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## FEDERAL PENALTIES APPLY TO POLLUTION OF INTERMITTENT STREAMS

**ENVIRONMENTAL LAW—FEDERAL WATER POLLUTION CONTROL ACT:** Intermittent streams are navigable waters, and a penalty for polluting them is appropriate under federal statute, regardless of polluter's unintentional act or good faith cleanup. *United States v. Texas Pipe Line Co.*, 611 F.2d 345 (10th Cir. 1979).

A pipeline owned by Texas Pipe Line Company (the Company) was inadvertently broken, spilling 600 barrels of oil into an unnamed creek in Atoka County, Oklahoma.<sup>1</sup> The creek, which had a small flow at the time of the pipeline spill, fed into Caney Creek, a stream that fed the Red River via Clear Boggy Creek.<sup>2</sup> The area is described as an alluvial valley with a marginal water supply which is used primarily for public consumption and agricultural irrigation.<sup>3</sup>

The Company was not at fault in any way for the spill; the accident was caused by a bulldozer operator who struck one of the Company's pipelines while working for a local farmer.<sup>4</sup> By prompt action, the Company managed to recover all but 90 barrels of the spill.<sup>5</sup> Nevertheless, the United States District Court for the Eastern District of Oklahoma entered summary judgment against the Company, upholding a fine of \$2500 assessed by the United States Coast Guard under the Federal Water Pollution Control Act (FWPCA)<sup>6</sup> for polluting navigable waters.<sup>7</sup>

The Company appealed, claiming that the unnamed tributary was not "navigable waters" within the meaning of FWPCA. The Company also contended that the unintentional nature of the spill and the

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1. This small county in southeastern Oklahoma is approximately 30 miles from the Red River, which borders Oklahoma and Texas. WEBSTER'S GEOGRAPHICAL DICTIONARY 821 (1969).

2. *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 346-47 (10th Cir. 1979).

3. NATIONAL ATLAS OF THE UNITED STATES OF AMERICA 25, 121, 123, 127, 185 (1970).

4. *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1979).

5. *Id.*

6. 33 U.S.C. §§ 1251-1376 (1976 & Supp. II 1978). The goal of this act is to restore and maintain the integrity of the nation's waters by eliminating pollutants in these waters. See 33 U.S.C. § 1251(a) (1976).

7. 33 U.S.C. §§ 1321(b)(6)(A)(B) (1976) provides the fine shall not be less than \$500 nor more than \$5000 determined by the number of units of pollutants discharged. 33 U.S.C. § 1362(7) (1976) defines navigable waters as "waters of the United States."

Company's quick, good faith cleanup efforts should be mitigating factors in assessing penalties under FWPCA.

The Tenth Circuit Court of Appeals held that the unnamed Atoka County stream met the definition of navigable waters, that the fine assessed by the United States Coast Guard was appropriate, and that intent was not a total mitigating factor in determining this particular pollution penalty under FWPCA.<sup>8</sup>

According to the court, the commerce clause<sup>9</sup> allows broad interpretation of the term "navigable waters" under FWPCA.<sup>10</sup> The court found that "[i]t makes no difference that a stream was or was not at the time of the spill discharging water continuously into a river navigable in the traditional sense."<sup>11</sup> Citing one of its previous holdings, the court concluded that the intent of FWPCA was to cover all tributaries to waters like the Red River.<sup>12</sup>

Even though the Company was not found at fault, the court found that a penalty may be assessed regardless of the polluter's intent or fault.<sup>13</sup> FWPCA requires that notice be immediate so that cleanup can begin at the source.<sup>14</sup> The court, in the instant case, found the Company's actions were no more than conformance to FWPCA requirements of notification.

The court also found that the assessment of the penalty, the opportunity for hearing, and the \$2500 fine (one-half of the statutory maximum) were all well within the statute guidelines.<sup>15</sup> The Coast Guard assessment officer had determined the fine was not detrimental to such a large company and that \$2500 was adequate to finance cleanup of a spill of this size. The officer minimized the fine because of the Company's diligence and prompt action in recovery of the oil discharge. Finding that all factors required by FWPCA were taken into account in determining the size of the penalty, the tenth circuit court affirmed the summary judgment entered against the Company.<sup>16</sup>

Judge Barrett, concurring in part and dissenting in part, noted "it

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8. *United States v. Texas Pipe Line Co.*, 345, 347 (10th Cir. 1979).

9. U.S. CONST. art. I, § 8, cl. 3.

10. 33 U.S.C. § 1362(7) (1976).

11. *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1979).

12. *Id.*, citing *United States v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979) (a gold leaching process found to pollute navigable waters within the Federal Water Pollution Control Act although the stream itself was not navigable nor used for transportation of goods or materials).

13. *United States v. Texas Pipeline Co.*, 611 F.2d 345, 347 (10th Cir. 1979).

14. 33 U.S.C. § 1321(b)(5) (1976).

15. 33 U.S.C. § 1321(b)(6) (1976) provides penalty assessment based on the size of the business itself, how much effect a fine will have on the continued operation of that business, and the seriousness of the violation; 33 U.S.C. § 1320(c) (1976) provides for a hearing board to be appointed by the FWPCA Administrator to conduct public hearings.

16. *United States v. Texas Pipeline Co.*, 611 F.2d 345, 347 (10th Cir. 1979).

would appear that the sole basis for the assessment relates to the need for collection of funds in the nature of penalties."<sup>17</sup> Although Judge Barrett agreed with the holding on the definition of navigable waters and that good faith and prompt notice did not mitigate the penalty entirely, he favored remanding for a precise statement concerning the rationale behind this particular penalty assessment.<sup>18</sup> Judge Barrett was concerned with the lack of defenses, the automatic assessment of penalties, and the penal or retributive purposes of fines under the FWPCA. He was also concerned with the criminal nature of the penalty and the safeguards that should, in his opinion, be afforded to those who violate the act.<sup>19</sup> The United States Supreme Court has recently resolved this issue however, finding the FWPCA fine a civil penalty.<sup>20</sup> However, Judge Barrett also raised the issue of the purpose and use of the fines collected, asking whether they are assessed purely to cover administrative costs or whether they are indeed related to clean up expenses.

### CONCLUSION

The majority in *United States v. Texas Pipe Line Co.* conformed to previous decisions in the tenth circuit. The court followed the standard interpretation of the commerce clause and relevant portions of the FWPCA. In affirming the decision of the lower court, it relied heavily on Coast Guard assessment officers' report.

The concerns of dissenting Judge Barrett were later partially resolved in *United States v. Ward*,<sup>21</sup> which held that a fine, like that assessed here, is civil, not criminal in nature. An issue still unresolved, however, is whether the penalties must relate to the actual costs of cleanup. Future decisions may reach the issue of the relationship between fines and actual cleanup costs.

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17. *Id.* at 348.

18. *Id.*

19. *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1979), *citing* *Ward v. Coleman*, 598 F.2d 1187, 1191 (10th Cir.), *rev'd sub nom.* *United States v. Ward*, 100 S. Ct. 2636 (1980). *United States v. Ward* was decided after *United States v. Texas Pipe Line Co.* The issue in *Ward v. Coleman* was whether the requirement of self-reporting of polluting streams violated the self-incrimination protection of the United States Constitution. The tenth circuit held that when assessing penalties, some other independent evidence of pollution besides that which the polluter volunteers must be used in determining damage and assessing penalties. *Ward v. Coleman*, 598 F.2d 1187, 1194 (1979). Mr. Justice Rehnquist, in the United States Supreme Court opinion, held that penalties under the Federal Water Pollution Control Act are civil in nature and not subject to criminal safeguards for violators who are required under the act to give notice when pollutants are discharged. *United States v. Ward*, 100 S. Ct. 2636, 2640-41 (1980).

20. *See* note 19 *supra*.

21. *Id.*