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METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

August 29, 1994

To: Board of Directors (Legal & Claims Committee--Information) (Legislative Committee--Information)

From: General Counsel

Subject: Clean Water Act Criminal Liability - U.S. v. Weitzenhoff

Report

The U.S. Court of Appeals for the Ninth Circuit has significantly modified the standard for criminal liability for violating permits issued under the federal Clean Water Act (CWA, 33 USC §§ 1251 to 1387). Those permits include Section 404 (33 USC § 1344) wetlands permits as well as waste discharge (NPDES) and other CWA permits. On August 8, the Court denied a petition for rehearing by the entire court, with five of the judges voting for rehearing (94 Daily Journal D.A.R. 11061). A petition requesting Supreme Court review is expected this fall (United States v. Weitzenhoff, 1 F3d 1523).

The decision is the first to interpret a 1987 amendment to the CWA that based penalties on whether a person "knowingly", rather than "wilfully," violated CWA permits. It effectively imposes a strict liability standard on CWA permittees, holding that conviction does not require proof that the permittee knew that its acts violated the permit or the CWA (1 F3d at 1530); and that,

> "[C]riminal sanctions are to be imposed on an individual who knowingly engages in conduct that results in a permit violation, regardless of whether the person [was] cognizant of the requirements or even the existence of the permit." (1 F3d at 1529).

It classifies violations of CWA permits and other statutes that regulate "dangerous or deleterious devices or products or obnoxious waste materials" as public welfare offenses" which require only a showing of general, rather specific, intent (94 Daily Journal D.A.R. 11062).

The facts of the case are unfortunate and reflect the adage that bad facts make hard law. The decision affirmed the convictions of the manager and assistant manager of a Honolulu sewage treatment plant for authorizing the release of substantial amounts of waste activated sludge near a popular beach in violation of the plant's CWA waste discharge permit. The managers claimed that their actions were justified under their interpretation of their CWA permit.

However, the decision's strict criminal liability standard appears to apply to less aggravated situations and other federal statutes such as the federal Clean Air Act (42 USC §§ 7401 to 7642). The "knowing" violation criterion is used extensively throughout the CWA and other federal regulatory statutes. Furthermore, bills are now pending before Congress to amend the CWA to increase criminal sanctions for "knowing" violations (e.g. S. 2093 § 503(b)(4) and H.R. 3948 § 309(c)(3) and (e)).

The five judges that voted for rehearing expressed substantial concern with the Decision's new strict standard:

> "We have now made felons of a large number of innocent people doing socially valuable work. They are innocent, because the one thing which makes their conduct felonious is something they do not know. It is we, and not Congress, who have made them felons. The statute, read in an ordinary way, does not. If we are fortunate, sewer plant workers around the circuit will continue to perform their vitally important work despite our decision. If they knew they risk three years in prison, some might decide that their pay, though sufficient inducement for processing the public's wastes, is not enough to risk prison for doing their jobs. We have decided that they should go to prison if, unbeknownst to them, their plant discharges exceed permit limits. Likewise for power plant operators who discharge warm water into rivers near their plants, and for all sorts of other dischargers in public and private life. If they know they are discharging into water, have a permit for the discharges, think they are conforming to their permits, but unknowingly violate their permit conditions, into prison they go with the violent criminals."
> (94 Daily Journal D.A.R. 11063)

Metropolitan's operations involve discharges under CWA permits as well as Clean Air Act and other federal regulatory permits, as well as state permits issued under CWA delegations. While Metropolitan takes great care in meeting permit requirements, the new standard established by this decision creates serious new risks related to actual compliance with complex and varying physical, chemical and biological factors.

Recommendation

For information only.

N. Gregory Taylor

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