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9th Circ. Stormwater Flip Should Catch High Court's Eye

By **Sean McLernon**

Law360, New York (August 12, 2013, 6:08 PM ET) -- The Ninth Circuit bent over backwards last week to find a way to assign liability for stormwater pollution, setting up a likely review by the Supreme Court only months after the justices reversed the same panel's opinion and refused to lower the bar for water pollution liability, attorneys say.

The nation's high court already unanimously struck down the appeals court's earlier decision finding the Los Angeles County Flood Control District accountable for water permit violations, ruling that water traveling through storm sewer systems between separate portions of a river could not be considered discharges under the Clean Water Act. But that didn't stop the Ninth Circuit from keeping the district liable, ruling on remand that monitoring data revealing excessive pollution levels is sufficient to trigger liability even when the discharges can't be directly linked to the permit holder.

The same Ninth Circuit panel had previously rejected that argument, but said its earlier judgment was not final and concluded that the Supreme Court's decision allowed them to reconsider the merits of the plaintiffs' argument.

The high court justices could easily jump back into the fray and tell the Ninth Circuit that they already said there is no liability, according to Stoel Rives LLP partner Kristen Castanos.

"It seems results-oriented, like the Ninth Circuit was looking for a way to find a violation," Castanos said. "It's an unusual approach to go back and reinterpret this way when there were no new facts or new evidence."

The Natural Resources Defense Council, which brought the case against the flood control district, had tried and failed to get the Supreme Court to weigh in on the monitoring liability question when it heard the case last term. Justice Stephen Breyer noted during oral arguments that the group had already "struck out twice with that argument."

Justice Antonin Scalia said that the Ninth Circuit wouldn't have anything new to say about liability on remand "unless, of course, it adopts another fanciful interpretation of the statute," which the justice added he was worried about.

With the Ninth Circuit seemingly confirming Scalia's fears, the high court looks poised to take the case up again.

“By nature of it being a Ninth Circuit environmental opinion that has achieved the liability determination and worked its way around a Supreme Court decision, I could certainly see it catching attention,” Crowell & Moring LLP partner Kirsten Nathanson said. “Justice Scalia made his views clear at oral argument.”

The Ninth Circuit is essentially thumbing its nose at the high court with this decision, according to Mayer Brown LLP partner Timothy S. Bishop.

“Typically, the Supreme Court would be reluctant to get involved in interpreting the language of a single permit, but this ruling is so blatantly incorrect, and such an end run around the Supreme Court's prior decision, that the court may wish to take it,” Bishop said.

However, NRDC senior attorney Aaron Colangelo, who argued the case for the environmental group, told Law360 the Ninth Circuit was well within its bounds and stressed that the appeals court only looked at how one permit was written. The Ninth Circuit found that self-reported municipal monitoring data can clearly establish liability for permit breaches.

“The court’s opinion was narrowly focused on the specific language of the county’s own permit,” Colangelo said. “It follows logically and necessarily from the permit that they had that they should be accountable on their own monitoring.”

Many other permits in California contain similar language, making it easier for citizens groups and other plaintiffs to target municipal districts that have the primary permits for stormwater discharges. Those districts will likely turn to smaller cities and towns in the area that could be contributing to the pollution, and the effect could trickle down to individual dischargers like businesses or even homeowners.

“The decision solidifies the fact that this type of liability will exist, and I think that anybody who runs a system of this type will now have to say: ‘Wait, will I be in the same position? What will I do if I am? What if I have a rogue discharger?'” Morris Polich & Purdy LLP partner Steven L. Hoch said.

If the ruling is upheld, costs that will immediately fall on the flood control district would likely get passed on to corporations and residents alike in the form of significant rate increases, according to Barnes & Thornburg LLP partner Fredric P. Andes. He said it was unclear whether the Supreme Court would stop those increases from happening by overturning the ruling, as there’s no circuit split and the issue is much more esoteric this time around than it was last year, when the Ninth Circuit ruling concerned the nature of discharges under the CWA.

What the L.A. County Flood District can point to is a Ninth Circuit decision that ruled in favor of the plaintiffs despite the high court refusing to follow a similar course when it had the chance. That might just be enough, Andes said.

“They could say: ‘The Ninth Circuit ignored you. You told them not to find liability, and they did it anyway. You may not have thought it would be back here, but now you need to do something about it,'" he said.

--Additional reporting by Gavin Broady. Editing by Elizabeth Bowen and Melissa Tinklepaugh.

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