CHRISTOPHER J. NEARY (#69220)
JENNIFER M. O'BRIEN (#278821)
NEARY AND O'BRIEN
110 South Main Street, Suite C
Willits, CA 95490
Telephone: (707) 459-5551
Email: cjneary@pacific.net

Attorneys for Intervener,
BROOKTRAILS TOWNSHIP COMMUNITY
SERVICE DISTRICT

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CALIFORNIA RIVER WATCH, a 501(c)(3) nonprofit public benefit corporation,

Plaintiff,

vs.

CITY OF WILLITS,

Defendant.

Case No. CV 13 3395 VC

OBJECTION TO CONSENT DECREE

TABLE OF CONTENTS

I. INTRODUCTION 2

II. OBJECTION 3

A. The Court reviews a consent decree to determine whether it furthers the objectives of the Clean Water Act and is in the public interest 3

B. The Proposed Consent Decree does not further the objectives of the Clean Water Act 5

C. The Proposed Consent Decree is not in the public interest 5

D. The proposed consent decree fails to address the Unpermitted discharge to groundwater 8

E. The public interest is in quantifying the amount of unpermitted groundwater discharge and determining the impact on public health 10

F. The Proposed Consent Decree potentially has preclusive effect 12

1. Preclusion in General 12

2. Preclusion is in the context of citizen enforcement actions under the Clean Water Act 13

G. Practical Solutions which may be implemented by the Court 15

1. The Court may reject the proposed Consent Decree as being inconsistent with the Clean Water Act 15

2. Another alternative would be to allow Brooktrails to intervene in the current action as a party to press the issues related to the unlawful discharge to groundwater 16

NEARY & O'BRIEN
ATTORNEYS AT LAW
110 SOUTH MAIN STREET, SUITE C
VILLITS, CALIFORNIA 95490
(707) 459-5551

3. The Court could enter a judgment approving the proposed consent decree, and the dismissal, but make an explicit and biding disclaimer of preclusion as to the issues raised in the proposed complaint in intervention and the issue of groundwater contamination 17

III. CONCLUSION.....18

NEARY & O'BRIEN
ATTORNEYS AT LAW
110 SOUTH MAIN STREET,
SUITE C
VILLITS, CALIFORNIA 95490
(707) 459-5551

ED_001083_00000155-00003

TABLE OF AUTHORITIES

Cases

Lewis v. County of Sacramento,
218 CA3d 214, 217-219 (Cal. App. 3d Dist. 1990) 13

Martin v. Wilks,
490 U.S. 755 (1989) 12

Sierra Club, Inc. v. Elec. Controls Design, Inc.,
909 F.2d 1350 (9th Cir. 1990) 4

Statutes

33 U.S.C.A. § 1251(a) 5
33 U.S.C.A. § 1311 4
33 U.S.C.A. § 1342(o) (1) 5

Rules

Fed. R. Civ. P. 19 13
Fed. R. Civ. P. 24 12

Other Authorities

18 Fed. Prac. &Proc. Juris, § 4413 17
Justin Vickers, Res Judicata Claim Preclusion of Properly Filed Citizen Suits,
104 Nw. U. L. Rev. 1623 (2010) 14

NEARY & O'BRIEN
ATTORNEYS AT LAW
110 SOUTH MAIN STREET,
SUITE C
WILLITS, CALIFORNIA 95490
(707) 459-5551

ED_001083_00000155-00004

BROOKTRAILS COMMUNITY SERVICES DISTRICT, Putative Intervener, objects to the proposed Consent Decree in this proceeding as follows.

I. INTRODUCTION

The reality is that the City of Willits Wastewater Treatment Plant is percolating approximately 100 million gallons of partially treated wastewater to the groundwater aquifer of the Little Lake Valley without a permit to do so. The proposed Consent Decree was devised after this fact was confirmed.

The proposed Consent Decree is inadequate because it ignores the reality that the groundwater is being contaminated with partially treated wastewater. The proposed Consent Decree does not impose any requirement that the City correct the now recognized fact that there are substantial unpermitted discharges to the groundwater. The proposed Consent Decree merely calls for additional surface water testing when it is known that the issue is contamination of the groundwater, not the surface water, and then the sampling is delayed for over a year under circumstances which makes the sampling but an illusion of effective action.

The proposed Consent Decree not only does not further the objectives of the Clean Water Act, it purports to legitimize a major threat to the public health and is for that reason not in the public interest. It is also clear that the unpermitted discharges to the groundwater is polluting the groundwater and in particular adding nitrates to groundwater used as a source of drinking water in a concentration more than double the maximum level permitted by the EPA. This is evident because the City is routinely and substantially violating the permit limitations for Nitrogen/Nitrates even for the wastewater reaching the end of the wastewater treatment process, while the discharge

NEARY & O'BRIEN
ATTORNEYS AT LAW
110 SOUTH MAIN STREET,
SUITE C
WILLITS, CALIFORNIA 95490
(707) 459-5551

of wastewater to the groundwater is well before the end of the wastewater treatment process.

In sum, it has been confirmed that the City is discharging wastewater to the groundwater in quantities of approximately 100 million gallons per year and that the wastewater is well in excess of safe levels of Nitrogen/Nitrates.

The proposed Consent Decree was devised within days after it was confirmed that the City had misreported data to its engineering firm whom then relied upon such misreported and erroneous data to provide assurance to the Regional Board that there was no permit violation. The proposed Consent Decree could have preclusive effect, especially as it relates to Brooktrails which is in privity with the City of Willits by way of contract. In this regard, it is not just a settlement between two private parties. The proposed Consent Decree could insulate the City of Willits from being pressed upon its illegal discharges by any member of the public.

In Section II G *infra* Brooktrails presents several practical solutions are presented for consideration by the Court.

II. OBJECTION

A. The Court reviews a consent decree to determine whether it furthers the objectives of the Clean Water Act and is in the public interest.

The United States Supreme Court has observed that:

> "To be sure, a federal court is more than "a recorder of contracts' from whom parties can purchase injunctions; it is an organ of government constituted to make judicial decisions. . . [citations omitted] . . . Furthermore . . . the consent decree must 'come within the general scope of the pleadings, and must further the objectives upon which the complaint was based'."

NEARY & O'BRIEN
ATTORNEYS AT LAW
110 SOUTH MAIN STREET, SUITE C
WILLITS, CALIFORNIA 95490
(707) 459-5551

ED_001083_00000155-00006

Local No. 93, Intern. Assn. of Firefighters, ALF-CIO v. City of Cleveland, 478 U.S. 501, 525.

The role of the District Court in considering a consent decree under circumstances such as these is to ensure that the objectives of the Clean Water Act are furthered, "[a] district court should enter a proposed consent judgment if the court decides that it is fair, reasonable and equitable and does not violate the law or public policy, "Sierra Club, Inc. v. Electronic Controls Design, Inc., 909 F.2d 1350, 1355, (9th Cir., 1990). There is no clearer objective that the Clean Water Act preserves the waters of the United States by prohibiting unpermitted discharges of pollutants.

The First Amended Complaint herein alleges:

> "Willits has violated and continues to violate the CWA as evidenced by the mass balance analysis which demonstrates a loss of at least 100 million gallons of wastewater annually somewhere between the headworks and the discharge point. RIVER WATCH alleges the lost wastewater likely percolated from the unlined or inadequately lined ponds and constructed wetlands, and discharging via hydrologically connected groundwater to Broaddus Creek and Baechtel Creek, both waters of the United States. Said discharges are in violation of CWA §301, 33 U.S.C. §1311."

First Amended Complaint, ECF # 9, September 2, 2013, ¶33

The permit issued to the City by the North Coast Regional Quality Control Board by order No. R1-2010-0017 provides:

> "The permitted discharge is consistent with the antigradation provisions of the State Water Board Resolution No. 68-16. This order provides for an increase in the volume and mass of pollutants discharged. The increase will not have significant impacts on the beneficial uses of groundwater because the Order does not authorize the discharge of treated wastewater to groundwater. The Discharger is limited to application of recycled water at agronomic rates."

NCRWCB Order No. R1-2010-0017, p. F-50, Request for Judicial Notice,

NEARY & O'BRIEN
ATTORNEYS AT LAW
110 SOUTH MAIN STREET, SUITE C
WILLITS, CALIFORNIA 95490
(707) 459-5551

Document 1.

Therefore this Court has subject matter jurisdiction over the issue relating to unpermitted discharge of wastewater to the groundwater the discharge of which is in excess of agronomic rates. The discharge of 100 million gallons of wastewater to groundwater is not permitted by the North Coast Regional Quality Control Board, nor could it have been permitted due to backsliding provisions of the Clean Water Act. (See 33 U.S.C. § 1342 (o) (1).)

B. The Proposed Consent Decree does not further the objectives of the Clean Water Act.

The objective of the Clean Water Act is statutorily defined as to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." (33 U.S.C. § 1251(a).) This proposed consent decree should be viewed by this Court in the context of the objectives of the Clean Water Act to determine whether it furthers those objectives and it will be seen that it does not further those objectives.

When the issue is whether or not there is an unpermitted discharge in any quantity to the waters of the United States it certainly would not perpetuate the objectives of the Clean Water Act to ignore the fact that there is a substantial unpermitted discharge to the waters of the United States.

C. The Proposed Consent Decree is not in the public interest.

The discharge of treated wastewater, and especially partially treated wastewater to the groundwater aquifer in volumes of 100 million gallons per year is not in the public interest not only because the groundwater constitutes protected waters of the United States under the Clean Water Act, but also for the simple fact that members of

NEARY & O'BRIEN
ATTORNEYS AT LAW
110 SOUTH MAIN STREET, SUITE C
VILLITS, CALIFORNIA 95490
(707) 459-5551

ED_001083_00000155-00008

the public rely upon the groundwater aquifer for drinking water. (Decl. of Donald McEdwards, ¶ 12; Decl. of C.J.Neary, ¶ 2.)

In April 2014 it was confirmed that up to 100 million gallons per year flowing through the City of Willits wastewater plant is unaccounted for. Metered flow into the plant is not being discharged either at the end- of- the- process discharge point, or recycled by irrigation land application, and is therefore unaccounted for. The only two possible explanations for the loss is that the wastewater is evaporating in three large ponds located before the metered end-of-process discharge point, or that this wastewater is percolating to the groundwater aquifer underling the three large ponds.

In April 2014 after the City provided Brooktrails with meter data for calendar year 2013 in discovery in another case. The City also released its engineer's report opining that the losses were accounted for by "slow seepage" and evaporation. In review of the data in April 2014 it was discovered that the data supplied by the City and relied upon by its engineer was erroneous. (McEdwards Decl. ¶14.) Review of the City's meter data revealed that for the Month of June 2013 the City had reported that 81.30 mg had been discharged by irrigation when only 8.1 mg had been discharged leaving a discrepancy of 74 mg constituting unaccounted wastewater. (Dr. McEdwards Decl. ¶ 14). It was this data upon with the City's engineer based its conclusions, apparently unaware that the data was erroneous.

This error became apparent to the City of Willits, on April 21, 2014 when the City's attorneys deposed Dr. McEdwards as a designated expert by Brooktrails in another proceeding. Shortly after Dr. McEdwards' deposition the parties reported to this Court on May 1, 2014 that the parties reached a settlement in principle and were

NEARY & O'BRIEN
ATTORNEYS AT LAW
110 SOUTH MAIN STREET,
SUITE C
WILLITS, CALIFORNIA 95490
(707) 459-5551

then negotiating the specific terms. (Further Joint Case Management Statement, 5-1-2014, ECF No. 46.) Not only was there considerable speed in settling the present action once the City learned that the discrepancy had been recognized by others, but the parties attempted an unusual procedure to dismiss the case in a document appearing to the Court that River Watch was just giving up, when in fact there was a written consent decree which was not disclosed to the Court at the time that dismissal was attempted. (ECF No. 48.)

That there was a substantial error in the data reported by the City of Willits is disputed by no one. The City Manager in a letter dated August 5, 2014 stated, "City staff has subsequently learned that inaccurate data was submitted to GHD for purposes of conducting a water balance analysis of the wetland ponds." (Letter from Adrienne Moore, Exhibit 1, Decl. of C.J. Neary ¶ 3.) The impact of the error is that for that one month alone in 2013 a total of 74 million gallons is unaccounted for . The same situation prevailed in calendar year 2012, the first year of the operation of the City of Willits' new wastewater plant when the City's records showed that 100 million gallons were unaccounted for.. The wastewater entered the plant, was partially treated by a mechanical system, discharged to the so called three "polishing ponds," and the 74 million gallons were not discharged to the creek, and not land discharged by irrigation. Absent the explanation of evaporation which the City's engineer estimates as somewhat less than 9 million gallons per year, the unaccounted wastewater percolated to the groundwater. [1]

---

[1] It is clear that the Regional Board staff thought the ponds constructed in 2010 would be lined. (See E-mail of a Regional Board

NEARY & O'BRIEN
ATTORNEYS AT LAW
110 SOUTH MAIN STREET, SUITE C
WILLITS, CALIFORNIA 95490
(707) 459-5551

Now that the unpermitted discharge to groundwater can be said to be either confirmed the question before this Court is whether or not the provisions of the proposed consent decree are in the public interest.

D. The proposed consent decree fails to address the unpermitted discharge to groundwater.

The proposed consent decree essentially gives the City a pass upon the issue of unpermitted discharge to the groundwater. Although the proposed consent decree goes into great detail as to how the City will address its deteriorated sewer collection system and its deficiencies, as to the issue of unpermitted discharge is addressed entirely in paragraph 5 of the proposed consent decree which:

- Requires the City to within one year obtain recommendations from its engineering firm GHD as to "additional, appropriate sampling of surface water from Outlet Creek, in addition to that already required by the RWQCB to assess any effect on water quality…";
- To allow River Watch to comment upon the GHD Inc. sampling protocol recommendations.
- To provide the sampling results to River Watch;

The provisions of Paragraph 5 are completely ineffective because:

1) There is considerable urgency to addressing the recently confirmed discharge to groundwater and there is no reason to wait for a year for the City's engineering firm to make recommendations, setting in motion a subsequent

---

staff member who oversees permit compliance, (Exhibit 2, Decl. of C. J. Neary, ¶ 4.). Not only were the ponds not lined, (Decl. of Dr. McEdwards, ¶ 9), but the ponds were not compacted during construction enabling percolation. (Decl. of Dr. McEdwards, ¶ 9. The circumstances of the failure to provide for compaction prior to commencement of construction were set out in the Brooktrails effort to intervene in this proceeding. (See Brooktrails proposed complaint in intervention, ECF No. 11, 9/9/2013, ¶¶ 25-31.)

NEARY & O'BRIEN
ATTORNEYS AT LAW
110 SOUTH MAIN STREET, SUITE C
WILLITS, CALIFORNIA 95490
(707) 459-5551

process of uncertain duration to determine whether the recommendations are adequate with the process only to be implemented at some time following this open-ended process.

2) Even more importantly paragraph 5 eventually requires sampling only of surface water. The public health threat is to the groundwater not to the surface water. Dr. McEdwards indicates that sampling of surface water would not necessarily confirm or disprove discharge to groundwater, and would not confirm or disprove contamination of groundwater from percolating wastewater. (McEdwards, Dcl. ¶ 16 In fact, there is evidence that percolation is down gradient and away from the surface water, McEdwards Decl. ¶10, Exhibit 2 containing a packet of pictures showing green vegetation where percolated water had risen to the surface on the eastern side of the three polishing ponds-on the side away from the creek where surface sampling would be conducted in accord with the proposed consent Decree.

3) And, even if the process to sample surface water had any benefit at all, the entire process is illusory as the results are reported only to River Watch, a private entity. If the sampling results were to reveal that the wastewater is contaminating the waters of the United States, River Watch upon being advised of such is precluded by Paragraph 9 of the proposed consent decree from bringing action against the City of Willits for the next seven years. River Watch having received compensation authorized by the proposed Consent Decree would have no incentive to become embroiled in a controversy and there is no certainty that River Watch will still exist at the time the results are producible under the delayed timetable of the proposed Consent Decree.

NEARY & O'BRIEN
ATTORNEYS AT LAW
110 SOUTH MAIN STREET, SUITE C
WILLITS, CALIFORNIA 95490
(707) 459-5551

E. The public interest is in quantifying the amount of unpermitted groundwater discharge and determining the impact on public health.

The entire reason that Clean Water Act was adopted was to protect the nation's waters. Here there is evidence that the City's three polishing ponds constituting 30 acres in size is percolating tens of millions of wastewater to the groundwater aquifer in the Little Lake Valley, a result which was not contemplated by the permitting authorities. Common sense discloses that such unanticipated discharges to the groundwater may have adverse public health implications, especially for those relying upon the groundwater aquifer as a drinking water source. (See Decl. of McEdwards, ¶¶17-18.)

The limitation of 10 mg/L for nitrates was established by the EPA mostly to combat infant health issues including "Blue Baby Syndrome." The sampling results of the City of Willits in 2013 for nitrates has routinely be exceeded by the City's discharges by at least twice the permitted level after moving through the treatment train of the three polishing ponds and being discharged at the discharge points for either surface water, or land application by irrigation. The nitrate concentrations in the three polishing ponds are likely higher than the City's reported exceedance of 100% because the percolation of wastewater with limited polishing pond retention time is likely to be higher, possibly much higher than at the permitted discharge points. (See McEdwards Decl. ¶ 19).

Although the City did not respond to Brooktrails' original April 2013 concern of this problem (See Exhibit 3, Declaration of C.J. Neary ¶5) it is notable that the 74 mg mistake was made in June 2013 just a few months after Brooktrails' expression of

NEARY & O'BRIEN
ATTORNEYS AT LAW
110 SOUTH MAIN STREET,
SUITE C
WILLITS, CALIFORNIA 95490
(707) 459-5551

concern, and a short time after River Watch issued its 60 day letter. The City purported to have a complete answer to the concern that over 100 mg were unaccounted for. (See Exhibit 4, Decl. of C.J. Neary ¶ 6.) It became apparent in April 2014 that the City's complete answer to the concern of percolation to the groundwater relied upon June 2013 data which purported to account for 81.3 million gallons of wastewater, but which accounted in fact only for 8.1 million gallons and that for that month alone leaving 73.9 million gallons were unaccounted for.

It is notable that instead of addressing the issue after the erroneous data was reported to the City in April 20134, the City rushed into a May 2014 settlement with River Watch promising to pay River Watch $60,000 in return for a consent decree which arguably has preclusive effect and which does not acknowledge the discharge, does not take effective action to confirm the discharge and will not correct problem.

It is notable that the City deposed Dr. McEdwards on April 21, 2014 receiving his verified explanation that the City's reported data contained a huge error. It should have then been apparent to the City that the information presented by GHD Inc. to the Regional Board was misleading because it relied upon the City's reported data that was misleading.[2] It does not appear that the City has called to the attention of the Regional

---

[2] See Exhibit 5, Decl. of Neary for the GHD report which at page 3 includes a reference to 81.30 mg as reported by the City, (See Exhibit 6 Decl. of C.J. Neary for the City's raw data.). Every one now acknowledges that the 81.30 mgd reported irrigation usage in June 2013 was in error and that the report should have been 8.1 mg--- an error which jumps off the page and should have been known by the City staff to be an error as 81.30 mgd irrigation usage was so disproportionate to other usage. There are several possibilities, that the City was very careless in reporting the data, or that the misreporting was a convenient way to conceal the fact that the three polishing ponds are discharging more than 100 million gallons per year to the groundwater

NEARY & O'BRIEN
ATTORNEYS AT LAW
110 SOUTH MAIN STREET, SUITE C
VILLITS, CALIFORNIA 95490
(707) 459-5551

Board that it has unaccounted wastewater in the range of 100 million gallons per year, although the Regional Board has been supplied with the GHD Inc. report assuring the Regional Board that there was no problem (Decl. of Neary ¶7). Instead the City rushed into a settlement with River Watch on May 1, 2014 (See ECF No. 47).

The proposed Consent Decree does nothing to address this continuing discharge and imminent public health threat. Additionally, the proposed Consent Decree, if entered, could have preclusive effect to prevent further citizen enforcement and leave the matter to the discretion of the Regional Board which to date has shown absolutely no concern with the issue.[3]

F. The Proposed Consent Decree potentially has preclusive effect.

The uncertainty as to the preclusive effect of the proposed consent decree, if entered, is so pronounced that Brooktrails would be compelled to appeal the denial of its intervention petition, and would do so if the proposed consent decree is approved as is.

1. Preclusion in General

Although non-parties are unlikely to be bound by collateral estoppel in federal court, Martin v. Wilks (1989) 490 U.S. 755, 756, due to the application of FRCP Rule 24,

---

in violation of the permit and more importantly in a manner which threatens the public health.

[3] See recent communication of the Regional Board staff as to its position. (Exhibit 2, Decl. of Neary) It is apparent that the GHD Inc. "slow seepage" explanation (relying upon misreported data) is accepted by the Regional Board. This communication also refers to the liner for the three polishing ponds, it having been known for a long time that the Regional Board either received misinformation from the City, or misinterpreted the data, because not only is there no liner, but the specifications for the construction project did not require compaction of the excavated soils leading to the near certainty that the ponds would percolate to the groundwater.

NEARY & O'BRIEN
ATTORNEYS AT LAW
110 SOUTH MAIN STREET, SUITE C
VILLITS, CALIFORNIA 95490
(707) 459-5551

cast in permissive terms, and FRCP Rule 19 providing for mandatory joinder in certain circumstances. However, a central factor is privity between the parties. In that Brooktrails and the City of Willits are in contract regarding the Willits Wastewater Plant the parties are in privity and such privity skews the analysis of preclusion.

In Lewis v. County of Sacramento, (1990) 218 CA3d 214, 217-219 an employee was held collaterally estopped because he was in privity with his employer and had an "identity of interest" with his employer in earlier federal litigation.

This is a concern to Brooktrails because in the Order denying Brooktrails the right to intervene, ECF No. 34 Judge Chen held, "Brooktrails Township, putative intervener, has failed to meet its burden of showing that it has a protectable interest and is not already adequately represented by the City of Willits in defending this action." This was in response to the representations of the City of Willits in its Opposition to the Brooktrails motion for intervention. (See ECF # 24, pp. 11-13.) In that Brooktrails and the City are said to be in privity and have been found by this Court to have an identity of interests, it appears that Brooktrails could face an argument from the City of Willits that collateral estoppel precludes any further action to prevent discharge of partially treated wastewater to the groundwater should Brooktrails attempt to seek an order requiring the City of Willits to address its unlawful discharge to the groundwater of the Little Lake Aquifer- an undertaking Brooktrails is now committed given the developments outlined herein.

2. Preclusion in the context of citizen enforcement actions under the Clean Water Act.

It is safe to say that the issue of preclusion in the Clean Water Act is muddled.

NEARY & O'BRIEN
ATTORNEYS AT LAW
110 SOUTH MAIN STREET,
SUITE C
WILLITS, CALIFORNIA 95490
(707) 459-5551

In a recent law review article it was observed that "[t]here is not merely a split of opinion among the circuits but a shattering, with no two circuits analyzing the res judicata problem the same way. Res Judicata Claim Preclusion of Properly Filed Citizen's Suits, Vickers, Northwestern University Law Review (2010)104 N.W.U. L. Rev 1623, 1641. There does not appear to be a Ninth Circuit decision which is precisely on point. Furthermore, most of the preclusion analysis in Clean Water Act cases discuss whether or not a citizen enforcement action is precluded after a consent decree is issued by a governmental agency where the citizen enforcement group believes the governmental action is too lenient. In our case, the flip side presents itself where the government has abdicated enforcement after having an opportunity to so and the proposed consent decree is viewed by Brooktrails as absolutely inadequate to further the policy of the Clean Water Act.

The preclusion analysis is difficult enough without the grafting of this reverse preclusion issue. In this regard the order denying intervention looked to the City of Willits as the agency with whom the Brooktrails Township had a commonality of interest, when just the opposite condition prevailed with the Brooktrails Township and the City of Willits engaged in state court action with this complexity evident in the oral argument on the intervention motion, ECF No. 40.[4]

---

[4] Contextually, the intervention was asserted at the commencement of this case when the City of Willits advised that it had an engineer's report which showed that "there is no material leakage at all . . . none that would constitute a violation or potential violation of the City's permit . . ." (See E-mail from City's attorney dated 8/29/2013, Exhibit 4, Decl. of Christopher Neary.) Brooktrails did not receive the City's reported data until March 2014 when deposing the City Engineer, or the engineer's report until April 2014, and was unaware that the engineer's report was procured with misrepresented data until

NEARY & O'BRIEN
ATTORNEYS AT LAW
110 SOUTH MAIN STREET, SUITE C
WILLITS, CALIFORNIA 95490
(707) 459-5551

All of this is to say that it is uncertain as to how preclusion might apply to Brooktrails' claims and the reality that the City of Willits is unlawfully discharging partially treated wastewater, (with Nitrogen levels far exceeding the expectation of the Regional Board and far exceeding the levels deemed to be safe), to the groundwater aquifer.

G. Practical Solutions which may be implemented by the Court.

The one thing that is clear is that the District Court cannot rewrite the Consent Decree to address the issues presented above. It is suggested that the Court might reject the Consent Decree as being inconsistent with the public interest and inconsistent with the objectives of the Clean Water Act. In doing so, the Court might grant intervention to Brooktrails so that the issues regarding the percolation of partially treated wastewater is litigated and addressed. A third alternative might be to approve that portion of the proposed consent decree relating the City's collection system and judicially determine that the issues relating to the percolation is not to be granted preclusive effect. Each of these alternatives will be discussed in turn.

1. The Court may reject the proposed Consent Decree as being inconsistent with the Clean Water Act.

In that the matter was presented to the Court as a motion to dismiss the case in a manner which effectively concealed the fact that there was a Consent Decree on the

---

late March 2013. (Decl..of Neary,¶9) Had Brooktrails been aware that its conclusion that 100 million gallons as percolating to the groundwater had not been effectively refuted, its complaint in intervention last Fall would have asserted Brooktrails' interest that the City of Willits treat the wastewater originating in Brooktrails, rather than unlawfully discharge it to the Little Lake Aquifer. Therefore, the issues as now understood are much broader than when Brooktrails first asserted its right to intervene.

NEARY & O'BRIEN
ATTORNEYS AT LAW
110 SOUTH MAIN STREET,
SUITE C
WILLITS, CALIFORNIA 95490
(707) 459-5551

side (ECF No. 47), but with release of the consent decree to the press in a manner which provided notice to Brooktrails that there was a consent decree which gave short shrift to groundwater protection. This raises a potentially plausible argument that the Court was in effect approving the Consent Decree; the Court could reject the Consent Decree for the reasons stated herein, and grant the motion to dismiss. Apparently River Watch does not wish to proceed with the litigation.

One problem with this approach is that the Proposed Consent Decree contains detailed provisions as to how the City might address its inflow and infiltration problems. It is this inflow and infiltration which gives rise to the incredible volume of wastewater entering the wastewater plant. However, the allegations of the health risk set forth in the complaint at ¶33 might be said to have been litigated and merged with the judgment.

2. Another alternative could be to allow Brooktrails to intervene in the current action as a party to press the issues related to the unlawful discharge to groundwater.

By this alternative the Court would simply reject the request for dismissal, and allow Brooktrails to intervene to assert the groundwater contamination issue. The advantage to this approach is that Brooktrails would not have to issue a sixty day letter to the EPA to allow it time to act, it being apparent that the EPA has notice of this issue.[5]

---

[5] The EPA stands in a different position on the issue of preclusion as outlined in its filing on August 10. 2014, ECF No. 57 at pp. 2-3. It is unknown as to whether the U.S. EPA will commence enforcement of the Clean Water Act in this instance as its consent to the decree was not inconsistent with it doing so in the future on its own timetable.

NEARY & O'BRIEN
ATTORNEYS AT LAW
110 SOUTH MAIN STREET, SUITE C
WILLITS, CALIFORNIA 95490
(707) 459-5551

If this alternative was adopted the litigation would simply continue until Brooktrails and the City resolved the groundwater contamination issue.

This is Brooktrails' preferred alternative.

3. The Court could enter a judgment approving the proposed consent decree, and the dismissal, but make an explicit and biding disclaimer of preclusion as to the issues raised in the proposed complaint in intervention and the issue of groundwater contamination.

A leading commentator has suggested that, " [a] judgment that expressly leaves open the opportunity to bring a second action on specified parts of the claim, or cause of action that was advanced in the first action should be effective to forestall preclusion." Wright & Miller, Federal Practice and Procedure, 18 Fed. Prac. &Proc. Juris, § 4413 Claim Preclusion –control by First Court (2nd. Ed.).

In this regard the Court could issue a judgment approving the Consent Decree, but expressly exclude from the operation of preclusion the claims asserted in Brooktrails proposed Complaint in Intervention and any claims that "Willits has violated and continues to violate the CWA and its permit as evidenced by a mass balance analysis which demonstrates a loss of tens of millions of wastewater annually somewhere between the headworks and any authorized discharge point which loss is caused by unlined or inadequately lined ponds including, but not necessarily limited to the constructed wetlands."

Brooktrails would then, immediately, cause to be issued a sixty day letter to the City of Willits and the U.S. EPA individually, and acting by and through the North Coast Regional Water Quality Control Board, and then file its own action in the event that the agencies declined to take effective action within sixty days.

NEARY & O'BRIEN
ATTORNEYS AT LAW
110 SOUTH MAIN STREET,
SUITE C
WILLITS, CALIFORNIA 95490
(707) 459-5551

IV. CONCLUSION

The proposed Consent Decree does not further the goals of the Clean Water Act and is not in the public interest. The proposed Consent Decree should be rejected and Brooktrails allowed to intervene, to either litigate the issues related to the unpermitted discharges, or to devise a consent decree which does further the goals of the Clean Water Act and which is in the public interest. In no event should the Court enter an order which has potential preclusive effect upon the public or which has preclusive effect upon Brooktrails.

Dated August 25, 2014

/s/ Christopher J. Neary
CHRISTOPHER J. NEARY
Attorney for Brooktrails Township
Community Services District

NEARY & O'BRIEN
ATTORNEYS AT LAW
110 SOUTH MAIN STREET,
SUITE C
WILLITS, CALIFORNIA 95490
(707) 459-5551

ED_001083_00000155-00021