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Winter Conference

Environmental Bankers Association

January 15 – 18, 2017
Tampa Marriott Waterside Hotel
Tampa, Florida

www.envirobank.org

Legal Update: Recent Court Cases and Regulatory Actions

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Presenters

- Fredrick Dindoffer – Bodman PLC
  - Air Emissions & continued liability
- William Alpine – ATC Associates, Inc.
  - Recent cases on reliance
- Moderator: Beth Sexton – PM Environmental, Inc.
  - Hopefully with some fun quips and an accurate timer

Breaking News on Chevron deference

- Congress considering legislative Repeal of the *Chevron* statutory interpretation doctrine
- In 1984 the U.S. Supreme Court decided that if a statutory provision is ambiguous, the courts should defer to EPA's interpretation even if there are better alternative interpretations.
- Status update on Bill to repeal

Army Corps of Engineers v. Hawkes, U.S. Supreme Court, March 2016

- Held that a party is entitled to immediate pre-enforcement judicial review of an Army Corps Jurisdictional Determination (JD) [which is Corps' official position on whether a project requires a Clean Water Act permit]
- Prior to this, majority of Courts held that a JD was not a challengeable final agency action
- Key point: JD and compliance orders were determined to be "final agency actions"

Importance of Hawkes

Before *Hawkes*, a party facing a negative JD (e.g., plan to develop property with CWA issues) had to choose between two bad alternatives:

- Follow time-consuming, expensive process to seek CWA permit, even if JD was clearly erroneous (delay of project; delay financing; costs; possible project cancellation if no permit ultimately issued); or
- Proceed without a permit and face possible enforcement actions (face financing problems with lenders; possible civil/criminal penalties; remedial costs if lose)

Under *Hawkes*, a party can get quicker, pre-enforcement resolution of issue without the above risks.

Possible Extensions of Hawkes

- As decided, Hawkes applies to CWA, and may be limited to the facts and that statute
- But, other environmental statutes have similar provisions and may have similar results
  - E.g., CERCLA Administrative Orders might be challenged before performing demanded actions.
  - this might allow financing determinations, could avoid treble damages and other enforcement risks

Pakootasa v. Teck Cominco Metals, 9th Circuit Court of Appeals, July 2016

- Reversed trial court, and held that one who emits hazardous substances into air is not liable under CERCLA as one who "arranged for disposal" when those hazardous substances settle onto an unrelated contaminated site.
- Teck operates British Columbia Pb/Zn smelter
- Teck's water discharges had deposited Pb/Zn downstream in a Superfund Site, and it had to pay response costs for those

Teck continued

- The trial court then considered a further claim of CERCLA liability based on a disposal of the emissions when they were deposited on land
- Trial court found Teck liable as an "arranger", because the Pb/Zn were emitted and the wind then deposited them on land.
- The 9th Circuit reversed holding that the disposal required a placement by someone, not emissions that would depend on the wind for the deposit

Lessons of Teck

- Avoids possible never-ending CERCLA scenarios where emissions might travel long distances and settle on land
- Owner/Operator liability still could apply if the emissions dropped directly onto the site where generated
- Decision does not affect other avenues of statutory or common law liability, such as Nuisance, violation of State or federal air permits

Obama EPA End Run on Trump? *Texas v. EPA*, pending in 5th Circuit Court of Appeals

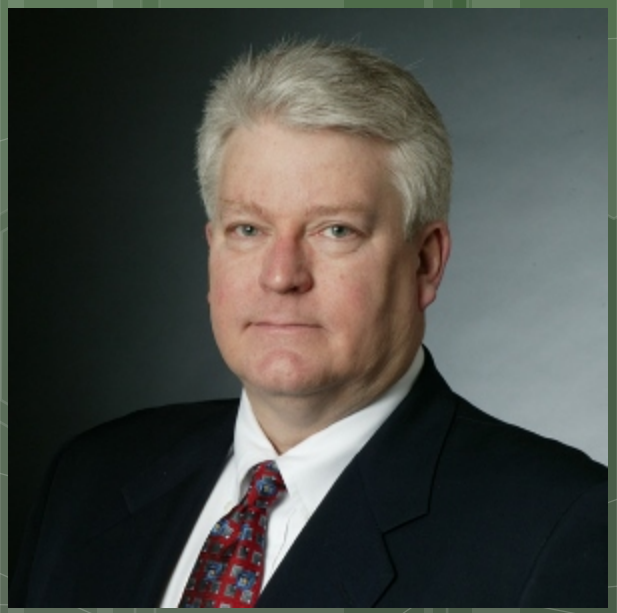
- EPA disapproved Texas state implementation plan (SIP) regarding Visibility and replaced it with a Final Federal Implementation Plan (FIP)
- The FIP would cost utilities about $2 billion extra
- Texas challenged EPA's actions
- EPA sensing problems with the case, asked court to remand the FIP to the agency to fix
- But, EPA asked that the Final FIP remain in place (Stayed) until regulatory fixes are made

Problems/Issues/Lessons

- Leaving FIP in place means that utilities must plan as though they will have to comply with it
  - Design costs
  - Planning/logistics issues
- Also, the reasoning that underpinned the Final Rule might not be changed
- This might be an end run to avoid anticipated Trump revisions to rules

Recent Environmental Cases

Environmental Bankers Association, Tampa, January 2017



Environmental Bankers Association

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Questions?

Recent Cases on Reliance

Environmental Bankers Association

Winter Conference 2017

Tampa, Florida

January 17, 2017

ENVIRONMENTAL • GEOTECHNICAL
BUILDING SCIENCES • MATERIALS TESTING

TC RICH, LLC v. Pacifica Chem., Inc.
United States District Court for the Central District of California
Decided: October 9, 2015
LEXIS 140091

- Professional Negligence claim against an environmental consultant with respect to a Phase I ESA that it had performed.
- ESA was prepared for two financing entities lending on a purchase transaction involving their client (the "Client").
- ESA contained specific disclaimer language limiting its use to the two financing entities only.
- Ten years later, the Client had an update performed by a different environmental consultant in connection with a refinance.
- That report discovered RECs which were estimated to cost between $300K and $1MM to resolve.
- The Client brought the instant action.
- The environmental consultant filed a Motion to Dismiss arguing that the Client was not entitled to use and rely upon the Report and that the statute of limitations had lapsed.

TC RICH, LLC v. Pacifica Chem., Inc.
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- The limiting language in the Report simply establishes what the Report, on its face, indicates as to the identity of its intended beneficiaries.
- It does not, however, preclude plaintiffs from alleging that they were intended beneficiaries of the Report in spite of language in the Report suggesting otherwise.
- It is enough "that the maker of the representation knows that his recipient"—here, plaintiffs' lender and mortgage broker—"intends to transmit the information to a similar person, persons or group" (e.g., plaintiffs).
- With regards to the SOLs claim, the court followed the Discovery Rule in that the action is not time-barred because the various statutes of limitations did not begin to run until plaintiff discovered or had reason to discover the alleged injury in the first instance.
- Plaintiffs relied upon the Phase I Environmental Report of "a registered environmental assessor" and have adequately alleged they "had no reason to know that their reliance on [such] professional work . . . had been misplaced."

Southern Wine & Spirits of Am., Inc. v. Impact Envtl. Eng'g, PLLC, 104 A.D.3d 613
Supreme Court of New York
Decided: March 28, 2013

- The parties' agreements contained a clause in which Impact disclaimed any intention to benefit third parties.
- There is no evidence of any provisions in the parties' agreements granting enforceable rights to any entity other than Impact.
- Absent privity of contract, or the functional equivalent of privity of contract, these entities have no right to recover from defendants either for breach of contract or professional negligence.
- There is no indication in the record that Southern New York and Syosset Property were intended beneficiaries of Southern Wine's agreements with Impact.
- Indeed, there is no evidence that Impact was aware that the substance of the ESA Reports it furnished to Southern Wine would be transmitted to and relied upon by any other entity, including Southern New York and Syosset Property.
- Nor is there any evidence of direct contact or any communication between Impact and the two entities that would constitute conduct linking Impact to either of the entities to support their reliance on the ESA Reports.

Crown Bank v. 6116 Capital Dev., LLC
Superior Court of New Jersey, Appellate Division
Decided: February 19, 2015

- Defendants appeal from the judgment entered against them on a promissory note after 6116 LLC defaulted on a construction loan.
- Defendants contend the court misapplied the law and failed to consider all materials facts when it dismissed their counterclaim, which was based on an allegedly negligent environmental investigation performed by a company on behalf of the predecessor bank.
- The predecessor bank had been shut down by the FDIC.
- The crux of defendants' argument is that the environmental consultant negligently performed its Phase I investigation; and thereafter, the predecessor bank "expressly and impliedly represented by way of a pre-closing letter to the defendants that without qualification that the property was environmentally clean."
- The pre-closing letter in essence spelled out two RECs which needed to be addressed prior to the issuance of the loan.
- Defendants' argument is unsupported by legal authority and premised on a misconstruction of the letter.

Crown Bank v. 6116 Capital Dev., LLC
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- First, the environmental consultant was an independent contractor, not an agent of the predecessor bank.
- The predecessor bank did not control the manner in which the environmental consultant performed the Phase I environmental assessment, nor did it have the ability to do so.
- The statements in the letter do no more than identify the recommendations in the environmental consultant's report and request remedial action.

Key Takeaways

- Consultants
  - Depending on jurisdiction, disclaimer language regarding reliance may or may not protect you from a claim by a third party.
  - Statutes of Limitation - Typically align with Date of Discovery Rule.
- Lenders
  - Careful attention to language in pre-closing letters particularly where lender arranges for commission of the report?

Questions?

Thank you for your time today!