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Edward Bacha

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Ninth Circuit Explains Meaning of the Word “Pollutant” Under the Clean Water Act and Refuses to Ignore the Constitution’s Supremacy Clause

In *Northern Plains Resource Council v. Fidelity Exploration and Development Co.*,¹ the Ninth Circuit held that pumping underground water to the surface for the purposes of extracting methane gas and then subsequently dumping the unaltered wastewater into an adjacent river and creek without an appropriate permit violated the Clean Water Act (CWA).² The court held that Montana had no authority to enact a statute that allowed unaltered wastewater to be dumped into CWA-protected water, effectively lowering the standards set forth in 33 U.S.C. § 1370.³ Additionally, the court based its decision on both the definition of the word “pollutant” set forth in the CWA⁴ and precedent that does not permit a state to reduce the stringency of federal regulations.

In June 2000, the Northern Plains Resource Council (NPRC) filed a citizen suit under the CWA alleging that Fidelity Exploration & Development Company (Fidelity) unlawfully discharged pollutants into navigable waters of the United States.⁵ Fidelity ran an operation in the Powder River Basin of Montana which extracted methane gas for commercial sale.⁶ As part of the coal bed methane (CBM) extraction process, Fidelity pumped groundwater to the surface and discharged the water into the Tongue River and Squirrel Creek.⁷ The water was never altered by Fidelity during this process.⁸ However, the discharged water contained several chemicals that the Environmental Protection Agency (EPA) identified as pollutants because the chemicals degraded soil and were generally unfit for irrigation use.⁹ The Montana Department of

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¹ 325 F.3d 1155 (9th Cir.), cert. denied, 124 S. Ct. 434 (2003).
² Fidelity, 325 F.3d at 1157-63.
³ Fidelity, 325 F.3d at 1164.
⁵ Id. at 1157.
⁶ Id.
⁷ Id. at 1159.
⁸ Id. at 1157.
⁹ Id.
Environmental Quality (MDEQ) had informed Fidelity that they could discharge the CBM groundwater without a permit because Montana state law exempts unaltered groundwater from state water quality requirements.  

Both parties filed cross motions for summary judgment in the District of Montana. The parties agreed that four of the five elements needed to prove a violation of the CWA were satisfied, and that the only element at issue was whether the CBM water constituted a pollutant.  

The district court granted summary judgment to Fidelity holding that "(1) CBM water was not a pollutant within the meaning of the CWA, and (2) Montana state law exempted Fidelity from CWA permitting requirements."  

The Ninth Circuit reviewed the district court's grant of summary judgment de novo and overturned the decision. It divided its opinion into two parts: (1) examining the classification of the CBM groundwater under the CWA, and (2) determining the validity of Montana's state law lowering the standards of CWA. As to part one, the court held that the CBM groundwater discharged into CWA-protected waters was a pollutant for three reasons: (1) the water was "industrial waste" as defined in the CWA, (2) the water was a pollutant by virtue of being "produced water" derived from gas extraction, and (3) the water was a pollutant consistent with the CWA's definition of "pollutant." The Ninth Circuit arrived at the conclusion that the CBM groundwater was "industrial waste" by examining the definition of "pollutant" set forth in the CWA which defines the word inter alia as "industrial, municipal, and agricultural waste" discharged into water. To determine whether CBM

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10. Id. at 1159. Montana Code Section 75-5-401(1)(b) provides that "[d]ischarge to surface water of groundwater that is not altered from its ambient quality does not constitute a discharge requiring a permit under this part if: (i) the discharge does not contain industrial waste, sewage, or other wastes; (ii) the water discharged does not cause the receiving waters to exceed applicable standards for any parameters; and (iii) to the extent that the receiving waters in their ambient state exceed standards for any parameters, the discharge does not increase the concentration of the parameters."

11. Fidelity, 325 F.3d at 1159.

12. Id. at 1160. The five elements required to prove a violation of the CWA are (1) discharge, (2) pollutant, (3) from a point source, (4) to a navigable water, (5) without a permit.

13. Id.

14. Id. at 1160-64.

15. Id. at 1161-62.

16. See id. at 1160. (citing 33 U.S.C. § 1362(6) (alteration in original)). The definition goes on to state that [pollution] does not mean...water, gas, or other material which is injected into a well to facilitate production of oil and gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.
water was industrial waste, the court turned to the plain meaning of the
words "industrial" and "waste" found in the American Heritage
Dictionary, finding that "industrial waste is any useless byproduct derived
from the commercial production and sale of goods and services." Applying this plain language definition to Fidelity’s actions, the court held that CBM water is industrial waste because it is an unwanted byproduct of the extraction process for the commercial sale of methane gas.

The court next applied the rule set forth by *Sierra Club v. Cedar
Point Oil Company*, which classified "produced water" as an industrial
waste regulated by the CWA. The Ninth Circuit found that CBM water qualified as "produced water" under EPA guidelines defining "produced water as water (brine) brought up from the hydrocarbon-bearing strata during the extraction of oil and gas, and can include formation water, injection water, and any chemical added downhole or during the oil/water separation process." The court further held that since CBM water is brought up from coal seams to extract methane gas, it is "industrial waste" and is consequently classified as "produced water."

The final reasoning the court provided for classifying CBM water as a pollutant was that the water met the CWA’s definition of "pollution."

Again, the Ninth Circuit turned to the language of the CWA to find that "pollution" is the "man-made or man-induced alteration of chemical, physical, biological, and radiological integrity of water." In applying this definition, the court recognized that, by discharging the CBM water into the Tongue River, Fidelity altered the water quality of the Tongue River, thus causing "pollution" under the CWA. The Ninth Circuit also

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17. *Id.* at 1161. The word “industrial” is defined as “of, pertaining to, or derived from industry.” “Industry” is defined as “the commercial production and sale of goods and services.” “Waste” is defined as “any useless or worthless byproduct of a process or the like; refuse or excess material.” *Id.* (citing AMERICAN HERITAGE DICTIONARY 672, 1447 (1979)).

18. *Id.*

19. *Id.* (citing Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 568 (5th Cir. 1996)) (“addressing whether discharge of water ‘produced’ during the extraction of oil and gas without an NPDES permit violated the CWA and concluding that produced water is an ‘industrial waste’ regulated by the CWA”).

20. *Id.* (citing 40 C.F.R. §§ 435.41(bb), 435.11(bb)).

21. *Id.*

22. *Id.*

23. *Id.* at 1162 (citing 33 U.S.C. § 1362(19)).

24. *Id.* The court cited a Montana Department of Environmental Quality environmental impact statement analyzing the impact of CBM water production on Montana waterways, which concluded that CBM water discharged into the Tongue River caused slight to severe surface water degradation resulting in restricted downstream use of some waters. Additionally, the statement concluded CBM water discharged in the Tongue River threatens to make the water unfit for irrigation. Montana Statewide Final Oil and Gas Environmental Impact Statement, available at http://www.deq.state.mt.us/CoalBedMethane/finaleis.asp (last visited July 31, 2004).
explained that the lower court's ruling was illogical. Under the district court's holding, the Ninth Circuit explained, "the massive pumping of salty, industrial waste water into protected waters does not involve discharge of a "pollutant," even though it would degrade the receiving waters to the detriment of the farmers and ranchers." In a particularly poignant remark, the Ninth Circuit noted that the district court would "allow someone to pipe the Atlantic Ocean into the Great Lakes and then argue that there is no liability under the CWA because the salt water from the Atlantic Ocean was not altered before being discharged into the fresh water of the Great Lakes."

Having concluded that the CBM water Fidelity was dumping into CWA protected water was pollution, the Ninth Circuit then turned to the validity of Montana state law. Section 75-5-402(1)(b) in the Montana Code allows "[d]ischarge to surface water of groundwater that is not altered from its ambient quality" without a permit. As a result of the Montana law, the MDEQ informed Fidelity that they may discharge CBM water without a permit. The district court agreed with MDEQ's position, explaining that "the EPA implicitly approved of Montana's groundwater exemption because the EPA did not revoke Montana's authority to operate the EPA-approved state permitting program despite section 75-5-401(1)(b)."

The Ninth Circuit rejected the lower court's reasoning for three reasons. First, the court stated that even if the EPA approved of section 75-5-401(1)(b), it had no authority to exempt any discharges which are subject to the CWA, because Congress has the sole authority to create exemptions from regulation through the amendment process. Second, the court held that Montana lacks the authority to create any sort of permit exemptions that affect the CWA. Finally, the Ninth Circuit held that, under the Supremacy Clause, Montana state law cannot contradict or limit the scope of the CWA as section 75-5-401(1)(b) does by reducing permit requirements.

Accusations that the Ninth Circuit is an activist institution are wholly unjustified when the court can point to well-researched and astute

26. Id. at 1163.
27. Id. at 1164. See also Montana Code § 75-5-401(1)(b).
28. Fidelity, 325 F.3d at 1164.
29. Id.
30. Id. at 1164. In footnote 5 of the opinion, the court notes that the EPA did not approve of section 75-5-401(1)(b), as indicated by a letter sent to the MDEQ which disapproved of the code and its application.
31. Id. (citing 33 U.S.C. § 1370 ("[S]tates may not adopt or enforce standards that are less stringent that federal standards").
32. Id. at 1165.
decisions such as Northern Plains. The Ninth Circuit's ruling in this case is doctrinally legitimate and results in a fair policy. It stands as a beacon for a sane approach to examining the CWA. Clearly the legislative intent for the CWA was to protect waters from pollution. When entities seek to exploit the CWA by looking for loopholes in definitions like "pollutant," it is assuring to know that the courts interpret well written legislation seriously and fairly. Moreover, the case reminds states that they must think carefully about passing legislation that weakens federal legislation, and that Congress holds exclusive power to lower federal standards through the amendment process. At the end of the day, the Ninth Circuit should be commended for writing a well thought out decision, which takes to heart the doctrine of stare decisis and legislative intent. The result is both a reasonable holding in terms of application of the law at the appellate level as well as a practical holding which serves to unpack the complications of the deceivingly clear definition of the word "pollutant" under the CWA.

Edward Bacha