When it Rains it Pours: Municipal and Govt. Liability Associated with Stormwater Events, Flooding, and Other Recent Water Developments

Presented to the Colorado Special District Association

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Overview

- Wet weather event enforcement trends;
- Stormwater regulation; and
- Government-induced temporary flooding and regulatory takings.
EPA National Enforcement Initiatives 2011-2013

- Reducing Air Pollution from the Largest Sources
- Cutting Hazardous Air Pollutants
- Keeping Raw Sewage and Contaminated Stormwater Out of Our Nation’s Waters
- Preventing Animal Waste from Contaminating Surface and Ground Water
- Assuring Energy Extraction Activities Comply with Environmental Laws
- Reducing Pollution from Mineral Processing Operations
Civil enforcement actions at facilities and criminal enforcement actions concluded in FY 2012.
Civil Enforcement Trends

- Municipal wastewater and stormwater discharges from combined sewer systems and sanitary sewer systems have been and remain one of EPA’s enforcement priorities.
- EPA and the states also are looking at NPDES dischargers who also operate public water systems and often do not like what they find.
CSO Enforcement

- According to EPA, approximately 772 communities have combined sewer systems, but only 201 have wet weather overflows, primarily east of the Mississippi and the Pacific NW.
- Not yet fully addressed are providers in the NY, Chicago, and Cleveland metro areas.
- EPA lists 14 municipal CSO consent decrees since 7/19/11 on its wet weather enforcement website ([http://www.epa.gov/compliance/data/planning/initiatives/2011sewagestormwater.html](http://www.epa.gov/compliance/data/planning/initiatives/2011sewagestormwater.html)), not including St. Louis (4/12) and Scranton PA (12/12).
CSO Enforcement -- Sample

- St. Louis MSD Consent Decree entered 4/27/2012
  - 4th largest sewer system in the US (525 sq. miles & 9,600 pipe miles) with components dating to the 1860’s.
  - Requires $4.7B in infrastructure improvements over 23 years. Initial 4 years’ costs funded by $945M bond issue approved June, 2012. Residential sewer bills will increase 52% by 2015 instead of 123% immediately (to $65/month) without bonds. MSD also pays $1.2M in penalties.

- Seattle and King County, WA Consent Decree 4/2013
  - King County 900 million gallons of raw sewage on yearly basis, and Seattle 200 million gallons
  - $1.4B to upgrade the systems
SSO Enforcement

- Because sanitary sewer and WWTP systems are generally regulated by the states, enforcement is also often state-driven and can vary widely depending on resources, politics and publicity.
- EPA estimates that there are at least 23,000 - 75,000 SSOs per year.
- CDPHE – City of Durango, (2/13)
  - $80,866 Civil Penalty
  - SEP - $122,550 – Pump stations
- CDPHE – City of Littleton/Englewood (8/12)
  - $105,150 Civil Penalty
  - SEP - $105,150 – Bike trail improvements
  - Compliance Order aspects (evaluation of system, implementation plans, etc.)
SSO Enforcement

- For municipal systems, enforcement issues frequently arise in the context of permit compliance and financial ability to pay constraints.
  - On January 18, 2013 EPA issued the “Assessing Financial Capability for Municipal Clean Water Act Requirements” memo summarizing recent discussions with municipalities on affordability considerations for required sewer and wastewater system improvements.
  - That memo followed from EPA’s June 5, 2012 “Integrated Municipal Stormwater and Wastewater Planning Approach Framework,” which allows CSO, SSO, municipal separate storm sewer system (MS4), and wastewater treatment plant (WWTP) permits to be harmonized.
Cumulative Progress Toward Addressing Large Combined Sewer Systems with Untreated Sewage Overflows

Fiscal Year

- **Work Done from 1998-2010**: 140 systems
- **FY2011**: 160 systems
- **FY2012**: 172 systems
- **FY2013**: 135 systems
- **FY2014** and **FY2015**: No data
- **FY2016 - Goal End Date**: Universe = 201 systems, Goal = address all 201 systems by FY2016

*Large municipal combined sewer systems are those serving a population > 50,000 people.*

*Addressed means the system is subject to an enforceable order or has a schedule requiring a long term control plan acceptable to EPA.*

*Initiated enforcement actions are defined as formal EPA or state actions in progress, or referrals under development or finalized (signed and dated) in each fiscal year.*
Cumulative Progress Toward Addressing Sanitary Sewer Systems with Untreated Sewage Overflows

Universe = 1090 Systems

Goal = address all 1090 systems by FY 2016

Fiscal Year

Work Done from 1998-2010  FY2011  FY2012  FY2013  FY2014  FY2015  FY2016 - Goal End Date

Systems

0  200  400  600  800  1000  1200

Systems Addressed or with Initiated Enforcement Actions
Systems Addressed

873  776

*This initiative focuses on large municipalities whose sanitary sewer systems produce > 10 million gallons per day (mgd) of wastewater.

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On February 7, EPA released a new *State Enforcement Performance Information and Comparative Map* tool as part of ECHO called the “State Dashboard.”

http://www.epa-echo.gov/echo/stateperformance/comparative_maps.htm

This interactive map can be set to show air, water or hazardous waste compliance and enforcement at federal and/or state-specific levels.
Number of ANCR Non-Major Facilities Reviewed for Violations (EPA and State) in 2010

Map Legend:
- 0
- 1 - 314
- 315 - 774
- 775 - 2,016
- 2,017 - 3,955

Other States & Territories:
- Alaska
- Hawaii
- Puerto Rico
- U.S. Virgin Islands
- American Samoa
- Guam
- Northern Mariana Islands

View full Continental U.S. extent
Drinking Water / Safe Drinking Water Act

- Approximately 40 Enforcement Actions by CDPHE in 2012 (already 16 in 2013)
- Safe Drinking Water Act - numerous recent criminal convictions, based on false reporting and false statements
  - Chicago (4/13) Water department clerk and supervisor – criminal conviction and criminal plea
  - Wyoming (5/12) RV Park - submission of false drinking water samples
  - Indiana (10/12) – Lab director, falsification of records
  - Oregon (7/12) – Water treatment plant supervisor, false test results for E. Coli on two reports
Criminal Prosecution

- The line between civil enforcement and criminal prosecution is blurry and getting blurrier.
  - CWA Section 309 (c)(1) (33 U.S.C. §1319 (c)(1)) makes it a misdemeanor to “negligently violate” a laundry list of statutory sections but does not use “gross” or “willful” to color that negligence as is true elsewhere in the Act.
In *United States v. Maury*, No. 09-2305, 2012 WL 4343775 (3d Cir. Sept. 17, 2012), the court held that *simple negligence* would support a misdemeanor conviction under the CWA at a New Jersey pipe foundry. This plus other felony convictions sends 4 managers to jail, costs the company $8M in fines and puts it on 4 years’ probation.

Why criminal and not civil enforcement? Multiple, multi-media violations (CWA, CAA, OSHA); fatal and non-fatal worker injuries; late-night and weekend illegal discharges; and repeatedly falsifying records and lying to inspectors.

DON’T MISLEAD THE REGULATORS!
Criminal Prosecution

- Other recent criminal CWA cases:
  - Wastewater treatment operators and supervisors
    - Exceedances
    - False certification of Discharge Monitoring Reports
    - Bypasses
    - Illegal discharges of untreated sewage
  - Deepwater Horizon Gulf Oil Spill – guilty plea, $4B in fines and penalties but not just for CWA violations.
Stormwater Preview

- Finally, some recent civil stormwater construction cases
  - CDPHE – Rocky Mountain Materials and Asphalt (4/13) - $65,000
  - Toll Brothers (6/12) – 23 states, 40 sites, $741k penalty.
  - Ryland Group (10/11) – 14 states, 22 sites, $625k penalty.
  - Each settlement includes the same types of company-wide sediment and stormwater control requirements.
Additional Enforcement Resources

- EPA’s Transparency Initiatives Aimed to Expose Violators – The Best of Disinfectants or a Scarlet Letter?

- EPA Seeking Input on National Enforcement Initiatives FY2014-2016, and “Next Generation Compliance” Initiative

- Has EPA Stopped Using Its Voluntary Self-Disclosure Policy?
Stormwater Regulation

- Three categories of regulated stormwater discharges
  - Municipal
  - Industrial
  - Construction
- CWA Permit Required
  - Discharge
  - Point Source
  - Pollutant
  - Navigable Waters
Stormwater – A Discharge?

- **Los Angeles Co. Flood Cont. Dist. v. NRDC 12.4.12**

- **Facts:** L.A. operated MS4 storm sewer system
  - Monitoring station in Los Angeles River reflected permit violations, but numerous entities also discharged upstream of monitoring station

- **Supreme Court:** No “discharge” when water passes through a river’s channelized portion downstream to unchannelized sections of the same waterway.
A River Runs Through It
Mass Emissions Station
Stormwater – A Discharge?

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Stormwater – A Point Source?

- *Decker v. Northwest Env. Def. Center 12.3.12*
- **Facts:** EPA exempted runoff from logging roads, including ditches, culverts, and conduits specifically designed to carry stormwater under EPA’s Silviculture Rule 40 CFR 122.27
- **Hours before oral argument – EPA issues new final rule (Fed. Reg. 12.7.12, effective 1.7.13)**
  - Instead of point source exemption, EPA says the silvicultural activities are not “associated with industrial activity”
- **Supreme Court 3.20.13—EPA’s interpretation of regulation that logging is not related to industrial activity is reasonable and entitled to deference**
Stormwater “Flow” – A Pollutant?

- *Virginia DOT et al. v. EPA, E.D.Va.(1.3.13)*

- **Facts:** EPA established TMDL designed to control flow as a proxy for controlling sediment

- **Court:** EPA cannot regulate stormwater “flow” as a surrogate for sediment control
  - Although sediment is a pollutant, flow is not
  - “EPA’s authority does not extend to establishing TMDLs for nonpollutants as surrogates for pollutants.”
“Navigable Waters” and “Waters of the United States”

- Draft guidance in April 2011
- EPA and ACOE finalized guidance in Feb. 2012, pending interagency review at OMB
- Final expected in 2013 – may cover intermittent and ephemeral streams and wetlands not currently covered
Stormwater – Numeric Effluent Limitations at Construction Sites?


- **Facts:** In 2009, EPA issued first-time numeric “turbidity” limits in Construction General Permit to control sediment

- **Settlement – 12.21.2012**
  - EPA to withdraw numeric turbidity limit

- **EPA issued proposed rule on 4.1.13 and final rule to be issued by 2.28.14**
Stormwater – Construction Sites

- Post-Construction Stormwater Rule
  - newly developed; and
  - redeveloped sites.
- Expected Spring 2013
Additional Stormwater Resources

- “Stormwater Runs Through It” – Stormwater as the New Epicenter of Clean Water Act Regulatory Disputes

- EPA Cannot Regulate Stormwater Flow Rate as a “Surrogate” for Sediment Runoff, According to Federal Court

- Road Construction Contractor to Pay $735,000 Fine for Stormwater Discharges
The United States Supreme Court in Arkansas Game and Fish Commission v. United States, cited supra, held that it was possible for government-induced, temporary flooding to constitute a "taking" of property under the Fifth Amendment to the U.S. Constitution. The Court considered whether and under what circumstances a taking of property by government action on a temporary basis is compensable to the owner of the flooded property.

The Fifth Amendment provides that private property shall not be taken for public use without just compensation. The issue in the Arkansas Game and Fish Commission case was whether or not temporary flooding, authorized and caused by the U.S. Army Corps of Engineers, which destroyed 18 million board feet of timber on forest land owned by the Arkansas State Commission, constituted a compensable taking of private property.
The case arose from the management of Clearwater Dam by the United States Army Corps of Engineers. The Corps followed a water control plan under which it released water from the dam at various rates depending on the season. For several years the Corps deviated from this plan at the request of farmers, releasing water during a period that extended into the timber-growing season of the Dave Donaldson Black River Wildlife Management Area owned and managed by the Arkansas Game and Fish Commission, an Arkansas state agency.[1]

The suit alleged that federal flood control practices along the Black River had damaged valuable timber on state-owned lands. The Commission's lawsuit was supported by advocates for property rights, as well as by fish, forestry and wildlife groups,[2] including the National Association of Home Builders, the American Farm Bureau Federation, the American Forest Resource Council, and The Pacific Legal Foundation, among others. In opposition, the federal government cited the concern that an adverse ruling could expose it to massive liability for its nationwide flood control efforts.
At the lower court level, the Court of Federal Claims ruled in favor of the Commission and awarded it $5.7 million for the lost timber and the cost of reforesting.\[3\] The ruling was reversed on appeal by a divided panel of the Federal Circuit, on the basis that there could be no takings claim unless the flooding was "permanent or inevitably recurring."\[4\]

The only issue before the Court was whether government-induced temporary flooding was categorically exempt from the scope of the Fifth Amendment's takings clause. In a unanimous eight-justice opinion delivered by Justice Ruth Bader Ginsburg,\[5\]and after reviewing 140 years of takings clause flood cases, the Court ruled that there was no basis in its takings clause jurisprudence for such an exemption. In analyzing this issue, the Court held that “government-induced flooding temporary in duration” and measures taken in pursuance thereof, may constitute a taking for which compensation may be owed to a landowner.
Arkansas Game and Fish Commission (continued)

The Solicitor General’s office, arguing for the United States, had relied primarily on a 1924 case, where the Court had stated that to establish liability, an overflow must be the direct result of “an actual, permanent invasion of the land.”[6] While never going so far as to label the statement dicta,[7] the 2012 Court reasoned that even if the 1924 Court’s “passing statement” had established a general limitation, that limitation had been superseded by the temporary takings logic developed in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304.[8]

The Deputy Solicitor General also advanced the notion that the Corps requires a broad ambit of discretion in managing a river over time. Consequently it must be able to change to update circumstances without exposing the United States to massive liability. The United States also argued for the first time that landowners downstream of a federally managed dam knew the risks of seasonal flooding and so should never be entitled to compensation, so long as the flooding was not aimed at any particular landowner, but was merely collateral or incidental, an argument that appeared to perplex some of the justices.
Justice Ginsburg took care to explicitly express no opinion on this theory first advanced at oral argument, that the takings clause only applies to flooding upstream, and not downstream,[9] as well as on an amicus argument[10] based on water rights.[11] The Court left to the Federal Circuit on remand to decide if either of those issues was preserved, as well as a host of Government challenges to the Court of Federal Claims’ fact-findings.[12]

The Court emphasized that all takings cases “should be assessed with reference to the particular circumstances of each case, and not by resorting to blanket exclusionary rules.” The Court stated, "[w]e have recognized...that no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking. In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area." [13]
The conclusion and lessons to be drawn from the Court’s cautionary language is somewhat constrained. While a temporary flooding may constitute a taking in one instance, the analysis is very much fact specific. It is unclear whether any bright-line rules can be gleaned to guide further decisions. Yet given the Court’s holding that there is no categorical exclusion for takings claims arising from temporary flooding, local governments and government agencies will need to carefully weigh the risks and benefits of seasonal and temporary flooding, as well as the financial impacts resulting therefrom.

A little more than twenty years ago, some of you may recall that my partner Larry Berkowitz and I brought a series of 42 USC 1983 claims against four local governments, for creating conditions resulting in multiple flooding episodes over several years on our client’s commercial property. The location of 70th and Lowell Boulevard in Denver was serviced by a below street grade, corrugated metal culvert, which regularly silted in due to standing water in the Little Dry Creek drainage basin. The dividing line between Adams County to the east and the City of Westminster to the west was the centerline of Lowell Boulevard, which runs north and south.
We reasoned that the issuance of building permits over the years had replaced the formerly undeveloped, permeable ground with improvements and impermeable surfaces, requiring a coordinated storm drainage plan among the local governments. Additionally the culvert was poorly maintained and often silted in to more than half of its capacity.

As summertime thunderstorms crept over the Little Dry Creek Basin, the torrential downpour inundated the drainageway, backing up at the Lowell Boulevard culvert. Our Section 1983 legal theory was based on the local governments acting under “color of law,” and in concert of action for having issued the building permits without adequate storm drainage planning, and in the improper maintenance of the culvert. As the thunderstorms progressed from west to east, the stormwaters regularly flooded Lowell Boulevard, causing a series of flood backups over several years, damaging our client’s inventory, real property and causing lost profits and diminishing business value.
We argued the settled law at that time, that the “regularly recurring flooding” had placed the local governments on notice, and argued a taking under the Fifth and Fourteenth Amendments. After our case was able to withstand motions for summary judgment filed by the Defendant local governments, each of the Defendants settled. Professor Sheldon Nahmod of the University of Chicago School of Law, a regular co-host at Professor Charles Abernathy’s annual 1983 Civil Rights Symposium at Georgetown Law School, often cited our case as an example of the creative use of Section 1983 to achieve takings claim compensation for clients.

Upshot: The Court's decision in *Arkansas Game and Fish Commission v. United States* has been praised as an important victory for property rights,[14] as well as a blow to the Corps of Engineers in the management of dams, rivers, stream and other water courses and waterways.[15] Further factual development of the remanded case may also have an impact on the eventual outcome of this important Supreme Court ruling.
Endnotes

1. Arkansas Game and Fish Commission, 568 U.S. at ___ (slip op., at 2-4).
2. Baynes, Terry; Stempel, Jonathan (December 4, 2012), Supreme Court: government may be liable for flood damage, Reuters, retrieved December 4, 2012.
3. Summarized at 568 U.S. at ___ (slip op., at 4-6); original decision at Arkansas Game and Fish Comm'n v. United States, 87 Fed. Cl. 594 (2009).
4. Summarized at 568 U.S. at ___ (slip op., at 6); original decision at Arkansas Game and Fish Comm'n v. United States, 637 F. 3d 1366 (Fed. Cir. 2011).
6. Arkansas Game and Fish Comm'n, slip. op., at 10 (citing Sanguinetti v. United States, 264 U.S. 146, 150 (1924).
8. Id. at 10.
9. See Arkansas Game and Fish Commission v. United States, Tr. of Oral Arg. 30-39; Brief for United States 26-27.
11. Arkansas Game and Fish Comm'n, slip op., at 13.
12. Id. at 15.
13. 568 U.S. at ___ (slip op., at 6-7
Conclusion: Questions?
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