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EWL

FEATURE ARTICLE

THE ENDANGERED SPECIES ACT: THE HIGH COURT, THE SERVICES, AND CONGRESS ALL IN PLAY!

By David C. Smith

All three branches of the federal government—judicial, executive, and legislative—are actively considering major aspects of the federal Endangered Species Act (ESA or Act). Some decisions and resulting changes are certain; others are probably, based on history, unlikely to be enacted. But with the statute not having been amended or revised since 1988 and no meaningful regulatory reform having occurred since 1986, some argue that updates to what many consider the nation's most powerful environmental regulatory regime is long overdue. Currently pending are: 1) a major case at the Supreme Court regarding the Act's provision for protection of purported "habitat" on private land that is not presently occupied by the protected species nor could it be absent significant intervention and human alteration; 2) broad-sweeping and comprehensive proposed regulatory reforms; and 3) significant proposed amendments to the Act itself in both chambers of Congress.

An Endangered Species Act Primer

As statutes go, the ESA is actually notably straightforward on paper. Even non-lawyers can readily follow it section-by-section implementation from a nomination for a particular species to be "listed," the designation of particularly important habitat for that species, the role of federal agencies in ensuring that actions that they take do not further imperil listed species, and the Act's prohibition against various categories of harm to the species once listed.

The Act's provisions are carried out in combination by the Departments of the Interior (Interior) and Commerce. Commerce, generally, has jurisdiction over marine and anadromous species, and it has delegated implementation of that authority to the National Marine Fisheries Service (NMFS), also referred to as NOAA Fisheries. All other species are under the jurisdiction of Interior, and it delegated implementation to the U.S. Fish and Wildlife Service (FWS). Collectively, NMFS and FWS are referred to as the "Services."

ESA Section 4 (16 USC § 1533)

Section 4 of the Act provides the processes and standards for listing species for protection, designation of their protected habitat, and eventual delisting, among other things. There are two categories of listing provided for in the ESA: "threatened" and "endangered." An "endangered species" according to the Act is one that is "in danger of extinction throughout all or a significant portion of its range." A "threatened" species is one:

> . . .that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

Section 4 outlines the procedures whereby any interested party or entity may petition the respective Service seeking to invoke the Act's protections for a given species by adding to the list for protection as either threatened or endangered.

The Services usually must also, at the time a species is listed, designate such species' "critical habitat," defined as areas "essential to the conservation of the species." The Services may include both "occupied" and "unoccupied" acreage in the designation within specified parameters.

ESA Section 7 (16 USC § 1536)

Section 7 requires and outlines the procedures whereby virtually any action by any entity of the federal government must be considered as to its potential impact on species protected under the Act. This includes the issuance of a permit or provision of federal funding to private entities. If any such federal agency action may detrimentally impact a listed species, that agency must "consult" with the respective Service to evaluate such potential harm. Under Section 7, such action may not "jeopardize the continued existence of the species" nor may it result in the "destruction or adverse modification" of its critical habitat.

ESA Section 9 (16 USC § 1538)

The "teeth" of the ESA are in Section 9. Here, the Act prohibits the "take" of any listed species. Take is broadly defined as: "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

ESA Section 10 (16 USC § 1539)

Section 10 allows the respective Service to issue a permit to allow "take" of a listed species in proscribed contexts, most frequently in the private sector where such take is "incidental to otherwise lawful activity."

The U.S. Supreme Court and the ESA

Weyerhaeuser Company v. *U.S. Fish and Wildlife Service*, currently pending before the U.S. Supreme Court, presents the issue of whether "habitat" designated as critical by the Services must actually be "habitable" by the species. The case also asks whether a Service's decision not to exclude a given area from designated habitat based on its economic impact to the landowner, as permitted under the ESA, is reviewable by a court.

The dusky gopher frog was listed under the ESA as "endangered" in 2001. In fact, it was and is considered one of the most highly endangered species in the nation, according to the federal government. The FWS did not designate critical habitat for the frog, however, until it was forced to do so by litigation. The designation occurred in 2012. According to the FWS, the frog's historic range included Mississippi, Louisiana, and Alabama.

At the time the FWS designated critical habitat for the frog, it was only known to exist in one location in Mississippi. Nonetheless, the FWS designated 6,477 acres as critical habitat for the frog, including 1,544 acres known as "Unit 1" in Louisiana. Unit 1 was private land and part of an area leased by Weyerhaeuser for timber production activities. The frog had not been seen in Unit 1 since 1965 and, according to Weyerhaeuser, the area no longer contained the biological features that, according to the FWS, were essential for use of the area by the frog.

According to Weyerhaeuser, the FWS' own record provides that the "physical and biological features" that the "frog requires" are absent from Unit 1 and could only be re-established there at extraordinary effort and expense. According to Weyerhaeuser's Reply Brief in the Supreme Court proceedings, the frog requires breeding ponds and:

> . . .'upland forested nonbreeding habitat' 'maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover' and 'underground habitat' that the 'frog depends upon for food, shelter, and protection.'

Not only are the current conditions on the ground no longer accommodating of the frog's needs, the specified frequent fires for maintenance of the area would be prohibited in the active timber harvesting area.

Questions for the Supreme Court

Accordingly, the first question that the Court agreed to review in this matter is: Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to the conservation of the species?

As a threshold matter, Weyerhaeuser is asking the Court to make a blanket holding that inclusion of unoccupied areas as critical habitat must necessarily involve a more exacting and rigorous standard than inclusion of occupied habitat.

The next question the High Court will review has to do with the ESA's allowance in § 4(b)(2) for the Services to exclude a given area of proposed critical habitat if it determines that the benefit to such species is outweighed by the economic or other impact of including the area in the designation. Although the FWS' own analysis showed that inclusion of Unit

1 in the designation could have an economic impact to the landowner of as much as $34 million in lost development value, the FWS nonetheless determined that potential future biological benefit of the area to the species warranted its inclusion.

When Weyerhaeuser challenged the designation in court, both the trial court and the Fifth Circuit Court of Appeals not only upheld the designation, they ruled that the FWS' decision not to exclude the area on economic grounds was not even reviewable by any court because of a "lack of a judicially manageable standard." Thus, the second question to be reviewed by the Supreme Court is: Whether an agency decision not to exclude an area from critical habitat designation because of the economic impact of designation is subject to judicial review.

The case has garnered broad attention from many stakeholders. *Amicus* briefs in support of Weyerhaeuser and the property owners have been filed by no less than 50 entities including the Chamber of Commerce of the United States, the National Association of Home Builders, the National Mining Association, the Council of State Governments, National Conference of State Legislatures, the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors, and the American Forest Resource Council.

Weighing in supporting the government are: the Center for Biological Diversity, the Sierra Club, former Department of Interior officials, Defenders of Wildlife, the Humane Society of the United States, Wildearth Guardians, and others.

Reportedly *Weyerhaeuser* will be the first case argued in the upcoming Court's term on October 1, potentially the first case to be heard by whomever will replace Justice Anthony Kennedy. The underlying case being reviewed by the Supreme Court was *Markle Interests, L.L.C.* v. *United States Fish and Wildlife Service*, 848 F.3d 635 (5th Cir. 2017).

The Departments of the Interior and Commerce (and the ESA)

As noted, there have been no comprehensive amendments to the ESA itself since 1988, and there have been no comprehensive revisions to the Act's extensive implementing regulations since 1986. In providing context for the broad-sweeping regulatory revisions now proposed, the Services state:

> In the years since those changes took place, much has happened: The Services have gained considerable experience in implementing the Act, as have other Federal agencies, States, and property owners; there have been numerous court decisions regarding almost every provision of the Act and its implementing regulations; the Government Accountability Office has completed reviews of the Act's implementation; there have been many scientific reviews, including review by the National Research Council; multiple administrations have adopted various policy initiatives; and nongovernmental entities have issued reports and recommendations.

On July 24, 2018, the Services simultaneously published for public comment three packages of proposed regulatory reforms. All of the proposed revisions would apply prospectively only; they would not impact species already listed as threatened or endangered, nor would they impact already designated critical habitat. The deadline for comments on each package is September 24, 2018.

Regulations Relating to Interagency Consultation (Section 7)

Perhaps the most potentially impactful proposed regulatory revision has to do with the definition of the term "destruction or adverse modification." Recall that Section 7 of the ESA prohibits any federal agency action from jeopardizing the continued existence of a listed species or from causing the "destruction or adverse modification" of the species designated critical habitat.

What constitutes "adverse modification" has been the subject of much debate, both within the Services and in court. In 2001, the Fifth Circuit Court of Appeals in *Sierra Club* v. *United States Fish and Wildlife Service*, 245 F.3d 434 (5th Cir. 2001) invalidated the then-existing regulatory definition for adverse modification. Under that regulation, adverse modification was not implicated until both the recovery and survival of the listed species was implicated. Given the ESA's statutory characterization of critical habitat as areas "essential to the *conservation*" of the species, the *Sierra Club* court differentiated between factors threatening the recovery (an aspect of "conservation") of a species as being implicated well before matters proceed to a more dire point where the very

survival of the species is implicated. By requiring both "recovery *and* survival" to be implicated, the regulation effectively read "recovery" out of the standard and left "survival" as the sole gage. Three years later, the Ninth Circuit Court of Appeals followed suit in *Gifford Pinchot Task Force* v. *United States Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004).

In 2016, the Obama administration promulgated a revised definition of adverse modification as follows:

> Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.

The Services today are proposing two modifications for this definition. First, the proposed change would add "as a whole" to the end of the first sentence in order to "clarify the appropriate scale of the destruction or adverse modification determination." According to the Services, whether regulatorily actionable adverse modification has taken place should be evaluated relative to:

> . . .the value of the designated critical habitat as a whole for the conservation of a species, in light of the role the action area serves with regard to the function of the overall designation.

Further:

> . . .a determination of destruction or adverse modification is made at the scale of the entire critical habitat designation. Even if a particular project would cause adverse effects to a portion of critical habitat, the Services must place those impacts in context of the designation to determine if the overall value of the critical habitat is likely to be reduced.

Additionally, the Services propose to delete the entire second sentence from the 2016 definition:

> Many commenters argued that the proposed second sentence established a significant change in practice by appearing to focus the definition on the preclusion or delay of the development of physical or biological features, to the exclusion of the alteration of existing features. A number of commenters believed these concepts were vague, undefined, and allowed for arbitrary determinations.

The Services state that the second sentence is "unnecessary and has caused confusion" and is thus proposing its deletion.

Another term for which the Services are proposing revision is "effects of an action." Currently, the analysis of "effects of an action" parses between notions of "direct," "indirect," "interrelated," and "interdependent" effects. The Services today contend such differentiation is confusing and unnecessary. Instead, the Services now are proposing to collapse the analysis into a single, two-part test:

> First, the effect or activity would not occur but for the proposed action, and second, the effect or activity is reasonably certain to occur.

At the heart of the first prong is a traditional "but for" standard of causation. As for the second prong, the Services incorporate the notion of "reasonable certainty" already present in Section 7 regulations and regulatory practice.

Currently, "effects of an action" includes the notion of an "environmental baseline." The Services are not proposing to redefine "environmental baseline," but they are proposing to pull it out of "effects of an action" and make it a freestanding consideration:

> Moving it to a standalone definition clarifies that the environmental baseline is a separate consideration that sets the stage for analyzing the effects of the proposed action on the listed species and critical habitat within the action area by providing the foundation upon which to build the analysis of the effects of the action under consultation. The environmental baseline does not include the effects of the action under review in the consultation . . . .

Other proposed regulatory changes in the Section 7 consultation context include programmatic con-

sultations, time deadlines for informal consultations, expedited consultations, and utilization of agency information and data regarding the proposed federal action in biological opinions.

The Services' proposed revisions relating to Interagency Cooperation are available at: https://www.gpo.gov/fdsys/pkg/FR-2018-07-25/pdf/2018-15812.pdf

Regulations Relating to Species Listing, Delisting, and the Designation of Critical Habitat (Section 4)

Under the express terms of § 4(b)(1)(A) of the ESA, the Services must base their listing determinations "solely on the basis of best scientific and commercial data available after conducting a review of the status of the species." This is widely recognized as prohibiting the Services from considering economic implications of listings. Nonetheless, the Services are now proposing to strike the phrase "without reference to possible economic or other impacts of such determination" from existing regulations relating to listings. While the Services openly recognize they cannot consider economic implications in deciding whether or not to list a species, they do believe inclusion of economic data may better inform the public at large of the implications of their listing decisions.

And somewhat reminiscent of the *Weyerhaeuser* case pending at the Supreme Court referenced above, the Services are proposing reforms to the regulations governing the designation of unoccupied areas as critical habitat. In its 2016 revisions to the regulations, the Obama-era Services removed from regulations the following phrase:

> The Secretary shall designate as critical habitat outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.

According to the Services, removal of this prerequisite caused broad concern that the Services "intended to designate as critical habitat expansive areas of unoccupied habitat." To address this concern, the Services are proposing to again require that they must first evaluate areas occupied by the species before proposing inclusion of unoccupied areas.

Several relatively recent listing determinations by the Services withstood judicial challenges premised upon the fact that the threat to the species was not present today but was implicated according to modeling future impacts of climate change. These cases primarily focused on projected reductions in ice sheets from melting based upon rising temperatures. Without specific reference to these cases, the Services are proposing that consideration of whether designating critical habitat for a given species at the time of listing is or is not "prudent," may be influenced by such factors. Specifically:

> In such cases, a critical habitat designation and any resulting section 7(a)(2) consultation, or conservation effort identified through such consultation, could not prevent glaciers from melting, sea levels from rising, or increase the snowpack. Thus, we propose in section 424.12(a)(1)(ii) that designation of critical habitat in these cases may not be prudent because it would not serve its intended function to conserve the species.

The Services' proposed revisions relating to Listing and Designation of Critical Habitat are available at: https://www.gpo.gov/fdsys/pkg/FR-2018-07-25/pdf/2018-15810.pdf

Regulations Relating to Protections for 'Threatened' Species (Section 9)

Another potentially sweeping proposed change has to deal with how the Act extends protections to "threatened" as opposed to "endangered" species. The ESA itself only expressly applies the take prohibition of Section 9 to endangered species. It leaves to the discretion of the Services crafting appropriate species-specific rules for species designated as threatened. NMFS has continuously operated this way—applying Section 9's blanket take prohibition to species listed as endangered and crafting more narrow, species-specific provisions for species listed as threatened.

Conversely, the FWS has instead incorporated by regulation the Section 9 take prohibition for both threatened and endangered species without differentiation. The FWS has on occasion adopted more focused, so-called "4(d) Rules" to address the specific needs of a given species, the effect of which is often to clarify that specified instances of "take" are permissible without separately obtaining a permit under Section 10.

The FWS is now proposing to revert back to the same practice as NMFS—having the Section 9 prohibition apply only to species listed as endangered and adopt species-specific rules for species listed as threatened.

The proposed revisions related to threatened species are available at: https://www.gpo.gov/fdsys/pkg/FR-2018-07-25/pdf/2018-15811.pdf

Congress (and the ESA)

The House of Representatives—the Committee on Natural Resources

Representative Mike Johnson (R-La.) introduced HR 6346 in the House of Representatives on July 12, 2018. Titled "Weigh Habitats Offsetting Locational Effects of 2018" or the "WHOLE Act," the bill simply requires consideration of beneficial measures being taken on behalf of a species. Specifically, the proposed legislation provides:

> In determining whether a Federal agency action is likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of the critical habitat of a species, the Secretary shall consider the offsetting effects of all avoidance, minimization, and other species-protection or conservation measures that are already in place or proposed to be implemented as part of the action, including the development, improvement, protection, or management of species habitat whether or not it is designated as critical habitat of such species. HR 6346.

HR 6346 is pending in the House Committee on Natural Resources and has not at the time of this publication been set for hearing. HR 6346 is available at: https://www.congress.gov/bill/115th-congress/house-bill/6346

The Senate—the Environment and Public Works Committee

On July 2, 2018, Senator John Barrasso (R-Wy), Chair of the Senate Committee on Environment and Public Works (EPW), released a comprehensive package of proposed amendments to the ESA. Though not yet formally introduced and thus not yet having a bill number, the package includes a broad array of proposed amendments. According to an EPW release:

The discussion draft legislation will:

- Elevate the role of state conservation agencies in species management;
- Increase transparency associated with carrying out conservation under the Act;
- Prioritize available resources for species recovery;
- Provide regulatory certainty for landowners and other stakeholders to facilitate participation in conservation and recovery activities;
- Require that listing of any species must also include recovery goals, habitat objectives, and other criteria established by the Secretary of Interior, in consultation with impacted states, for the delisting or downlisting of the species;
- Require that the satisfaction of such criteria must be based on the best scientific and commercial data available;
- Enable states the opportunity to lead recovery efforts for listed species, including through a species' recovery team;
- Allow such a recovery team to modify a recovery goal, habitat objective, or other established criteria, by unanimous vote with the approval of the secretary of the Interior;
- Increase federal consultation with local communities;
- Improve transparency of information regarding the status of a listed species;
- Create a prioritization system for addressing listing petitions, status reviews, and proposed and final determinations, based on the urgency of a species' circumstances, conservation efforts, and available data and information so that resources can be utilized in the most effective manner;
- Include studies on how to improve conservation efforts and to understand in greater depth the ex-

tent of resources being expended across the federal government associated with implementation of the act; and
•Reauthorize the ESA for the first time since its funding authorization expired in 1992.

The legislative discussion package is available at: https://www.epw.senate.gov/public/_cache/files/b/9/b99b7ec0-cc53-4051-8827-9a1681602304/FD921A33A08582D2C2C4124BDE001F48.esa-amendments-of-2018-discussion-draft.pdf

Conclusion and Implications

There is only one thing certain at the moment—the *Weyerhaeuser* case remains pending at the Supreme Court, is set for oral argument October 1, 2018, and will likely produce an opinion addressing designation of unoccupied habitat and judicial review of the Services' discretion to exclude areas from critical habitat on economic or other reasons. Beyond that, the future of both the packages of proposed regulatory reforms as well as the proposed statutory amendments to the Act itself remain uncertain. Additionally, the last House Committee Chair to promulgate ESA reforms and pass them out of his committee (only to see them never taken up by the entire House), was voted out of office in the immediately following election cycle after being targeted by special interest opposed to any reform of the Act.

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EASTERN WATER NEWS

CROSS-BORDER U.S.-MEXICO SEWAGE POLLUTION CLAIM MAKES ITS WAY TO FEDERAL COURT

Cross-border pollution, which has plagued the region in and around the Tijuana River watershed in southern San Diego County since the 1930s, has been flaring up again, leading to a lawsuit by local agencies against the commission overseeing the capture and treatment of fugitive flows. [*City of Imperial Beach, et al. v. International Boundary Commission,* Case No. 3:18-cv-00457-JM-JMA (S.D. Cal. 2018).]

Transboundary flows, which can be comprised of treated and untreated wastewater, often carry substantial amounts of sediment, trash, and other pollutants. Human bacterial and viral pathogens have historically been detected in the surf zone of the Tijuana River during wet weather. Treatment of these flows, which are largely produced in Mexico, is further complicated by Tijuana's challenging topography, with many canyons and hillsides, which drain toward the international border. When it rains, the existing infrastructure on the U.S. side is unable to stem the large volumes of polluted runoff flowing down the river channel. Even without rain, equipment failures or broken lines in Tijuana regularly lead to cross-border spills. Further, ocean currents carry pollutants and contaminants from the shoreline of the Tijuana River Valley upcoast to California beaches.

The City of San Diego has declared a continued state of emergency since September 1993 in connection with these discharges. In March 2017, the government of Baja California also declared an environmental state of emergency due to excessive volumes of raw sewage flowing from the Tijuana sewage collection system into waters in the city of Tijuana and the Tijuana River Valley.

Background

The Tijuana River watershed is approximately 1,700-square miles and straddles the U.S.- Mexico international border. The watershed is a diverse and complex drainage system ranging from 6,000-foot high pine forest-covered mountains to the tidal saltwater estuary at the mouth of the Tijuana River. Nearly three-quarters of the watershed is located in Mexico, but the watershed drains to the Pacific Ocean in the U.S. through the eight-square-mile Tijuana River Valley, located adjacent to the border.

The Tijuana River Valley's aquatic system consists of three general components: the river, the estuary, and the ocean shoreline. The Tijuana River Estuary, a marine-dominated estuary with habitats as diverse as sand dunes and beaches, vernal pools, tidal channels, mudflats, coastal sage scrub occupied by multiple endangered species, was established by the Coastal Zone Management Act and the California State Park and Recreation Commission as a Natural Reserve.

Issues related to the Tijuana River Valley's aquatic system fall under the jurisdiction of the International Boundary and Water Commission (IBWC), an agency established by the U.S.-Mexico Convention of March 1, 1889, for the purpose of applying the rules in a 1884 Convention and resolving disputes over the international boundary line formed by the Rio Grande and the Colorado Rivers. In 1944, by treaty between the U.S. and Mexico (1944 Treaty) on the Utilization of Waters of the Colorado River and Tijuana Rivers and of the Rio Grande, the IBWC was authorized to exercise the rights and obligations of both governments under the Treaty and to give attention to the issue of border sanitation.

The IBWC consists of a U.S. Section (USIBWC) and a Mexican Section, Comisión Internacional de Límites y Agua (CILA), each with exclusive jurisdiction and control over matters and within the territorial limits of their respective countries.

Decisions of the IBWC are recorded in the form of "Minutes," which become binding on the parties if not disapproved within 30 days.

Progress by the 'Minute'

On September 24, 1979, the IBWC submitted Minute 261, which the U.S. and Mexico approved, whereby the IBWC agrees to "give permanent attention to border sanitation problems and give currently

existing problems immediate and priority attention."

In 1990, the IBWC entered into an international agreement, known as Minute 283, for the construction, operation, and maintenance of the South Bay International Wastewater Treatment Plant (SBIWTP). The SBIWTP's purpose is to capture (within the facilities' designed capacity), and treat to secondary standards Tijuana wastewater that would otherwise flow into the United States through the Tijuana River and its tributaries, for eventual discharge in the Pacific Ocean through the South Bay Ocean Outfall under a Clean Water Act National Pollutant Discharge Elimination System (NPDES) Permit. Minute 283 provided that Mexico had the primary responsibility for preventing the discharge of wastewater to receiving waters in the Tijuana River Valley, and the USIBWC had the role of assisting with equipment, maintenance and resources in the containment of wastewater discharges through utilization of collectors which collect and divert untreated sewage and other dry transboundary flows to the SBIWTP for treatment. Congress authorized the construction of the SBIWTP and appropriated necessary funds for its construction and operation. Minute 283 located the SBIWTP in the United States; it is owned and administered by the USIBWC and is operated and maintained by a private contractor, Veolia Water North America – West, LLC.

The San Diego Regional Water Quality Control Board (RWQCB) began regulating discharges of waste from the SBIWTP on November 14, 1996 by Order No. 96-50 and National Pollutant Discharge Elimination System Permit No. CA0108928. The San Diego RWQCB currently regulates the SBIWTP by Order No. 2014-0009 (2014 NPDES Permit).

In October 2015, the USIBWC and CILA signed Minute 320, which established a framework for addressing the solid waste, sediment, and water quality problems in the Tijuana River watershed. This resulted in the formation of a binational water quality working group as well as an executive-level binational core group (BCG).

A Persistent and Growing Problem

Rapid population growth within the watershed and unplanned housing developments, combined with aging infrastructure and treatment facilities are increasing the volume of uncontrolled transboundary flows, leading to frequent beach closures in Imperial Beach and other neighboring San Diego beaches.

Dry-weather flows in the Tijuana River, averaging around 14 million gallons per day are captured in Tijuana and diverted from the river's main channel through a pump station operated by CILA and through other Mexico-side infrastructure. Under certain circumstances, such as when Tijuana's sewer system fails or due to other problems with the river diversion infrastructure, uncollected flows reach the tributaries into the United States. Five of these tributaries contain canyon collector systems, which collect and divert the flows for treatment at the SBIWTP. However, the flows often exceed the SBIWTP treatment capacity.

During wet weather, the problem is exacerbated as the Tijuana River swells considerably. Stormwater can increase flow volume to over 1 billion gallons per day. After almost any rain event, flows in the Tijuana River exceed 27 million gallons per day, a level that surpasses CILA's wastewater treatment capacity. Under those conditions, Mexico-side diversion infrastructure in the main channel of the Tijuana River are shut down, and water flows from Mexico into the United States through the Tijuana River, ultimately draining into the U.S. waters of the Pacific Ocean south of Imperial Beach. Depending on the amount and frequency of rainfall, it may be days, weeks, or months, before the Tijuana River's flow falls below the 27 million gallons per day threshold at which the Mexico-side diversion infrastructure can resume operation.

The December 2017 Workshop and Ensuing Lawsuit

On September 27, 2017, following a significant cross-border raw sewage release a few months earlier in February, the City of Imperial Beach (Imperial Beach), the San Diego Unified Port District (Port District), and the City of Chula Vista notified the USIBWC and Veolia Water North America -West, LLC., of their intent to sue over Tijuana River Valley pollution discharges. On October 12, 2017, the San Diego RWQCB issued a tentative draft order (Order No. R9-2017-0135) requiring the IBWC to produce a water and sediment quality monitoring plan for the Tijuana River.

The result was a workshop meeting on December 12, 2017 (Workshop) between the Department of Justice, U.S. Environmental Protection Agency,

Department of State, the USIBWC, and the cities of Imperial Beach, San Diego, National City, the County of San Diego, the San Diego Unified Port District, and the San Diego RWQCB. The Workshop resulted in a distilled list of priority projects; the cities and San Diego Regional Board also sought certain commitments from the USIBWC to address cross-border pollution. The projects included: 1) a main river channel pollution interception facility with a conveyance to the SBIWTP; 2) enhanced wastewater capture and control facilities in the hills west of the Tijuana River's intersection with the international border, including a new collector/diversion in Yogurt Canyon; and 3) a functioning water quality monitoring and assessment program.

In a letter response to the State Water Resources Control Board dated March 1, 2018, the IBWC stated that, among other things, the USIBWC structure "does not contemplate the sort of unilateral commitments and decisions on infrastructure investments outlined by the Water Board," that the USIBWC's role under the 1944 Water Treaty does not make it the agency that, under U.S. law, is "responsible for managing transboundary trash, sewage, and sediment discharges" from Mexico, and that the USIBWC cannot commit to funding projects for which it has not received appropriations from Congress.

On March 2, 2018, Imperial Beach joined Chula Vista and the Port of San Diego in a federal lawsuit in the U.S. District Court for the Southern District of California against the USIBWC et al., alleging the USIBWC repeatedly failed to take measures to address pollution in the Tijuana River Valley under the Clean Water Act (CWA) and the Resource Conservation and Recovery Act (RCRA). Specifically, the lawsuit alleges violations of §§ 1311(a) and 1342 of the CWA, which prohibit the discharge of pollutants without NPDES permit or in violation of NPDES permit. The complaint also claims regarding the alleged violation of § 6972(a)(1)(B) of the RCRA (RCRA Citizen Suit provision), which authorizes any person to commence a civil action against a past or present owner or operator of a wastewater treatment facility who may have contributed or is now contributing to the handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

In their prayer for relief, plaintiffs requested: 1) injunctive and equitable relief to compel defendants to comply with CWA and RCRA, including an order enjoining discharges of pollutants and solid and/or hazardous wastes; 2) civil penalties; 3) litigation costs and reasonable attorneys' fees; (iv) prejudgment interest; and 4) any other and further relief as the court deems just, proper, and appropriate.

Conclusion and Implications

On August 13, 2018, the Department of Justice argued in court that the case must be dismissed on the ground that the USIBWC did not create the pollution, and therefore the federal agency and the civilian contractor that manages the SBIWTP are not responsible for the problem. The federal judge overseeing the case plans to visit the border to assess the situation before he issues a decision on the government request for dismissal. A decision on the Department of Justice motion could come relatively soon.
(Maya Mouawad, Steve Anderson)

PROPOSED PROJECT TO INCREASE HOOVER DAM POWER PRODUCTION VIA SOLAR AND WIND ENERGY IN ITS EARLY STAGES

The Los Angeles Department of Water and Power has proposed a multi-billion dollar pump station and pipeline project associated with the Hoover Dam. The project would be powered by excess solar and wind energy available during daylight hours, and would generate electricity for distribution in California. The target date for completion of the project is 2028, although the federal government, which operates Hoover Dam, has not yet indicated whether it would support the proposed project.

Background

Hoover Dam and its associated facilities (Project) were constructed in the 1930s to store Colorado River water used by California, Arizona, and Nevada. Hoover Dam impounds the Colorado River to form Lake Mead, from which water is released and stored in downstream reservoirs such as Lake Havasu and Lake Mohave. The Colorado River empties into the Sea of Cortez near Baja, California.

The Project also functions as a hydroelectric plant. On average, the Project generates approximately four billion kilowatt hours of hydroelectric power each year. California, Arizona, and Nevada use electricity generated by the Project to serve roughly 1.3 million people, with California cities and public agencies receiving the majority of generated power. The Project's cost of construction was repaid in 1987, and flood control related improvements will be paid off in 2037.

The proposed project, which would consist of a pumping station and pipeline and would cost approximately $3 billion, could increase the efficiency of the Project's use of water. As currently proposed, the pumping station would be located approximately 20 miles downstream of the dam. The pumping station would be powered by excess solar and wind energy generated in California. An underground pipeline would be used to transport water from the pumping station back to Lake Mead, where water could be released to generate hydroelectricity during periods of higher electrical demand.

More Efficient Use of Alternative Energy

The overarching purpose of the proposed project is to more efficiently use the growing amount of solar and wind energy generated by renewable technologies, particularly in California. Currently, excess energy generated by these technologies cannot be fully distributed across electrical grids due to the risk of overloading the system and causing blackouts. By utilizing renewable energy sources to pump water released downstream back to Lake Mead, the proposed project would, in effect, convert renewable energy into stored energy in the form of water behind Hoover Dam. Water released from Hoover Dam, in turn, generates electricity any time the water flows through its generators, thus producing electricity from stored renewable energy when solar and wind facilities are not operating, during peak periods. However, the proposed project is in the very early stages of engineering and technical assessments, and a host of potential obstacles may arise as the proposed project moves forward, if at all.

The Project would be located on federal lands and operated by the U.S. Bureau of Reclamation (Bureau). While the Bureau has acknowledged the concept of using the Project as a means of storing solar and wind energy generated in California, it has not indicated whether it would support the proposed project. According to the Bureau, more details are necessary before a full evaluation can be made. Federal approval would be necessary to construct the necessary facilities for the proposed project, although the proposed project does not contemplate alterations to existing Project facilities. The National Park Service would be the responsible agency for reviewing environmental and related impacts caused by the proposed project.

Concerns Raised

Several environmental concerns have already been raised regarding the impact of the proposed project on downstream interests. For instance, by retaining

more Colorado River flow in Lake Mead by capturing releases downstream, less water could ultimately make its way to the Colorado River Delta, a sensitive environmental area that has been impacted by upstream dam and reservoir operations. Additionally, Big Horn sheep are reported to rely on flows downstream of Lake Mead and could, it is alleged, also be impacted by greater retention of river water in the reservoir.

Local communities downstream of Lake Mead have also voiced concerns about the potential economic impacts of higher recapture rates for downstream flows while the proposed project is operating. These concerns relate primarily to water levels for boating and other watercraft activities. Water levels in downstream reservoirs like Lake Mohave and Lake Havasu, and the businesses that rely on sufficient water levels to support watercraft and other water-related recreational activities, may suffer, they contend. A Project operating schedule, including conditions for operation produced by negotiations or litigation among stakeholders, has not yet been proposed.

Conclusion and Implications

The proposed project to construct a pumping station and underground pipeline from downstream of Hoover Dam to Lake Mead is in its very early stages. Technical feasibility of the proposed project, environmental and economic impacts, and funding, among others potential issues, are uncertain. However, in light of the increased power production from renewable energy sources, particularly in California, it is likely that the proposed project will continue to receive serious attention until a final determination regarding its feasibility is made. Even if the project is pursued, a host of environmental, economic, and technical issues will likely arise, and it will remain to be seen whether a 2028 target date for completing the project is feasible.
(Miles Krieger, Steve Anderson)

NEWS FROM THE WEST

In this month's News from the West we report on a decision our of the Colorado Supreme Court addressing water rights stemming from return flows in augmentation plans. We also report on a decision, now pending in the Nevada Supreme Court in the form of answering certified questions from the Ninth Circuit Court of Appeals regarding the Nevada state law interplay between the public trust doctrine and doctrine of prior appropriation.

I. Colorado Supreme Court Rules that Right to Reuse Return Flows Not Included in Augmentation Plans

Coors Brewing Co. v. City of Golden,
2018 CO 63 (Colo. 2018)

On June 25, 2018, the Colorado Supreme Court denied an appeal from Coors Brewing Co. and held that a water user may not obtain the right to reuse return flows by amending a decreed plan for augmentation. Instead, the user must adjudicate a new water right. Additionally, the Court confirmed that replacement water retained its character as native, tributary water and therefore was not allowed to be used and reused to extinction but rather must be allowed to flow back into the river as return flows.

Background and Water Court Decision

Coors currently operates three augmentation plans to replace water diverted out-of-priority for use in its brewery and industrial complex. Although those uses consume a large portion of those diversions, in many years there was excess water that was returned to the Clear Creek as return flows. Beginning in the 1970s, with approval and oversight of the State and Division Engineers, Coors began a water leasing program that sold those would-be return flows to other downstream users.

In 2014, Coors attempted to lease excess return flows to Martin Marietta Materials, Inc., but this lease was denied by the Colorado State Engineer. Coors and Martin then challenged this denial before the Water Court, arguing that return flows could be reused or successively used, as they had been for more than 40 years.

The Water Court agreed with the State Engineer, finding that the three decreed augmentation plans only allow for a single use by Coors, and that use is limited to the uses in the decree (commercial and industrial, among others). But the augmentation plans did *not* authorize the reuse or successive use of that water. So the Water Court held that Coors was required to allow unconsumed water to flow back into the stream.

Coors argued that water diverted under an augmentation plan is akin to developed, foreign, or nontributary water that can be fully consumed, reused, and successively used to extinction. The Water Court rejected this argument, holding that the character of the water is never changed—it remains native, tributary water, and so the rules governing native, tributary water must apply.

Coors also tried to argue that other users had no expectation of return flows from fully augmented diversions, and therefore Coors had no obligation to release the return flows. The Water Court also denied this argument, relying on the 1987 Colorado Supreme Court decision in *Water Supply and Storage Co. v. Curtis*. 733 P.2d 680 (Colo. 1987). In that case, the court ruled that:

> . . .once the beneficial use on which a water right is based has taken place, any unconsumed waters remain waters of the state and were subject to appropriation. *See, Coors* at 7.

Like Coors, the applicant in *Water Supply* argued that because they had made use of the return flows immediately after appropriation, no downstream users had ever developed an expectation or reliance on those return flows. However, the court ruled that question was irrelevant—the pertinent question was whether the user (Water Supply) had established an appropriative right to the return flows. Neither Coors nor Water Supply had established that right, so neither was allowed to reuse or successively use the return flows.

After the Water Court ruling, Coors attempted to amend one of its existing augmentation plans to include the reuse and successive use of the return flows. Golden moved to dismiss that application, and the Water Court agreed, holding:

> . . .Coors may not obtain the right to reuse return flows through an amendment to its decreed augmentation plans, but instead may only obtain the right to reuse return flows by adjudicating a new water right. *Id.* at 8.

To reach this conclusion, the Water Court relied on the fundamental rule governing native stream water: diversions are limited to one use, and any return flows belong to the stream, subject to appropriation and administration. Therefore, allowing Coors to reuse or successively use or lease those return flows would constitute and impermissible enlargement of its water right. Rather than seeking a new appropriative right to those return flows, Coors appealed the Water Court decision to the Colorado Supreme Court.

The Supreme Court's Decision

Coors' appeal raised three issues: 1) the Water Court erred in ruling that Coors may not obtain reuse rights by amending its augmentation plan, 2) the Water Court erred in finding that return flows are subject to appropriation by other users, *i.e.* Coors believed that return flows from augmented water are more akin to foreign or developed water, and 3) the Water Court erred in interpreting the augmentation plan decrees to require return flows to the stream, regardless of whether those flows are needed to fully augment Coors' out-of-priority diversions

The Colorado Supreme Court began its analysis with a detailed explanation of the history of Colorado water law, including the overarching precedence of the prior appropriation doctrine. The Court then reviewed the statutory and case history of augmentation plans, and their necessity in a pure prior appropriation state like Colorado.

Reuse Rights via Amended Augmentation Plan

Turning to Coors' first claim, the Court noted that the only permitted amendments to augmentation plans are for "additional or alternative sources of replacement water." *See*, C.R.S. § 37-92-305(8).

Importantly, Coors had previously adjudicated other decrees allowing for reuse and successive use—but its three augmentation plans do not allow those uses. The absence of such a provision in the augmentation decrees indicated to the Court that the use and successive use of excess return flows was not an originally contemplated or decreed use.

The Court also rejected Coors' argument that the State Engineer's prior approval of the return flow leases legitimized that use. In sum, the Court concluded that not only was there no statutory support for Coors' claims, the idea that return flows from an augmentation plan could be reused without their own appropriation is fundamentally conflicted with the basics premises of Colorado water law.

Implied Right to Reuse and Make Successive Use of Water

The court then addressed Coors' contention that because return flows from an augmentation plan compensate, and sometimes overcompensate, the river, there should be an implied right to reuse and make successive use of that water. In essence, Coors argued that once it makes the river "whole" (augments the amount that it diverts out-of-priority) it should be able to do what it wants with any excess water. Coors' therefore claimed that this excess water was of the same character as foreign or produced water—it didn't belong there in the first place, so it could be used and reused to extinction by the original user. *See*, C.R.S. § 37-82-106(1).

The Court rejected this argument, pointing out that unlike foreign or produced water, Coors has not introduced water from a source unconnected to the stream system.

The water began as native, tributary water, and, regardless of diversions and replacements, remains native, tributary water.

In its analysis of the argument, the Court noted that Coors is never required to overcompensate the stream because its augmentation decrees specifically allow Coors to reduce its replacement obligations in the amount of return flows generated. Therefore, there is no need for Coors to ever replace so much water that there is enough return flows to lease or reuse. When operated as decreed, the augmentation plan simply makes Clear Creek "whole" again—no more, no less.

This, the Court argued, is the very essence of an augmentation plan.

Alleged Water Court Error

Finally, Coors made a last ditch argument that the Water Court erred in holding that its augmentation decreed required Coors to dedicate return flows to the stream, regardless of whether those return flows were needed to complete the replacement of out-of-priority diversions. The Court denied this argument by quoting directly from two of Coors' augmentation decrees. The third augmentation decree also contained similar language requiring the return flows to be returned, and making no mention of the reuse or successive use of replacement water.

Although Coors attempted to argue that those sentences only governed where Coors may release the return flows, the Court rejected that proposition in favor of the plain language reading that expressly requires unconsumed water to be returned to the stream system. That reading also aligns with the above-discussed reasoning that the augmentation water remains native, tributary water that, when returned to the stream, becomes available for appropriation by other users.

Conclusion and Implications

The Colorado Supreme Court therefore rejected all three of Coors' arguments on appeal. So, if Coors wishes to continue its water leasing program, it will have to file a new application to add the reuse and successive use of return flows.

Augmentation plans were created by the Colorado General Assembly to allow maximum flexibility in water uses, while still protecting the system of prior appropriation and its senior water rights. To that end, replacement water from an augmentation plan is treated the same as any other diverted water—absent a decree stating otherwise, it may be used once, for only its decreed use, and then any excess water must be allowed to flow back into the stream as return flows, where it is subject to appropriation and use by another party.

(John Sittler, Paul Noto)

II. Nevada Supreme Court Accepts Certified Questions From the Ninth Circuit Regarding Application of Public Trust Doctrine to Adjudicated Water Rights

Mono County, et al. v. Walker River Irr. Dist., et al., 890 F.3d 1174 (9th Cir. 2018) (certifying question to Nevada Supreme Court); *Mineral County, et al. v. Lyon County, et al.*, Nevada Supreme Court Case No. 75917 (July 18, 2018) (accepting certified question and directing briefing)

In the long-running dispute over the waters of the Walker River, the Ninth Circuit Court of Appeals recently certified the following question of law to the Nevada Supreme Court:

> Does the public trust doctrine apply to rights already adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent?"

The Nevada Supreme Court accepted the certified question and set a briefing schedule, setting off what is sure to be a flurry of activity from the parties and a slate of amici.

Factual and Procedural Background

The Walker River runs from the Sierra Nevada Mountains in California into the Great Basin of Nevada, where it terminates in Walker Lake. The majority of precipitation and surface water flow into the Walker River Basin occurs in California, but most of the water is consumed by irrigators in Nevada. Since agricultural appropriations from the river and its tributaries first commenced in the mid-nineteenth century, the size and volume of Walker Lake have shrunk significantly, and the concentrations of total dissolved solids have risen to the point where the lake can no longer sustain a fishery. Disagreement exists as to the causes of these changes, but there is general consensus that upstream diversions play at least some part.

Litigation over the Walker River commenced in 1902 as a trans-border dispute in the U.S. District Court for Nevada between two ranching operations, one in California and one in Nevada. The case ended in 1919, but five years later, the United States commenced a new action in the same federal court seeking to establish a federally reserved water right for the Walker River Paiute Tribe (Tribe). The court issued a decree in 1936 (subsequently amended in 1940) that distributed water rights to the Tribe and various other claimants and that retained jurisdiction in the decree court for future modification.

In 1991, the Walker River Irrigation District filed a petition with the decree court to enforce its decreed rights in response to regulatory action by the California Water Resources Control Board to prevent the District from dewatering portions of the river. The Tribe and the United States filed counterclaims, asserting new rights for a reservoir built on the tribal land. In 1994, Mineral County moved to intervene, requesting that the court reopen and modify the decree:

> . . .to recognize the rights of Mineral County … and the public to have minimum [water] levels to maintain the viability of Walker Lake.

Invoking the public trust doctrine, Mineral County requests that the court require at least 127,000 acre-feet annually to reach Walker Lake.

In 2015, the decree court dismissed Mineral County's complaint in intervention for lack of standing but nevertheless proceeded to address, in detail, the applicability of the public trust doctrine. The court concluded that the public trust doctrine could not be used to reallocate decreed rights without constituting a taking for which just compensation must be paid. Mineral County appealed.

The Ninth Circuit's Decision

The Ninth Circuit held the U.S. District Court erred by dismissing Mineral County's complaint in intervention for lack of standing. The court then proceeded to discuss the public trust doctrine jurisprudence in Nevada, noting that the Nevada Supreme Court expressly recognized the doctrine but "whether it permits reallocation of rights settled under the separate doctrine of prior appropriation" remains unsettled.

The Ninth Circuit's analysis started with the case of *Lawrence v. Clark County*, 254 P.3d 606 (Nev. 2011), which involved the Nevada Legislature's effort to transfer state owned land that may have been navigable when Nevada joined the United States. In *Lawrence* the Nevada Supreme Court formally recognized the public trust doctrine for the first time, although it pointed to several earlier decisions in which it had applied public trust principles. The court identified the doctrine as being:

> . . .based on a policy reflected in the Nevada Constitution, Nevada statutes, and the inherent limitations on the state's sovereign power.

It set out a three-part test to assess whether the doctrine permits alienation of state land.

The earlier decisions cited by the court included

Mineral County v. Nevada Dep't of Conserv. & Nat. Res., 20 P.3d 800, 802-05 (2001), a state court iteration of Mineral County's public trust claim, which had been dismissed in light of the federal decree court's prior exclusive jurisdiction. In considering the case, however, Justice Robert Rose wrote a concurring opinion that expounded the public trust doctrine in Nevada water law. Although no subsequent Nevada Supreme Court decision formally adopted Justice Rose's concurrence, the *Lawrence* court deemed it persuasive authority.

After discussing this history of the public trust doctrine in Nevada, the Ninth Circuit analyzed the parties' competing arguments as to whether Nevada would apply the doctrine to reallocate water rights long settled under the doctrine of prior appropriation. The court noted the polarity of the parties' positions. On the one hand, Mineral County contended that, under the public trust doctrine, the Nevada State Engineer had to reconsider previous allocations to reserve a minimum flow to Walker Lake. On the other hand, invoking the importance of finality, Lyon County and the Walker River Irrigation District argued that water rights settled by decree are "vested" and "conclusive" and cannot be disturbed.

The Ninth Circuit questioned why a middle ground did not exist, citing the California Supreme Court's decision in *Nat'l Audubon Society v. Superior Court*, 658 P.2d 709 (1983), which interpreted California's public trust obligations in the context of the prior appropriation system. As the Ninth Circuit noted:

> . . the California Supreme Court outlined the competing values underlying the public trust doctrine and the doctrine of prior appropriation and, rather than deeming one doctrine supreme, balanced them.

The Ninth Circuit opined that a similar balancing approach appeared to be what Justice Rose described in his concurrence in the *Mineral County* decision.

Ultimately, the court concluded, it could not be certain how the Nevada Supreme Court would answer the question of:

> . . .whether, and to what extent, the public trust doctrine applies to appropriative rights settled under the Walker River Decree.

Noting the "significant implications for Nevada's water laws," the court decided that certification to the Nevada Supreme Court was the most appropriate path forward.

Conclusion and Implications

The widespread interest in the Ninth Circuit case is a probable harbinger of what's to come in the Nevada Supreme Court. Beyond the numerous parties, multiple amici, including the State of California, a coalition of law professors and the Natural Resources Defense Council, weighed in on the public trust issue when it came before the Ninth Circuit. In all likelihood, these and others will submit amicus briefs in the Nevada Supreme Court as well.

As the driest state in the nation, Nevada exemplifies the competing demands on water resources that exist throughout the West. Most, if not all, of the state's rivers and streams are adjudicated, resulting in decrees that set forth the respective rights in the water source. For that reason, the Nevada Supreme Court's answer to the certified question of whether and how the state's public trust obligation might weave into the state's prior appropriation system, particularly where water rights are already adjudicated, will have far-reaching implications. Many others beyond the litigants in the long-running Walker River litigation will be closely following this case.
(Debbie Leonard)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

Editor's Note: Complaints and indictments discussed below are merely allegations unless or until they are proven in a court of law of competent jurisdiction. All accused are presumed innocent until convicted or judged liable. Most settlements are subject to a public comment period.

Civil Enforcement Actions and Settlements—Water Quality

•August 8, 2018—The U.S. Environmental Protection Agency reached a settlement with Vital Energy, Inc. (Vital) to resolve federal Clean Water Act (CWA) violations at the Guam Power Authority Piti Bulk Fuel Terminal in Piti, Guam. Vital will pay a $86,875 penalty as part of the agreement. EPA inspected the facility and found that Vital had failed to perform required inspections to the inside and outside of its aboveground oil and fuel tanks. Vital also improperly stored diesel fuel in a converted aluminum tank, which had inadequate venting. Aluminum is not suitable for storage of fuel due to its low melting point. The tank also had steel fuel piping which had corroded and was leaking. Vital also had an inadequate Spill Prevention, Control, and Countermeasure (SPCC) plan, a federal requirement for facilities that pose potential risks to waterways and nearby environments. Vital, which stores and distributes fuel in the Pacific Islands, operated the facility, which is owned by the Guam Power Authority and includes two aboveground oil storage tanks with a capacity of 22.5 million gallons. Vital leased the facility from Guam Power Authority from May 1, 2012 to September 30, 2017. Any spills from the facility would flow into the Piti Channel, which leads to Apra Harbor, the Philippine Sea, and the Pacific Ocean.

•August 7, 2018—The U.S. Environmental Protection Agency announced settlements with four Oakland companies—Sierra Pacific Ready Mix, Argent Materials, National Recycling Corporation, and Nor-Cal Rock—over Clean Water Act violations. Under the terms of the settlements, the companies will pay a combined $137,000 in civil penalties and will better manage stormwater runoff. EPA partnered with the San Francisco Bay Regional Water Quality Control Board to inspect concrete, motor vehicle parts and recycling facilities in East and West Oakland. The inspections were part of an initiative by the California Environmental Protection Agency's (CalEPA) statewide Environmental Justice Task Force, which focuses compliance and enforcement efforts related to air, water, toxics, solid waste, and pesticides. EPA conducted a total of six inspections between February and March 2017, which resulted in enforcement actions against:

1. Sierra Pacific Ready Mix (also known as Allied Redy-Mix), a ready-mix concrete manufacturing facility—$72,169 penalty

2. Argent Materials, a concrete and asphalt recycling facility—$27,000 penalty

3. National Recycling Corporation, a recycling facility—$23,106 penalty

4. Nor-Cal Rock, a concrete and asphalt recycling company—$15,000 penalty

Each of the companies failed to develop and implement an adequate stormwater pollution prevention plan and failed to use best management practices designed to prevent contaminants from entering stormwater. Sierra Pacific Ready Mix and Nor-Cal Rock also discharged stormwater containing industrial pollutants without first obtaining a permit.

•July 24, 2018—The U.S. Environmental Protection Agency announced settlements with two Goodyear, Arizona-based companies to resolve Clean Water Act violations. BioFlora, a fertilizer manufacturer,

and Inventure Foods, a food manufacturer, will pay $39,000 and $79,957 in civil penalties, respectively. Each company has made improvements to their facilities' wastewater pretreatment systems to achieve compliance with local and federal pretreatment standards. As part of negotiations with EPA, BioFlora installed a wastewater recycling system allowing it to become a zero-discharge facility. Inventure upgraded its wastewater system and operations procedures through an Administrative Order on Consent. Improvements to the companies' wastewater pretreatment systems will significantly reduce the volume of pollutants sent to Goodyear's wastewater treatment system each year, including over 230,000 pounds of total dissolved solids, 44,000 pounds of oil and grease and 250 pounds of nutrients in the form of nitrogen and phosphorous. During inspections in 2016 and 2017, EPA found that BioFlora and Inventure discharged wastewater violating local and federal standards from their manufacturing facilities into the City of Goodyear wastewater system. Municipal wastewater treatment facilities are not designed to treat industrial wastewater; as a result, industrial facilities are required under CWA to pretreat wastewater before it enters municipal drains. Both facilities discharge industrial wastewater into Goodyear's sewer system, which in turn flows to the city's 157th Avenue Water Reclamation Facility.

•July 17, 2018—The U.S Environmental Protection Agency announced a settlement with Electric Boat Corporation to resolve alleged violations of the Clean Water Act at Electric Boat's Groton, Connecticut submarine assembly facility. Under the settlement, Electric Boat is required to perform specific facility improvements to promote its compliance with EPA stormwater management requirements. The company will also pay a civil penalty of $60,000 as part of the settlement. Under the settlement, Electric Boat will install heavy metal filters on a select number of storm drains, outfit outdoor waste accumulation containers with covers, and develop and implement improved specific stormwater management training for shipyard trades. These measures will reduce pollution that can be picked up by stormwater and improve Electric Boat's compliance with the company's CWA stormwater discharge permit. After EPA informed Electric Boat of the alleged violations, Electric Boat responded promptly to address EPA's concerns and worked to resolve the claims. During an April 2017 inspection, EPA found that Electric Boat had allegedly violated provisions of its CWA permit for stormwater discharges by failing to adequately implement best management practices to minimize the impacts of stormwater discharges on the Thames River. In addition, EPA inspectors observed that an Electric Boat employee had dumped used fiberglass resin into a storm drain. Compliance with environmental requirements related to stormwater is important to New England's waters because stormwater is the leading cause of impairment of the region's rivers, lakes and streams Stormwater runoff is generated from rain and snowmelt events that flow over land or impervious surfaces, such as paved streets, parking lots, and building rooftops, and does not soak into the ground. The runoff picks up pollutants like trash, chemicals, oils, metals, dirt and sediment that can harm our rivers, streams, lakes, and coastal waters.

•July 2, 2018—The U.S. Environmental Protection Agency reached a settlement with Supreme Group Guam LLC (Supreme) to resolve Clean Water Act violations at its fuel terminal at the Guam International Airport in Tamuning, Guam. Supreme will pay a $150,000 penalty as part of the agreement. EPA inspected the facility in April 2017 and found that Supreme lacked a written Spill Prevention, Control, and Countermeasure (SPCC) plan that was certified by a professional engineer and included procedures to prevent and respond to oil spills. In addition, EPA found that Supreme was operating without a facility response plan (FRP), which helps staff plan how they would prevent or respond to an oil spill. FRPs also help local and regional response authorities better understand potential hazards and response capabilities in their area.

•July 2, 2018—The U.S. Environmental Protection Agency has reached an agreement with Cabras Marine Corp. to reduce discharges of oil, metals and other contaminants into Apra Harbor, Guam. In March 2017, EPA conducted an inspection of the Cabras Marine facility and found multiple violations of the Clean Water Act. Those violations included discharge of industrial stormwater without a permit, failure to properly maintain containment berms, failure to control sandblast grit and paint particles, improper storage of used oil, and inadequate controls for leaking oil. Cabras Marine's operations include

boat, chassis and engine repair, fabrication, sandblasting, and material storage and disposal. Cabras Marine will file a final report with EPA documenting completion of the work required under the settlement.

•June 20, 2018—The U.S. Environmental Protection Agency reached a settlement with Taylor Farms Retail, Inc. over Clean Water Act violations at its refrigerated warehouse and food processing facility in Salinas, California. Under the terms of the settlement, the company will take steps to prevent pollutants from discharging in industrial stormwater and pay a penalty of $67,640. EPA inspected Taylor Farms' facility in November 2016 and found the company failed to obtain a stormwater discharge permit from the California State Water Resources Control Board. Stormwater runoff from Taylor Farms discharges into Alisal Creek, a tributary to the Old Salinas River, which flows into Monterey Bay. EPA also found the facility was operating without a stormwater pollution prevention plan and failed to conduct required annual employee training on minimizing pollutants in stormwater runoff. The company has obtained the necessary permit and come into compliance with CWA requirements.

•June 19, 2018—The U.S. Environmental Protection Agency has announced an agreement with Herzog Wine Cellars over violations of the federal Clean Water Act. The settlement requires the company to pay a $70,000 penalty after an EPA inspection found the company was discharging wastewater that violated local and federal standards from its production operations into the City of Oxnard, California's sanitary sewer. Herzog Wine Cellars, also known as Royal Wine Corporation, produces kosher wine at its Ventura County facility. An EPA inspection in 2015 found that wastewater from cleaning and sterilizing operations exceeded the limits for total suspended solids. The facility also discharged acidic wastewater to the city of Oxnard's sanitary sewer, which eventually enters the Pacific Ocean. As part of a prior 2016 agreement with EPA, Herzog Wine Cellars upgraded its on-site wastewater treatment system to comply with the company's industrial wastewater discharge permit requirements and prevent pretreatment violations. The company has since achieved consistent compliance with the applicable pretreatment standards. Industrial wastewater discharges must meet CWA standards for pH (acidity). Low pH wastewater is corrosive and can compromise the integrity of the wastewater collection system pipes, leading to potential leakage. Both low and high pH can damage bacteria and micro-organisms that effectively treat sewage.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•August 8, 2018— EPA Region 7 has reached an administrative settlement with GBW Railcar Services, LLC, to resolve violations of the Resource Conservation and Recovery Act (RCRA). The agreement is expected to improve the company's management of hazardous waste at six facilities in Kansas and Nebraska. The company will take steps to ensure its operations are complying with environmental regulations that protect communities and the environment from potential exposure to hazardous waste. EPA alleged GBW to be in violation of several RCRA requirements at six of its facilities in Coffeyville, Cummings, Junction City, and Neodesha, Kansas; and Omaha, Nebraska. GBW is required to submit documentation within 60 days to EPA for each facility to demonstrate that accurate hazardous waste determinations have been performed. GBW will also submit two Bi-Annual Compliance Reports to EPA to demonstrate ongoing compliance with RCRA. As part of the settlement, the company has also agreed to pay a civil penalty of $150,731. RCRA gives EPA the authority to regulate hazardous waste from creation to disposal. This includes the generation, transportation, treatment, storage, and disposal of hazardous waste. GBW facilities manage ignitable, corrosive, and toxic hazardous wastes that could potentially affect surrounding groundwater and surface water. EPA actively seeks to prevent potential catastrophic events by enforcing safeguards and preventative measures.

•July 24, 2018—The U.S. Department of Justice, U.S. Environmental Protection Agency and State of West Virginia announced a settlement with CSX Transportation Inc. to resolve its liability for state and federal water pollution violations related to a 2015 oil spill caused by a train derailment in Mount Carbon, West Virginia. Under the terms of the settlement, CSX Transportation will pay penalties of $1.2 million to the United States and $1 million to West Virginia. On February 16, 2015, a CSX Transporta-

tion train with 109 railcars carrying crude oil derailed in Mount Carbon. Twenty-seven tank cars, each containing approximately 29,000 gallons of Bakken crude oil, derailed, and about half of the tank cars ignited. The resulting explosions and fires destroyed an adjacent home and garage. Local officials declared a state of emergency, nearby water intakes were shut down, and residents in the area were evacuated. EPA and the West Virginia Department of Environmental Protection joined with other federal, state, and local agencies in responding to the incident. In response to federal and state orders, CSX Transportation has taken steps to remedy the damage and disruption caused by the oil spill. Separately, under a state-negotiated provision, CSX Transportation will help improve surface water quality in the area impacted by the oil spill through a contribution of $500,000 to a state-administered fund to upgrade a water treatment facility in Fayette County, West Virginia. Some of the oil discharged during and following the train derailment flowed into the Kanawha River and Armstrong Creek. Freshwater bodies are particularly sensitive to fuel spills, which may damage fish and bird habitat and threaten drinking water supplies.

•July 17, 2018—The U.S. Environmental Protection Agency announced settlements with four New England companies that resolve alleged violations of the Emergency Planning and Community Right to Know Act (EPCRA), which requires companies and organizations to report their use and release of toxic chemicals. The companies are Atlantic Footcare of North Smithfield, R.I., Smith & Wesson of Springfield, Mass., Masters Machine Co. of Round Pond, Maine, and Bath Iron Works of Bath, Maine. The settlement with Bath Iron Works also resolves alleged Clean Water Act violations. All four companies promptly corrected the EPCRA violations after EPA inspections, and have filed required reports of their use of toxic chemicals under EPA's Toxic Release Inventory (TRI) program, allowing the public and local officials to access data about toxic chemicals used and released in their communities. Each company agreed to pay a civil penalty and improved its compliance with TRI requirements; Bath Iron Works is also now in compliance with the company's Clean Water Act discharge permit. The permit requires the company to minimize the exposure of waste from the shipbuilding process, such as metal shavings and grit from sand blasting operations, so that when it rains these pollutants do not flow into the Kennebec River. Bath Iron Works will pay a $355,000 penalty under the settlement with EPA.

The obligation to report toxic chemical use and releases under the Toxic Release Inventory program is included in EPCRA, enacted in 1986, in response to concerns regarding the environmental and safety hazards posed by the use and release of toxic chemicals. The yearly submission of Toxic Release Inventory forms is a key component of the statute. They ensure that citizens and public safety officials have access to information about chemicals at nearby facilities, their uses, and releases into the environment. Making such information available to the public and municipal officials also creates a strong incentive for companies to reduce or eliminate the use of toxic chemicals and improve overall environmental performance and safety.

•July 9, 2018—The U.S. Department of Justice, the U.S. Environmental Protection Agency and the Rhode Island Department of Environmental Management (RIDEM) announced that two subsidiaries of Stanley Black & Decker, Inc.—Emhart Industries Inc. and Black & Decker, Inc.—have agreed to clean up dioxin contaminated sediment and soil at the Centredale Manor Restoration Project Superfund Site in North Providence and Johnston, Rhode Island. The settlement, which includes cleanup work in the Woonasquatucket River (River) and bordering residential and commercial properties along the River, requires the companies to perform the remedy selected by EPA for the Site in 2012, which is estimated to cost approximately $100 million, and resolves longstanding litigation. The cleanup remedy includes excavation of contaminated sediment and floodplain soil from the Woonasquatucket River, including from adjacent residential properties. Once the cleanup remedy is completed, full access to the Woonasquatucket River should be restored for local citizens. The cleanup will be a step toward the State's goal of a fishable and swimmable river. The work will also include upgrading caps over contaminated soil in the peninsula area of the Site that currently house two high-rise apartment buildings. The settlement also ensures that the long-term monitoring and maintenance of the site, as directed in the remedy, will be implemented to ensure that public health is protect-

ed. Under the settlement, Emhart and Black & Decker will reimburse EPA for approximately $42 million in past costs incurred at the Site. The companies will also reimburse EPA and the State of Rhode Island for future costs incurred by those agencies in overseeing the work required by the settlement. The settlement will also include payments on behalf of two federal agencies to resolve claims against those agencies. These payments, along with prior settlements related to the Site, will result in a 100 percent recovery for the United States of its past and future response costs related to the Site. Litigation related to the Site has been ongoing for nearly eight years. While the Federal District Court found Black & Decker and Emhart to be liable for their hazardous waste and responsible to conduct the cleanup of the Site, it had also ruled that EPA needed to reconsider certain aspects of that cleanup. EPA appealed the decision requiring it to reconsider aspects of the cleanup. This settlement, once entered by the District Court, will resolve the litigation between the United States, Rhode Island, and Emhart and Black and Decker, allowing the cleanup of the Site to begin. The Site spans a one and a half mile stretch of the Woonasquatucket River and encompasses a nine-acre peninsula, two ponds and a significant forested wetland. From the 1940s to the early 1970s, Emhart's predecessor operated a chemical manufacturing facility on the peninsula and used a raw material that was contaminated with 2,3,7,8-tetrachlorodibenzo-p-dioxin, a toxic form of dioxin. Elevated levels of dioxins and other contaminants have been detected in soil, groundwater, sediment, surface water and fish. The Site was added to the National Priorities List (NPL) in 2000, and in December 2017, EPA included the Centredale Manor Restoration Project Superfund Site on a list of Superfund sites targeted for immediate and intense attention. Several short-term actions were previously performed at the Site to address immediate threats to the residents and minimize potential erosion and downstream transport of contaminated soil and sediment. This settlement is the latest agreement EPA has reached since the Site was listed on the NPL. Prior agreements addressed the performance and recovery of costs for the past environmental investigations and interim cleanup actions from Emhart, the barrel reconditioning company, the current owners of the peninsula portion of the Site, and other potentially responsible parties.

• June 26, 2018—The U.S. Environmental Protection Agency announced Northeast Dredging Equipment Company, LLC has completed the installation of two cleaner diesel engines on a floating crane as part of a legal settlement reached in April of 2017 for alleged violations of the Marine Protection, Research, and Sanctuaries Act. As part of the settlement, Northeast Dredging LLC invested at least $250,000 to replace two old diesel engines from its floating crane with cleaner models, resulting in improved water and air quality. The crane operates in or around the New York/New Jersey Harbor. In addition, Northeast Dredging paid a $100,000 penalty. Among the alleged violations were placement of dredged materials in an unauthorized location in the Atlantic Ocean. The purchase and installation of these engines is considered by EPA to be a "supplemental environmental project," which is an environmentally-beneficial project that a business or individual voluntarily agrees to undertake in partial settlement of violations. The new cleaner diesel engines installed emit 71 percent less nitrogen oxides and 86 percent less particulate matter than the 1972 diesel engines they replaced. (Andre Monette)

JUDICIAL DEVELOPMENTS

EPA'S SECTION 316(B) NPDES RULE FOR COOLING WATER INTAKE STRUCTURES UPHELD BY SECOND CIRCUIT

Cooling Water Structure Intake Coalition, et al., v. U.S. Environmental Protection Agency, et al, ___F.3d___, Case No. 14-4645 (2nd Cir. July 23, 2018).

On July 23, 2018, the U.S. Court of Appeals for the Second Circuit, in *Cooling Water Structure Intake Coalition, et al., v. U.S. EPA*, denied several environmental conservation groups' and industry associations' petition for review of the U.S. Environmental Protection Agency's (EPA) August 2014 Final Rule that established requirements for Cooling Water Intake Structures (CWIS). EPA's new regulation requires CWIS that withdraw more than 2 million gallons of water a day (mdg) with at least 25 percent used for cooling, to minimize impingement and entrainment.

Supported by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (cumulatively: the Services), through a jointly issued Biological Opinion (BiOp), the Final Rule withstood challenge under the Endangered Species Act (ESA). The court upheld the Final Rule and held that the EPA gave adequate notice of its rulemaking

Background and The Final Rule

Regulations for cooling water intake structures (CWIS) are heavily debated, as any implemented standard will affect thousands of industrial facilities across the nation. Cooling water is withdrawn to dissipate waste heat from various industrial processes. As a natural byproduct of the ordinary maintenance and use of CWIS, billions of aquatic organisms are removed and killed. In response, § 316(b) of the Clean Water Act (CWA) requires the EPA to formulate regulations that seek to minimize these environmental impacts.

To comply with § 316(b), in 2014 the EPA promulgated its National Pollutant Discharge Elimination System—Final Regulations to Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend requirements at Phase I Facilities (Rule), 79 Fed. Reg. 48,300 (Aug. 15, 2014) (codified at C.F.R. pts. 122, 125). The Rule regulates CWIS in existing power plants and manufacturing facilities that withdraw mdg where 25 percent or more is used for cooling. The requirements are implemented through National Pollutant Discharge Elimination System (NPDES) permits and are applied to CWIS':

> . . .location, design, construction, and capacity…[to] reflect the Best Technology Available for minimizing adverse environmental impact.

The Rule's new impingement and entrainment standards are to be enforced by the NPDES permit system.

Impingement occurs when aquatic organisms are pinned against or become trapped in or near the intake structure or its screen. The new rule also includes a national standard for impingement mortality based on seven options that a facility owner may choose as the Best Technology Available (BTA) for reducing impingement. Entrainment occurs when aquatic organisms are drawn into the CWIS water flow and enter the structure and its cooling system. With respect to entrainment, the Rule sets a national standard of BTA for site-specific determination of mitigation requirements at a particular CWIS.

The Services concluded in their joint BiOp that the proposed rule included certain process-based protections that ensured that the operation of CWIS was not likely to "jeopardize" the continued existence of listed species or "adversely modify" their critical habitat within the meaning of § 7 of the ESA.

Ultimately, the court agreed with the Services' analysis despite receiving petitions challenging the Rule from both environmental and industry petitioners. The court's reasoning is further explained below.

The Second Circuit's Decision

Entrainment and Impingement Standards

The environmental petitioners challenged the Rule's entrainment and impingement standards as a violation of the CWA. They also claimed that the Rule's definition of a "new unit" is a violation of the Administrative Procedure Act (APA) and that the BiOp was not sufficiently supported and thus does not comport with ESA standards.

With respect to the entrainment standards, the environmental petitioners disagreed with the EPA's recognition that closed-cycle cooling is not the national BTA and that the BTA may be determined on a site-specific basis through a process held by the directors of NPDES programs (Directors). However, the court held that a "one-size-fits-all" approach to entrainment was infeasible because closed-cycle cooling cannot be retrofitted to many existing facilities on a national scale. The court also held that the EPA did not act arbitrarily and capriciously in its conclusion because it utilized multiple reasonable factors, in making its determination. The court also allowed the Directors to base their BTA determinations under § 316(b) of the CWA in part, on a cost-benefit analysis.

The court then turned to the environmental petitioners' challenges to the Rule's impingement standards. Similarly, the court rejected the argument that closed-cycle cooling should be the BTA to minimize impingement mortality and that it was not arbitrary or capricious to reject the technology as the BTA on a nationwide scale. Instead, the court upheld the EPA's standard of allowing the Directors to determine whether a facility's impingement technologies are adequate. The court also agreed with the EPA's exclusion of certain species from its calculation of impingement mortality and concluded that it was adequately supported by data showing that the mortality of the excluded species was not contingent on the CWIS's impingement technology.

New Unit Definition

The environmental petitioners also challenge the EPA's definition of "new unit" to "exclude rebuilt, repowered, and replacement units" under the Administrative Procedure Act. The court upheld the Rule and reasoned that an agency may modify a rule through the notice-and-comment process so long as the modification was rational—which the court noted that the EPA properly did.

No Jeopardy Finding

The court also rejected all challenges claiming that the Services, who provided the joint BiOp and Incidental Take Statements (ITS), and upheld the BiOp's findings with respect to the Rule. The court largely deferred to the determinations of the Services and concluded that the Services' "no-jeopardy" finding was procedurally and substantively sound, meaning that the BiOp and Rule both sufficiently established their compliance with ESA standards and procedural processes.

Notice and Comment

The industry petitioners argued that the EPA procedurally violated the APA by failing to provide the public with adequate notice of and an opportunity to comment on various provisions of the Rule. However, the court concluded that the Rule is the logical extension of the proposed rule and that the EPA "fairly apprised interested persons" of compliance with the ESA during its comment period. Further, the court noted that the public has no independent right to comment on these circumstances, under § 7(a)(2) of the ESA.

Allegations of Unlawful Delegation of Regulatory Authority

The industry petitioners also substantively challenged the Rule on the grounds that the EPA exceeded the scope of § 316(b) by unlawfully delegating regulatory authority to the Services. However, the court noted that the Rule did not grant Directors vested authority to establish permit requirements and that the agencies ultimately still have the power for permit issuance.

Additional Claims

Similar to the environmental petitioners' challenges to the BiOp, industry petitioners also claimed that the EPA's biological evaluation, the Services' BiOp, and the factual support of each were deficient. However, the court disagreed and held that the BiOp's environmental analysis was properly supported. The court also disagreed with the industry petitioner's

argument that the EPA failed to give adequate notice of the Rule's new definition of "new unit" and noted that challengers had adequate opportunity to comment. Finally, the court rejected the argument that the EPA acted arbitrarily and capriciously with respect to the NPDES permitting process. The court largely deferred to the EPA's findings and interpretation of the Rule.

Conclusion and Implications

The Second Circuit rejected all the environmental and industry petitioner's arguments. As a result, the 2014 CWIS final regulations remain effective and the court unequivocally deferred to the EPA in its final interpretation of § 316(b) of the Clean Water Act. (Rachel S. Cheong, David Boyer)

SEVENTH CIRCUIT FINDS JURISDICTIONAL DETERMINATION UNSUPPORTED BY RECORD WHERE CORPS OF ENGINEERS FAILED TO INCLUDE WETLANDS INVENTORY MAP OR SITE-SPECIFIC DATA

Orchard Hill Building Co. v. U.S. Army Corps of Engineers, 893 F.3d 1017 (7th Cir. 2018).

Deference to agency decisions under the abuse of discretion test has its limits, as illustrated by this Clean Water Act case in which the U.S. Army Corps of Engineers (Corps) failed to include in the administrative record of is jurisdictional determination site-specific testing results to support its findings the artificially-created wetlands at issue would have a significant pollution effect on navigable water of the United States, and also failed to include in the record the National Wetlands Inventory map on which the agency relied for its "similarly situated" finding.

Background

The plaintiff homebuilder, Orchard Hill, purchased "the Warmke parcel, a 100-acre former farm-land located in Tinley Park, Illinois," in 1995, and subsequently obtained authorization to build "a two-phase residential development on the parcel." The parcel is surrounded by residential development. The closest navigable water to the Warmke parcel is the navigable-in-fact Little Calumet River, which is 11 miles away:

> In between the Warmke wetlands and the Little Calumet River are man-made ditches, open-water basins, sewer pipes, and the Midlothian Creek—a tributary of the Little Calumet River.

From 1996 through 2003, Orchard Hill build "more than a hundred homes" in the first phase of development. Construction altered the area's water drainage, and about 13 acres pooled with rainwater and grew wetland vegetation. "[T]he Warmke wetlands drain[], by way of sewer pipes, to the Midlothian Creek." Before starting the second phase and building on those acres—the Warmke wetlands—Orchard Hill sought a jurisdictional determination from the Corps in 2006 that the wetlands are not "waters of the United States subject to regulation under the Clean Water Act, 33 U.S.C. § 1251 *et seq*.

That application unfurled "[a] braid of regulatory, judicial, and administrative events" leading to the Corps asserting jurisdiction over the Warmke wetlands on the basis a determination that "the Warmke wetlands were adjacent to" Midlothian Creek, "and thus waters of the United States."

During the pendency of Orchard Hill's administrative appeal from the Corps' 2006 jurisdictional determination, the U.S. Supreme Court decided *Rapanos v. United States*, 547 U.S. 715, 126 S.Ct. 2208 (2006). Justice Kennedy's concurring opinion, held controlling by the Seventh Circuit in *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724–25 (7th Cir. 2006), held that "adjacency to a tributary of a navigable-in-fact water is alone insufficient to make the wetland a water of the United States," and that:

> . . .the Corps' jurisdiction over [such] wetlands depends upon the existence of a significant nexus between the wetlands in question and

navigable waters in the traditional sense. *Rapanos*, 547 U.S. at 779, 126 S.Ct. 2208.

The Corps issued internal guidance in 2008 (*Rapanos* Guidance) interpreting "similarly situated lands" to mean all "wetlands adjacent to the same tributary," because "such wetlands are physically located in a like manner." It instructs the Corps to determine first if any such adjacent wetlands exist, and if so, to:

> . . . consider the flow and functions of the tributary together with the functions performed by all the wetlands adjacent to that tributary in evaluating whether a significant nexus is present.

The Corps' division engineer remanded the 2006 jurisdictional delineation to the district engineer for further review in light of *Rapanos* and the Corps' internal guidance. In the course of that review the district engineer visited the site and "observed an 'intermittent flow' of water from the Warmke wetlands to the Midlothian Creek." He:

> . . .did not test or sample the Warmke wetlands' composition, but based on the observed hydrological connection. . .concluded the Corps had jurisdiction over the wetlands.

In a subsequent confirmation of this determination, the district engineer listed:

> . . .165 wetlands purportedly 'adjacent' to the Midlothian Creek and thus 'similarly situated' to the Warmke wetlands per the *Rapanos* Guidance.

This record was found insufficient by the division engineer in the ensuing administrative appeal, who remanded to the district engineer for what would be the Corps "final approved jurisdictional determination for the Warmke wetlands." On remand the district engineer issued an 11-page report that asserted that the 165 wetlands considered were all a part of the "Midlothian Creek watershed," though it did not describe that term or map that area. The supplement further explained the significant flooding problems the Tinley Park area had faced in recent years, and, relying on scientific literature and studies, detailed how wetlands help reduce floodwaters. It also described the effect of wetlands generally on reducing pollutants in downstream waters, and the wildlife that inhabited the Warmke wetlands.

The Corps' final jurisdictional determination concluded that the Warmke wetlands "alone or in with the area's other wetlands, have a significant nexus to the Little Calumet River." The U.S. District Court affirmed the Corps' determination, deferring to the agency's:

> . . .conclusions regarding the physical, chemical, and biological impact of the Warmke wetlands on the Little Calumet River.

The Seventh Circuit's Decision

Applying *de novo* review (*Laborers' Pension Fund v. W.R. Weis Co.*, 879 F.3d 760, 766 (7th Cir. 2018)), the Seventh Circuit considered whether the record before it contained substantial evidence that "a reasonable mind might accept as adequate to support the [agency's] conclusion" (*Zero Zone, Inc. v. U.S. Dep't of Energy*, 832 F.3d 654, 668 (7th Cir. 2016)), or whether the Corps' determination "r[an] counter to the evidence before the agency, or [was] so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

Regarding the Corps' determinations that the Warmke wetlands on their own "significantly affect the chemical, physical, and biological integrity of 'waters of the United States.'" The agency first found that the wetlands:

> . . .have the 'ability' to pass pollutants to the Little Calumet River, because "wetlands are 'nature's kidneys,' able to filter out pollutants that would otherwise reach downstream waters. Northeastern Illinois waters are known to suffer relatively high rates of nitrogen, and the Warmke wetlands have a 'discrete and confined intermittent flow' to the Midlothian Creek. The court held this "'speculative' finding cannot support a significant nexus," citing *Rapanos* for the proposition that "'conditional language' like 'potential ability' may 'suggest an undue degree of speculation, and a reviewing court must identify substantial evidence.'" 547 U.S. at 786.

The Corps also found that the loss of Warmke wet-

lands would lead to an increase in floodwaters in the Midlothian Creek watershed, as well as an increase in downstream nitrogen, supporting a finding that the Warmke wetlands alone significantly affect the chemical, physical, or biological integrity of Midlothian Creek, itself a tributary of the Little Calumet River. But both of these findings were based on the agency's assertion that the Warmke wetlands:

> . . .are the fourth largest wetlands in the area, making up 2.7 percent of the 462.9 total acres of the wetlands in the Midlothian Creek watershed.

Thus, while the loss of *all* the wetlands in the watershed would lead to a 13.5 rise in floodwaters "loss of the Warmke wetlands would result in a floodwater rise of a fraction of a percent." The Corps also estimated a rise of 27-51 percent in the amount of nitrogen entering Midlothian Creek from the loss of all of the wetlands within the watershed, but did not test the Warmke wetlands for the presence of nitrogen. Even assuming the presence of nitrogen in the Warmke wetlands:

> . . .they, again, make up just 2.7 percent of the watersheds' total wetlands, and so would presumably account for a small fraction of that increase to the Midlothian Creek (to say nothing of the increase to the navigable-in-fact River).

In light of this "insubstantial" impact (*Rapanos*, 547 U.S. at 780), the court held that "if the Corps thinks otherwise it must provide its reasoning."

The Corps' alternative findings that the Warmke wetlands "in combination with similarly situated lands in the region" have a sufficient impact on the Little Calumet River to support jurisdiction, per the *Rapanos* Guidelines' interpretation of "similarly situated" to mean "all wetlands adjacent to the same tributary." All of the Corps' similarly-situated findings were based on 165 wetlands the Corps asserted are all adjacent to Midlothian Creek, based on a National Wetlands Inventory map entitled "Tinley Park, Illinois Quadrangle, 1981," that was not itself made a part of the record. The court observed that the title of the map "hardly suggests a focus on Midlothian Creek," and the record was devoid of any other information supporting "how wetlands in the same watershed are, *ipso facto*, adjacent to the same tributary," as required by the *Rapanos* Guidelines:

> [T]he so-called Midlothian Creek watershed is 12,626 acres—almost 20 square miles—and that considerable size belies any assumption that lands within the watershed are necessarily, or even likely, adjacent to the Creek.

The court went on to conclude:

> The significant-nexus test has limits: the Corps can consider the effects of in-question wetlands only with the effects of lands that are similarly situated. *Rapanos*, 547 U.S. at 780. To do as the Corps did on this record—to consider the estimated effects of a wide swath of land that dwarfs the in-question wetlands, without first showing or explaining how that land is in fact similarly situated—is to disregard the test's limits. Whatever the degree to which the Corps must defend each and every wetland it considers, its approach according to the record was plainly deficient.

Conclusion and Implications

The Seventh Circuit's failure to defer to the agency here was not attributable to any evolution in judicial standards; rather, the Corps' jurisdictional determination was undermined by the agency's failure to provide a legally adequate record. Applicants tempted to take heart from the outcome here should beware: these same record deficiencies can doom a development permit challenged by third parties. (Deborah Quick)

FEDERAL CIRCUIT AFFIRMS GOVERNMENT WAS REQUIRED TO REIMBURSE OIL COMPANIES FOR CLEANUP COSTS INCURRED FROM WORLD WAR II AVIATION GAS PRODUCTION

Shell Oil Co. v. United States, ___F.3d___, Case No. 2017-1695 (Fed Cir. July 18, 2018).

The United States Court of Appeals for the Federal Circuit recently affirmed the U.S. Court of Federal Claim's order in favor of plaintiffs oil companies against defendant United States, who appealed the award of damages associated with environmental cleanup costs resulting from the production of wartime aviation gas.

Factual and Procedural Background

In 1942 and 1943, the United States (Government) contracted with Oil Companies to purchase aviation gas (avgas) during WWII. The manufacture of avgas from crude oil uses sulfuric acid as a catalyst in an alkylation process and produces a waste product called "spent alkylation acid." Spent alkylation acid may be used to: 1) catalyze the alkylation process again, 2) produce non-avgas petroleum by-products, or 3) be disposed of as waste. If spent alkylation acid is used to produce non-avgas petroleum by-products, a secondary waste product called "acid sludge" results. Avgas production increased twelvefold during WWII and Oil Companies were unable to reprocess the increased amount of spent alkylation acid because avgas production was prioritized over reprocessing. Spent alkylation acid and acid sludge were dumped on property in California (McColl Site).

In 1991, the Government and California sued the Oil Companies under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to recover $18 million in cleanup costs at the McColl Site. The Oil Companies countersued, alleging the Government was liable for cleanup costs. The Ninth Circuit held that the Oil Companies were liable for all cleanup costs, and the Government was liable only for cleanup costs for benzol acid waste.

In response, the Oil Companies filed a new complaint in the Court of Federal Claims seeking reimbursement for CERCLA costs of non-benzol acid waste cleanup under a breach of contract theory. The Oil Companies argued that under the Avgas Contracts, the Government agreed to reimburse the Oil Companies for new or additional charges the Oil Companies would be required "'to collect or pay by reason of the production, manufacture, sale[,] or delivery of [avgas]'."

This is the third time the case has appeared before the Court of Appeals. In *Shell I*, the court vacated a decision in favor of the Oil Companies and remanded. In *Shell II*, the court reversed a finding that the Government did not breach the Avgas contracts, held that the Government was liable to the Oil Companies for reimbursement costs, and remanded for further discovery on damages. During discovery in *Shell III*, the Government requested for the first time, the Oil Companies' insurance policies and settlements, and moved to amend its answer to assert counterclaims related to insurance settlements. The Court of Federal Claims held in *Shell III* that the Government had waived arguments related to an insurance offset in its 2008 answer to the Oil Companies' breach of contract claim and could not amend its pleadings at such a late stage in litigation. In *Shell IV*, the Court of Federal Claims issued its order on damages and awarded $99,509,847.32, including interest, to the Oil Companies.

On appeal, the Government challenged the Court of Federal Claims' Order on the grounds that: 1) it failed to allocate between recoverable and non-recoverable costs; 2) wrongfully admitted stipulations into evidence to calculate damages; and, 3) wrongly refused to allow the Government to show the Oil Companies were paid the same costs by insurance.

The Court of Appeals' Decision

Allocation between Recoverable and Non-Recoverable Costs

The first issue is whether the Court of Federal Claims failed to allocate between recoverable and non-recoverable costs. Specifically, the Government alleges that the Court of Federal Claims failed to: 1) follow the Court's instructions on the allocation of

recoverable and non-recoverable costs; 2) properly discount pre-contract activities; 3) discount dumping from non-avgas waste; and, 4) discount dumping from non-contractual avgas production waste.

First, the court held that the Court of Federal Claims did not err in determining the amount of waste attributable to the Avgas Contracts. The court in *Shell II* had determined that the Government was required to pay all CERCLA costs incurred by reason of the Avgas contracts. On remand, the Court of Federal Claims was free to determine whether some, or all, of the acid waste at the McColl Site was attributable to the Avgas contracts.

Second, the court held that the Court of Federal Claims did not err in considering pre-contract activities. The Government alleged that the Oil Companies had been dumping waste at the McColl Site prior to the sale of avgas and that the relevant timeframe to measure the Government's but for causation damages was 1941. However, the court reasoned that avgas production had already increased in 1940 to meet Government demand and the appropriate measure of non-breach was 1946, when production plummeted to pre-contract levels.

Third, the court held that the Court of Federal Claims did not err in including acid sludge from non-avgas products in the damages calculation. Even though acid sludge is a secondary waste product, it is still directly related to the initial reaction used to create avgas under the Avgas Contracts. In addition, the Government hindered the Oil Companies' efforts to reprocess acid sludge by refusing to provide rail cars to transport the acid sludge to reprocessing facilities.

Fourth, the court held that the Court of Federal Claims did not err in determining that the Government was liable for the cleanup costs of acid sludge from the production of non-contractual avgas. The Government did not offer evidence that waste from the production of non-contractual sales of avgas was actually dumped at the McColl Site and failed to rebut acid waste disposal costs.

Relying on Government's Stipulation as to Remediation Costs

The second issue was whether the Court of Federal Claims abused its discretion by relying on the Government's stipulation of remediation costs through 1998 to determine damages. The court held that there was no error since the Government's statements were admissible as an opposing party statement and the Government did not offer evidence to rebut the Oil Companies' cost and waste disposal breakdown.

Denial of Discovery of Insurance Policies and Settlements

The third issue was whether the Court of Federal Claims properly denied discovery of Oil Companies' insurance policies and settlements and the Government's motion for leave to amend its pleadings to assert a related claim. The court held that the Government had waived its right to discovery by failing to timely assert an affirmative defense. The court also held that the Court of Federal Claims did not abuse its discretion in denying the Government leave to amend because it would result in undue delay and prejudice to the Oil Companies since the Government knew the insurance policies existed as early as 1992 and more than a decade had passed since the Oil Companies filed their Complaint.

Conclusion and Implications

This case highlights the extent of the Government's liability for CERCLA costs related to waste produced by governmental contractors supporting the Government's war effort, as set forth in the contract documents. While this decision may have somewhat limited applications, where similar contracts are at issue, other governmental contractors may try and use this case as a basis for seeking contribution from the Government for CERCLA liability. The court's decision is available online at: http://www.cafc.uscourts.gov/sites/default/files/opinions-orders/17-1695.Opinion.7-18-2018.pdf
(Danielle Sakai, Joanna Gin)

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