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CONTENTS

FEATURE ARTICLE

EASTERN WATER NEWS

REGULATORY DEVELOPMENTS

PENALTIES AND SANCTIONS

JUDICIAL DEVELOPMENTS

Continued on next page

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FEATURE ARTICLE

THE EBB AND FLOW OF THE FEDERAL CLEAN WATER ACT— EPA RELEASES NEW PROPOSED 'WATERS OF THE UNITED STATES' RULE DEFINING THE SCOPE OF THE ACT

By John Sittler, Esq. and Paul Noto, Esq., Patrick, Miller, Noto, Aspen, Colorado

The U.S. Environmental Protection Agency (EPA) released its new proposed "waters of the United States" (WOTUS) rule on December 11, 2018. The proposed rule has not yet been officially published in the *Federal Register*, but is expected to be published soon. The new proposed rule would replace rules enacted under President Obama and repeal protections on large stretches of U.S. waterways. (*See* related coverage of this issue at page 303 in this issue of *Eastern Water Law & Policy Reporter*.

Background

The federal Clean Water Act (CWA) was passed in 1972 with the goal of reversing significant water pollution across the country by protecting "navigable waters." The general understanding of the term was that used by the Supreme Court in *The Daniel Ball*, 77 U.S. 557, 563 (1871)—waterways are navigable:

> . . .when they are used, or are susceptible of being used, in their ordinary condition, as highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

By the time of the CWA, U.S. Supreme Court precedent had expanded the term to include non-navigable tributaries, if that was necessary to protect the navigable waterway. *See, Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 523 (1941). Unfortunately, Congress did not further define "navigable," but rather left it up to EPA and the U.S. Army Corps of Engineers (Corps), paving the way for decades of litigation that attempted to determine what waters the CWA protects.

The last time the Supreme Court spoke on the issue was in 2006 in *Rapanos v United States*, 547 U.S. 715 (2006). That case was a plurality decision, further muddying the issue and resulting in unclear precedent. *Rapanos* particularly focused on wetlands and the extent to which they are covered under the CWA. The late Justice Antonin Scalia, writing for the four-justice plurality, said that WOTUS can only refer to "relatively permanent, standing or flowing bodies of water" not "occasional," "intermittent," or "ephemeral" flows. Justice Kennedy, who voted with the plurality, but only through his separate concurring opinion, said that wetlands need only a "significant nexus" to a navigable water in order to be protected under the CWA.

The Clean Water Rule

In 2015, the Obama administration enacted the Clean Water Rule (2015 Rule) in an attempt to clarify what constituted navigable waters under the CWA. Key components included the inclusion of wetlands and ephemeral streams (those that only flow when it rains). Instead of adjudicating tributaries on a case-by-case basis, the 2015 Rule clarified that if a stream had a bed, bank, and high-water mark (physical features of flowing water), it garnered CWA protections. Regarding wetlands, the 2015 Rule used Justice Kennedy's "significant nexus" test but also provided they would be protected if they were within 100 feet, or within the 100-year floodplain, of a navigable waterway. This distance requirement in particular was met with opposition because it was not included in the proposed rule, only the final rule.

Although the EPA claimed that the 2015 Rule merely created certainty for 3 percent of the nation's waterways, it was met with significant blowback, particularly from agriculture and industry groups. The 2015 Rule was repeatedly called a federal power grab, even with its explicit exemptions for certain farm waterways including puddles, ditches, artificial stockwatering ponds, and irrigation systems that would revert to dry land if irrigation were to stop.

One of the more vocal opponents of the 2015 Rule was then candidate Donald Trump who called the rule "destructive and horrible" during his campaign. Throughout the 2016 election cycle, he repeatedly promised to do away with the rule, a promise, which he began fulfilling immediately.

'Repeal and Replace'

Shortly after entering office, President Trump announced his plan to "repeal and replace" the 2015 Rule. On February 28, 2017 he issued an executive order instructing the EPA to begin this process. The plan is comprised of two phases: first, a repeal of the 2015 Rule to revert regulation back to the pre-Obama WOTUS definition for the immediate future, and second, to adopt a new rule with the goals of eliminating uncertainty and reducing regulatory costs.

EPA published a final rule on February 6, 2018 adding an "applicability date" to the 2015 Rule. That means that the 2015 Rule, which was scheduled to go into effect on August 16, 2018, now doesn't take effect until February 6, 2020. This essentially gives the Trump EPA additional time in which to repeal the 2015 Rule and to propose and implement a new rule. The applicability date rule was immediately challenged in several lawsuits across the country. The principle challenge was that the EPA was in violation of the Administrative Procedure Act because it did not solicit comments as part of the standard notice and comment rulemaking process. The EPA argued that the applicability date rule was not an entirely new rule, and therefore notice and comment was not required.

The Southern Environmental Law Center was the principal plaintiff in a challenge that resulted in the applicability date rule being invalidated on procedural grounds. The U.S. District Court for the District of South Carolina invalidated the rule in 26 states, creating a patchwork of jurisdictions where the 2015 Rule applies. Additional lawsuits have resulted in the 2015 Rule now applying in 28 states, the District of Columbia, and the U.S. Territories, while the pre-Obama WOTUS definition, thanks to the applicability date rule, controls in the remaining 22 states. The only western states where the 2015 Rule applies are California, Oregon, and Washington.

The actual repeal of the 2015 Rule has been a messy process with several comment periods. After initially publishing a proposed repeal rule on July 27, 2017, the EPA later republished the rule on June 29, 2018 clarifying that this proposed rule would repeal the 2015 Rule in its entirety. The comment period for that proposed rule closed on August 13, 2018, and a final rule has not yet been published.

The New Proposed Rule

Although the new proposed rule has not yet been published, the EPA and Corps released a "pre-publication" rule on December 11, 2018. The rule lists six categories of waters that will be protected under the CWA, while including language that specifically exempts any waterway not mentioned in those six categories.

The categories of protected waters follow.

Traditionally Navigable Waterways

The least controversial category, there is no doubt that the WOTUS definition includes traditionally navigable waterways. This term includes rivers, streams, large lakes, and oceans that could be traveled by boat or used for commerce. There is no question that these larger waterways were intended to be included as WOTUS.

Impoundments

There is no change from the 2015 rule regarding regulation of impoundments—this is also the same as the 1986 CWA regulations. This category includes check dams and perennial rivers that form lakes and ponds behind them. However if fill material, under a valid § 404 permit, transforms a water body into an upland (an area above the high-water mark that does not qualify as a wetland), the waters would no longer be considered WOTUS. The proposed rule notes that EPA will be seeking comment on the status of an unprotected wetland if, after being turned into a pond, no longer meets the standards for ponds, discussed below.

Tributaries to Navigable Waterways

The standard for tributaries under the new proposed rule is those that contribute "extended periods of predictable, continuous, seasonal surface flow occurring in the same geographic feature year after year" to traditionally navigable waters. This is a departure from the 2015 Rule physical standard of having a bed, bank, and high-water mark.

Although the new rule specifically excludes ephemeral streams, it is unclear how often, or how much, water a tributary would need to carry to be federally regulated. The proposed rule states that the tributaries would be evaluated on whether they contribute on a typical year—based on a 30-year average—but offers no further guidance. EPA noted in a press conference that it would require decisions in the field to determine what constitutes a typical year within the 30-year average. Several commentators believe that this classification includes streams that do not flow all year, provided the flows are predictable and continuous within the season of flows. That means that some, but not all, of western snowmelt-fed streams would continue to be protected.

Ditches

Regulation of ditches under the new proposed rule is split into two main categories. First, ditches that function like a traditional navigable waterway—such as the Erie Canal—will continue to be federally regulated as navigable waters. However, other ditches are regulated much like tributaries to navigable waterways. If the ditches contribute flow to a traditional navigable waterway in a typical year, they will continue to be regulated. Again, like tributaries, it is unclear how often, or how much water will need to flow from the ditches to a navigable waterway to meet the "typical year" standard. Ditches that relocate a protected tributary, or ditches built through wetlands with surface water connections would be regulated.

Lakes and Ponds

Lakes large enough to be considered traditionally navigable waters are of course still included as WOTUS under the proposed rule. However, smaller lakes and streams would now be subject to the same standard as ditches and tributaries—they will only be regulated if they contribute intermittent or perennial flow to downstream navigable waters. This is a departure from the 2015 Rule that covered all naturally occurring lakes and ponds either within 100 feet of a navigable waterway, or within 100-year floodplain and within 1,500 feet of its ordinary high-water mark. Lakes and ponds that contribute to navigable waterways via flooding, such as oxbow lakes, would be regulated provided that the contribution happens when examined on the rolling 30-year average standard. Artificial ponds, such as those constructed for stockwatering, would continue to be exempt from regulation.

Wetlands

The proposed rule would include all "adjacent wetlands", *i.e.* those that abut or have a direct hydrological connection to a federally regulated WOTUS. This is a split from the 2015 Rule's standard of having a "significant nexus," which itself was taking from Justice Kennedy's concurring opinion in *Rapanos*. The 2015 Rule also included specific distance requirements for jurisdictional wetlands—100 feet from a navigable water or within that waterway's 100-year floodplain. This controversial requirement would be eliminated under the new proposed rule. Waters that have been naturally or artificially (with a valid § 404 permit) transformed to uplands would no longer be considered wetlands.

Everything Else Is Not WOTUS

The new proposed rule specifically provides that any water that does not fit into one of the above categories is *not* a water of the United States subject to regulation under the CWA. This includes ditches (other than those listed above), prior converted cropland (excluded since 1993), and importantly, all groundwater. The regulation of groundwater under the CWA has been a contentious issue over the history of the act, most recently resulting in a circuit split between the Fourth and Sixth Circuits.

The main issue is whether discharges into groundwater that later end up in a navigable water are able to be regulated. The Fourth Circuit Court of Appeals held that, although it takes a specific fact inquiry, if groundwater can be hydrologically traced to a navigable water, then that groundwater is considered WOTUS. *Upstate Forever v. Kinder Morgan Energy Partners LP* (4th Cir. April 12, 2018). The Sixth Circuit later held the exact opposite, finding that

groundwater, by its very nature, can never be traceable to a navigable water. *Tennessee Clean Water Network, et al. v. Tennessee Valley Authority* (6th Cir. September 24, 2018). Although either, or both, of those cases are likely to be appealed to the Supreme Court, the issue of groundwater regulation would no longer matter under the proposed rule.

Interstate Waters

The 1986 CWA regulations first introduced separate sections for interstate waters, including interstate wetlands. Under the new proposed rule, that section would be eliminated, and the classification of all interstate waters would be under one of the other six categories, or not regulated.

Initial Reception

EPA and the Corps released a joint press release and held a press conference concurrently with the pre-publication rule to discuss the proposed changes. Acting EPA Administrator Andrew Wheeler said the new proposed rule would be "clearer and easier to understand" and "would end years of uncertainty over where federal jurisdiction begins and ends." This goal of simplicity was echoed by EPA Assistant Administrator for Water David Ross who said the "goal was to provide as few categories [of WOTUS] as possible."

As expected, industry and agriculture groups have been initially favorable to the proposed rule in its pre-publication form, while environmental groups have been opposed. American Farm Bureau Federation President Zippy Duvall said the new rule will "empower" farmers and ranchers to comply with the law. Other supporters included U.S. Secretary of Agriculture Sonny Perdue, U.S. Secretary of the Interior Ryan Zinke, the National Cattleman's Beef Association, the National Council of Farmer Cooperatives, and the Agricultural Retailers Association.

Several environmental groups immediately released statements condemning the new proposed rule, including the National Resources Defense Council, which said the proposal "would be the most significant weakening of the Clean Water Act protections in its history." Trout Unlimited also took aim at the reduction in tributary protections, noting that "more than 117 million Americans get their drinking water from small intermittent and ephemeral headwater streams."

There has also been controversy surrounding the exact number of waterways currently protected under the 2015 Rule that would no longer be classified as WOTUS under this proposal. Various environmental groups have claimed that the new proposed rule would eliminate protections on 60 percent of the country's waterways and up to 1/3 of the country's drinking water. Acting Administrator Wheeler responded to these claims in the press briefing, saying:

> . . .[t]hat 60 percent number is from the previous administration. But maps do not distinguish between ephemeral and intermittent waters. There is not map that identifies all the waters of the United States.

In a rebuttal to Wheeler's claim to not know exactly how many waterways would lose protection under the proposed rule, *E&E News* recently obtained a 2017 slideshow by EPA and Corps staff showing that 18 percent of streams and 51 percent of wetlands would not be protected under the new WOTUS definition. The slides, obtained through a Freedom of Information Act request, were prepared for a presentation to former EPA Administrator Scott Pruitt and former Corps Deputy Assistant Secretary Douglas Lamont.

Conclusion and Implications

The new proposed rule is expected to immediately be published in the *Federal Register*, upon which interested parties will then have 60 days to file comments. EPA and the Corps are planning to host an informational webcast on January 10, 2019, and then a listening session in Kansas City, Kansas on January 23, 2019, implying that the rule will at least be published before then. After the comment period closes, EPA will then review the comments and publish a final rule that takes into account those comments and is based on the record established throughout the process. This is often a long process, and it is possible that there will be a second comment period as with the repeal rule. Considering the amount of litigation that has already gone into the applicability rule, it is likely that there will be legal challenges to both the repeal rule and new proposed rule once they are published.

John Sittler is an associate attorney with Waterlaw: Patrick, Miller & Noto. He is based in Aspen, Colorado and practices water rights law, water quality law, and related municipal, environmental, and natural resources law.

Paul Noto is a partner with Waterlaw: Patrick, Miller & Noto. He is based in Aspen, Colorado, and has practiced all aspects of western water law since 2002. Paul is a member of the Editorial Board of the *Western Water Law & Policy Reporter.*

EASTERN WATER NEWS

NEWS FROM THE WEST

In this month's coverage of News from the West we address efforts in California to expand it water storage capabilities and—despite the seemingly endless feuding between California and the Trump administration in most every way—loan funds have been made available to that end from the Department of Agriculture. We also address a decision out of the Nevada District Court in which reverses the State Engineers prohibition on domestic well drilling in portions of the state. Nevada is one of the "driest" states in the nation.

•U.S. Department of Agriculture Announces $449 Million Loan to Assist in Developing the Sites Reservoir Project in California

In November 2018, the U.S. Department of Agriculture committed to a $449 million loan for the Maxwell Water Intertie, a component of the Sites Reservoir Project. The Sites Reservoir Project is a proposed off-stream reservoir, designed to provide new water storage to increase water supply flexibility, benefit fish and wildlife, and aid in drought relief. The Sites Reservoir Project would accomplish these goals by creating an additional source of water, which would allow existing water sources to retain more water when demand is high.

A Joint Powers Authority composed of local public agencies, the Sites JPA, is pursuing the Sites Reservoir Project, a project intended to provide another source of water storage for the state. Located in the Sacramento Valley, the Sites Reservoir would divert high winter flows and storm event flows from the Sacramento River and would receive water diverted from the Glenn-Colusa and Tehama-Colusa Canals.

With this new water storage source, one goal of the Sites Reservoir Project is to relieve the stress on California's water system by allowing other reservoirs to hold more water for a longer period of time. The addition of an extra reservoir would effectively increase the total storage in northern California by about 500,000 acre-feet of water. The project will also benefit the environment by providing up to half of its annual water supplies to environmental flows and lessen the impact of drought on sensitive species. Specifically, the project will improve water quality for endangered fish, reduced salinity levels in the Sacramento-San Joaquin Delta and improve habitat for migratory birds.

The Loan

After the California Water Commission approved $816 million of Proposition 1 bond funding earlier this year, the Sites Reservoir Project received yet another source of funding in the form of a loan from the U.S. Department of Agriculture and the Department of the Interior. This loan totals $449 million, the largest ever given by the Department of Agriculture. The loan will be used to build the Maxwell Water Intertie, a pipeline between the Tehama Colusa Canal and Glenn Colusa Irrigation District canal, which will deliver water for Sites Reservoir during high Sacramento River flows. However, the money received does come with a cost. The loan will need to be paid off in 40 years at 3.875 percent interest.

The Sites Reservoir Project is still undergoing environmental review, but the MWI is expected to be completed by 2024 and the reservoir is set for completion in 2030. As of the time of the receipt of this loan, the total amount of the project is estimated to be $6.4 billion. Most of this price tag still lacks a significant source of funding.

Conclusion and Implications

Taken together with the allocation of Proposition 1 bond funds, the U.S. Department of Agriculture loan provides a boost as the Sites JPA seeks more funding for the Sites Reservoir Project. However, it remains to be seen just how the rest of the project, which has a projected $5.1 billion price tag, will be financed. Given the current status of water management in California, the Sites Reservoir Project remains an attractive option to address future water concerns. For more information, see: Sites Project: Introduction, Sites Projects Authority, 30 Nov. 2017,

https://www.sitesproject.org/

USDA Invests in Innovative Management of California Water Supply, Sites Project Authority, 27 Nov. 2018, https://content.govdelivery.com/accounts/USDAOC/bulletins/21e5d9b
(Geremy Holm, Steve Anderson)

•Nevada State Court Reverses Nevada State Engineer's Prohibition on Domestic Well Drilling in Pahrump Basin

Pahrump Fair Water, LLC, et al. v. Jason King, P.E., et al., Case No. 39525 (5th Dist. Ct. Dec. 6, 2018).

The Nevada State Engineer's efforts to regulate groundwater withdrawals in the over-appropriated Pahrump Artesian Basin were dealt a blow recently when a state District Court reversed the State Engineer's order that prohibited the drilling of new domestic wells without first obtaining a two-acre-foot water right. The court concluded that the State Engineer exceeded his statutory authority; violated affected property owners' due process rights by failing to give notice and opportunity to be heard; and lacked substantial evidence to support his decision. As a result, the court directed the State Engineer to immediately give notice to the public that the drilling restriction was no longer in effect.

The Pahrump Basin has a long history of over-appropriation. To address this problem, the Nevada State Engineer first designated it for special administration in 1941. Once an area receives such a designation due to groundwater depletion, the State Engineer may make appropriate rules, regulations and orders that, within the State Engineer's judgment, are essential for the welfare of the area. Nevada Revised Statute (NRS) 534.120(1).

To that end, in 1953, the State Engineer ordered that meters be installed at all points of diversion. In 1970, the State Engineer determined that irrigation would be a non-preferred use and ordered that new irrigation applications be denied. Over time, the State Engineer limited new applications to small commercial, small industrial and environmental uses and then curtailed new applications altogether except for limited exceptions.

Nevada law does not require a person who drills a domestic well to apply for or obtain a water right permit. NRS 534.030(4); NRS 534.180(1). A domestic well is for culinary and household purposes directly related to a single-family dwelling, including the watering of a family garden, lawn, livestock and any other domestic animals or household pets. To qualify as a domestic use, the amount withdrawn annually may not exceed two acre-feet annually. NRS 533.013 and 534.180.

As of 2017, committed groundwater rights in the Pahrump Basin were close to 60,000 acre-feet per year, while the State Engineer calculated the Basin's perennial yield as 20,000 acre-feet annually. Because domestic wells do not require a water right, the State Engineer estimates that an additional 11,385 acre-feet committed for domestic well use based on the number of existing domestic wells. According to the State Engineer's pumpage inventories, pumping steadily increased from 14,355 acre-feet in 2013 to 16,416 acre-feet in 2017, with domestic well pumping accounting for approximately one third of the total.

The State Engineer estimates the Pahrump Basin to have 11,280 domestic wells at a density of 1 to 469 wells per square mile. If each domestic well pumps the two acre-feet annually that is allowed by statute, the pumping from domestic wells alone would exceed the Basin's perennial yield. The State Engineer has determined that pumping by domestic wells has the potential to be the greatest source of groundwater use in the Basin, estimating that an additional 8,000 domestic wells could be drilled, which could withdraw as much as 16,000 acre-feet more groundwater from the aquifer.

Due to these concerns regarding the proliferation and impact of domestic wells, in 2017, the State Engineer issued Order #1293, which except for specified exceptions, prohibited the drilling of new domestic wells in the Pahrump Basin without first obtaining a two acre-foot water right. A group called Pahrump Fair Water, LLC (PFW), an association that was formed to challenge Order #1293, filed a petition for judicial review in Nevada District Court. While that case was pending, the State Engineer issued amended Order #1293A, which added two additional exemptions to the drilling restriction. PFW dismissed its petition for judicial review of Order #1293 and filed a new petition for judicial review of the amended Order #1293A.

On review, PFW advanced four arguments: 1) the State Engineer lacked the statutory authority to restrict drilling of domestic wells; 2) the State Engineer violated property owners' due process rights by

not providing notice and an opportunity to be heard; 3) Order #1293A was not supported by substantial evidence; and 4) Order #1293A amounted to an unconstitutional taking of private property without just compensation.

The District Court's Decision

The Nevada Legislature has authorized a party aggrieved by a decision of the State Engineer's to seek judicial review, which amounts to an appeal based on the record before the agency. The role of the reviewing court is to determine if the State Engineer's decision was arbitrary, capricious, an abuse of discretion or legally erroneous. The State Engineer's factual findings must be supported by substantial evidence in the record, which is evidence that "a reasonable mind might accept as adequate to support a conclusion."

The District Court reversed Order #1293A on three grounds. First, the court concluded that the State Engineer exceeded his statutory power because the Legislature expressly exempted domestic wells from the scope of the State Engineer's general supervisory control and the permitting process otherwise required for water appropriations. Because there is no statutory language that authorizes the State Engineer to restrict domestic wells in the manner done in Order #1293A, the court concluded, the order is unenforceable.

Second, the court found that the State Engineer failed to afford property owners who are affected by Order #1293A with notice and an opportunity to be heard. Absent publication of the proposed order, opportunity to oppose it and a public hearing at which testimony and other evidence could be presented, the court concluded, a due process violation occurred, which rendered Order #1293A invalid.

Third, the court held, even setting aside these legal impediments, Order #1293A was not supported by substantial evidence that new domestic wells will interfere with existing rights. The court took issue with the State Engineer's statement that:

> . . .if existing pumping rates will lead to well failures, an increase in the number of wells and therefore an increase in pumping will accelerate the problem undoubtedly causing an undue interference with existing wells.

Finding no support for that assertion in the record, the court found that the State Engineer did not fully analyze alleged conflicts or determine how the restrictions in Order #1293A would benefit existing wells.

The court also criticized the model used by the State Engineer, concluding that the model looked at possible failures of existing wells, not the impact of potential new wells. The court further faulted the State Engineer for failing to use objective standards to determine whether the lowering of the static water level caused by new wells would be "reasonable" within the language of the statute. Having concluded that Order #1293A was invalid, the court determined there was no need to address whether the order resulted in a taking.

Conclusion and Implications

Faced with increasing demands on the state's scarce water resources, the State Engineer has construed the Nevada Revised Statutes to give him broad regulatory authority. Historically, Nevada's courts have afforded the State Engineer considerable deference to interpret the state's water law and regulate water users. The *Pahrump Fair Water* decision is one of a handful of recent cases, however, in which the courts have declined to give the State Engineer such latitude.

This trend begs the question as to whether the Nevada Legislature will take steps to expressly broaden the State Engineer's statutory authority. Because water tends to be a politically charged issue in Nevada, and if recent efforts are any indication, the Legislature is unlikely to embark on such an undertaking. It will be up to the Nevada Supreme Court to delineate the contours of the State Engineer's powers on a case-by-case basis. *Pahrump Fair Water* is poised to be the next such case in line for Supreme Court review. (Debbie Leonard)

REGULATORY DEVELOPMENTS

NEW ROUND OF RULEMAKING BY EPA AND THE CORPS OF ENGINEERS DEFINE WATERS OF THE UNITED STATES AND THE SCOPE OF THE CLEAN WATER ACT

Andrew Wheeler, Administrator of U.S. Environmental Protection Agency (EPA) along with the U.S. Army Corps of Engineers (Corps) announced a new formal definition of "waters of the United States" (WOTUS) under federal Clean Water Act regulations governing permit reviews on December 11, 2018, promising to the American people the new proposed rule defines WOTUS in clear and understandable language such that common sense and local knowledge could make it possible for a landowner to know by observation whether there are federal waters on his or her property.

The proposal is soon to be published in the *Federal Register*. The proposal is the second phase of EPA's undertaking to void the 1980s definition of WOTUS. A comment period on a range of issues related to the new Proposed Rule will run at least 60 days from the date of publication in the Federal Register. That 1980s definition is still in effect in 28 states affected by an injunction issued by a federal district court. A 2015 definition issued by the Trump administration is in effect in 22 states.

The New Proposed Final Rule Defining the Scope of the Clean Water Act

Promising clarity and predictability from the new proposed rule, EPA states that its proposal is in "straightforward" language that will help sustain economic growth. The EPA indicates it based its proposal on careful study and respect for both Supreme Court rulings and the language Congress employed in the Clean Water Act itself. A 2017 Executive Order from the President in February 2017 further affected the choices made in the new proposal, according to EPA's issued Fact Sheet. Citing Congress' interstate commerce clause authority, EPA believes the new definition restricts its application to waters that are physically and meaningfully connected to traditional navigable waters.

Six Categories of Waters of the United States

EPA indicates that only six categories of waters are considered to be within its new definition: 1) traditional navigable waters, 2) tributaries that are not ephemeral, 3) certain ditches that serve as or in place of covered tributaries, 4) certain lakes and ponds that are traditional navigable waters themselves, that serve as tributaries, or when flooded annually by a navigable water; 5) impoundments of waters of the United states, and 6) wetlands that physically connect to jurisdictional waters or are directly affected by them. The proposal also describes several categories of waters that are not within its proposed definition: groundwater, ephemeral waters, ditches such as farm and roadside ditches that are not within the navigable or traditional waters definition, stormwater control features, and wastewater process waters or systems.

The EPA also makes special note that the exemption for converted farmland in prior rules is preserved, and the EPA indicates the abandonment of agricultural use will no longer cause exempt converted farmland to be subject to reclassification as WOTUS.

'Basis and Purpose'

The EPA has published a lengthy "basis and purpose" explanation and justification of the process it has gone through in crafting its new definition. That document will be part of the formal Federal Register proposal. Comments will be taken on many specifics of the proposed rule and on several aspects of the EPA's analysis. For example, EPA invites comment on its legal history discussion and interpretation, the definitions of terms used within the proposal, the best means of implementing the rule, and on whether particular means of identifying wetlands should be preferred for purposes of clarity in field application of the rule.

EPA's emphasis on clarity and its claim that this proposal is a serious change for a better economy was likely expected, given the amount of publicity and length of time invested so far in legal battles over the propriety of EPA efforts to change the rule.

Overly Optimistic?

Detractor suggest that this new definition and it's attempt to settle the large body of litigation of WOTUS may be overly optimistic in two respects: 1) The Trump administration does not claim huge economic value added or benefit from the rule, even if most states do not seek to regulate "waters" or areas that are eliminated from being jurisdictional. The maximum predicted is between $28 and $266 Million Dollars of benefit from the new rules, offset by no more than $47 Million Dollars of foregone benefits from the prior rule. 2) The actual proposed definition, while put forth in logical structure, still includes some fuzzy or unclear language. For example, the key definition of the term "waters of the United States" includes the following:

> . . .the term "waters of the United States" means: Waters which are currently used, or were used in the past, *or may be susceptible to use in interstate or foreign commerce,* including the territorial seas and waters which are subject to the ebb and flow of the tide. . . .

Conclusion and Implications

Detractors suggest that the italicized phrase above undoes much of the clarity in the EPA's and Corps' proposal. While most courts have insisted "navigable waters" have to in fact be navigable, and the President has been seeking to appoint conservatives as judges that enforce the laws as written, the EPA appears by its choice of words to be inviting all sorts of inventive ideas about how future commerce could be conducted in order for some previously non-jurisdictional water body to be included within its and the Corps' authority under this definition.
(Harvey M. Sheldon)

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

•November 28, 2018—EPA, developer settle case over stormwater violations in Eyrie Canyon subdivision. The U.S. Environmental Protection Agency has settled its case against Connell Development Company, owned by Colin Connell, a Boise-area developer the agency found had committed numerous violations of a federal Clean Water Act permit for stormwater management at Connell's Eyrie Canyon project. Connell has agreed to pay a $68,000 penalty for failing to comply with EPA's Construction General Permit, which requires developers to implement stormwater controls to minimize the amount of sediment and other pollutants associated with construction sites from being discharged in stormwater runoff. Connell has also come into compliance with the permit and agreed to perform additional work beyond the requirements of the permit—such as more frequent inspections—to ensure that he remains in compliance. Stormwater runoff from the project flows to Sand Creek, either directly or through the Ada County Highway District Municipal Separate Storm Sewer System. Sand Creek flows into the Boise River. After both the Ada County Highway District and the City of Boise issued numerous Notices of Violation and 'Stop Work Orders,' EPA was notified of the on-going problems at the site. EPA representatives inspected the project twice in January 2016, and again in September 2017, and found multiple violations of stormwater management requirements,

•November 19, 2018—The U.S. Environmental Protection Agency has reached an agreement with the Saratoga Springs Owners Association, Inc. and Cross Marine Projects, Inc. (defendants) resolving alleged unpermitted dredge and fill activities and damages to wetlands at a Utah Lake marina facility in Utah County, Utah. Under the terms of a consent decree in the Federal District Court of Utah, the defendants will restore and enhance more than seven acres of wetlands and pay a civil penalty of $150,000. In December 2017, the United States filed a complaint against the Saratoga Springs Owners Association and Cross Marine Projects for damages associated with alleged illegal dredge and fill activity. EPA asserts that between September 2013 and February 2014, the Saratoga Springs Owners Association and Cross Marine Projects dredged a marina access channel and discharged the resulting fill material into Utah Lake and adjacent wetlands without a Clean Water Act (Section 404) permit from the U.S. Army Corps of Engineers. In March 2018, EPA, the U.S. Department of Justice, and the U.S. Army Corps of Engineers participated in mediation with the defendants. The resulting consent decree requires the defendants to pay a civil penalty of $150,000 and to restore an approximately 0.37-acre wetland and enhance an additional 7.0 acres of wetlands adjacent to Utah Lake. The restoration plan also includes reporting requirements and success criteria. The court entered the decree on November 19, 2018. Utah Lake is a water of the U.S. and is habitat for projects associated with an Endangered Fish Recovery Program, established in 1999, to protect the June Sucker, a fish that naturally occurs only in Utah Lake and spawns only in the lower Provo River.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•December 4, 2018—EPA cited the Rust-Oleum Corporation for violating the Resource Conservation and Recovery Act (RCRA), the federal law governing the treatment, storage, and disposal of hazardous waste. RCRA is designed to protect public health

and the environment, and avoid long and extensive cleanups, by requiring the safe, environmentally sound storage and disposal of hazardous waste. Under terms of the settlement, Rust-Oleum will pay a $168,000 penalty, and has ensured EPA it will properly contain and manage hazardous waste in the future. The facility, which has been in operation at this location since 1978, manufactures paints that are primarily contained in aerosol cans.

•November 28, 2018—EPA settled with a West Chester, Pennsylvania contractor for alleged violations of "Lead Safe" renovation protections. This rule protects the public from toxic lead hazards created by renovation activities involving lead-based paint. RRP safeguards are designed to ensure "lead safe" practices in the renovation and repair activities involving "target housing" built before the 1978 federal ban on lead-based paint. EPA alleged during multiple renovations of target housing in West Chester in February 2017 that Chapman Windows and Doors, while working under the parent company Air Tight Home Improvements, violated the RRP "lead safe" requirements by: 1) Failing to document whether target housing owners had timely received the required lead hazard information pamphlet titled "Renovate Right: Important Lead Hazard Information for Families, Child Care Providers and Schools"; 2) Failing to retain records to document compliance with lead-practices during renovation; and 3) Failing to ensure that the renovators conducting the work were EPA-certified to conduct lead-safe renovations.

As part of the settlement, the company did not admit these alleged violations, but has cooperated with EPA in resolving this matter and certifying its compliance with applicable RRP requirements.

Indictments, Convictions and Sentencing

•December 12, 2018—The U.S. Department of Justice announced that Navimax Corporation, incorporated in the Marshall Islands with its main offices in Greece, was sentenced to a $2,000,000 fine by a federal District Court for violating the Act to Prevent Pollution from Ships and obstructing a Coast Guard investigation. The Act to Prevent Pollution from Ships is a codification of international treaties known as the "MARPOL Protocol." To ensure that oily waste is properly stored and processed at sea, all ocean-going ships entering U.S. ports must maintain an Oil Record Book in which all transfers and discharges of oily waste, regardless of the ship's location in international waters, are fully recorded. According to court documents and statements made in court, Navimax operated the Nave Cielo, a 750-foot long oil tanker. Prior to a formal inspection on December 7, 2017, the U.S. Coast Guard boarded the vessel near Delaware City when a crewmember gave the officers a thumb drive containing two videos, depicting a high-volume discharge of dark brown and black oil waste from a five-inch pipe, located 15-feet above water level. Subsequent investigation during a more comprehensive inspection on December 7, 2017, disclosed that the approximately 10-minute discharge occurred on November 2, 2017, in international waters, after the ship left New Orleans en route to Belgium. During the Coast Guard boarding on December 7, 2017, crewmembers presented the ship's Oil Record Book, which did not record this discharge. The District Court ordered Navimax to pay the $2,000,000 fine immediately and placed the company on probation for four years. This case was investigated by the U.S. Coast Guard Sector Delaware Bay and the Coast Guard Investigative Service.

•November 27, 2018—Two Greek shipping companies, Avin International LTD, and Nicos I.V. Special Maritime Enterprises, pleaded guilty in federal court in Beaumont, Texas, to charges stemming from several discharges of oil into the waters of Texas ports by the oil tanker M/T Nicos I.V., announced Assistant Attorney General Jeffrey Bossert Clark for the Justice Department's Environment and Natural Resources Division and United States Attorney Joseph D. Brown for the Eastern District of Texas. Avin International was the operator and Nicos I.V. Special Maritime Enterprises was the owner of the Nicos I.V., which is a Greek-flagged vessel. The Master of the Nicos I.V., Rafail-Thomas Tsoumakos, and the vessel's Chief Officer, Alexios Thomopoulos, also pleaded guilty to making material false statements to members of the United States Coast Guard during the investigation into the discharges. Both companies pleaded guilty to one count of obstruction of an agency proceeding, as well as one count of failure to report discharge of oil under the Clean Water Act, and three counts of negligent discharge of oil under the Clean Water Act. Under the plea agreement, the companies will pay a $4 million

criminal fine and serve a four-year term of probation, during which vessels operated by the companies will be required to implement an environmental compliance plan, including inspections by an independent auditor. Mr. Tsoumakos and Mr. Thomopoulos each pleaded guilty to one count of making a material false statement and face up to five years in prison when sentenced. A sentencing date has not been set. According to documents filed in court, the Nicos I.V. was equipped with a segregated ballast system, a connected series of tanks used to control the trim and list of the vessel by taking on or discharging water, the latter involving an operation called deballasting. At some point prior to July 6, 2017, the ballast system of the Nicos I.V. became contaminated with oil and that oil was discharged twice from the vessel into the Port of Houston on July 6 and July 7, 2017, during deballasting operations. Both Tsoumakos and Thomopoulos were informed of the discharges of oil in the Port of Houston. Tsoumakos failed to report the discharges as required under the Clean Water Act. Neither discharge was recorded in the vessel's oil record book, as required under MARPOL and the Act to Prevent Pollution from Ships. After leaving the Port of Houston, en route to Port Arthur, Texas, the deck crew was instructed to open the ballast tanks, and oil was observed in several of the tanks. After arriving in Port Arthur, additional oil began bubbling up next to the vessel, causing a report to the U.S. Coast Guard. During the ensuing investigation, both Tsoumakos and Thomopoulos lied to the Coast Guard, stating, among other things, that they had not been aware of the oil in the ballast system until after the discharge in Port Arthur, and that they believed that the oil in the ballast tanks had entered them when the vessel took on ballast water in Port Arthur. The case was investigated by the U.S. Coast Guard Investigative Service with assistance from the U.S. Coast Guard Sector MSU Port Arthur, which conducted the inspection of the ship.
(Andre Monette)

JUDICIAL DEVELOPMENTS

THE CURIOUS CASE OF THE DUSKY GOPHER FROG— U.S. SUPREME COURT LIMITS AGENCY DISCRETION UNDER THE ENDANGERED SPECIES ACT

Weyerhaeuser Co. v. U.S. Fish and Wildlife Service, ___U.S.___, Case No. 17-71 (Nov. 27, 2018).

In a victory for landowners and other regulated entities, the U.S. Supreme Court unanimously limited the U.S. Fish and Wildlife Service's (FWS) discretion when designating critical habitat under the federal Endangered Species Act (ESA). In its recent *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service* decision, the Supreme Court held that: 1) only "habitat" may be designated as "critical habitat" under the ESA, and 2) FWS decisions regarding whether to exclude property from critical habitat designation due to economic considerations are subject to judicial review.

Background

The ESA requires the Secretary of the Interior to designate "critical habitat" for a species upon that species' listing as endangered or threatened. Critical habitat is defined by the ESA to include:

> . . .specific areas outside the geographical area occupied by the species. . .upon a determination by the Secretary that such areas are essential for the conservation of the species.

Before the Secretary may designate an area as critical habitat, however, the ESA requires him to "tak[e] into consideration the economic impact" and other relevant impacts of the designation. The statute further authorizes the Secretary to "exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of [designation]," unless exclusion would result in extinction of the species.

Weyerhaeuser stemmed from FWS' designation of 1,544 acres of private property in Louisiana as critical habitat essential for the conservation of the endangered dusky gopher frog—even though no such frogs had occupied the property since 1965, and even though the property in its current condition cannot be inhabited by the endangered frog.

The dusky gopher frog requires rare ephemeral ponds for breeding (*i.e*, ponds that are dry for part of the year) and open canopy forest. Though the subject property lacks open canopy forest, FWS nonetheless designated it as critical habitat "essential for the conservation of the species" on the basis that the property has five high quality ephemeral ponds, and that modification to the property—such as replacing portions of the property's closed-canopy timber plantation with an open-canopy pine forest—could allow the property to support a sustainable population of the endangered frog.

The private landowners opposed the designation. While a critical-habitat designation does not directly limit a landowner's rights, it does limit the federal government's authority to engage in action—such as issuing a permit—that could adversely affect designated critical habitat. Here, the landowners claimed that the designation could bar their ability to develop the property if such development were to require federal permits under the Clean Water Act; if this were the case, the critical habitat designation could potentially cost the owners up to $33.9 million in lost development potential. The landowners filed suit, challenging both the critical habitat designation and the sufficiency of FWS' determination not to exclude the subject property from critical habitat designation despite the designation's economic impacts. After the Fifth Circuit Court of Appeals upheld the critical habitat designation, the case was reviewed by the Supreme Court.

The Supreme Court's Decision

FWS May Only Designate 'Habitat' as Critical Habitat

The landowners contended that the subject

property could not be critical habitat for the dusky gopher frog because the property was not "habitat" for the frog; in particular, the landowners noted that the frog could not survive at the subject property unless portions of the closed-canopy timber plantation were replaced with an open-canopy pine forest. In rejecting this argument, the Fifth Circuit dismissed the suggestion that the definition of critical habitat contains any "habitability requirement."

On appeal, the Supreme Court did not address whether the FWS erred in designating the subject property as critical habitat. Rather, the Court addressed the very narrow question of whether critical habitat must also be "habitat" under the ESA. Rejecting the Fifth Circuit's prior holding, the Supreme Court held that the ESA does not authorize FWS "to designate [an] area as *critical* habitat unless it is also *habitat* for the species."

This holding, however, constitutes only a limited victory for landowners. While the Supreme Court held that critical habitat must also be "habitat," the Supreme Court did not define "habitat" or determine that habitat cannot include areas where the species could not currently survive. Rather, the High Court remanded the case back to the Fifth Circuit to consider the definition of habitat and whether it may include areas, like the property in question, that would require some degree of modification to support a sustainable population of a given species.

FWS Decisions to Exclude Property from Critical Habitat Subject to Judicial Review

The landowners further contended that, even if the subject property could be properly classified as critical habitat for the dusky gopher frog, FWS should have excluded the property from designation. As noted above, the ESA requires FWS to consider the economic impact of specifying an area as critical habitat before acting. The ESA further authorizes FWS to exclude an area from critical habitat designation if FWS determines that the political, social, economic or other benefits of such exclusion outweigh the benefits of designating the area as critical habitat. For years, FWS has maintained that it enjoys full discretion on whether to exclude property from a critical habitat designation based on economic considerations, and that its discretion could not be reviewed by federal courts.

In the more momentous of the Supreme Court's two holdings, the Court held that FWS' determination of whether to exclude property from a critical habitat designation based on economic or other factors is subject to judicial review. In doing so, the Supreme Court rejected the Fifth Circuit's holding that a decision to exclude a certain area from critical habitat is unreviewable by federal courts. In particular, the Supreme Court held that a federal court may review FWS' economic analysis and determination to ensure that they are not arbitrary, capricious, or an abuse of discretion. The Supreme Court then sent the case back to the Fifth Circuit to determine whether the FWS' assessment of the costs and benefits of its critical habitat designation passed legal muster.

Conclusion and Implications

This case illustrates the potential intersection between the Endangered Species Act and the Clean Water Act. FWS' critical habitat designation effectively limited the federal government's authority to issue permits under the Clean Water Act for development of the subject property, and this limitation could have cost the landowners tens of millions of dollars in lost development potential.

The primary import of this case, however, is that property owners are not without redress when the FWS designates critical habitat, particularly as to economic impact analysis. The Supreme Court's holding provides property owners with potent legal arguments to challenge future critical habitat designations.
The Supreme Court's decision is available online at: https://www.supremecourt.gov/opinions/18pdf/17-71_omjp.pdf
(Ali Tehrani, Steve Anderson)

TENTH CIRCUIT FINDS SETTLEMENT AGREEMENT BETWEEN BLM AND ENVIRONMENTAL GROUPS NOT RIPE FOR CHALLENGE UNTIL AGENCY IMPLEMENTS THE SETTLEMENT PROVISIONS

Southern Utah Wilderness Alliance v. Burke, 908 F.3d 630 (10th Cir. 2018).

Environmental groups and the U.S. Bureau of Land Management (BLM) entered into a settlement agreement requiring the agency to adopt new land use management plans taking into account specifically enumerated agency regulations and adopted guidance. The State of Utah's challenge to the settlement agreement was found to be unripe because the agency had yet to implement the settlement agreement.

Background

In January of 2017, the Bureau of Land Management, various environmental groups led by the Southern Utah Wilderness Alliance (SUWA) and intervenors entered into a Settlement Agreement to resolve "a longstanding, complex dispute dating from 2008" concerning BLM's adoption of "six resource management plans (RMPs) and associated travel management plans (TMPs) adopted by" BLM for federal lands located within Utah. *See*, http://suwa.org/wp-content/uploads/APPELLATE-349183-v2-SUWA_-_Final_Settlement_Agreement_Signed_with_Maps.pdf

The state of Utah had intervened in the litigation, but did not enter into the Settlement Agreement. When the settling parties sought to have the Settlement Agreement approved by the District Court and the underlying lawsuit dismissed, Utah challenged the Settlement Agreement on the grounds that it:

> . . .illegally codified interpretative BLM guidance into substantive rules, impermissibly binds the BLM to a past Administration's policies, infringes valid federal land rights (known as 'R.S. 2477 rights'), and violates a prior BLM settlement [the "Wilderness Settlement.]

The U.S. District Court did not agree and it approved the Settlement Agreement.

The Tenth Circuit's Decision

The settling parties opposed Utah's appeal on the grounds that the state's:

> . . .claims are not ripe for judicial review. . . .[T]he ripeness doctrine has two underlying rationales: preventing courts from becoming entwined in 'abstract disagreements over administrative policies,' and 'protect[ing] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.' *Utah v. U.S. Dep't of Interior*, 535 F.3d 1184, 1191-92 (10th Cir. 2008).

Three Prong Factor Analysis for Ripeness

The Tenth Circuit applied the three-factor ripeness test set forth in *Sierra Club v. U.S. Dep't of Energy*, 287 F.3d 1256, 1262-63 (10th Cir. 2002):

> 1) whether delayed review would cause hardship to the plaintiffs; 2) whether judicial intervention would inappropriately interfere with further administrative action; and 3) whether the courts would benefit from further factual development of the issues presented.

The Settlement Agreement was entered into in the following legal context. BLM manages the federal lands at issue under the Federal Land Policy and Management Act (43 U.S.C. §§ 1701-1787, FLPMA) and its associated regulations and adopted agency Instruction Memorandum, Handbooks and Manuals. R.S. 2477 rights are right-of-way interests across federal lands created without any administrative formalities, *i.e.*, requiring "no entry, no application, no license, no patent, and no deed on the federal side; no formal act of public acceptance on the part of the states or localities in whom the right was vested," obtained prior to 1976. *Utah*, 535 F.3d at 41. And BLM had previously entered into the Wilderness Settlement to resolve:

> . . .land-use litigation between several of the same parties to this litigation that concerned wilderness study areas (WSAs) in Utah.

BLM conceded in the Wilderness Settlement "that its authority to establish new wilderness study areas expired no later than October 21, 1993," and the agency:

> . . .stipulated. . .that it would not utilize its general land use planning authority under FLPMA § 202 to establish, manage, or otherwise treat non-WSA public lands as wilderness or as WSAs.

The Settlement Agreement, as is typical, may only be amended with the written consent of all parties to it. Substantively, it provides at Paragraph 13 "deadlines by which BLM will issue five new TMPs for five specific travel management areas [and] details the process by which BLM will prepare the TMPs," including a catalogue of Instruction Memorandum, Handbooks and Manuals that BLM will apply in formulating the new TMPs. "Utah contends that Paragraph 15 elevates certain agency guidance to the level of substantive rules in violation of the [Administrative Procedures Act], and also provides SUWA with veto power," by way of requiring SUWA's written consent to any Settlement Agreement amendments:

> . . .over future BLM guidance and substantive rulemaking that could apply to the five specific travel management areas listed in Paragraph 13.

Various other provisions of the Settlement Agreement require that BLM take into account, and explain in writing how it has done so, various environmental considerations related to road configuration and wilderness designations, in developing the new TMPs.

Applying its ripeness test to the Settlement Agreement, the Court of Appeals observed that:

> . . .[a] common thread [runs] through all three factors point[ing] to our concluding that Utah's appeal is unripe: at this point, no one knows how BLM will implement the Settlement Agreement.

For example, there are no final travel management plans. Additionally, BLM has not rescinded any of the guidance referenced in the Settlement Agreement, and therefore SUWA has not had the opportunity to exercise its alleged veto power provided by the Settlement Agreement. Further, the Settlement Agreement has no effect on R.S. 2477 rights, App. 1107, and nothing in the Settlement Agreement requires BLM to protect wilderness characteristics when developing a TMP. Instead, the Settlement Agreement lays out criteria for BLM to consider as it develops TMPs in a complex regulatory scheme. BLM may ultimately develop a TMP that creates *de facto* wilderness, or may impermissibly consider guidance that has been rescinded or ignore future substantive rules. But BLM might not.

The Settlement Agreement neither requires BLM to create *de facto* wilderness, nor mandates that BLM reject future agency action taken by the present Administration. Accordingly, this court can more confidently address the substantive legal arguments raised by Utah when BLM finalizes the TMPs subject to the Settlement Agreement and ultimately reveals the Settlement Agreement's "true effect[.]"

The court concluded it could "more confidently" adjudicate any disputes Utah might have with specific new TMPs "with the benefit of insight into how BLM actually implements the settlement in practice."

Conclusion and Implications

Parties settling with agencies where the terms of the settlement require future agency regulatory action will typically bargain for the agency's future action to comply with specific, identified statutory and regulatory provisions. This case illustrates an equally common hurdle to challenging such settlement agreements prior to their implementation—until the agency performs under the settlement terms, courts are reluctant to consider with that implementation is unlawful.

(Deborah Quick)

DISTRICT COURT RULES ON TRUMP ADMINISTRATION'S MOTION TO DISMISS BORDER-WALL COMPLAINT'S NEPA AND ENDANGERED SPECIES ACT CLAIMS

Center for Biological Diversity, et al., v. Kirstjen M. Nielsen, et al.,
___F.Supp.3d___, Case No. CV-17-00163-TUC-CKJ (D. D.C. Oct. 31, 2018).

On January 25 2017, President Trump signed an Executive Order on "Border Security and Immigration Enforcement Improvements" to build a wall which is to span across 2,000 miles along the United States-Mexico Border (southern border wall enforcement program). On April 12, 2017, the Center for Biological Diversity and Congressman Raul M. Grijalva, the top Democrat on the house Natural Resources Committee (plaintiffs), sued the Trump administration, specifically the Department of Homeland Security (DHS) (cumulatively: defendants), over its U.S.-Mexico border wall proposal. Plaintiffs seek declaratory and injunctive relief to prevent the wall's construction and its potentially harmful environmental effects. Plaintiffs argue that the proposal failed to take into account various environmental impacts as required under the National Environmental Policy Act (NEPA) and the federal Endangered Species Act (ESA). Plaintiffs also argue a third claim based on the Freedom of Information Act. Recently, the court ruled on the defendants' motion to dismiss the NEPA and ESA claims.

Impact on Borderlands

Currently, there is an approximately 650-mile wall that stands along the United States-Mexico border. On March 17, 2017, Secretary John Kelly of the DHS issued two Requests for Proposals (RFP) for two border-wall prototypes. These prototypes are projected to span across the entirety of the U.S.-Mexico border, which is about 2,000 miles in length (Borderlands). The Borderlands expands across international and federal, as well as state and local, protected lands. The border expansion is projected to impact National Parks and Forests, National Conservation Areas, Wilderness Areas, and international biosphere reserves, to name a few. Furthermore, the Borderlands encompass critical habitats including wetlands and desert streams and is home to numerous threatened and endangered species, including the jaguar and ocelot. As of the filing of this suit, an EIS has not been updated to reflect the two new prototypes for the southern border wall enforcement program. As such, the environmental impact to the Borderlands and its inhabitants has yet to be fully accessed and remain unknown.

The NEPA Claim

Under NEPA an agency must supplement an Environmental Impact Statement (EIS) when the:

> . . .agency makes substantial changes in the proposed action that are relevant to environmental concerns. . .[or when]. . .[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. 40 C.F.R. § 1502.9(c)(1)(i)-(ii).

Plaintiffs argue that because the current wall spans across 650 miles and the southern border wall enforcement program is seeking prototypes that will span across 2,000 miles of the U.S.-Mexico border, that the expansion qualifies as a substantial change under NEPA thus triggering the NEPA requirement—that the agency must supplement its initial EIS.

Plaintiffs also contend that the DHS has not updated its border wall EIS since 2001 (2001 EIS Update), over 15 years ago, and since then there has been significant new scientific information regarding the conservation needs of many wild life species in relation to the Borderlands. In addition to new scientific studies, there are also new critical habitat designations and endangered species that the 2001 EIS Update did not consider. For example, there have been 27 newly designated or revised critical habitats along or within 50 miles of the United State-Mexico border since the 2001 EIS that had not existed when the 2001 EIS Update was conducted. Furthermore, since 2001, there was an uptick in border security efforts in response to the September 11, 2001 terrorist

attacks. Increases in border security include more border personnel, fencing and infrastructure, and surveillance technology. Plaintiffs argue that the increase in activity to the border wall and the surrounding environment warrants further environmental impact review.

The ESA Claims

Section 7(a)(1) requires that all federal agencies "carry out programs for the conservation of endangered and threatened species" but to do so in consultation with the U.S. Fish and Wildlife Service (FWS). Plaintiffs claim that the DHS violated § 7(a)(1) by failing to "take any affirmative action to conserve the many threatened or endangered species" impacted by the southern border wall enforcement program.

The goal of § 7(a)(2) of the ESA is to ensure that none of the agency's action will jeopardize the:

> . . .existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical habitat]. 16 U.S.C. § 1536(a)(2).

To achieve this goal, the ESA requires federal agencies taking action to consult with the FWS to analyze the potential impacts to listed species and their critical habitats in the form of a biological opinion. However, plaintiffs claim that the DHS did not engage in consultation with FWS to ensure that the RFP does not jeopardize or result in the destruction or adverse modification of any listed species or their critical habitat.

The District Court's Decision

On October 31, 2018, the District Court heard the defendants' motion to dismiss on both the NEPA and ESA claims.

On the NEPA claim, the defendants claimed that plaintiffs failed to allege what agency action will occur based on the 2001 EIS Update and that the southern border enforcement program does not exist. However, the court held that the plaintiff's NEPA claim survives a motion to dismiss because of the increase in border security after the September 11, 2001 attacks that have substantially changed the defendants' proposed action in their 2001 EIS Update. Because the 2001 EIS did not consider these activities, the court reasons that the increase in border activity creates new information relevant to defendants' potential environmental impacts, which must be addressed. The court further held that the agency has a duty to supplement the 2001 EIS Update to reflect the changes in the agency's actions or it may no longer rely on the 2001 EIS Update.

For the ESA claims, defendants argued that it has not consulted with the FWS because it did not perform any actions that warrant such consultation. In fact, defendants argued in their motion to dismiss, that the plaintiffs failed to identify "any specific affirmative agency action allegedly requiring ESA consultation." The court disagreed, finally that it has jurisdiction over the § 7(a)(2) claims due to the agency's increased border activity, which requires the DHS to consult with FWS on all actions that may jeopardize, adversely modify, or destroy the designated critical habitats for those species. However, the court granted the motion to dismiss with respect to plaintiffs' claim under § 7(a)(1). Plaintiffs argued that DHS is required to take affirmative action to conserve threatened or endangered species. However, the court stated that the ESA requires agencies to carry out programs for environmental conservation but does not require comprehensive programs to cover every activity in which the agency engages. Thus, the court granted the defendants' motion to dismiss on only on the ESA claim under § 7(a)(1).

Conclusion and Implications

Overall, the NEPA claim survived a motion to dismiss in its entirety while its ESA claim survived in part. In other words, the Trump administration's motion to dismiss was mostly denied. Though this matter is early in its litigation, this procedural win for the plaintiffs may give some insight to the determination of this case. At the very least, it seems that courts are likely to hold the Trump administration responsible for complying with federal environmental laws by conducting a further environmental impact studies for actions that may jeopardize, adversely modify, or destroy the designated critical habitats of threatened or endangered species and the animals that inhabit those areas.

(Rachel S. Cheong, David D. Boyer)

DISTRICT COURT CONCLUDES FEDERAL AGENCIES' ENVIRONMENTAL ASSESSMENT OF COASTAL 'FRACKING' VIOLATED THE ESA AND COASTAL ZONE ACT

Environmental Defense Center v. U.S. Bureau of Ocean Energy Management, ___F.Supp.3d___, Case No. CV168418PSGFFMX (C.D. Cal. Nov. 9, 2018).

The U.S. District Court for the Central District of California recently granted in part and denied in part seven cross-motions for summary judgment relating to the issuance of a final environmental assessment for fracking and acidizing in oil production off the California coast. The federal Bureau of Ocean Energy Management (BOEM) and the Bureau of Safety and Environmental Enforcement (BSEE) issued a Final Environmental Assessment (EA) on the potential impacts of offshore well stimulation treatments, more commonly known as "fracking" or "acidizing," on the Pacific Outer Continental Shelf. Plaintiffs claim BOEM and BSEE violated their statutory obligations under the National Environmental Policy Act (NEPA), federal Endangered Species Act (ESA), and Coastal Zone Management Act (CZMA) when they issued a Final EA. The court found the federal agencies had complied with NEPA requirements, but had violated provisions of the Endangered Species Act and CZMA. The court ordered prohibitory injunctions preventing the federal agencies from issuing any well stimulation treatments plans or permits until BOEM and BSEE 1) complete a formal consultation with Fish and Wildlife Service (FWS) pursuant to the Endangered Species Act, and 2) complete the CZMA review process.

Factual and Procedural Background

This case consolidated two successor cases which culminated in settlement agreements where BOEM and BSEE agreed to conduct an EA and withhold any future application permits for well stimulation treatments. After the agencies issued the Final EA and subsequent Finding of No Significant Impact (FONSI), three groups of plaintiffs filed separate suits challenging the EA and FONSI. All three cases were transferred to the U.S. District Court and consolidated in the present case. The parties then cross-moved for summary judgment on seven claims under NEPA, the Endangered Species Act, and CZMA.

NEPA requires federal agencies to prepare an Environmental Impact Statement (EIS) when federal action is proposed that will significantly affect the quality of the human environment. Alternatively, a federal agency may prepare an EA and provide a concise summary on whether an EIS is even required, and if the agency finds that there will be no significant impact, then it can forgo the EIS and issue a FONSI. BOEM and BSEE reviewed four proposed plans relating to well stimulation treatments and then issued a FONSI based on a determination that there would be no significant impact on the human environment. The federal agencies argued that they had not taken any "major federal action" to trigger the statutory requirements of NEPA. The plaintiffs disagreed, challenged the adequacy of the EA, and argued that the agencies should have prepared the more robust EIS.

Under § 7 of the Endangered Species Act, a federal agency must ensure that any action they authorize is not likely to result in the jeopardization of any endangered, or threatened species, or result in the destruction of critical habitat. 16 U.S.C. §1536(a)(2). The ESA requires procedural mandates, including at least informal consultation with Fish and Wildlife Services (FWS) and National Marine Fisheries Services (NMFS), even if a certain substantive outcome or determination is not reached. Plaintiffs allege BOEM and BSEE failed to initiate consultation with either FWS or NMFS before issuing the EA. The federal agencies argue that the consultation requirements were not triggered because they had not taken "action" within the meaning of the statute.

The CZMA gives coastal states the right to review federal agency activity and if the state finds that federal activity is inconsistent with the state's coastal management plan, the state may seek relief in federal court. The plaintiffs allege BOEM and BSEE violated the CZMA by failing to prepare and submit a determination to the California Coastal Commission on whether the proposed use of well stimulation treat-

ments is consistent with California's coastal management plan. The federal agencies argued that they had not taken the required federal agency activity that would have triggered review under the CZMA.

The District Court's Decision

The NEPA Claims

The court determined that NEPA claims were reviewable because the proposal to allow well stimulation treatments on the Pacific Outer Continental Shelf was a major federal action. The court then denied the plaintiffs' NEPA claims because the federal agencies took the requisite "hard look" at the environmental effects of "fracking" on the Pacific Outer Continental Shelf and reasonably concluded that there would be no significant impact. The court reviewed the agencies' action under a deferential standard that looks for agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Finding the federal agencies had made informed decision-making and satisfied public participation requirements for the EA, the court rejected the plaintiffs challenges to the substance of the EA. The court then considered whether an EIS should have been prepared instead of an EA, and found that the intensity factors required under the statute were not present. Lastly, the court found BOEM and BSEE had provided a reasonable range of alternatives in preparing the EA.

The ESA Claims

The Endangered Species Act claims were based on the federal agencies' failure to initiate consultation with the FWS and NMFS, as required by Section 7 of the Act before issuing the Final EA. The NMFS claim was found moot because BOEM and BSEE adequately initiated and completed consultation with NMFS. NMFS issued a letter concurring with BOEM and BSEE's determination. In contrast, BOEM and BSEE asked FSW to engage in a formal consultation given the adverse effect of an accidental oil spill on certain species. The court determined that the federal agencies violated the Endangered Species Act, however, by issuing their Final EA before the consultation was complete. The court granted the plaintiffs' request for declaratory relief and issued an injunction prohibiting the agencies from proceeding with well stimulation treatments permitting until consultation with FWS is complete.

The Coastal Zone Managemnt Act Claims

Finally, the court granted the plaintiffs' motion for summary judgment on the CZMA claims and issued an injunction prohibiting the agencies from approving permits until they complete the required CZMA process. The court found that the broad statutory language of "federal agency activity" included the federal action at issue and the federal proposal as described in the Final EA is reviewable under 16 U.S.C. §1456(c)(1).

Conclusion and Implications

This case illustrates that issuance of plans or permits may constitute an "action" under the Endanger Species Act or a "federal agency activity" under the CZMA, triggering interagency consultation and review requirements. Even under a deferential standard of review, federal agencies may be ordered to refrain from any further action unless and until the Endangered Species Act and CZMA consultations are completed.
(Rebecca Andrews)

DISTRICT COURT DISMISSES CLEAN WATER ACT CITIZEN SUIT CHALLENGING UNPERMITTED DISCHARGE OF POLLUTANTS VIA GROUNDWATER SEEPS

Prairie Rivers Network v. Dynegy Midwest Generation, LLC,
___F.Supp.3d___, Case No. 18-CV-2148 (C.D. Ill. Nov. 14, 2018).

Environmental group brought citizen suit challenging unpermitted discharge of coal ash wastewater via groundwater seeps and thence to navigable surface waters. The U.S. District Court for the Central District of Illinois dismissed the complaint, relying on a 1994 Seventh Circuit Court of Appeals precedent holding that the Clean Water Act (CWA) does not regulate discharges to groundwater, *even* when that groundwater is unquestionably hydrologically linked to navigable surface waters.

Background

Dynegy operated a coal-fired power plant in Illinois, the Vermillion Power Station, from the 1950s until 2011. Coal ash from the plant's operation is stored in three unlined pits containing an approximate total of 3.33 million cubic yards of coal ash:

> Coal ash wastewater such as that in the coal ash pits contains heavy metals and other toxic pollutants that are harmful and at times deadly to people, aquatic life, and animals.

Dynegy and holds a permit that authorizes the company to discharge pollutants from the Vermilion Power Station to the Middle Fork [of the Vermillion River] through nine external outfalls. The plant also discharges pollutants into the Middle Fork "from numerous, discrete, unpermitted seeps on the riverbank.

Coal ash at the VPS has groundwater flowing through it year round. While the thickness of saturated ash varies as groundwater levels rise and fall with the seasons, groundwater has saturated coal ash at depths of more than 21 feet. That groundwater flows laterally through the ash, picking up contaminants in the process, while precipitation leaching down through the top of the coal ash mixes with the groundwater and further adds to the pollutant load contained within the discharge to the Middle Fork. Defendant's own reports and information have concluded that the coal ash contaminated groundwater flows right into the adjacent Middle Fork.

Prairie Rivers Network (PRN) sued Dynegy under the citizen suit provisions of the federal Clean Water Act, 33 U.S.C. §§ 1311 and 1342, alleging the seeps:

> . . .are not authorized by any permit and are contrary to the limited authorization to discharge within Defendant's discharge permit.

PRN also alleged Dynegy via the seeps "discharged and is discharging on an ongoing basis, pollutants into the Middle Fork in concentrations, colors, and with characteristics that violate Illinois effluent limits and water quality standards that are incorporated as conditions of the Vermilion [discharge] permit" governing the nine external outfalls.

The District Court's Decision

Dynegy moved to dismiss, arguing "the CWA does not regulate discharges of contaminants to groundwater, even where that contaminated groundwater reaches navigable waters," citing *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994). PRN opposed on the basis that *Oconomowoc:*

> . . .governs discharges *into groundwater itself*, absent evidence that the groundwater discretely conveys pollution into a navigable water.

Oconomowoc concerned discharges to groundwater from a six-acre retention pond that drained runoff from a warehouse parking lot containing oil and other pollutants. The contaminated groundwater "eventually reached streams, lakes, and oceans," including water of the United States regulated under the CWA.

The Seventh Circuit affirmatively held that the CWA did not assert authority over groundwaters, just because those waters "may" be hydrologically connected with surface waters. This court's reading of that passage is that the Seventh Circuit found

any hydrological connection between surface waters and groundwater to be *irrelevant* in terms of whether groundwaters were covered by the CWA. If the discharge is made into groundwater, and the pollutants somehow later find their way to navigable surface waters via a discrete hydrological connection, the CWA is still not implicated, because the offending discharge was made into groundwater, which is not subject to the CWA.

The District Court rejected PRN's more limited reading of *Oconomowoc*, by which the Seventh Circuit was:

> . . .distinguishing between discharges of pollutants into groundwater with only the hypothetical possibility of further seepage into navigable waters and discharge of pollutants into groundwater with *definite* seepage into navigable waters.

Instead, the District Court found the *Oconomowoc* Court held that

> . . .*even if* there was a possibility (or reality) of discharged pollutants into groundwater seeping into navigable waters, such a discharge was not covered by the CWA, because the *actual discharge* from the artificial pond was into groundwater, regardless of whether those pollutants later seep into navigable surface waters via discrete groundwater seepage.

The court cited in support of its interpretation a recent U.S. District Court for the Eastern District of North Carolina decision citing *Oconomowoc* as holding that "an NPDES permit is not required for discharges to groundwater even if those discharges eventually migrate to surface waters." *Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, 25 F.Supp.3d 798, 809 (E.D. N.C. 2014).

Applying *Oconomowoc* to the facts in this case, the District Court dismissed the complaint because all of its allegations were premised on discharges via the seeps, rather than the nine external outfalls.

Conclusion and Implications

The effects of the Circuit split with respect to Clean Water Act jurisdiction over discharges to groundwater continues to percolate through the District Court, with wildly varying outcomes based on the Circuit within which each District Court is located. The court's decision is available online at: https://will.illinois.edu/nfs/Bruce_-_2018_-_UNITED_STATES_DISTRICT_COURT_CENTRAL_DISTRICT_OF_I.pdf
(Deborah Quick)

Eastern Water Law & Policy Reporter
Argent Communications Group
P.O. Box 506
Auburn, CA 95604-0506

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