The Arnold Law Practice

News From the Practice

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US EPA Cracks Down on Developers

Last year, with developers scrambling to complete new projects before the Fed raises interest rates again, their compliance with wetlands regulations slipped and the US EPA made them pay. Private companies paid huge fines; here are some of the highlights:

- A Las Vegas developer filled wetlands on a 160 acre site. The company agreed to pay $80,000 in penalties and fund three environmental restorations projects at a cost of $193,000.
- A developer in Galt, CA paid $47,000 in fines and agreed to finance the preservation of 14 acres of wetlands after it illegally filled 3 acres to complete a residential development.
- An Alaskan developer agreed to transfer more than $200,000 in land to establish a 318 acre wetland conservation area and paid $12,500 in civil penalties after filling wetlands without a permit for road-building.
- Four Puerto Rican Companies paid over $900,000 in fines and restoration projects in an EPA settlement. The violators must restore and remove fill from 5 acres destroyed and create new wetlands on an area five times the size of the wetlands lost.

One EPA Regional Administrator said: "These developers thought they could ignore federal law but EPA will continue to crack down on them if they don't get a proper permit before developing a wetland. Violators will be forced to pay the cost of mitigating the damage they caused, plus pay fines when they break the law."

New Supreme Court Set to Reconsider SWANCC

Last October, the 9th Circuit Court of Appeals upheld the Army Corps of Engineer's ("Corps") jurisdiction over wetlands "adjacent" to San Francisco Bay in *Baccarat Fremont Developers v. US Army Corps of Engineers*. This decision came three days after the Supreme Court granted certiorari to reconsider similar issues in two 6th Circuit cases.

The split among the federal appellate courts involves the jurisdiction of the Corps to regulate development of wetlands under the U.S. Clean Water Act. In 2001, the U.S. Supreme Court decided *Solid Waste Agency of North Cook County ("SWANCC").* The Court ruled that wholly isolated wetlands that were located totally within one state could not be regulated by the Corps. (The *SWANCC"* properties were old gravel pits.) The Court's reason was that the Commerce Clause of the U.S. Constitution does not authorize regulation over such local matters.

Since *SWANCC,* the Corps' jurisdiction over such "in-state" wetlands has been "muddy," to use a pun. Some federal courts have ruled that *SWANCC* only means the Corps cannot control wetlands by seeing if they are used by migratory birds. Other courts require a greater "nexus" between an alleged wetland and waters used in interstate commerce. Such a "nexus" is usually a hydrological or ecological connection. In other words, does the water flow from or to the river or ocean?

In *Baccarat,* the Corps' claimed that Baccarat's property was wetlands "adjacent" to flood-control channels connected to San Francisco Bay. The channels flow back and forth, due to tides in the Bay. Between the property and the channels are dikes, with drainage tubes. Baccarat argued that his property does not have an ecological or hydrological connection to the Bay, and therefore cannot be regulated by the Corps.

The 9th Circuit disagreed. The Court ruled that *SWANCC* did not apply because "adjacency" was not an issue for the isolated gravel pits in *SWANCC.* Second, the Bacarrat property is hydrologically linked to San Francisco Bay. Third, a hydrological connection is not needed, because "adjacency" alone is enough to allow the Corps to use the Clean Water Act to regulate property.

The 9th Circuit is "holding" the *Bacarrat* case until the Supreme Court decides the two 6th Circuit cases. The "Supremes," with new Justices Roberts and Alito, may shed new light on the definitions of "adjacency" for the federal appeals courts. The oral argument is this month, so watch for rulings this summer in *Carabell v. Corps* and *US v. Rapanos*.

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The Arnold Law Practice represents business owners in multi-defendant litigation with claims of groundwater pollution by drycleaning practices, USTs, waste disposal practices, OSHA penalty issues, claims against environmental consultants as to site audits, Fish & Game civil penalty proceedings, condemnation of portions of business for road expansion, failure of seller to disclose buried contamination, compliance with air pollution control laws, civil penalties from air quality management districts, spill response claims, toxics reporting and disclosure requirements, UST closure laws.

The Arnold Law Practice represents individuals in state and federal courts in a variety of lawsuits, including complaints for specific performance of real estate contracts, quiet title, defending permits issued by the National Marine Fisheries Service, defending and prosecuting construction claims, breach of contract, negligence, fraud, property trespass and damages, and related matters.

The Arnold Law Practice associates with specialized counsel in complex real estate closings, estate and trust planning, partition actions involving contamination, and transfers of real estate with indemnities and cleanup rights under the California UST Fund.

Cutting of "Movie Star" "Parrot Trees" Prompts Landmark Tree Ordinance

In January 2006, San Francisco passed a new city ordinance to give "landmark status" to "significant trees." The City acted after a property owner on Telegraph Hill cut down two old large Monterey cypress trees. The trees became famous in the movie, *The Wild Parrots of Telegraph Hill.* http://www.wildparrotsfilm.com/ The two cypress trees were a favorite roost for wild Conjure parrots.

The "tree landmark ordinance" is similar to many historic preservation laws in many U.S cities. The government nominates a tree to be preserved. Trees can be either on public or private property. "Landmarking" is based on size, age, historic value, and use by wildlife. Once designated, anyone who cuts a "landmarked" tree can be fined up to $1,000 and required to pay the tree's replacement value ($35,000 in one case).

Monterey Cypress

***"The U.S. has seen a remarkable increase in values of residential properties – both urban and suburban. Higher values probably mean more conflicts over trees, views, easements, and the like."* explains Jim Arnold, who has represented government and private clients for over 20 years in such matters.**

Owners of property (and trees) are increasingly concerned about laws that take away their property rights. "Tree law" is very complex, with questions of "view rights", liability for personal injuries from falling trees, destruction of property by tree roots, etc. The Telegraph Hill owner, who cut down the parrots' roosting trees, says the trees were rotten and he had to cut them for safety and liability reasons.

"Landmark Tree" laws, like other "preservation" laws, complicate the law further. Neighboring cities often have completely different tree laws. For example, the town of Mill Valley protects local redwood trees as "heritage trees." But, neighboring Sausalito considers redwood trees undesirable because they block views of San Francisco Bay. Down South, San Diego does not protect Torrey Pines, but Del Mar does.

Tree Laws can be particularly vexing for developers. Cities often have different permit requirements. Some cities require permits to cut trees over a certain diameter or trees of a certain variety. For example, Los Angeles County protects all large oak trees; and Orange County protects all trees larger than 2 feet in diameter. Other cities require special "tree removal permits" or "landscaping permits" for developments over a certain acreage or proposing to remove a certain number of trees.

One thing is for sure, think before you cut.