RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

Robert Munroe
Deputy Counsel, Maryland Port Administration
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Overview

- A U.S. District Court in northern California has ordered that a 30 year-old, EPA regulation exempting certain vessel discharges from regulation under the Clean Water Act be vacated on September 30, 2008.
- Supreme Court's grant o f certiorari in *US v. Atlantic Research Corp.*, to address Circuit court split on the ability seek contribution under § 107 of CERCLA after Supreme Court's watershed decision in *Cooper Industries, Inc. v. Aviall Services.*
- The U.S. Department of Justice's increasing use of environmental statutes to prosecute matters related to worker safety.

Northwest Environmental Advocates v. EPA, 2006 WL 2669042

40 CFR § 122.3(a)

- "The following discharges do not require NPDES permits:
  (a) Any discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or any other discharge incidental to the normal operation of a vessel. This exclusion does not apply to rubbish, trash, garbage, or other such materials discharged overboard . . ."

Northwest Environmental Advocates v. EPA, 2006 WL 2669042

- Ruled that EPA acted in excess of its statutory authority in exempting these vessel discharges from regulation under the Clean Water Act, and ordered 42 CFR § 122.3(a) be vacated on September 30, 2008.
- EPA has appealed the decision to 9th Circuit
- If the order is affirmed, this case could have significant implications for the shipping industry, as well as ports, particularly if EPA ends ups requiring on-shore, or near-shore treatment of ballast water and other effluents

Driver for lawsuit was ballast water

- Although regulation challenged in *Environmental Advocates* exempts discharges such as blackwater, gray water, and bilge water, its ballast water that the Plaintiffs really care about, and in particular:
  - (1) the lack of regulation of ballast water discharges, and
  - (2) the fact that ballast water discharged from ships is one of the largest pathways for the introduction and spread of aquatic nuisance species (ANS).

What is Ballast Water?

- Water taken on, or discharged, by oceangoing vessels to maintain vessel stability, balance, or structural strength
- Generally, vessels take on ballast water as they unload cargo, and discharge it as they load cargo.
- Ballast water is also used to maintain stability in rough seas, compensate for off-center weight, or maneuver under bridges and cross shoals
- Bottom Line: BW is critical to the proper operation of a vessel and safety of its crew

Ballast water is a source of because it is the primary vector for introduction of non-indigenous and aquatic nuisance species (ANS)

- When a ship takes on ballast water, whether freshwater or saltwater, organisms found in the water are typically taken in as well.
- These organisms are carried in the ballast tanks of the ships until it arrives in the next port, where, due to changes in the distribution of the cargo, the organisms are released with the ballast water into a new ecosystem
- Given the large size of these ballast tanks, and the speed with which the ships reach their destinations, organisms are increasingly able to survive the journeys to a new ecosystem

Losses/Costs due to ANS are not trivial

- Significant economic costs. For example
  - In 1990, Congress estimated $5 billion in damages to water pipes, boat hulls, and other hard surfaces by zebra mussels in Great lakes
  - One study by GAO indicated that total economic losses and associated control costs are about $137 billion a year
- Potential threat to public health
  - Cholera bacteria breakout in 1991 in Latin America which caused death of approx 10,00 people is believed to have been brought about by bilge water discharged from a Chinese freighter
- Ecological costs are difficult to quantify but there is widespread agreement that they are
  - ANS multiply rapidly due to lack of predators, and often take an ecosystem
  - Major contributor to decline of endangered species

Current Ballast Water Management Technology

- Ballast Water Exchange
  - Ships on their way to next port must release their lower-salinity coastal water brought aboard in their past port, and replace it with higher-salinity open-ocean water
- Treatment
  - Subject of extensive current research and development
  - Mechanical methods (filtration & separation)
  - Physical methods (sterilization, UV light, ultrasound, ozone)
  - Chemical methods (using biocides)
  - On-shore or near-shore

What is currently being done to manage ballast water?

- International Efforts
- 1997, International Maritime Organization (IMO) adopted voluntary ballast water guidelines calling for ballast water exchange
- 2004, IMO adopted "International Convention for the Control and Management of Ship's Ballast Water and Sediments." The Convention requires:
  - Ballast water management plan (approved by the vessel's flag nation) and a vessel ballast water record book carried on board;
  - Ships perform ballast water exchange with an efficiency of at least 95% volumetric exchange;
  - Phased implementation of concentration-based performance standards
- Problems
  - The Convention will only enter into force 12 months after ratification by 30 nations, representing 35% of the world shipping tonnage
  - US has not ratified the Convention

Congressional efforts aimed at managing ballast water

- Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 (NANPCA)
  - Enacted to focus federal efforts on non-indigenous, invasive, aquatic nuisance species. The Act created a broad, multi-agency Aquatic Nuisance Species Task Force, and encouraged negotiation with foreign countries.
- In 1996, Congress amended NANPCA with the National Invasive Species Act (NISA)
  - NISA, delegated to the US Coast Guard the authority to establish a phased-in regulatory program for ballast water.

Coast Guard actions re: ballast water

- Implemented mandatory regulations requiring vessels equipped with ballast water tanks to:
  - File a report 24 hours prior to arrival
  - Have a ballast water management plan; and
  - Perform ballast water exchange 200 miles or more from shore, or perform other treatment methodology approved by the Coast Guard.
- Established system a qualitative BW treatment performance standard, protocols for testing, and a program to facilitate experimental shipboard treatment systems
- Promulgated more stringent requirements for vessels entering the Great Lakes: no discharge and ship inspections

Clean Water Act and National Pollution Discharge Elimination System (NPDES)

- Congress enacted CWA in 1972 to "restore and maintain the chemical, physical, and biological integrity of the nation's waters."
- In furtherance of this goal, CWA established NPDES system for regulating discharges into navigable waters. NPDES permit "allows a polluter to discharge a specified amount of a pollutant" into the navigable waters.
- CWA prohibits discharge of any pollutant from a "point source" into navigable waters of US without an NPDES permit.
- Term "point source" includes "a vessel or other floating craft.

Court's Holding

- Simple, straight forward textual reading of CWA to determine if Congress had authorized EPA to exempt ballast water discharges from NPDES permit
- Court held that BW was (1) the discharge of a "pollutant"; (2) into "navigable waters," (3) from a "point source," therefore, BW discharges require an NPDES permit.

EPA's Defense

- EPA did not really challenge textual reading; rather it argued that Congress had "acquiesced" to the regulation because it had not revised or overridden the rule in the three decades since its promulgation in 1973.
- Court rejected this argument holding that a party must show must support such for such an argument with overwhelming evidence of acquiescence, which Court said was not evident here. Court noted that mere lack of revision is not sufficient to meet the heightened burden since Congress never directly discussed, actively deliberated the rule

Real World Problems Confronting EPA is Case is Upheld On Appeal

- Other than mid-ocean ballast water exchange, there are not other environmentally sound methods of removing ANS from ballast water
- In addition to technological hurdles, EPA will need to face the fact that a one size fits all approach will not work for vessels that vary greatly in size, types of cargo carried, types of loading, and unloading
- Mobile nature of vessel point sources will need to be harmonized with overlapping federal and state permit schemes that are rooted in stationary point source discharges

Practical Challenges Associated With Land-Based Treatment

- Currently, there are no on-shore, or near shore BW treatment facilities dedicated to removal of ANS
- There are approximately 351 relevant US ports where these facilities would need to be designed, constructed, and permitted
- Vessels' needs to discharge BW vary by ship type and cargo. For example:
  - Large bulk carriers with huge quantities of BW must begin to discharge many miles from pier, while some vessels entire BW discharge takes place at pier while cargo ops are being performed.

Additional Practical Challenges Associated With Land-Based Treatment

- All vessels would need to be modified to conduct BW transfer “over the top” at the same rates they are currently being conducted through the hull
  - Envision piping and pumps necessary to BW from tanks that can be 40 feet below the main deck
- Infrastructure such as rail lines, tanker trucks, possibly barges would be needed in most ports to transfer BW to a treatment facility

United States v. Atlantic Research Corp.

- In this case the Supreme Court will address the principal question left open by its decision in *Cooper Industries, Inc. v. Aviall Services*: "Can a potentially responsible party who can not seek contribution under § 113 of CERCLA nevertheless seek cost recovery under § 107 of CERCLA?"

There are 2 sections under CERCLA that address the issue of cost recovery/contribution

- Section 107(a)
- Section 113(f)

Section 107(a) Liability

- Section 107(a) states in relevant part that a responsible party

(4) . . . shall be liable for –

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; . . .

Section 113(f) of CERCLA

- "Any person may seek contribution from any other person who is liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title.

Cost Recovery under section 107

- Before passage of SARA in 1986, which codified right to contribution by creating section 113(f), courts had recognized an implied right of contribution for those sued under 107(a) who had been required to pay more than their pro rata share of cleanup costs
- After SARA, but before *Aviall*, the federal court s uniformly held that a PRP could proceed only under section 113 once Congress had added that procedure. Courts reasoned that allowing a PRP to proceed under 107 would make 113 irrelevant, contrary to the intent of Congress. Thus, implied right of contribution under 107 for PRPs fell into disuse.

Cooper Industries, Inc. v. Aviall Services, Inc., 543 US 157 (2004)

- Ct held that in order to pursue an action for contribution against another PRP under § 113(f), a PRP must itself be sued under either § 106 or § 107(a). In other words, a PRP who voluntarily undertook a voluntary cleanup does not qualify under § 113(f).
- While *Aviall* applied the literal statutory language that contribution is only available "during or following" a administrative or judicial settlement, it altered the relatively settled understanding that a PRP that had incurred CERCLA response costs could seek contribution from other PRPs without regard to whether there had been a past settlement or civil action.
- The Court in *Aviall* expressly left open the question of whether an action may proceed under § 107(a) for cost recovery.

107 cost recovery after *Aviall*

- Three Circuit courts (Second, Eighth, and just last month the Seventh), have reversed their precedents on this issue, and have allowed PRPs to bring § 107 cost recovery claims
- The Third Circuit has taken the contrary view, reaffirming its prior decisions barring PRPs from bringing 107 claims.

United States v. Atlantic Research Corp.

- Facts: Atlantic contaminated soil and groundwater while cleaning rocket motors for the US government. In 2002, before *Aviall* decision, Atlantic filed suit vs. US government (as a PRP) for cleanup costs under both 113(f) and 107(a). Atlantic dropped claim under 113(f) after Aviall.
- District Court concluded that Atlantic could not bring suit under 107(a), but Eighth Circuit reversed.

Eighth Circuit's Reasoning

- In wake of Cooper, Ct held "it no longer makes sense to view 113 as a liable party's exclusive remedy."
- Ct noted that 113 and 107 are "distinct," and the plain language of 107(a)(4) refers to recovery from "any other person" which embraces other PRPs
- Ct also noted that holding to the contrary would "result in an absurd and unjust outcome: the government could insulate itself from responsibility for its own pollution by simply declining to bring a CERCLA cleanup action, or refusing a PRP's offer to settle."
- The Court was concerned that precluding a party who has voluntarily performed a cleanup, and, who if sued, would be otherwise liable under 107, from cost recovery would seriously undermine CERCLA's goal of encouraging cleanups of contaminated properties.

US Government's Arguments Against Allowing Contribution under 107(a)

- US argues that phrase "any other person" under 107(a) refers to persons other than those 4 categories of PRPs
- Allowing PRPs to sue for contribution under 107(a) will render 113(f) superfluous, and more importantly, would thwart the primary intent of the SARA amendments, which was to induce parties to settle with the government

Worker Safety Issues

- Worker safety-related cases are a priority for EPA and the Department of Justice
- Several enforcement provisions of environmental statutes may apply in situations that also affect worker safety
- These environmental laws have more severe criminal penalties than the Occupational Safety & Health Act

Example: Motiva Delaware City Refinery

- Facts:
  - One worker killed and several injured from an explosion at the refinery
  - Estimated 1.1 million gallons of spent sulfuric acid released into environment, with 100,00 gallons reaching Delaware River
- OSHA settled civil violations connected to this incident for $175,000.
- DOJ and the State filed claims under environmental statutes resulting in the company pleading guilty to one count of negligent endangerment under the Clean Air Act, and three Clean Water Act violations.
- Motiva's sentence was $10 million fine and 3 years probation. No individuals were prosecuted in this case.

Another example: McWane Company Prosecutions

- During the mid 1990's, OSHA cited several companies owned by McWane, Inc. for hundreds of violations of Occupational Health & Safety Act
- Over last two years, DOJ has prosecuted several of these same companies under environmental statutes, and have been successful in obtaining more than $20 million in criminal fines

Relevant Environmental Statutes

- Certain environmental statutes contain provisions related to worker safety
  - "Knowing endangerment" under the Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act
  - "Negligent endangerment" under the Clean Air Act
  - The Clean Air Act General Duty Clause and EPA has promulgated Risk Management Program regulations

Knowing Endangerment

- Most serious crime, punishable by up to 15 years of imprisonment and fines of up to $1 million
- To date, limited caselaw in this area indicates that knowing endangerment has been brought only in cases of egregious conduct where significant imminent danger to individuals was know to defendant
  - Example: *United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001) (defendant who knew tank contained cyanide waste sent his employees to clean tank without protective equipment, even after employees had complained about health effects from being in tank)

Negligent Endangerment

- This provision applies in cases where defendant's conduct negligently causes risk of death or serious bodily injury
- penalties are less severe than for knowing endangerment, with a maximum prison sentence of 1 year for individuals.
- Major issue in prosecution of these cases is appropriate *mens rea* standard: do you need to prove ordinary negligence or gross negligence
  - Several circuit courts have held that prosecution only needed to prove ordinary negligence in criminal prosecution for negligent discharge under Clean Water Act

Clean Air Act Accidental Release Provisions

- General Duty Clause
  - This provision imposes a "general duty" upon the owners and operators of stationary sources to identify hazards using an appropriate methodology, to design and maintain a safe facility by taking steps necessary to prevent accidental releases, and to minimize the consequences of releases that occur. 42 USC § 7412(r)(1).
- EPA Risk Management Program Regulations
  - Codified at 40 CFR Part 68; requirements vary by type of stationary source.

Individual criminal liability is greatly enhanced under environmental statutes

- Under OSH Act, criminal liability is limited to "employer," while relevant environmental laws allow for criminal liability to be imposed on broad category of "persons" allegedly involved in the criminal conduct
- Environmental statutes also allow for severe individual criminal liability – up to 15 years of imprisonment for knowing endangerment, and 1 year for negligent endangerment
- Note: Clean Air Act "operator" defenses, 42 USC § 7413(b) apply to protect certain employees from criminal liability absent proof of "specific intent."

Endangerment Offenses: jurisdictional limits

- Clean Water Act & RCRA – endangerment offenses require showing of underlying regulatory violation
  - For the Clean Water Act, the prosecution would need to prove that endangerment resulted from a discharge to navigable waters
  - for RCRA, that the endangerment resulted from the unlawful handling of a jurisdictional waste.
- Example: *US v. Borowski*, 977 F.2d 27 (1st Cir. 1992), the court held that the Clean Water Act could not be used to prosecute a company for endangering its own employees due to these jurisdictional limits.

Additional Potential Defenses

- Is the General Duty Clause criminally enforceable?
  - There is some support in the legislative history that it is not
- Are worker safety cases under environmental laws preempted by the OSH Act?
- Are the EPA Risk Management Program Regulations void for vagueness