaculture operations in federal waters. Last year, the U.S. Army Corps of Engineers issued permits for three offshore mussel farms – two off the coast of Massachusetts and one off California.

The new rule authorizes the National Marine Fisheries Service (NMFS) to issue permits to grow fish species native to the Gulf of Mexico, including red drum, cobia and almaco jack. Permits may be issued for an initial 10-year period. The initial permit application fee is $10,000, and an additional $1,000 fee will be assessed annually. Permits may be renewed in 5-year increments. Additional permits are required from the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers pursuant to other federal laws, such as the Clean Water Act and the Rivers and Harbors Act. NOAA believes the new regulations will "maximize benefits to the Nation by establishing a regional permitting process to manage the development of an environmentally and economically sustainable aquaculture industry in federal waters of the Gulf of Mexico."[2] Others are not so sure.

Previous Litigation

The Gulf Council released the Aquaculture FMP in 2009. On June 4, 2009, NMFS published a notice of availability for the Aquaculture FMP and requested public comment. The Aquaculture FMP entered into effect by operation of law on September 3, 2009, when no action was taken by NMFS within 30 days of the close of the comment period. Three advocacy groups, Gulf Restoration Network, Food and Water Watch, and the Ocean Conservancy, subsequently filed lawsuits alleging violations of the Magnuson-Stevens Fishery Management and Conservation Act (MSA), the National Environmental Policy Act (NEPA), and the Administrative Procedure Act (APA).

In August 2010, the U.S. District Court for the District of Columbia dismissed the groups' lawsuit for lack of standing, basically finding the plaintiffs filed their lawsuit too soon since the FMP alone has no regulatory effect.[3] At the time, NMFS had not issued implementing regulations and therefore could not permit aquaculture operations in the Gulf of Mexico. The plaintiffs' alleged injuries, therefore, were not actual or imminent nor were their claims ripe for judicial review.[4]

The Response

Shortly after NOAA published the new regulations implementing the Aquaculture FMP, the Center for Food Safety again filed suit.[5] The lawsuit, representing a wide range of plaintiffs, from commercial fishermen to environmentalists, alleges that the new plan results in a violation of the MSA, NEPA, APA, as well as the Endangered Species Act. Now that the regulations are in effect, the court will likely find that the claim is ripe for review. Whether the court will uphold the regulations, allowing aquaculture production in the Gulf to proceed, remains to be seen.

Endnotes

1 Director, National Sea Grant Law Center.

2 NOAA Fisheries Southeast Regional Office, http://sero.nmfs.noaa.gov/sustainable_fisheries/gulf_fisheries/aquaculture/.

3 Gulf Restoration Network v. National Marine Fisheries Service, 730 F. Supp.2d 157, 166 (2010).

4 *Id.* at 167-172.

5 *Fishing and Public Interest Groups File Challenge to Feds' Unprecedented Decision to Establish Aquaculture in Offshore U.S. Waters,* (Feb. 16, 2016), http://www.foodandwaterwatch.org/news/fishing-and-public-interest-groups-file-challenge-feds%E2%80%99-unprecedented-decision-establish.

U.S. Supreme Court: Are CWA Jurisdictional Determinations Immediately Appealable?

John Juricich[1]

The U.S. Supreme Court courtesy of William Warby.

The U.S. Army Corps of Engineers regularly receives petitions for a Jurisdictional Determination (JD). That is, a petition for the Corps to make a determination of whether a certain property contains "waters of the United States" subjecting it to regulation under the Clean Water Act (CWA). Naturally, if a party receives a JD subjecting it to the CWA (CWA) and does not agree, the first instinct is to get a second opinion on the matter before expending time and money completing the permitting process. In this instance, the second opinion would take the form of judicial review. The issue, however, lies with the courts' jurisdictional scope: a court may only review a JD if it is "final agency action" subject to immediate review under the Administrative Procedure Act (APA).[2] It is unclear whether a JD is a "final agency action" subject to immediate judicial review. This issue has spawned a circuit split that the United States Supreme Court will hopefully suture later this year.[3]

Jurisdictional Determinations: Final Agency Action?

The CWA prohibits, among other things, the "discharge of any pollutant" into "navigable waters" unless authorized by a permit.[4] The CWA defines navigable waters as "waters of the United States."[5] Under Section 404 of the CWA, the Corps has authority to issue permits for the discharge of dredged or fill materials into navigable waters. The regulations governing the permitting process authorize the Corps to consult with potential permit applicants prior to receiving, processing, and issuing or denying individual permits.

The regulations also authorize the Corps to issue jurisdictional determinations, or "formal determinations concerning the applicability of the Clean Water Act . . . to activities or tracts of land and the applicability of general permits or statutory exemptions to proposed activities."[6] There lies the crux of the issue: if a regulated party requests and receives one of these JDs, can the party appeal the determination to a court before the party commences and finishes the permitting process? The answer to this question, simply put, is yes—if JDs are "final agency action."

Under the APA, a court only has jurisdiction over a "final agency action." According to the Supreme Court's finality test set out in *Bennett v. Spear*, two conditions must be satisfied for agency action to be final: "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow."[7]

Most recently, and directly pertinent to the discussion at hand, the Supreme Court in *Sackett v. EPA*, applied these finality factors to hold that a CWA compliance order was final agency action subject to immediate judicial review.[8] The Sacketts had filled a portion of their undeveloped property with dirt and rocks in preparation for building a house. The EPA then issued a compliance order containing findings that the property contained wetlands under the CWA and that the Sacketts had discharged fill material into the wetlands. The order directed the Sacketts to immediately undertake restoration of the property per an EPA plan and to provide EPA access to the site and all documentation relating to the site.

The Sacketts sued, and the Ninth Circuit affirmed the district court's dismissal for lack of subject-matter jurisdiction, holding that the CWA precludes pre-enforcement review of compliance orders. The Supreme Court reversed, holding that an EPA compliance order is a final agency action immediately reviewable under the APA because it satisfies both prongs of the *Bennett* finality test. Although the Court was analyzing a CWA compliance order, the Court's analysis is directly applicable to the question of whether CWA jurisdictional determinations are "final agency action."

The Circuit Split

Three Circuits have addressed the issue whether JDs are "final agency action"—like the compliance order in *Sackett*—subject to immediate judicial review. The Fifth and Ninth Circuits have ruled that CWA jurisdictional determinations do not satisfy *Bennett*'s second prong, and are therefore not "final agency action" subject to immediate judicial review.[9] The Eighth Circuit, however, noted the Fifth and Ninth Circuits' rationale and holdings, and ruled the exact opposite, cementing a circuit split on this issue. In *Hawkes Co. v. Corps of Engineers*, the Eighth Circuit held that the Fifth and Ninth Circuits misapplied the Supreme Court's holding in *Sackett* with regard to the issue of whether JDs constituted "final agency action."

In *Hawkes*, a peat mining company and related property owners brought a complaint seeking judicial review of the Corps' JD finding that property from which the company sought to mine peat constituted "waters of the United States." The U.S. District Court for the District of Minnesota granted the Corps' motion to dismiss the company's complaint, holding that the JD did not constitute "final agency action" subject to immediate judicial review. The Eighth Circuit reversed: "Absent immediate judicial review, the impracticality of otherwise obtaining review, combined with 'the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case . . . leaves most property owners with little practical alternative but to dance to the EPA's [or to the Corps'] tune.' In a nation that values due process, not to mention private property, such treatment is unthinkable."[10]

Implications of a Supreme Court Ruling

The Supreme Court granted certiorari in *Hawkes* in December 2015. If the Court were to agree with the Fifth and Ninth Circuit on this issue, regulated parties would be required to complete the permitting process before a court could address the threshold issue of whether the Corps made the proper determination that the party needed a permit in the first place. This would certainly be a blow for regulated parties, especially considering the fact that "the average applicant for an individual Corps permit 'spends 788 days and $271,596 in completing the process.'"[11] This time and money would be lost if a court eventually determined that the regulated party never needed a permit in the first place.[12]

Close-up photo of peat mining courtesy of Jolene Bragg.

The Supreme Court heard oral arguments for this case on March 30, 2016. With Justice Antonin Scalia's passing, however, the outcome of this case is uncertain at best. It takes five votes to accomplish most things at the Supreme Court, but left with only eight justices, there is a strong possibility of a stalemate at 4-to-4. If the result is 4-to-4, the Court can automatically affirm the decision under review without giving reasons and without setting a Supreme Court precedent, or it can set the case down for re-argument in the term starting in October in the hope that it will be decided by a full court. Curiously, Justice Alito, in his concurring opinion in *Sackett*, provided a guiding light to where he stands on the issue of whether JDs are final agency action: "The Court's decision provides a modest measure of relief. At least, property owners like petitioners *will have the right* to challenge the EPA's jurisdictional determination under the Administrative Procedure Act."[13] In any event, this is an interesting procedural quagmire in need of resolution—for both the agency and regulated parties.

Endnotes

[1] 2016 J.D. Candidate, University of Mississippi School of Law.

[2] *See* 5 U.S.C. § 704. The APA provides for judicial review of a "final agency action for which there is no other adequate remedy in a court." *Id.*

[3] *See* Hawkes Co. v. United States Army Corps of Engineers, 782 F.3d 994 (8th Cir. 2015), cert. granted, 136 S. Ct. 615 (2015) (holding CWA jurisdictional determination was final agency action immediately reviewable). *Cf* Belle Co. v. United States Army Corps of Engineers, 761 F.3d 383 (5th Cir. 2014) (holding CWA jurisdictional determination was not final agency action immediately reviewable); Fairbanks North Star Borough v. United States Army Corps of Engineers, 543 F.3d 586 (9th Cir. 2008) (same).

[4] 33 U.S.C. §§ 1311(a), 1344.

[5] 33 U.S.C. § 1362(7).

[6] 33 C.F.R. §§ 320.1(a)(6); 325.9.

[7] Bennett v. Spear, 520 U.S. 154, 177-78 (1997).

[8] Sackett v. EPA, 132 S. Ct. 1367 (2012).

[9] *See supra* note 3.

[10] *Hawkes*, 782 F.3d at 1002 (quoting *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring)).

[11] *Id.* at 1001 (quoting Rapanos v. U.S., 547 U.S. 715, 721 (2006)).

[12] *See Id.* ("Moreover, even if appellants eventually complete the permit process, seek judicial review of the permit denial, and prevail, they can never recover the time and money lost in seeking a permit they were not legally obligated to obtain.").

[13] *Sackett*, 132 S. Ct at 1374 (Alito, J., concurring) (emphasis added).

Microbead-Free Waters Act of 2015

Leigh Horn[1]

Close-up photo of microbeads courtesy of the Minnesota Pollution Control Agency.

On December 28, 2015, President Obama signed H.R. 1321, enacting the Microbead-Free Waters Act of 2015. The bill, introduced by New Jersey Democrat Representative Frank Pallone and Michigan Republican Representative Fred Upton, demonstrates a rare bipartisan agreement in our present Congress regarding a serious threat to freshwater and marine environments – plastic pollution.

Plastics do not biodegrade. Rather than dissolving naturally, as something like paper might, plastics break down into fragments, or particles, after prolonged exposure to UV radiation and other forces such as ocean waves or actions of microbes. These fragments of plastic are termed "microplastics." Due to their size and extreme proliferation, these microscopic pieces of plastic become platforms for nutrients and unavoidable food to small marine organisms. If species, such as plankton, consume the microplastics, a direct pathway is formed for the toxic particles to spread into every level of the food web. "Contaminants leached from plastics tend to bioaccumulate in those organisms that absorb them . . . and can have serious and far-reaching effects, even on nonmarine species such as polar bears and humans."[2]

Unlike microplastics, which are the unintentional byproducts of plastic trash, microbeads are manufactured. Microbeads, also known as "Ugelstad spheres" for the Norwegian scientist who invented them in the late 1970s, are spherical plastic particles, millimeters in size.[3] Within the past few years, microbeads have become a popular replacement for more natural and expensive exfoliants, such as salt, in a wide range of personal care products like toothpaste, face soap, and body wash.[4] These microbeads, which do not dissolve in water, are released into the environment as users take showers, wash faces, and brush teeth. Huge quantities of microbeads from cosmetic products slip through our water treatment systems. One researcher estimates that 11 billion plastic particles are released into the nation's waterways each day.[5]

As a result of the growing awareness of these alarming numbers, states recently began to prohibit the manufacture and distribution of cosmetics and soaps with microbeads. Illinois was the first state to enact a ban in 2013, followed by Indiana and Minnesota. California enacted legislation in October, and more than half of the remaining states are considering taking similar action.[6] Although state action was a positive development to address this emerging environmental threat, the state laws lacked uniformity, particularly with respect to deadlines for implementation. The resulting confusion pushed the industry to support the passage of federal legislation.

The federal Microbead-Free Waters Act prohibits the manufacture and sale of rinse-off cosmetics containing plastic microbeads. The Act defines microbeads as solid plastic particles less than five millimeters in size used to exfoliate or cleanse the body. Manufacture of these products must cease by July 2017 and sales must stop by July 2018. Nonprescription drug products containing microbeads are given more time to change their ways. Manufacturer of such products must end by July 2018 and sales by July 2019.

The Act expressly preempts state law. It prohibits states from enacting or applying pre-existing restrictions on the manufacture or sale of rinse-off cosmetics with microbeads for delivery or introduction into interstate commerce unless those restrictions are identical to federal law. By preempting state law, Congress eliminated the confusion generated by the conflicting state law deadlines.

While the enactment of the Microbead-Free Waters Act is an important addition to our nation's environmental protection laws, the Act's scope is quite narrow as it only bans microbeads in rinse-off cosmetics. It does not attempt to address the larger, more challenging problem of microplastic pollution. That work is left for other policy-makers on another day.

Photo of microbeads in a bottled cosmetic product courtesy of the Minnesota Pollution Control Agency.

Endnotes

1 2016 J.D. Candidate, University of Mississippi School of Law.

2 J. Hammer et al., *Plastics in the marine environment: the dark side of a modern gift*, 220 Rev. Environ. Contam. Toxicol. (2012) http://ncbi.nlm.nih.gov/pubmed/22610295.

3 *Evil Orbs*, The Economist, (July 31, 2015), http://www.economist.com/news/americas/21660287-abrasives-toothpaste-and-face-scrubs-are-poisoning-fish-firms-and-governments-are-starting-ban.

4 Danny Lewis, *Five Things to Know About Congress' Vote to Ban Microbeads: Included as exfoliators in many common soaps and cosmetics, microbeads now pollute waterways worldwide*, Smithsonian.com (Dec. 10, 2015), http://www.smithsonianmag.com/smart-news/five-things-know-about-congress-vote-ban-microbeads-180957501/?no-ist.

5 John Schwartz, *Ban on Microbeads Proves Easy to Pass Through Pipeline*, N.Y. TIMES (Dec. 22, 2015), http://www.nytimes.com/2015/12/23/science/ban-on-microbeads-proves-easy-to-pass-through-pipeline.html.

6 *Id.*

Coast Guard Regulations Not Applicable to Aquaculture Operation

Terra Bowling

Companies using cutting-edge aquaculture technology, such as giant offshore floating cages, often need to hire employees with specialized skills to manage operations. Sometimes these operations go awry, bringing to light unique liability issues. This was the case several years ago when an employee for an offshore aquaculture company was injured while performing a diving operation. The employee filed suit, and recently, the U.S. District Court for the District of Hawaii ruled on whether the diver could recover damages.[1]

Background

Blue Ocean raises Hawaiian Kampachi fish in giant submersed net structures approximately one mile off the coast of Kona, Hawaii. Another local company, Keahole Fish, provides support services to Blue Ocean's aquaculture operations. As part of those operations, Keahole Fish hires divers to work aboard Blue Ocean's vessels.

On November 15, 2011, Keahole Fish's lead diver, Richard Mount, took part in a diving operation from Blue Ocean's vessel, the *Kona Kampachi I*. While Mount was underwater, a scuba regulator hose burst near his left ear, causing an injury.

Nearly one year later, in September 2012, Mount was again injured while on a diving operation for the company. This time, Mount claimed that he and a group of other divers were pushing a seep wall net used by the divers to confine fish to prepare them to be harvested. Mount suffered an inguinal hernia. He reported the incident on January 7, 2013 and underwent surgery in January 2013 and again in January 2015 for the condition.

Mounds filed suit against Blue Ocean and Keahole Fish. He also filed suit against two of Blue Ocean's vessels, as admiralty law allows suits to be brought "in rem" or against the object itself. Among other claims, Mounds alleged *negligence per se* and *unseaworthiness per se* with respect to U.S. Coast Guard Diving Operations regulations. Under maritime law, employers can be held liable for the violation of a regulation. In response to these claims, defendants filed a motion for summary judgment.

Coast Guard Regulations

The defendants alleged that the diving regulations were not applicable to Mount's case. The Coast Guard's diving regulations apply to any "commercial diving operations taking place" from "vessels required to have a certificate of inspection issued by the Coast Guard."[2] In its motion for summary judgment, the defendants argued that the vessels used in the aquaculture operations were "uninspected" fishing vessels. That is, due to the smaller size and weight of the vessels, they were exempt from inspection under 46 U.S.C. § 3302.

In its motion for summary judgment, the defendants argued that the vessels used in the aquaculture operations were "uninspected" fishing vessels.

Mount countered that the vessels were also classified as towing vessels subject to Coast Guard inspection. A towing vessel is defined as "a commercial vessel engaged in or intending to engage in the service of pulling, pushing, or hauling along side."[3] Mount cited incidents in which the vessels were used to tow component parts of offshore fish cages between

Coastal view of Kona, HI courtesy of Mitch Allen.

the offshore farm and land; tow offshore cages into position; and tow transfer pens used to move fish between offshore cages. In addition, there were two incidents in which the vessels were used in a towing capacity in the aid of others.

Despite these arguments, the court found that the fishing vessels did not meet the requirements of a towing vessel. The court noted that the vessels were former U.S. Navy or Army Landing Craft Mechanized 8 vessels refitted for fish farm tending, "equipped with fish harvesting pumps, cranes, bins to hold fish, scuba gear, fish feeding pumps, fish peroxide treatment pumps, and air compressor and associated hoses to lift the fish pens to the surface."[4] In addition, the Coast Guard documentation issued to the Kampachi Vessels specify that their operational endorsements are for fishery and registry only.

Ultimately, the court concluded that U.S. Coast Guard Commercial Diving Operations regulations did not apply to the vessels owned by the aquaculture company. The court noted that "[t]he vessels are outfitted for fishing, rather than towing operations.[5] The court therefore dismissed the *negligence per se* and *unseaworthiness per se* claims and will hear Mount's remaining claims at a future time.

Endnotes

1 Mount v. Keahole Point Fish, LLC, 2015 WL 7451162 (D. Haw. Nov. 23, 2015).

2 46 C.F.R. § 197.202.

3 46 U.S.C. § 2101(40).

4 *Mount*, 2015 WL 7451162, at *4.

5 *Id.*

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