Wetland Sagas Continue: The Minden Bog Maze

In one of the country's most interesting matters involving regulation of activities in wetlands under the federal Clean Water Act (CWA), Judge Avern Cohn of the United States District Court for the Eastern District of Michigan, recently granted in part and denied in the other parts, the request of the U. S. Environmental Protection Agency (EPA) for a judgment before tried in the government's favor.

Facts

The government's request asserted that defendant, Bay-Houston Towing Company, Inc., through its Michigan Peat Division, had violated three specific provision of the CWA. In connection with the peat mining activities of the Michigan Peat Division at the Minden Bog in Sanilac County, Michigan, the government first asserted that the company had discharged pollutants via peat bog drainage water through six outfalls into the Black River Drain without discharge permits under §402 of the CWA. Second, the company was accused of discharging dredged or fill material into wetlands without the requisite §404 permit under the CWA. And, finally, the government claimed that the company had violated an EPA administrative compliance order issued under §309 of the CWA which required, among other things, that the company cease the discharges and restore the wetlands. Several previous determinations in the case were reached by this court in 1998 and 1999; and the Court of Appeals for the Sixth Circuit reviewed certain of these determinations and issued a decision related to the case, also in 1999

Court's Decision.

The Court chose to address the second government assertion first. As to this asserted basis for the government's request, Section 301 of the CWA prohibits a "person" from "discharging" (and "adding") a "pollutant" from a "point source" into "waters of the United States" without a National Pollutant Discharge Elimination System (NPDES) "permit" under§404 of the CWA. The parties agreed about the presence of certain of these noted elements of the offense. However, Bay-Houston contended that it did not "add" or "discharge" a pollutant when it cleared land and made ditches but merely moved material around as it side-cast or otherwise took the materials removed in these activities and placed them elsewhere in the bog. Bay-Houston also asserted that the placement of these materials was only temporary and not permanent. After examining Bay-Houston's assertions and information, the Court determined that the movement of materials was not merely "incidental fallback" from the company's operations, but more extensive in nature both geographically and temporally (the materials were often removed quite some distance and left for extended periods of time). Thus, the Court determined that the "incidental fallback" exception which is sometimes applicable would not apply to Bay-Houston's activities. As a result, the Court found that the government was entitled to judgment before trial son this element of the case.

Bay-Houston also argued that the Minden Bog was an isolated wetland not adjacent to "waters of the United States," and, thus, not waters of the United States itself, nor subject to the reach of the CWA requirements, because the Black River Drain was manmade. The Court

disagreed and found for the government on the element of the materials being placed into "waters of the United States."

Next, Bay-Houston argued that its activities were not conducted "without a permit" because they were covered under the Corps of Engineer's nationwide permit 26, a "permit by rule," first issued in 1977. Nationwide permit 26 had authorized the discharge of dredged or fill material into "isolated wetlands" or "wetlands adjacent to headwaters" until 1984. The Court stated that, as discussed previously, the wetlands were "adjacent" wetlands but acknowledged that the issue of whether they were adjacent to "headwaters" was a genuine issue of material fact and, therefore, the Court could not grant judgment before trial on this issue.

Next, Bay-Houston argued that certain statutory exemptions pursuant to §404 (j) of the CWA from the need to have an NPDES permit applied in its case. The exemptions Bay-Houston claimed were applicable were those for haul roads (§404(f)(1)(e)) and maintenance of drainage ditches (§404(f)(1)(c)). The Court indicated that eligibility for these exemptions depended upon a number of factual determinations and, because there were opposing expert affidavits on the sfactual issues, judgment beore trial would not be permissible on this issue.

Thus, on the second of the government's assertions, and for purposes of this judicial determination, no final and conclusive judgment was granted but the issues for trial were reduced to the questions of whether activities prior to 1984 were permitted under Nationwide permit 26 and whether the ditch and road exceptions to the need for an NPDES permit applied to this case.

The Court next addressed the government's first assertion that drainage discharges to the Black River Drain were not authorized by a CWA §402 NPDES permit and applied the same elements to its assessment of this assertion as it had to the first.

Bay-Houston again argued it didn't "add" materials (pollutants) to the water discharged. The water was merely storm water and picked up only naturally occurring metals. The Court indicated that it could not grant judgment before trial on this "difficult matter at this time." The Court obviously wrestled with case law that suggested to the Court that a decision could be made either way, arguing, in part, that Bay-Houston operated ditches that drained water off the bog, thereby draining metals off the bog that would otherwise just sit there and then channeled the water to the drain. Bay-Houston, the Court said, in this sense didn't just pass pollution from one body of water back and forth as was the factual context in certain other cases.

The Court addressed Bay-Houston's argument that it had received a general stormwater discharge permit from the State under the CWA program and, therefore, it was not discharging without a permit. Here, however, the Court noted the government's contention that Bay-Houston's purpose wasn't merely to channel the stormwater and drain it off, but also to drain down the water table of the bog in order to dry and harvest peat, and said this raised a genuine issue of fact for trial. As a result, the Court was not able to grant judgment before trial on this element of the case, either.

As to the contention that Bay-Houston had violated the EPA's Administrative Order, the Court found that the company's cessation of activities as of April 14, 1998 and its termination of

37 employees at the Minden Bog location could be found to be substantial compliance with the cessation of the discharge requirement. However, the Court granted the government partial judgment on this contention, finding that there was no dispute that the company had not submitted a plan to plug the ditch outfalls as also required by the EPA order.

In a related Memorandum and Order, the Court also denied the company's request for judgment before trial. The company had argued, among other things, that a §404 permit issued by the Michigan Department of Natural Resources (MDNR) in March of 1995 allowed the company to harvest peat without another permit. The company noted that the EPA initially objected to this permit, but later withdrew its objections making the action granting the permit final agency action that wasn't appealed. This point was noted also by the Sixth Circuit's 1999 decision in previous Minden Bog case matters.

This article was prepared by William A. Wichers II, a partner in our Environmental Department, and previously appeared in the May, 2000 edition of the Michigan Environmental Compliance Update, a monthly newsletter prepared by the Environmental Department and published by M. Lee Smith Publishers.