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## New Jersey v. Gloucester Env'tl. Mgmt. Servs., Inc., 264 F. Supp. 2d 165 (D.N.J. 2003)

J. Reid Bumgarner

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NWF argued that (1) NOAA failed to consult under section 7 for several of the federal mitigation actions; and (2) the states, regions, treaty tribes, and private parties were not certain to act in accordance with 2000BiOp as NOAA asserted. NWF further contended that the 2000BiOp did not rationally connect NOAA's "no-jeopardy" conclusion with available information. NOAA argued that NWF defined the action area too broadly, that consultation was only necessary in regards to the immediate action area which the NOAA narrowly defined, and the proposed federal action occurred outside the action area and did not require section 7 consultation. NOAA further contended that any non-federal actions do not need to be reasonably certain to occur.

The court stated that 50 C.F.R. Section 402.02 required NOAA to assess the biological impact of FCRPS's operations on "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." Based on this regulation, the court held that even though it must give a great deal of deference to NOAA, more than just the immediate action area would be directly or indirectly affected by FCRPS's proposed actions; therefore NOAA's defined action area was arbitrary and capricious. The court also stated that NOAA specifically relied on off-site federal actions that had not undergone section 7 consultation and non-federal mitigation actions that are not reasonably certain to occur, and that the ESA required NOAA to rely solely on mitigation actions that have already undergone section 7 consultation. Thus, the court granted NWF's motion for summary judgment on the claim that the no-jeopardy conclusion in the 2000BiOp was arbitrary and capricious, and remanded the case in order to give NOAA the opportunity to reevaluate its plan and consider only mitigating actions that are reasonably certain to occur, as well as actions that have already undergone section 7 consultation.

*Brett Johnson*

**New Jersey v. Gloucester Env'tl. Mgmt. Servs., Inc., 264 F. Supp. 2d 165 (D.N.J. 2003)** (enforcing consent decree and directing finalization of a permit for pretreated landfill effluent to be discharged through a groundwater extraction system).

At issue in this case was the enforcement of a consent decree for closure and remediation of a landfill located in Gloucester Township, New Jersey. The GEMS Phase II Trust ("Trust"), established to oversee remediation of the Gloucester Environmental Management Services, Inc. ("GEMS") landfill, moved to enforce the consent decree concerning remediation of the landfill in the United States District Court for the District of New Jersey. Pursuant to the consent decree, the Trust constructed a groundwater extraction system and sought to discharge pretreated effluent through the sewage collection system for final treatment at Camden County Municipal Utilities Authority's

("CCMUA") offsite sewage treatment facility. Gloucester Township Municipal Utilities Authority ("GTMUA"), as administrator of the sewage collection system, opposed the motion and contended the Trust breached the Sewer Service Agreement ("SSA") set forth in the consent decree. Also opposing the motion, CCMUA asserted it could not receive pretreated effluent from the GEMS landfill without a legal mandate.

The consent decree, entered on June 27, 1997, expressly provided a method of remediation for the GEMS landfill. This method included construction and operation of a Groundwater Extraction ("GWE") and On-Site Groundwater Pre-Treatment system ("OSPT"). The SSA provided for treated effluent from the landfill to flow through GTMUA's sewage system for a \$400,000 connection fee in addition to annual service fees. Although the Trust paid the connection fee, CCMUA discovered the effluent contained low levels of radioactive contaminants prior to its discharge into the sewage collection system. Accordingly, CCMUA issued a cease and desist order to prevent further contamination. CCMUA also adopted more rigid standards for acceptable discharge from the GEMS landfill. As a result, the Trust added a solids removal process to its OSPT system to eliminate suspended solids from the effluent. This measure reduced radioactive contaminants in the effluent below levels required by the CCMUA.

Opposing the Trust's motion, GTMUA specifically argued the Trust failed to provide GTMUA with drawings and specifications of the GWE and OSPT within a 12-month period as required by the SSA. Indeed, the Trust failed to submit the specifications and drawings until March 1998. However, the Trust claimed GTMUA failed to seek timely rescission since the breach, if any, occurred in 1998. Moreover, the Trust stressed any breach was immaterial since GTMUA accepted \$400,000 as a connection fee after the alleged breach.

The court explained that under New Jersey law, if a party fails to perform essential obligations under a contract, the other party may terminate. However, a breach is material if it tends to defeat the purpose of the contract. The court then recognized that GTMUA received a \$400,000 connection fee and expected future annual fees. Further, the Trust received no benefit since it was unable to discharge any of its wastewater as provided in the consent decree. Nonetheless, the court found that the Trust's failure to submit timely drawings and specifications did not defeat the purpose of the SSA, and ultimately concluded GTMUA had elected to treat the SSA as valid and binding.

In sum, the court rejected GTMUA's arguments that the Trust materially breached the SSA, and granted the Trust's motion to enforce both the consent decree and the SSA. Finally, the court directed NJDEP and CCMUA to draft a permit for CCMUA to receive pretreated effluent from the GEMS landfill.

*J. Reid Bumgarner*