Water Law Review

Volume 3 | Issue 1 Article 26

9-1-1999

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Kimberley Crawford

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promulgating regulations requiring permits to graze stock on national forest lands. The U.S. Supreme Court has held that historical acquiescence on the part of the federal government allowing private use of public lands was never intended to confer any vested right. This "tacit consent" by the government does not deprive it of the power to recall any implied license.

The Tenth Circuit concluded that the Laneys did not hold and never held a vested private property right to graze cattle on federal public lands. The Laneys' predecessor in title held simply an implied license to use the lands for grazing. This privilege conferred no vested rights and was revocable at the government's will. Thus, without regard to the validity of predecessor's claimed water right, the Laneys were not entitled to graze cattle on national forest lands without a permit. Additionally, the court upheld the district court's assessment of penalties and injunction for unpermitted grazing.

John B. Ridgley

ELEVENTH CIRCUIT

Driscoll v. Adams, 181 F.3d 1285 (11th Cir. 1999) (holding that the stormwater discharged during timber harvesting and land development activities fell within the Clean Water Act's ("CWA") definition of "pollutant" from a "point source" into "navigable water" and landowner's failure to make every good faith effort to comply with pollution control standards and failure to reduce discharges to a minimum precluded application of the exception to liability under CWA for discharge without a National Pollutant Discharge Elimination System ("NPDES") permit even though no permit was available to be issued by the state).

Adams owned 76 acres of land in the mountains of North Georgia. The Driscoll and Galbreath families owned land adjacent to Adams' property. Driscoll owned five acres directly abutting Adams' property, and Galbreath owned approximately two acres adjacent to Driscoll's. The Spiva Branch stream flowed downhill from Adams' property through a pond on Driscoll's property and then through another pond on Galbreath's property before merging into another river.

Adams began harvesting timber in March of 1995 in order to develop his property for vacation homes. He cut and graded roads, installed storm pipes, and removed timber. This activity caused erosion which Adams did little to prevent. This erosion caused considerable damage to Driscoll's and Galbreath's properties. Adams did not seek proper approval from any federal, state, or local government agency before starting work on his property. In September 1996, Adams filed for the required state permit after

completing most of the timber harvest. Adams never obtained a NPDES permit, which is required for lawful pollutant discharge under the CWA. General stormwater permits were not available in Georgia.

Plaintiffs filed a lawsuit in December 1996 against Adams for violating the CWA. They included in their complaint state law claims for nuisance, trespass, and negligence. They filed a motion for summary judgment, and Adams filed a motion to dismiss, which the court treated as a cross motion for summary judgment. The trial court denied the plaintiffs' motion and granted Adams' motion. The court stated that because the NPDES permit was an impossible condition in Georgia, and since there were no approved federal standards, the complaint should be dismissed. The trial court declined to retain jurisdiction over the state law claims and dismissed them without reaching the merits. The Driscolls and Galbreaths appealed.

In his defense, Adams raised two issues on appeal. First, he claimed that the CWA's prohibition on pollutant discharge does not apply where the NPDES permit, normally required to make the discharge lawful, is not available in the state. Second, he claimed that his discharges did not fall within the CWA's definition of a release of a "pollutant" from a "point source" into "navigable water".

The CWA provides that the discharge of any pollutant by any person shall be unlawful except as in compliance with other sections of the Act. The CWA grants the EPA authority to issue permits that allow individuals to discharge limited quantities of pollutants under certain conditions. The EPA delegates this authority to the state. Georgia Environmental Protection Department ("EPD") was approved to administer the state NPDES program. The EPD has tried unsuccessfully to implement a "general" NPDES stormwater discharge permit that would cover an entire class of dischargers. However, due to court challenges, this permit is unavailable in Georgia.

In *Hughey v. JMS Development Corp.*, the Eleventh Circuit created a narrow exception to the general rule of liability for discharges without an NPDES permit. The court in *Hughey* held that (1) where compliance was factually impossible because there would always be some stormwater runoff from an area of development; (2) there was no NDPES permit available; (3) the discharger was in good faith compliance with local pollution control requirements; and (4) the discharges were minimal, a party could discharge without violating the CWA. The court found that Adams did not meet the four requirements established in *Hughey*. Although Adams met the first two elements, the court held that he did not discharge in good faith as he made no attempt to obtain the required permits and his discharges were not minimal. Thus, the exception did not apply.

The court held that Adams' discharges fell within the scope of prohibited pollutant discharges under the CWA. The CWA's definition of "pollutant" includes sand and silt, two of the primary sediments deposited in plaintiff's ponds by Adams' development activities. The CWA's definition of "point source" includes "any discernible, confined and discrete conveyance, including but not

limited to, any pipe, ditch, channel, tunnel, conduit . . ." Here, Adams constructed pipes and other means by which stormwater was transported into the streams which the court held to be a point source. Finally, the CWA defines "navigable waters" as "waters of the United States, including territorial seas." The court held that the Act makes it clear that Congress intended to include ditches, canals, as well as streams and creeks, under the term "waters of the United States." Thus, the court found that the Spiva Branch stream fell within the definition.

The appellate court reversed the district court's grant of summary judgment in Adams' favor on the CWA claim and vacated the district court's dismissal of the state law claims. The case was remanded for further proceedings.

Kimberley Crawford

UNITED STATES DISTRICT COURTS

Iberville Parish Waterworks Dist. No. 3 v. Novartis Crop Protection, Inc., 45 F. Supp. 2d 934 (S.D. Ala. 1999) (holding that water systems lacked standing to bring claims against herbicide manufacturer absent current or imminent injury).

Two waters systems, one in Iberville Parish, Louisiana and the other in Bowling Green, Ohio, ("Water Systems") sued Novartis, the manufacturer of Atrazine. Deemed an environmental hazard by the Environmental Protection Agency ("EPA"), Atrazine is a herbicide that corn, sorghum and sugar cane farmers use to control pre–emergence broad leaf weeds. The EPA had set limits on the levels of this contaminant for drinking water and also certified that the best way to remove it from water was to use a granular activated carbon ("GAC") filtration system. The plaintiffs, like many other water systems, did not have permanent GAC systems and the cost to install them was significant. Unfortunately, conventional water treatment systems could not remove Atrazine without great difficulty. Therefore, the Water Systems wanted Novartis to pay for both the costs of testing raw water for Atrazine and the resulting removal.

Because it found the Water Systems lacked standing, the district court did not reach the merits of their claims of strict products liability, negligence, strict liability for abnormally dangerous activities, trespass, nuisance, or unjust enrichment. In order to having standing to sue, the plaintiffs needed to show an injury in fact, a causal connection between the injury and the manufacturing of Atrazine, and finally, a likelihood that the injury was redressable by a favorable decision. Because the Water Systems invoked federal jurisdiction, they assumed the burden of establishing these elements.

The court found that neither Water System had suffered injury