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## M/G Transp. Servs., Inc. v. Water Quality Ins. Syndicate, 234 F.3d 974 (6th Cir. 2000)

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was not. The court, giving the Corps' decision substantial deference, ruled the cumulative impact analysis was not arbitrary and capricious.

The court of appeals next considered whether the Corps' mitigation analysis was sufficient. The Conservation Groups argued the Corps' mitigation analysis was insufficient. Specifically, the Conservation Groups disputed the Corps' claim that the project's cumulative effect would be nonexistent and all impacts would be fully compensated through mitigation. The Conservation Groups argued the potential impacts, should mitigation fail, were much greater than the Corps conceded. To support their position, the Conservation Groups pointed to mitigation efforts' frequent failure and the Corps' current mitigation backlog. The court agreed that the Conservation Groups made valid points in questioning the probability of mitigation's success. However, the court determined the Corps' evaluation was thorough enough to survive NEPA's process-oriented requirements and survive the arbitrary and capricious review standard.

Finally, the appellate court considered whether the Corps adequately evaluated all alternatives. The Conservation Groups argued the Corps did not. In particular, the Conservation Groups claimed the Corps dismissed the Landside Borrow alternative after only a preliminary screening. Further, the Conservation Groups asserted the Corps' selection was misleading because the stated priority of the Avoid and Minimize alternative was to use landside material. However, the Corps abandoned that option and chose, instead, to use the alternative riverside land for material. The court acknowledged that under NEPA the Corps must rigorously explore and objectively evaluate all reasonable alternatives. The Corps stated it rejected the Landside Borrow alternative because the option conflicted with the Project's purpose—farmland protection. The conflict existed because costs to acquire landside land were excessive, and Project sponsors and residents objected. The court affirmed the district court's summary judgment and held the Corps' analysis was rigorous and thorough, was not arbitrary and capricious, and, thus, did not violate NEPA.

*Brian L. Martin*

## SIXTH CIRCUIT

**M/G Transp. Servs., Inc. v. Water Quality Ins. Syndicate, 234 F.3d 974 (6th Cir. 2000)** (holding Water Quality Insurance Syndicate's ("WQIS") request for summary judgment should be affirmed because it needed neither to defend nor indemnify M/G Transportation Services, because its underlying insurance claims were based exclusively on the False Claims Act, not the Clean Water Act).

Former employees filed a complaint against M/G Transportation Services ("M/G") alleging M/G (1) knowingly falsified records in

order to hide Clean Water Act ("CWA") violations, and (2) knowingly falsified records in order to conceal, avoid, or decrease its duty to pay the United States for fines and clean up costs. M/G settled the dispute with the former employees and requested a defense and indemnity from its insurer, Water Quality Insurance Syndicate ("WQIS"). WQIS refused to indemnify M/G, which prompted M/G's suit against WQIS in the United States District Court for the Southern District of Ohio. The district court granted WQIS' motion for summary judgment because M/G's underlying claim asserted no CWA violations, but was, instead, based entirely upon the False Claims Act ("FCA"), which was not covered by M/G's insurance plan. M/G appealed the dismissal and asserted a genuine issue of material fact existed concerning whether the underlying claim was covered within the insurance plan. M/G also argued the district court should have granted its summary judgment motion.

The United States Court of Appeals for the Sixth Circuit affirmed the district court and held WQIS did not breach its duty to defend and indemnify M/G in its *qui tam* action brought under the FCA. The appellate court reviewed the grant of summary judgment and recognized it should affirm only if no genuine issue of material fact existed. The court examined first WQIS' duty to defend.

The court explained that WQIS had a duty to defend when the complaint stated, or arguably stated, a covered claim, or that the complaint was so vague, ambiguous, nebulous, or incomplete that a claim may have existed. The court found M/G's former employees' based their complaint on neither a covered claim nor an arguably covered claim, and was not ambiguous or incomplete. The court based its decision on the fact that the complaint stated two counts exclusively under the FCA, the complaint made no claims for liability based on the CWA, the settlement agreement with the employees expressly reserved CWA liability for the United States, and the CWA did not contain a *qui tam* provision that allowed private citizen suits for clean-up costs. Thus, the court of appeals held the former employees' complaint stated claims exclusively under the FCA, resulting in WQIS having no duty to defend M/G.

The Sixth Circuit also rejected M/G's argument that WQIS had a duty to defend M/G under the sudden and accidental discharge portion of the insurance policy. The court rejected this argument because the employees' complaint stated both that M/G had a regular practice of knowingly dumping and that M/G was convicted of a crime against the United States for knowingly discharging pollutants. Accordingly, the court held M/G's conduct was inconsistent with accidental spillage and the provision did not cover M/G's conduct.

Finally, the appellate court rejected M/G's argument that WQIS had a duty to indemnify. The court rejected this argument because the duty to indemnify was contingent upon liability under the policy. The evidence showed liability was predicated solely on the FCA, not under the policy. Thus, WQIS was under no duty to indemnify M/G.

The court of appeals found M/G based its complaint exclusively

on the FCA, not the CWA, and, thus, failed to state a claim covered under the insurance policy. Because M/G failed to state a claim covered within the insurance plan, WQIS did not breach its duty to defend or indemnify M/G in its *qui tam* action. Accordingly, the court affirmed WQIS' summary judgment motion and denied M/G's request for relief.

*Kirstin E. McMillan*

**United States v. Jolly, No. 99-5700, 2000 U.S. App. LEXIS 29907 (6th Cir. Nov. 20, 2000)** (holding, under the Safe Drinking Water Act, failure to timely challenge an administrative order precluded judicial review of that order and the district court did not abuse its discretion in the assessment of penalties and injunction, where a history of noncompliance and disregard for regulation procedures existed).

Peter E. Jolly appealed a partial summary judgment against him for violation of the Safe Drinking Water Act ("SDWA"). In 1977, Jolly and his associates formed the JAF Oil Company ("JAF"). JAF owned and operated eighty-nine injection wells on oil and mineral leases in Easton Field, Hancock County, Kentucky. Eventually, Jolly became JAF's sole shareholder, officer, director, and employee. In 1985, the Environmental Protection Agency ("EPA") informed JAF that the wells did not comply with the SDWA or the Underground Injection Control program ("UIC"). In 1988, JAF filed for bankruptcy but continued to operate the wells. In 1992, the EPA issued an administrative order ("AO") to remedy JAF's violations. Jolly continued solely to operate the wells under the name Strategic Investments Incorporated ("SI"). In 1995, the United States filed a civil enforcement action in the United States District Court for the Western District of Kentucky against JAF, SI, and Jolly to enforce the AO. The district court granted partial summary judgment to the government on claims that JAF failed to meet the AO compliance deadlines. Under state-law veil piercing theories, the court held Jolly individually liable for the JAF and SI violations. Additionally, the court held SI liable for failing to reply to EPA's request for information. Finally, the district court held JAF, SI, and Jolly liable for failing to comply with SDWA and UIC regulations. The court granted the government's injunctive request to shut down the wells, and issued a \$500,000 civil penalty to each defendant. Jolly appealed.

The first issue Jolly raised on appeal was whether EPA denied Jolly due process when they issued the AO. Under SDWA section 3000h-2(c)(6), the court of appeals did not review Jolly's compliance with the AO because Jolly failed to appeal the issuance of the AO. Section 3000h-2 authorized EPA to issue an AO and required the agency to notify Jolly of his right to request a hearing. The hearing granted Jolly the right to dispute the order's compliance requirements. Jolly failed to request a hearing. Once the AO became final, Jolly had another thirty days to appeal the AO in federal district court. Jolly again failed