Volume 13, Number 8
October 2018

EASTERN WATER LAW™

& POLICY REPORTER

CONTENTS

Continued on next page

Publisher's Note:

Accuracy is a fundamental of journalism which we take seriously. It is the policy of Argent Communications Group to promptly acknowledge errors. Inaccuracies should be called to our attention. As always, we welcome your comments and suggestions. Contact: Robert M. Schuster, Editor and Publisher, P.O. Box 506, Auburn, CA 95604-0506; 530-852-7222; schuster@argentco.com

WWW.ARGENTCO.COM

Subscription Rate: 1 year (11 issues) $785.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 506; Auburn, CA 95604-0506; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc.: President, Gala Argent; Vice-President and Secretary, Robert M. Schuster, Esq.

EWL

EASTERN WATER NEWS

NAVIGATING 'NAVIGABLE WATERS:' RECENT FEDERAL GOVERNMENT AND COURT ACTIONS LEAVE THE DEFINITION OF PROTECTED WATERS UNDER THE CLEAN WATER ACT IN FLUX

The federal Clean Water Act (CWA) prohibits the discharge of pollutants from any "point source" into "navigable waters" without a permit. 33 U.S.C. §§ 1311(a), 1342, 1344, 1362(12). Since its inception, many questions have developed over the exact scope and meaning of the specific terms and phrases found throughout the CWA. Recently, the phrase "navigable waters" has been subject to actions by the federal government, as well as courts and states, to establish its exact meaning. On one side, some are concerned that an overly broad CWA definition will infringe on the rights of states and private landowners to maintain and use waterways. Others worry that a narrow interpretation will leave many of the waterways throughout the nation susceptible to pollution, which could cause larger damage to the environment. Thus, the courts, states, and federal government, along with interested private parties on both sides, are engaging in a protracted battle over the definition of what waters constitute "navigable waters" for the purposes of the CWA.

Background

In 2015, the Obama administration issued a new definition attempting to clarify the meaning of "navigable waters", known as the "2015 Clean Water Rule" (2015 CW Rule). Several states challenged the 2015 CW Rule in court, which lead to orders in many states effectively stopping the 2015 CW Rule from being enforced in those states. Further, the Trump administration recently attempted to jump into the fray by issuing a new rule delaying the 2015 CW Rule from being effective nationwide. However, on August 16, 2018, the courts invalided the Trump administration's actions. Thus, the definition of navigable waters is currently subject to the 2015 CW Rule except for states affected by various court rulings. To get a clearer picture of the current status of CWA and what waterways fall under its jurisdiction, it is important to review the history of the CWA and the interpretation of this "navigable waters" language.

The Definitional History of 'Navigable Waters'

The CWA defines "navigable waters" as "waters of the United States, including the territorial seas." 33 USC 1362(7). However, CWA does not include a further definition of the term "waters of the United States" which has been deemed vague by many commentators. Thus, in the early 1980s, the U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) issued a regulation defining "waters of the United States" to include interstate waters, such as interstate wetlands "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds," and wetlands adjacent to these waters but excluding "waters that are themselves wetlands." 51 *Fed.Reg.* 41206 (Nov. 13, 1986) (amending 33 CFR 328.3); 53 *Fed.Reg.* 20764 (June 6, 1988) (amending 40 CFR 232.2).

On June 29, 2015, the federal government issued the 2015 CW Rule which noted that the term "waters of the United States" had been subject to several decisions by the U.S. Supreme Court that provided "critical context and guidance in determine the appropriate scope of the phrase." 80 *Fed.Reg.* 37054 (June 29, 2015). The 2015 CW Rule also noted that relevant and available science, along with other provisions of the CWA and the CWA's overall objective, provided more information as to what the phrase should actually mean. Thus, the 2015 CW Rule provided a new and expanded definition of the "waters of the United States" term by creating separate categories of waters including the following:

1) traditional navigable waters, which include waters that have been deemed navigable in fact by law as well as waters that been historically used, are currently used, or are susceptible to be used for future navigation;

2) territorial seas defined as "the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles";

3) impoundments of jurisdictional waters, which include any water that is blocked off by a dam or other man made structure;

4) tributaries, including streams that flow to a larger body of water;

5) interstate waters, defined as "waters that are characterized by the presence of physical indicators of flow—bed and banks and ordinary high water mark—and that contribute flow directly or indirectly to a traditional navigable water, an interstate water, or the territorial seas";

6) adjacent waters, includes any water bordering, contiguous, or neighboring, including waters separated from other "waters of the United States" by constructed dikes or barriers, natural river berms, beach dunes and the like; and

7) "case-specific significant nexus waters," which include waters that should be protected by the CWA because of a specific connection between other waters that are protected by the CWA and specifically if the waters "significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas."

States Challenge the 2015 Clean Water Rule

Once the 2015 CW Rule was issued, several states filed actions in federal court, claiming the 2015 CW Rule violated the CWA by attempting to assert federal regulations over waterways that are legally reserved for state or private ownership control. The state actions, which were filed in courts throughout the country, were consolidated in the U.S. Court of Appeals for the Sixth Circuit. On October 9, 2015, the Sixth Circuit issued a nationwide stay of the 2015 CW Rule, meaning the Six Circuit stopped the enforcement of the 2015 CW Rule until the Sixth Circuit decided the issues on their merits. *In re U.S. EPA*, 803 F.3d 804 (6th Cir. 2015).

However, on January 22, 2018, the U.S. Supreme Court ruled that the Sixth Circuit did not have jurisdiction to review the 2015 CW Rule and, therefore, all challenges needed to be heard in District Courts. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018). As a result, the Sixth Circuit vacated the nationwide stay of the 2015 CW Rule, giving jurisdiction back to the U.S. District Courts which continued to conduct their separate proceedings.

The Trump Administration's 'Suspension Rule'

While the 2015 CW Rule was going through the courts, the Trump administration attempted to step in and stop the 2015 CW Rule nationally. On February 6, 2018, the EPA issued a rule delaying the effective date of the 2015 CW Rule until February 6, 2020 so the 2015 CW Rule could be reviewed based on the CWA and court cases addressing the scope of the "waters of the United States" language (Suspension Rule). 83 *Fed.Reg.* 32227 (July 12, 2018). In the meantime, the Suspension Rule stated that the interpretation of "waters of the United States" set forth in prior regulations, issued in 1980, would control.

In response, several environmental groups filed action in the U.S. District Court for South Carolina (SC District Court) claiming that the Suspension Rule violated the Administrative Procedure Act (APA). In sum, the APA generally requires federal agencies to offer a "public comment period" during which it accepts and considers information provided by the public, before issuing any new rule. *South Carolina Coastal Conservation League et al. v. E. Scott Pruitt et al.*, Case No. 2-18-cv-330-DCN. Specifically, the plaintiffs alleged that the EPA provided insufficient time to issue public comment by limiting the timeframe to a few weeks and did not accept comments regarding the definition of "waterways of the United States" but instead limited comments to how long the 2015 CW Rule should be delayed. The EPA, however, contended that the public comment period requirement did not apply to the Suspension Rule because it was not a substantive rule and only delayed implementation of the 2015 CW Rule.

The SC District Court agreed with the plaintiffs, which effectively stopped the Suspension Rule from being implemented nationwide.

The 2015 CW Rule Is in Effect except Where Local Courts Have Stepped in

Based on the forgoing, the 2015 CW Rule, as implemented by the Obama administration, is still in effect. However, the actions initiated by various states challenging the 2015 CW Rule are continuing in District Courts. Thus, the courts could rule that the 2015 CW Rule is invalid in which case it may not apply to the states under the jurisdiction of a particular court. Currently, several courts have issued preliminary injunctions, which effectively block the 2015 CW Rule from applying in several states until the courts decide the cases on their merits. Specifically, the following courts have issued preliminary injunctions.

- On June 8, 2018, The US District Court for the Southern District of Georgia issued an order on June 8, 2018 enjoining the 2015 CW Rule in 11 states: Alabama, Florida, Georgia, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, West Virginia, and Wisconsin. *Georgia v. Pruitt,* No. 2:15-cv-00079.

- On August 27, 2018, the District Court of North Dakota issued a preliminary injunction regarding the 2015 CW Rule effective in thirteen states: Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota and Wyoming. *North Dakota, et al. v. U.S. Environmental Protection Agency, et al.*, C.A. No. 3:15–00059.

- On September 12, 2018 The U.S. District Court for the Southern District of Texas enjoined the implementation of the 2015 CW Rule in Texas, Louisiana, and Mississippi. *State of Texas, et al, v. U.S. Environmental Protection Agency, et al.*, C.A. No. 3:15-CV-00162.

Thus, the 2015 CW Rule is currently in effect in 23 states, or all the states not listed above.

Conclusion and Implications

The 2015 CW Rule remains valid federal law. While the Trump administration may still try to rescind or delay its implementation by appealing the Sixth Circuit's decision or issuing another rule, the Sixth Circuit's ruling suggests the Trump administration must go through the full "public comment period" required by the ADA, which could take several months.

In the meantime, the District Court actions identified above are proceeding on the merits. Even after these cases are decided, they will likely be appealed by the losing party. If appealed, the appellate court could decide to issue a preliminary injunction as well before hearing the merits of the case. Ultimately, these issues could end up before the Supreme Court if different courts make different rulings, since the Supreme Court often resolves inconsistent interpretations of federal law by the lower courts.

What constitutes navigable waters under the CWA will be debated and remain in flux nationally for the foreseeable future.

However, even in states where the 2015 CW Rule is not in effect, agencies do not have a free pass to violate the CWA with respect to local waterways. Even before the 2015 CW Rule, several cases, as well as other provisions in the CWA, suggested an expansive interpretation of what constitutes navigable waters as explained and detailed in the 2015 CW Rule. As many have suggested, and as is explicability stated in the 2015 CW Rule, the 2015 CW Rule is an interpretation of the CWA "based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades."

(Stephen M. McLoughlin, David Boyer)

NEWS FROM THE WEST

In this month's News from the West, we address a decision out of the Arizona Supreme Court involving a state agency's decision to green light a large land use development's water supply element without consideration of unquantified federal reserved water rights. We also report on a jury verdict of the California Superior Court which found Plains All American Pipeline LP guilty for one felony and eight misdemeanor charges in connection with its oil pipeline rupture into Santa Barbara Channel in 2015.

Arizona Supreme Court Finds State Department of Water Resources Need Not Consider Unquantified Federal Reserved Water Rights in Determination of Land Use Development

One of Arizona's last free-flowing streams, the San Pedro River, which provides critical habitat to millions of birds and is home to over 80 species of animals, might be in danger of drying up according to environmental groups, the Department of the Interior and other concerned citizens. *See,* Galvan, Astrid, "Arizona Sides with Developer in River Water Use Dispute," *Associated Press* (August 9, 2018). The Arizona Supreme Court's recent ruling in *Silver v. Pueblo Del Sol Water Co.* will allow a proposed 7,000 home development to be built within five miles of the River.

On August 9, 2018, in a 4-3 decision with several vigorous dissents, the Arizona Supreme Court held that the Arizona Department of Water Resources (ADWR) is not required to consider unquantified federal reserved water rights when it determines whether a developer has an adequate water supply for purposes of A.R.S.§ 45-108. An "adequate water supply" means both: 1) "Sufficient groundwater, surface water or effluent of adequate quality will be continuously, legally and physically available to satisfy the water needs of the proposed use for at least one hundred years" and 2) "The financial capability has been demonstrated to construct the water facilities necessary to make the supply of water available for the proposed use, including a delivery system and any storage facilities or treatment works." A.R.S. § 45-108(I). [*Silver v. Pueblo Del Sol Water Company*, CV-16-0294-PR (Az. Aug. 9, 2018).]

Background

This case involves a proposed development called "Tribute," which covers about 4800 acres of land in Cochise County and which would include about 7000 commercial and residential units near Sierra Vista, Arizona. In 2013, ADWR approved Pueblo Del Sol Water Company's (Pueblo) application to supply water for Tribute, finding that there is an adequate water supply for the development. However, the development site is located approximately five miles from the San Pedro River, one of the only free-flowing perennial streams in Arizona. In 1988, Congress created the San Pedro Riparian National Conservation Area (SPRNCA) and reserved enough water to fulfill SPRNCA's conservation purpose with a 1988 priority date, ordering the Secretary of the Interior to "file a claim for the quantification of such rights in an appropriate stream adjudication." *Silver v Pueblo Del Sol*, ¶ 3, p. 3. Also, SPRNCA has a 1985 state certificate-based surface water right and other pending state-based applications. SPRNCA's claims have not yet been adjudicated in the Gila River General Stream Adjudication (the "Gila Adjudication"). The Bureau of Land Management (BLM) manages national conservation areas, including SPRNCA, on behalf of the Secretary of the Interior.

To meet Tribute's demands, Pueblo Del Sol believes that it would need to increase its annual groundwater pumping from about 1430 acre-feet to 4870 acre-feet. Arguing that this increased pumping would affect the flow of the San Pedro River and conflict with its federal reserved water rights, the Bureau of Land Management along with other Plaintiffs objected. The Administrative Law Judge (ALJ) agreed with ADWR's designation of adequate water supply for Pueblo Del Sol's delivery of water to Tribute. ADWR issued an Order affirming the ALJ's decision and the Plaintiffs in the case filed complaints for judicial review. The state Superior Court vacated ADWR's decision, concluding that pursuant to A.R.S. § 45-108, ADWR was required to consider potential and existing legal claims that may affect the availability of the water supply, including BLM's unquantified federal reserved water right, when determining 'legal availability'. The Court of Appeals then vacated the Superior Court decision and remanded

the matter to ADWR, concluding that ADWR did not have to consider unquantified federal reserved water rights when determining 'legal availability,' but ADWR must consider the impact of BLM's federal reserved water right when determining 'physical availability'.

The Supreme Court's Decision

The Arizona Supreme Court granted review because the case presents an issue of statewide importance. The Court agreed with all parties that the Court of Appeals erred in directing ADWR to consider BLM's federal reserved water right under ADWR's 'physical availability' determination. Also, the four Justice majority held that ADWR's 'legal availability' regulation, A.A.C. R12-15-718, which provides that a private water company such as Pueblo Del Sol has a 'legally available' supply of groundwater when it possesses a CC&N, is consistent with the Statutory requirements of A.R.S. § 45-108(I), and does not require consideration of unquantified federal reserved water rights. Because Pueblo Del Sol has a CC&N, the Court reasoned, ADWR did not have to consider SPRNCA's unquantified federal reserved water rights when determining whether to approve Pueblo Del Sol's application for an adequate water supply designation. The Court also noted that:

> . . .the wisdom of interpreting [the term 'legal availability'] to require consideration of unquantified federal reserved rights is questionable. ADWR does not have the authority to quantify BLM's rights; that is the exclusive domain of the Gila Adjudication. *Silver v Pueblo Del Sol*, ¶ 32, p. 14.

Furthermore, the Court held:

> We decline Plaintiff's implicit invitation to transform ADWR, by judicial fiat, into a forum for anticipatory injunctive relief through regulation based upon unquantified federal reserved water rights. *Id.* at ¶ 37, p. 16.

Importantly, however, the Court limited its holding to unquantified federal reserved water rights, explicitly stating that:

> . . .we need not decide whether ADWR must consider *quantified* federal reserved water rights. ADWR conceded at oral argument that it would have to acknowledge a quantified federal reserved water right if the federal government could prove, likely through an injunction proceeding, that an applicant's prospective groundwater pumping would infringe upon its right. Id. ¶ 43, p. 19.

With this statement, the Court left open the possibility that ADWR must consider *quantified* federal reserved water rights in determining 'legal availability' for adequate water supply designations.

The Concurrences and Dissents

With respect to ADWR's 'legal availability' determination, the three Justices concurred in part and dissented in part, arguing that ADWR must consider unquantified federal reserved water rights. Chief Justice Bales took issue with ADWR's reliance on the issuance of a CC&N to determine 'legal availability'. The Chief Justice argued that A.R.S. § 45-108 requires an "evaluation" of 'legal availability', which includes consideration of existing federal reserved water rights. When the Arizona Corporation Commission issues a CC&N it does not evaluate water supply, so, according to the Chief Justice, ADWR's regulation is inconsistent with the requirements of A.R.S. § 45-108, which mandates that ADWR determine if there is an adequate water supply for 100 years. Furthermore, the Chief Justice argued that many of ADWR's projections to determine a 100-year water supply are speculative, and the consideration of unadjudicated rights would be no more so than a projection about physical or continuous availability. Chief Justice Bales purported:

> Requiring ADWR to consider federal water rights in making an adequate water supply determination does not require the water rights to be finally adjudicated.

Finally, Chief Justice Bales noted that the potential harm suffered by homeowners who purchase homes in a development that does not have an adequate water supply must be considered because it is the underlying purpose of the adequate water supply statute "Essentially, the majority would allow ADWR to ignore the legal inadequacy of a proposed water supply until

the problem becomes a reality. This interpretation defeats the adequate water supply provision's manifest purpose to proactively protect consumers in Arizona before they purchase property," wrote the Chief Justice. "[G]roundwater users in the area with inferior water rights should not bring the conservation area's wildlife populations and aquatic environments to the brink of collapse before the federal government can enforce its rights," argued the Chief Justice emphatically.

Justice Bolick wrote that the majority's construction of the 'legal availability' requirement in A.R.S. § 45-108 "renders that command essentially meaningless." *Id.* ¶ 74, p. 31. Justice Bolick took issue with the fact that ADWR's regulation only requires that the applicant has secured a CC&N, but he Arizona Corporation Commission has no jurisdiction over water and the CC&N process requires no analysis whatsoever of water supply. Therefore, Justice Bolick argued that:

> . . .[t]he lack of any meaningful connection between the statutory command to determine legal availability and the substance of ADWR's regulation renders the agency's definition untenable. *Id.* ¶ 80, p. 32.

Obtaining a CC&N tells us nothing about the legal availability of water for the next hundred years, Justice Bolick reasoned, and furthermore he noted that Pueblo Del Sol's CC&N was obtained forty-six years ago, before either ADWR's regulation or the statute requiring a legal availability determination were enacted. Therefore, obtaining a CC&N is completely unrelated to determining legal availability and would likely not survive legal challenge had ADWR adopted it as part of its regulation. Additionally, Justice Bolick observed that the legislature recently enacted a statute instructing that with regard to statutory interpretation, no deference should be provided "to any previous determination that may have been made on the question by the agency." A.R.S. § 12-910(E) (effective Aug. 3, 2018). *Id.* ¶ 82, p. 33.

Finally, Justice Bolick pointed out that:

> . . .speculation is inherent in any projection regarding water availability, legal or otherwise, 'for at least one hundred years,' but that is exactly what the statute commands. *Id.* ¶ 84, p. 35. Justice Bolick agreed with the Chief Justice in that:
>
> ADWR's projection is not a predetermination of legal rights, has no precedential effect, and does not usurp the Gila Adjudication's judicial authority. *Id.* ¶ 87, p. 35.

Justice Pelander concurring in the partial dissents, invited the legislature to rectify the disagreement between the Justices. "If the majority has it wrong," he wrote:

> . . .statutory clarification would be helpful to developers, consumers, water companies, ADWR, and many other entities and persons who care about and are affected by water issues in this state. *Id.* ¶ 91, p. 37.

Conclusion and Implications

The Majority of the Arizona Supreme Court deferred to ADWR, placing great weight in the fact that SPRNCA's inchoate federal reserved water rights are unquantified. They did not believe that the statute requires ADWR to speculate or consider such tenuous rights. The Court left open that there may be a distinction between unquantified rights and unadjudicated rights. For example, if a water user has a permit to appropriate pursuant to A.R.S. § 45-152, the Court may consider the right to be quantified. Also, for rights that pre-date the Arizona 1919 Water Code and appropriation statutes, the right might be considered quantified if the legal requirements in place at the time of appropriation were followed and a Statement of Claim that includes a quantity of water has been filed with ADWR. Nevertheless, the Court's holding creates some uncertainty as to the impact on state-based rights that have not yet been adjudicated.

Also, the strident dissents in this case raise the likelihood that the legislature and possibly ADWR will attempt to remedy some of the weaknesses in the legal availability prong of the adequate water supply determination.

A Motion for Reconsideration and Request to Stay Mandate was filed on August 24, 2018. However, on August 27th, The Court denied the Motion despite strong public reactions to the case, especially by those who fear that the ruling will allow the depletion of the San Pedro River's streamflow.
(Alexandra Arboleda, Lee Storey)

California Superior Court Jury Finds Pipeline Company Guilty of Felony and Eight Misdemeanor Charges in Relation to Oil Spill

The People of the State of California v. Plains All American Pipeline, L.P., James Colby Buchanan, Case No. 1495091 (Santa Barbara Sup. Ct. Sept. 2018).

After a four-month trial, a California jury recently found Plains All American Pipeline LP (Plains All American) guilty for one felony and eight misdemeanor charges in connection with its oil pipeline rupture in Santa Barbara County in 2015. The verdict found Plains All American guilty of one felony charge for discharging a pollutant into state waters, and for eight misdemeanor charges for the loss of wildlife . The company will be sentenced on December 13, 2018 and, if the Superior Court upholds the jury verdict, could face at least $1.5 million in penalties. The criminal charges are cause for infrastructure companies and pipeline companies in particular to carefully evaluate maintenance practices, and may give cause for opposition parties to slow infrastructure projects currently under way or in development.

Background

On May 19, 2015, a section of Plains All American pipeline Line 901, a 10.6-mile pipeline, ruptured in Santa Barbara County. The spill resulted in the release of over 140,000 gallons of crude, or, as many as 3,400 barrels of crude per the company's count, onto the Refugio State Beach in Santa Barbara County, which is a national marine sanctuary and a state-designated underwater preserve for whales, dolphins, sea lions and marine birds. The incident was the area's largest oil spill since 1969, when 100,000 barrels of crude spilled into California's Santa Barbara Channel.

The spill was caused by corrosion on the pipeline, as identified by federal pipeline safety officials in a 'root cause' report that was conducted after a California grand jury first indicted Plains All American in 2016 on 46 criminal charges. The initial 46 charges that Plains All American faced were reduced to 13 over the course of the trial. Of the remaining charges, the jury found Plains All American guilty of eight misdemeanor charges and one felony charge, declared a mistrial of three, and acquitted Plains American Pipeline of one charge.

The Jury Findings

The jury found Plains All American guilty on the following counts:

- Count 1: Felony charge that Plains All American knowingly engaged or caused oil to spill into state waters.

- Count 4: Misdemeanor charge that Plains All American knowingly made a false or misleading oil spill report to the California Office of Emergency Services.

- Count 7: Misdemeanor criminal charge that Plains All American failed to immediately report any release or threatened release of a hazardous material to

- Count 9: Misdemeanor criminal charge that Plains All American unlawfully allowed a substance/material hazardous to fish, plant and bird life to spill into state waters and beach.

- Count 10: Misdemeanor charge that Plains All American unlawfully took a California Sea Lion.

- Count 11: Misdemeanor charge that Plains All American unlawfully took a common dolphin.

- Count 12: Misdemeanor charge that Plains All American unlawfully took a common dolphin.

- Count 14: Misdemeanor charge that Plains All American unlawfully took a California Sea Lion.

- Count 15: Misdemeanor charge that Plains All American unlawfully took a California Sea Lion.

The jury declared a mistrial on the following three counts:

- Count 2: Felony criminal charge that Plains All-American knowingly discharged a pollutant into state waters.

- Count 3: Felony criminal charge that Plains All-American knowingly caused a hazardous substance to be deposited on roadways, railways, and land of another without permission of the owner.

•Count 13: Misdemeanor criminal charge that Plains All-American unlawfully took a California sea lion.

The Jury acquitted Plains All American of Count 8, a misdemeanor charge that Plains All American unlawfully deposited or permitted oil or residuary product of petroleum to enter state waters.

In a press release, Attorney General Xavier Becerra stated:

> Engaging in this kind of reckless conduct is not just irresponsible—it's criminal. Today's verdict should send a message: If you endanger our environment and wildlife, we will hold you accountable.

Statement by Plains All American

Plains All American issued a statement that it "accept[s] full responsibility for the impact of the accident [and is] committed to doing the right thing." However, the company noted that "the jury did not find any knowing misconduct by Plains with respect to the operation of Line 901," and maintains that its operations on Line 901 met or exceeded legal and industry standards. Plains All American stated that it:

> . . .believe[s] that the jury erred in its verdict on one count where applicable California laws allowed a conviction under a negligence standard.

Plains All American said it intends "to fully evaluate and consider all of [its] legal options with respect to the trial and resulting jury decision."

Conclusion and Implications

Sentencing is scheduled for December 13. Since the company was charged (and not a person), there is no possibility of jail time but the fines could reach at least $1.5 million if the court upholds the jury verdict. Plains states that it has already spent approximately $150 million in clean up, and further estimates that the total company cost from the incident, including actual and projected cleanup costs, emergency response, settlements from third-party claims, penalties, is closer to $335 million.

For companies in this industry, the verdict is a wake-up call that policies to ensure safety oversight and infrastructure maintenance cannot be overlooked, and that companies may even need to go above and beyond what state or federal regulators require to ensure operational safety of energy infrastructure. The verdict is also significant in showing that criminal charges may result not only where human fatalities are involved as with the San Bruno explosion of a PG&E gas line in 2010, but also where the failure to adequately maintain energy infrastructure results in significant harm to the environment. (Lilly McKenna)

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

•September 5, 2018—The U.S. Environmental Protection Agency has finalized an administrative order with the Los Angeles Department of Water and Power (LADWP) over federal Clean Water Act (CWA) violations. Under the terms of the order, LADWP will purchase $5.3 million in mitigation credits for damaging wetlands on its Granada Hills property. LADWP will also pay a $94,000 penalty. EPA, along with the U.S. Army Corps of Engineers (Corps) and the California Department of Fish and Wildlife, conducted an inspection in 2016 and found extensive vegetation clearing and soil displacement on the property, located in the San Fernando Detention Basin. Inspectors concluded that between 2013 and 2016, almost eight acres of open water and adjacent wetlands in the basin had been graded, filled and channelized without a proper permit. LADWP will purchase $5.3 million in mitigation credits at the Peterson Ranch Mitigation Bank. Mitigation banking is used to preserve, enhance, restore or create a wetland to compensate for adverse impacts to similar nearby ecosystems. Under the Clean Water Act, companies must obtain a permit from the Army Corps of Engineers before discharging pollutants including dredge and fill materials into waters of the United States, which include wetlands. The proposed penalty is subject to a 30-day public comment period

•August 30, 2018—EPA Region 7 has reached an administrative settlement with two concentrated animal feeding operation (CAFO) facilities in the West Point area to resolve violations of the Clean Water Act. The agreement is expected to help safeguard Nebraska waterways from pollutants and bring both facilities within federal regulatory compliance. During inspections at these CAFOs, EPA inspectors observed that both facilities lacked adequate, engineered livestock waste controls to prevent discharges of manure and process wastewater. Analysis of sampling conducted by EPA documented that feedlot-related pollutants discharge into an unnamed tributary of Plum Creek. The creek discharges into the Elkhorn River, which is listed as "impaired" by the state of Nebraska for Escherichia coli (E. coli), a disease-causing type of fecal coliform bacteria passed through the fecal excrement of livestock. Both facilities have agreed to provide EPA a plan describing how they will either: 1) cease all discharges from their facilities, 2) reduce the number of cattle at their facilities below regulatory thresholds, or 3) obtain a National Pollutant Discharge Elimination System (NPDES) permit that would require measures to minimize pollutant impacts. An NPDES permit is required for the discharge of pollutants from any "point source" into waters of the U.S. In addition, each facility has agreed to pay a civil penalty. Bar MK, L.L.C., has agreed to pay a penalty of $29,000. Cindy Stratman, doing business as Cindy Stratman Livestock, has agreed to pay a penalty of $22,000. The Consent Agreement and Final Orders for both sites are available for public notice and comment for 30 days.

•August 20, 2018—The U.S. Department of Justice (DOJ) and the U.S. Environmental Protection Agency Region 7 have entered into a consent decree with Ag Processing, Inc. (AGP) to ensure compliance with oil pollution prevention requirements of the Clean Water Act. As part of the settlement, the company has agreed to implement specific preventative measures to ensure future compliance and improve accidental spill response. EPA inspectors identified CWA violations at eight large vegetable oil and biodiesel production, processing, refining,

and storage facilities in Sheldon, Manning, Algona, Everly, and Eagle Grove in Iowa; Hastings, Nebraska; and Dawson, Minnesota. The eight facilities have a storage capacity greater than 1 million gallons, from which a discharge of oil to navigable waters could cause substantial harm to the environment. These facilities are required to prepare and submit a Facility Response Plan (FRP), and are subject to the Spill Prevention, Control, and Countermeasure (SPCC) rule. At each facility, AGP has agreed to work with EPA Region 7 to ensure compliance with SPCC and FRP regulations, as well as contract with a third party to conduct compliance audits. Additionally, AGP has agreed to install and maintain an electronic level monitoring and control system on seven large, crude soybean oil storage tanks at its Everly and Emmetsburg facilities in Iowa. The estimated $200,000 monitoring system project will provide additional benefits and safeguards at the facilities including real-time continuous monitoring of high and low tank levels; and audible alarms and cutoff switches that will de-energize the equipment from pumping further oil into the tanks when high levels are reached. The electronic system will provide AGP continuous monitoring over the tanks and enhance ability to prevent tank overflows and protect nearby waterways. AGP will also be required to pay a civil penalty of $500,000. Seven of the eight facilities were found to be in noncompliance with maintaining a proper FRP. A proper FRP is critical in providing an action plan for facilities storing large quantities of oil, and demonstrates a facility's preparedness to respond to an oil release and a worst-case discharge scenario. Additionally, five of the facilities exhibited a failure to comply with the SPCC rule. SPCC's are important to help facilities mitigate discharges of oil into navigable waters. The SPCC rule requires facilities to develop, maintain and implement an oil spill prevention plan. These plans help facilities prevent oil spills, as well as control a spill should one occur.The consent decree is subject to a 30-day public comment period and approval by the federal court.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•September 4, 2018 —H. Baxter & Company has agreed take corrective action at their Eugene, Oregon wood treatment facility for mishandling and improper storage of hazardous waste. They will also pay a $64,000 penalty as part of the agreement. In 2014, inspectors from the U.S. Environmental Protection Agency found multiple violations of the Resource Conservation and Recovery Act, a federal law intended to ensure safe management of hazardous waste from the moment it's generated to its final disposal. Specifically, the EPA found staining from the wood preservatives creosote and pentachlorophenol on an asphalt pad outside of a containment area, found an unmarked and undated container of hazardous waste from wood treating activities, and found that Baxter was not adequately cleaning a drip pad to prevent 'penta' and creosote from migrating from the containment area. Baxter is currently working with Oregon Department of Environmental Quality to clean up contaminated groundwater at the site, and EPA's enforcement action is focused on the prevention of recontamination of the soil and groundwater from the operation of the wood treatment facility. The company has already taken corrective actions to prevent potential land-based contamination from moving offsite. These actions, which resolve one count of the EPA consent order filed from the 2014 inspection, will help to protect the surrounding community and reduce the necessity for additional future cleanup activities. The second count of the consent order noted the company's failure to maintain a waste management plan to be used were the facility to close. While the company has no plans to close the Eugene facility, to resolve this violation, the company has agreed to work with ODEQ to develop such a plan.

Indictments Convictions and Sentencing

•September 12, 2018—Company in California Agrees to Pay Clean Water Act Fines, Mitigate Impacts to Sensitive Streams and Wetlands—Goose Pond Ag, Inc., a Florida corporation, and its manager of operations Farmland Management Services, Inc., an affiliate of the John Hancock Life Insurance Company, have agreed to pay a civil penalty, preserve streams and wetlands, and perform mitigation to resolve violations of the Clean Water Act on property near the Sacramento River located in Tehama County, California, the Justice Department announced today. The property in this case was acquired from Duarte Nursery Inc. and adjoins a Duarte site that was the subject of a settlement agreement announced by the Justice Department in August 2017 and approved by a federal judge on December 7, 2017.

Goose Pond Ag and Farmland Management Services have agreed to pay $5.3 million in civil penalties and mitigation for substantial acres of disturbed streams and wetlands on the property that are connected to the Sacramento River. In addition, the settlement requires the companies to permanently preserve hundreds of acres of streams, wetlands, and buffer areas. The agreement allows the companies to continue using the site for cattle grazing, to apply for a CWA permit to conduct other activities in jurisdictional waters on the site, and to seek future determinations concerning jurisdictional waters at the site. This case stems from activities these companies conducted after they purchased property that had laid fallow and unfarmed for more than 20 years. Goose Pond bought the 1,500-acre property in 2012 from Duarte Nursery, Inc. for $8.7 million, and shortly thereafter, Farmland Management Services began operating heavy machinery through streams and wetlands as part of the companies' efforts to convert the property to a walnut orchard. That machinery included "deep rippers" that drag long metal shanks through the ground to break up or pierce highly compacted, impermeable or slowly permeable surface layers, or other similar kinds of restrictive soil layers. The deep ripping in this case destroyed or significantly degraded the streams and wetlands at the site. Even before Goose Pond's purchase of the site, the companies received aerial photographs, advice from environmental consultants, and other information that alerted them to federally-protected streams and wetlands on the property. Despite that information, the companies conducted extensive ripping and other activities in streams and wetlands without a CWA dredge-or-fill permit. The settlement agreement reached today secures a significant penalty and mitigation for these violations, while providing fairness for farmers and other landowners who comply with the applicable laws. Last year, in resolving a related case against John Duarte and Duarte Nursery, Inc., who had conducted unpermitted ripping activities immediately south of the property at issue here, the United States gave assurances that these cases are not (and will not be used as) a pretext for federal prosecution of farmers who engage in normal plowing on their farms. No federal dredge-or-fill permit is required for plowing as defined in the regulations, and no such permit is required for discharges from "normal farming ... activities," such as plowing, if they are part of an established ongoing farming operation and not for the purpose of converting federally protected waters to new uses. Those protections for farmers remain in the law today and will continue to be recognized. The proposed consent decree, lodged in the U.S. District Court in Sacramento, is subject to a 30-day comment period and final court approval.

•September 7, 2018—United States Files Complaint Against Hawaii Fishing Companies, Managers, and Vessel Operator Over Illegal Oil Discharges and Lodges Partial Settlement With Managers—The United States filed a civil enforcement action against Azure Fishery LLC, the company's managers, the operator of the commercial fishing vessel Jaxon T, and the new owner of the vessel for violations of the federal Clean Water Act, the Department of Justice and U.S. Coast Guard announced today. Along with the filing of the complaint, the United States also lodged a partial settlement to resolve the claims against the two company managers, Hanh Nguyen and Khang Dang, who have agreed to pay $475,000 in civil penalties and reimbursements. The managers also committed to perform operational improvements and other compliance measures to their entire fleet of 25-longline fishing vessels based in Honolulu. The claims against the rest of the defendants remain for future adjudication. The complaint, filed in the U.S. District Court for the District of Hawaii today, alleges five causes of action against six defendants: Azure Fishery LLC, company managers Nguyen and Dang, company member and prior owner Tuan Hoang, vessel operator Andy Hoang and current owner Linh Fishery LLC. The complaint alleges willful discharges of oil, including oily bilge water, from the commercial longline fishing vessel Jaxon T, now known as the St. Joseph, into the ocean offshore of Hawaii, as well as related violations of the Coast Guard's longstanding spill prevention and pollution control regulations, including failure to provide sufficient capacity to retain all oily mixtures on board. The complaint further alleges that in order to extend the length of fishing voyages, the defendants routinely pumped a mixture of fuel oil, lubricating oils, water, and other fluids from the vessel's engine room bilge into the Pacific Ocean rather than retain the waste on board. The United States alleges that Azure Fishery LLC and the company managers and vessel operator are each liable for civil penalties under the Clean Water Act for discharging oily mixtures into the waters

off Hawaii. The United States also seeks injunctive relief from these same defendants and Linh Fishery LLC, the current owner of the vessel. The complaint further alleges that company managers Nguyen and Dang fraudulently transferred the vessel to the current owner, Linh Fishery LLC, shortly after the Coast Guard discovered the violations in March 2017. Because the sale of the vessel and distribution of the proceeds to company members rendered Azure Fishery LLC insolvent and thus otherwise unable to pay a civil penalty, the complaint seeks recovery of the value of the fraudulently transferred vessel from the beneficiaries of the transfer, Linh Fishery LLC, Hanh Thi Nguyen, Khang Nguyen Dang, and Tuan Ngog Hoang, under the Federal Debt Collection Procedures Act (FDCPA), 28 U.S.C. § 3001 *et seq*. Contemporaneously with the filing of the complaint, the United States has lodged a partial consent decree addressing the claims against company managers Nguyen and Dang. Under the settlement, Nguyen and Dang will each pay $211,000 for the Clean Water Act penalty claims against them and they will jointly pay an additional $53,000 for their apportioned share of the fraudulent transfer claim under the FDCPA. Moreover, they will perform corrective measures across their fleet of 25 Hawaii-based longline fishing vessels. The corrective measures are designed to ensure safe and lawful operations going forward and include: 1) repairing the vessels to reduce the quantity of oily waste generated during a fishing voyage; 2) obtaining independent verification of repairs; 3) providing crewmembers with training on the proper handling of oily wastes; 4) documenting proper oily waste retention during voyages and disposal after returning to port; and 5) submitting periodic compliance assurance reports to the Coast Guard and the Department of Justice. Section 311(b) of the Clean Water Act makes it unlawful to discharge oil or hazardous substances into or upon the waters of the United States or adjoining shorelines in quantities that may be harmful to the environment or public health. Under the act, the Coast Guard also has promulgated spill prevention and pollution control regulations for vessels and other facilities. Overboard discharges of oily mixtures, whether by directly pumping out oily bilge water that has not been properly treated, or by attempting to pump only the portion of the oily bilge water beneath a floating oil layer in the bilge (so-called decanting), has long been unlawful under federal law. Eliminating oil discharges into the ocean helps protect people, birds, fish, marine mammals, sea turtles and other natural resources. Under the terms of the Clean Water Act, the penalties paid for these violations will be deposited in the federal Oil Spill Liability Trust Fund managed by the National Pollution Funds Center. The Oil Spill Liability Trust Fund is used to pay for federal response activities and to compensate for damages when there is a discharge or substantial threat of discharge of oil or hazardous substances to waters of the United States or adjoining shorelines. The proposed partial consent decree, lodged in the District of Hawaii, is subject to a 30-day public comment period and court review and approval.
(Andre Monette)

LAWSUITS FILED OR PENDING

U.S. SUPREME COURT PETITIONED TO ADDRESS FOURTH CIRCUIT'S DECISION REGARDING THE CLEAN WATER ACT AND GROUNDWATER ACTING AS A CONDUIT TO SURFACE WATERS

Kinder Morgan Energy Partners LP v. Upstate Forever et al., Case No. 16-268 (U.S.).

Kinder Morgan Energy Partners, LP and a related pipeline company have asked the U.S. Supreme Court to resolve two questions under the federal Clean Water Act dealing with the role of groundwater: Whether discharges into soil or groundwater require National Pollutant Discharge Elimination System (NPDES) permitting whenever there is a "direct hydrological connection" between the groundwater and nearby navigable waters; and whether an "ongoing violation" of the Clean Water Act exists for purposes of the act's citizen-suit provision when a point source has permanently ceased discharging pollutants, but some of the pollutants are still reaching navigable water through groundwater.

Background

The Petition is from Fourth Circuit Court of Appeals decisions that dealt with a citizen suit over contamination due to the escape of gasoline and diesel fuel from a pipeline. Although the pipeline leak was discovered and the pipe itself repaired fully before the citizen's complaint was filed, the petroleum products released were still present in the groundwater and were leaching into surrounding tributaries and wetlands. (*See:* https://scholar.google.com/scholar_case?case=16862415639488993766&q=Kinder+Morgan+Energy+Partners+LP+v.+Upstate+Forever&hl=en&as_sdt=2006&as_vis=1)

The Petition to the Supreme Court

The statement of the case in the Petition argues that the statutory definitions of point source and discharges to navigable waters are clear and serve to make the release to groundwater from the pipeline a discharge that does not fall within the NPDES permitting provisions of the CWA. The CWA states that, except in compliance with its terms, including permit requirements, "the discharge of any pollutant by any person shall be unlawful." 33 U.S. Code § 1311(a). The CWA defines "navigable waters" as the waters of the United States, including the territorial seas. 33 USC §1362 (7). The terms "discharge of a pollutant" and the term "discharge of pollutants" each mean (A) any addition of any pollutant to navigable waters from any point source. 33 USC §1362 (12). The term "point source" means "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture." 33 USC §1362 (14).

Split in the Circuits

The Petition also urges the Supreme Court to review the Fourth Circuit's decision to resolve a conflict with the Seventh and Fifth circuits. It argues that in *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, the Seventh Circuit considered whether a permit was required for a "retention pond" built to catch runoff from a warehouse parking lot. 24 F.3d 962, 963 (7th Cir. 1994). The Petitioners note that the Seventh Circuit opinion expressly determined that the fact of hydrological connection of the pond to waters of the United States through groundwater is not subject to NPDES control, and that the subject of jurisdiction over groundwater was expressly left within state jurisdiction out of respect for tradition and federalism. The Petition notes the Fifth Circuit followed the same approach in *Rice v. Harken Exploration*, in which plaintiffs alleged that discharges from oil and gas wells had "seeped through the ground into groundwater which has, in turn, contaminated several bodies of

surface water." 250 F.3d 264, 265, 270-71 (5th Cir. 2001). The Fifth Circuit decision says that extending the CWA's NPDES system to include "remote, gradual, natural seepage" would ignore Congress' clear decision "to leave the regulation of groundwater to the States." Id. at 272.

The Petition recognizes that the Ninth Circuit has adopted a view of Clean Water Act liability similar to that of the Fourth in the case underlying the Petition. In *Hawai'i Wildlife Fund v. City. of Maui*, 886 F.3d 737, 749 (9th Cir. 2018). The Ninth Circuit held that the CWA prohibits an unpermitted discharge from a point source into groundwater that then finds its way to navigable waters "so long as the discharge is 'fairly traceable from the point source to a navigable water' and pollutants eventually reach the navigable water at "more than de minimis" levels.

Under the CWA effluent limitations are mandated to control a variety of chemical and biological threats to water quality that can arise from point sources ranging from industry to municipal sewage. In its *Hawaii Wildlife Fund* decision, the Ninth Circuit was contending with a discharge to a well that was not far from the sea, and the eventual escape of pollution into the ocean from the groundwater to which the well fed was an expected certainty. Both the term "well" and the term "pipe" are included in the definition of point source. Irrespective of the certainty however, there is the question of whether the groundwater itself may be regarded as "waters of the United States," since it is only discharges to such waters from point sources that the CWA expressly prohibits, albeit via somewhat convoluted definitions.

Conclusion and Implications

There is little question that groundwaters are traditionally within the sovereign jurisdiction of the various states, just as states control only river beds or the waters of rivers in public trust depending upon the "navigability" of the waters. Depending on the state in question, groundwaters are subject to regulation under state statutes or common law. Many have opined that Congress decided not to extend the reach of the Clean Water Act to groundwaters; the issue was expressly considered. Although the role of groundwaters as a means of "significant nexus" or direct hydrological connection of a source to waters of the United States became of heightened attention due to the use of that terminology in the Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006), the question actually dealt with in *Rapanos* was whether specific private wetlands that were filled without a permit under the CWA could be deemed subject to the regulatory scope of the CWA.

The *Kinder Morgan* Petition is likely to attract numerous supporting and opposing statements to the Court. If the Petition is granted it seems possible that the Supreme Court will be given the opportunity to address the fundamental scope of the central enforcement provision of the Clean Water Act.
(Harvey M. Sheldon)

Editors's Note: As this article was ready to go to print, we learned that the Sixth Circuit ruled that the 'groundwater as a conduit' argument was flawed. This might make Supreme Court review of this issue more likely.

JUDICIAL DEVELOPMENTS

SIXTH CIRCUIT LIKELY TO CLARIFY GROUNDWATER CLASS ACTION RULING

Martin v Behr Dayton Thermal Prods. LLC, ___F.3d___, Case No. 17-3663 (6th Cir. 2018).

Class actions in cases of common groundwater pollution are fairly common, particularly in areas where private wells are relied on for drinking water or the contamination poses vaporization risk. The degree of commonality of circumstances required to exist among the putative class of parties is a subject of importance to plaintiffs and defendants alike. In an ongoing Ohio case, class action status is being sought by residents and owners of property in a neighborhood near a Superfund site where solvent plumes from several companies have allegedly entered the groundwater, and are close enough to the surface to threaten vapor inhalation by occupants of structures.

In July 2018, a panel of the Sixth Circuit Court of Appeals upheld a class action ruling of the U.S. District Court for Ohio. Although the panel suggested that the ruling would be the law of the Sixth Circuit, the court subsequently has declared that the full opinion ought not be published. A motion by defendants to reconsider the ruling *en banc* has been granted and briefing is taking place. The issue raised is important for those concerned with groundwater pollution, and it is described here briefly, inasmuch as those seeking dismissal of the class action have indicated apprehension that the court has opened the door to class litigation too widely.

Background

Federal Rules of Civil Procedure (FRCP) Rule 23 provides for class actions. As the Sixth Circuit described the rules:

> Rule 23(b)(3) permits class certification where 'the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Rule 23(c)(4) provides that, "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues."

At the District Court

In the case under review the trial court held that there would not be a certification of class status for two proposed "liability-only" classes. This was due in great part to the court's interpretation of Ohio law on injury-in-fact and causation as elements of necessary proof of liability. The U.S. District Court then addressed plaintiffs' alternate request for issue-class certification under Rule 23(c)(4). It ruled that the language of Rule 23 (c)(4) was not controlled by lack of predominance as to liability. It ordered class treatment for specific issues concerning the actions and omissions of specific defendants, such as how each release occurred, whether the harm to the plaintiffs should have been foreseen, and where the plumes from specific defendants were located in relation to plaintiffs' properties.

The trial court considered whether predominance constitutes a threshold requirement that must be satisfied with respect to the entire action before a court may certify certain issues, noting that this question has resulted in a conflict between several other circuits. Finding persuasive the so-called "broad view," the District Court rejected treating predominance as a threshold requirement. It gave independent force to the language of Rule 23(c)(4) allowing issue specific certification.

The Sixth Circuit's Decision

The Sixth Circuit panel adopted the District Court's reasoning, indicating this so-called "broad view" of class certification is favored in most other Circuits, which have ruled on the question. However, a contrary, or "narrow," view as described by the Fifth Circuit and viewed favorably in the Eleventh Circuit

was also discussed. The "narrow" view essentially is that the:

> . . . proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial.

Conclusion and Implications

The Sixth Circuit panel felt that Rule 23(c)(4) deserves independent standing where common sensical evaluation yields common issues that can most efficiently be determined as class questions, or questions of common interest. In addition, the panel emphasized that the Courts of Appeals should only reverse a trial court decision on class actions where the trial court decision is demonstrably an abuse of discretion. Here the court seemingly adopted a broad view of class action certification. The court's decision appears online here: http://www.opn.ca6.uscourts.gov/opinions.pdf/18a0139p-06.pdf
(Harvey Sheldon)

DISTRICT COURT GRANTS MOTION TO DISMISS MONSANTO COUNTERCLAIMS AGAINST THE CITY OF SAN DIEGO IN ONGOING DISPUTE OVER PCB CONTAMINATION

City of San Diego v. Monsanto Co., ___F.Supp.3d___, Case No. 15CV578-WQH-AGS (S.D. Cal. Aug. 10, 2018).

The U.S. District Court for the Southern District of California recently dismissed two counterclaims filed by Monsanto Company, Solutia Inc., and Pharmacia Corporation (collectively: Monsanto) against the City of San Diego (City) in an ongoing dispute between the parties concerning the alleged PCB contamination of the San Diego Bay and the City's municipal stormwater system.

Factual and Procedural Background

On December 22, 2016, the City filed a Second Amended Complaint (SAC) in connection to its ongoing dispute with Monsanto concerning the alleged PCB contamination of the San Diego Bay and the City's municipal stormwater system. The City alleged that Monsanto created:

> . . .a public nuisance through its production and marketing of PCBs and improper disposal directions related to PCBs.

On November 22, 2017, the court rejected Monsanto's attempts to have the City's SAC dismissed and, on February 22, 2018, Monsanto filed its First Amended Answer and Counterclaims, denying liability for the alleged contamination of the San Diego Bay and injuries claimed by the City. Monsanto further alleged that the City was responsible for the contamination and brought two causes of action as counterclaims against the City: 1) unjust enrichment and 2) violations of the CWA. The City then moved to dismiss both counterclaims.

The District Court's Decision

In an order granting the City's motion to dismiss the First Amended Answer and Counterclaims, the court dismissed Monsanto's unjust enrichment counterclaim pursuant to Federal Rule of Civil Procedure 12(b)(1), for lack of subject matter jurisdiction, and Rule 12(b)(6), for failure to state a claim. Additionally, the court dismissed the CWA counterclaim pursuant to Rule 12(b)(1), for lack of subject matter jurisdiction.

Unjust Enrichment and Standing

First, the court rejected Monsanto's unjust enrichment claim for lack of Article III standing. Monsanto argued that:

> . . .contingent liability arising from an adverse judgment in the City's lawsuit, which would be

> eliminated or significantly reduced by a favorable decision on its unjust enrichment claim, provided a sufficient basis for standing.

Noting that contingent liability will only establishing Article III standing where it presents a "significant immediate injury," the court determined that Monsanto's liability remains too speculative to establish such standing.

As a second and independent ground, the court rejected Monsanto's unjust enrichment claim pursuant to Rule 12(b)(6) for failure to state a claim. In California, unjust enrichment "is not a standalone cause of action." Rather:

> . . .unjust enrichment is typically sought in connection with a 'quasi-contractual' claim in order to avoid unjustly conferring a benefit upon a defendant where there is no valid contract.

Monsanto's unjust enrichment claim was dismissed because Monsanto did not allege any contractual or quasi-contractual relationship with the City.

Subject Matter Jurisdiction

Finally, the court dismissed Monsanto's CWA claims pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. The court concluded that Monsanto lacked Article II standing to raise the CWA claims based on alleged contingent liability and investigation costs. The court rejected Monsanto's contingent liability theory for the same reasons it rejected this theory under unjust enrichment. The court then determined that Monsanto's alleged investigation costs were no more than litigation costs incurred solely in connection with the lawsuit and litigation costs are insufficient to establish standing for purposes of Article III.

Conclusion and Implications

This ruling presents a challenge to Monsanto's claims that the City has unclean hands in this lawsuit. Although contingent liability can establish Article III standing, liabilities cannot be merely speculative or costs relating solely to the lawsuit at issue. Contingent liabilities must be based on a significant and immediate risk of harm. The court's ruling is available online at: https://scholar.google.com/scholar_case?case=13337863465410310235&q=City+of+San+Diego+v.+Monsanto+Co.&hl=en&as_sdt=2006&as_vis=1
(Danielle Sakai, Rebecca Andrews)

DISTRICT COURT REQUIRES EPA TO EITHER CONDUCT CLEAN WATER ACT NPDES PERMITTING FOR CERTAIN STORMWATER DISCHARGES OR PROHIBIT THEM

Los Angeles Waterkeeper v. Pruitt, ___F.Supp.3d___, Case No. 2:17-CV-03454-SVW-KS (C.D. Cal. Aug. 9, 2018).

In an order granting a motion for summary judgement against the U.S. Environmental Protection Agency (EPA) and denying the EPA's cross-motion for summary judgement, the U.S. District Court for the Central District of California determined that the EPA must either engage in the federal Clean Water Act National Pollutant Discharge Elimination System (NPDES) permitting process for certain stormwater discharges affecting the Dominguez and Los Cerritos watersheds of Los Angeles or prohibit the discharges altogether.

Factual and Procedural Background

The federal Clean Water Act (CWA) prohibits the discharge of pollutants into the waters of the U.S. except pursuant to an NPDES permit. *Id.* § 1311(a). The CWA requires EPA to regulate stormwater discharges, including stormwater discharges that contribute to a violation of a water quality standard or are a significant contributor of pollutants to waters of the United States. In the Los Angeles area, the Dominguez and Los Cerritos watersheds are both heavily polluted by stormwater runoff despite heavily regulated discharges from municipal separate storm sewer systems (MS4s).

Community and environmental groups, including the Los Angeles Waterkeeper (plaintiffs), petitioned the EPA "to require a [NPDES] permit for a discharge which is composed entirely of storm water which contributes to a violation of a water quality standard" pursuant to 40 C.F.R. § 122.26(f)(2). In particular, the plaintiffs:

> . . .requested that EPA make a determination that currently unpermitted stormwater discharges from privately-owned commercial, industrial, and institutional ('CII') sources are contributing to violations of water quality standards in the [Dominguez and Los Cerritos watersheds], and therefore require NPDES permits pursuant to 33 U.S.C. § 1342(p).

After considering the plaintiffs' petitions, the EPA determined that certain stormwater discharges were, in fact, "contributing to water quality impairments" at the Dominguez and Los Cerritos watersheds. Nevertheless, on October 17, 2016, the EPA denied plaintiffs' petitions to require NPDES permits. In support of its decision, the EPA cited the existence of other programs currently underway to adequately address the water quality impairments, primarily relying "on NPDES permits that have been issued to MS4s in the watersheds." The MS4 permits, however, did not "regulate the CII sources in the watersheds which were the subject of plaintiffs' petitions."

After EPA's denial of their petitions, plaintiffs brought a citizen suit against the EPA, alleging 1) a failure to perform a nondiscretionary duty under the CWA; and 2) in the alternative, arbitrary and capricious agency action in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2). In a prior order, the court dismissed plaintiffs' claim under the CWA's citizen-suit provision on the basis that "the EPA had discretion to decide whether or not to require NPDES permits for stormwater" and, therefore, the EPA's decision was not covered by the CWA's citizen-suit provision, which "only provides for such suits where a plaintiff seeks to enforce a *non*-discretionary duty." Nevertheless, the court allowed the plaintiffs' claim under the APA to proceed.

The District Court's Decision

The court determined that "EPA's denial of plaintiffs' petitions and failure to engage in the NPDES permitting process was arbitrary and capricious." Accordingly, the court held that, if the EPA chooses to not "engage in the NPDES permitting process for stormwater discharges from the CII sources in plaintiffs' petitions that EPA has determined contribute to a violation of water quality standards," it cannot leave the sources unregulated and must, instead, "enforce the [CWA's] total proscription on the discharge of on the discharge of such pollutants" against those sources. In reaching its decision, the court examined: 1) whether the Act requires the EPA to engage in the NPDES permitting process for the stormwater discharges from the CII sources that the EPA has determined contribute to a violation of water quality standards; 2) whether the EPA properly considered the existence of other federal, state, or local programs aimed at addressing such discharges as a factor in its decision to deny the plaintiffs' petition; and 3) whether American Rivers, one of the plaintiffs, had proper standing to assert the claims at issue.

Clean Water Act Mandate

First, the court concluded that the text of the CWA requires the EPA to engage in the NPDES permitting process for the stormwater discharges from the CII sources in plaintiffs' petitions where it is undisputed that the discharges contribute to a violation of water quality standards. EPA asserted that33 U.S.C. § 1342(p)(2)(E) authorizes but does not require EPA to require permits for discharges that contribute to violations of water quality standards. The court rejected this assertion, determining that EPA's interpretation was not entitled to deference. Instead, the court determined that the this section unambiguously requires the EPA to engage in the NPDES permitting process where it has determined that stormwater discharges contribute to a water quality violation or to prohibit the discharge altogether. Because the EPA left the discharges unregulated, "in violation of the text of the [CWA]," it concluded that the EPA's action was arbitrary and capricious.

EPA and Other Programs

Second, the court determined that EPA's consideration of other programs, such as those related to the MS4s, was improper because it was "divorced from the statutory text." The court looked to the U.S. Supreme Court's analysis in *Massachusetts v. EPA*, 549

U.S. 497 (2007), as precedent for determining such a consideration is impermissible. In particular, the court noted that just as the Clean Air Act provisions at issue in *Massachusetts v. U.S. EPA*" required the EPA to decline to regulate emissions of air pollutants on the basis of whether the air pollutants "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare,'" the structurally-similar provisions of the CWA require that:

> . . .EPA's reasons for declining to issue permits must relate to whether the stormwater at issue contributes to a violation of a water quality standard.

Because the CWA does not provide for the consideration of whether other programs exist to address the water quality violations at issue, the EPA's consideration thereof in declining plaintiffs' petition was arbitrary and capricious.

Standing Issues

Finally, the court briefly addressed whether American River had standing to assert the claims at issue. While the court held that American River did not have standing and, accordingly, dismissed it from the case, the court nevertheless retained jurisdiction over the plaintiffs' claims given that the EPA did not "contest the standing of the other plaintiffs in this case, Los Angeles Waterkeeper and National Resources Defense Council." As such, the court's holding that American River lacked the requisite standing had no effect on the court's holdings with regard to whether or not the EPA acted arbitrarily and capriciously in declining the plaintiffs' petitions.

Conclusion and Implications

The EPA's admission that stormwater discharges caused or contributed to a violation of water quality standards required EPA to regulate those discharges, through the NPDES permitting process or to proscribe the discharges. The CWA does not allow a consideration of other programs designed to address the water quality standards at issue to excuse this requirement. This case demonstrates the far-reaching regulatory effect of the "cause or contribute" language present in the CWA and other environmental laws. (Rebecca Andrews)

DISTRICT COURT FINDS ARMY CORPS DISTRICT ENGINEERS HAVE DISCRETION TO APPROVE REDUCTIONS IN MITIGATION BANKS SIZE ESTABLISHED UNDER THE CLEAN WATER ACT

Sierra Club v. St. Johns River Water Management District, _ __F.Supp.3d___, Case No. 6:14-cv-1877 (M.D. Fl. Aug. 13, 2018).

Interpreting the regulations under which the U.S. Army Corps of Engineers (Corps) may approve mitigation banks for use by permit holders under the federal Clean Water Act (CWA), the U.S. District Court for the Middle District of Florida has held that the regulations vest district engineers with substantial discretion to approve modifications that reduce the size of a mitigation bank, provided that the reduction adheres to the applicable ecological performance standards and is necessary to ensure an environmentally and economically viable mitigation bank.

Background

Under the Clean Water Act § 404 permitting process the Corps may issue permits for activities that impact the waters of the United States (33 U.S.C. § 1344(b)(1)), while requiring that the applicant:

> . . .address how impacts to waters of the United States will be minimized, avoided, and—where impacts are unavoidable—how they will be mitigated. 33 C.F.R. § 325.1(d)(7). . . .Mitigation activities can be accomplished by the

> permittee or can be accomplished through the purchase of mitigation credits from a mitigation bank. § 332.3.

The code goes on the state that "The goal of the rule is to ensure permanent protection of all compensatory mitigation project sites." 73 *Fed. Reg.* 19594.

The Farmton Mitigation Bank (Bank or FMB) was established in Florida in 2000 pursuant to the Clean Water Act compensatory Mitigation Rule, 33 C.F.R. § 332. Mitigation banks are required:

> . . .to have a banking instrument as documentation of agency concurrence on the objectives and administration of the bank. The banking instrument should describe in detail the physical and legal characteristics of the bank, and how the bank will be established and operated. 60 *Fed. Reg.* 58605,02(C)(2).

A mitigation bank "instrument [a MBI] is a 'legal document for the establishment, operation, and use of a mitigation bank.'" 33. C.F.R. 332.2.

The Bank's MBI established it as including "more than 24,000 acres of wetland and upland habitat, making it one of the largest federal wetland mitigation banks in the country."

The Bank "was segmented into three distinct but hydrologically connected sites," with mitigation activities implemented on the sites in phases. It operated as follows:

> Once all mitigation tasks for a particular phase were completed, mitigation credits for that portion of the Bank were generated and available for purchase. As mitigation credits were sold pursuant to the ... section 404 compensatory mitigation program, conservation easements were recorded on the corresponding parcels of land in the FMB. The [St. Johns River Water Management District] is the grantee of all the conservation easements recorded on the FMB. As of March 2017, approximately 4,338.92 mitigation credits have been generated and released for sale. Of those available credits, only 363.728 have been withdrawn to mitigate for permitted impacts to waters of the United States. (*Id.*). The [Corps] . . . postu[lates] that the low credit sales at the FMB "may be a result of the [ ] economic downturn [from 2007 through 2009] as well as the availability of mitigation credits at other Corps-approved mitigation banks with overlapping mitigation service areas.(Internal citations omitted.)

The MBI recognized that it was not clear how many mitigation credits the market could support, therefore it provided that the Bank "reserves the right to removed unused portions of the bank (those areas without Conservation Easements in place) from the bank."

In 2010 the Bank applied to withdraw 860.22 acres, comprised of 374.77 acres of wetlands and 110.68 acres of uplands from its boundaries so that the withdrawn area could be included in "the surrounding Framton Local Plan—a long-term development plan approved by Volusia and Brevard Counties."

The land proposed to be removed had not been used to mitigate for any impacts to water of the United States, and thus had not been preserved by a recorded conservation easement. The Corps approved modification to the MBI following a notice-and-comment period and the Sierra Club filed suit. The Corps moved to remand in order to "conduct a more thorough environmental assessment under the National Environmental Policy Act," and following the completion of that analysis the parties launched cross-motions for summary judgment.

The District Court's Decision

Intent of the Mitigation Rule

The District Court rejected the Sierra Club's arguments that the modification to the Bank's MBI violated the intent of the Mitigation Rule to prohibit modifications with the effect of reducing the size of a mitigation bank. The Sierra Club's most direct argument was that the modification "is contrary to the site-protection requirements of the Mitigation Rule." The Mitigation Rule achieves its "fundamental goal" of site protection by requiring that:

> . . .[t]he aquatic habitats, riparian areas, buffers, and uplands that comprise the overall compensatory mitigation project *must be provided long-term protection* through real estate instruments or other available mechanisms, as appropriate.

33 C.F.R. § 332.7(a)(1) (emphasis added in the opinion).

The District Court held this language does not prohibit the Corps from approving a modification to a banking instrument "that reduces the overall size of the" bank, because:

> . . .[t]his interpretation does not consider the large degree of discretion the drafters of the Mitigation Rule intentionally left to the district engineer in approving modifications to existing MBIs. Citing 33 C.F.R. § 332.7(c)(1).

In fact, when facing public criticism that the Mitigation Rule leaves too much discretion to the district engineer, the drafters explained that "it is necessary to provide the district engineer with the authority to determine whether remediation measures are appropriate and practicable." 73 *Fed. Reg.* 19594, 19607. The drafters repeatedly refer to the flexibility allowed to the Corps and the district engineer in administering mitigation activities, noting that the "rule appropriately balances the need for consistency with the need for flexibility." 73 *Fed. Reg.* 19594, 19609.

Thus, the court held it:

> . . .more likely. . .that the district engineer. . .can approve modifications to the boundaries of an approved mitigation bank, if that modification adheres to the ecological performance standards set forth in the Mitigation Rule. Citing 33 C.F.R. § 332.5.

The Mitigation Rule and Modifications to the Mitigation Bank

The Sierra Club, citing 33 C.F.R. section 332.4(c)(7), also argued:

> . . .that the Mitigation Rule 'patently precludes modification s to the FMB that authorize removal of land from the FMB, which at a minimum alters the boundaries of the bank.

That section of the Mitigation Rule requires mitigation banks to have a mitigation work plan, including:

> Detailed written specifications and work descriptions for the compensatory mitigation project, including, but not limited to, the geographic boundaries of the project; construction methods, timing, and sequence; source(s) of water, including connections to existing waters and uplands; methods for establishing the desired plant community; plans to control invasive plant species; the proposed grading plan, including elevations and slopes of the substrate; soil management; and erosion control measures.

As the District Court noted, the Rule:

> . . .requires the creation of a mitigation plan that includes the geographic boundaries of the mitigation bank. However, the Court finds nothing in this language that would prohibit [the Corps] from approving a modification of those geographic boundaries if necessary to achieve an environmentally and economically viable mitigation bank.

Conclusion and Implications

The record in this litigation appears to have been very thin, perhaps because the Sierra Club was seeking a rule that would prohibit any reduction in the size of a mitigation bank, irrespective of whether the agency had relied on substantial evidence in approving the reduction. However, applicants for modifications to mitigation banking instruments should ensure that the agency proceeds on a record providing substantial evidence to support that the modification "adheres to the ecological performance standards of the Mitigation Rule," and that the modification is "necessary to achieve an environmentally and economically viable mitigation bank."
(Deborah Quick)

DISTRICT COURT FINDS *RES JUDICATA* FAILS TO BAR CLAIMS CHALLENGING APPROVAL OF STATE WATER QUALITY STANDARDS AFTER REMANDED-AGENCY PROCEEDINGS

Wild Fish Conservancy v. U.S. Environmental Protection Agency, ___F.Supp.3d___, Case No. 15-cv-1731 (W.D. Wash. Aug. 7, 2018).

When a regulatory approval is remanded to the agency to address one legal inadequacy, are claims brought by challengers in the first lawsuit barred in subsequent litigation challenging the agency's action on remand? The U.S. District Court for the Western District of Washington decided "no," where on remand the agency engaged in a materially different analysis and relied on new evidence. Also, claims the court declined to address in the first round of litigation were not barred in the second suit.

Background

Pursuant to the federal Clean Water Act (CWA) 33 U.S.C. § 1313(c), in 1996 the state of Washington revised its CWA-mandated state water quality standards, including standards for sedimentation, and submitted them to the U.S. Environmental Protection Agency (EPA) for review. The 1996 revision included an amendment to the sediment source control provisions to exclude "'Marine Finfish Rearing Facilities'—or net pens operated by commercial salmon farms in Puget Sound—from generally applicable sediment management standards." The CWA requires the EPA to approve proposed state standards, or notify the state of required changes, within 60 days (33 U.S.C. § 1313(c)(3)), and if the state does not adopt the required changes within 90 days EPA "itself promulgates the standards." 33 U.S.C. § 1313(c)(4). That did not occur here: The EPA did not respond to Washington's 1996 amendments "until some twelve years later, and only after the Conservancy filed a lawsuit in 2008 to enforce the" EPA-review requirement:

> . . .in the interim. . .Washington has treated the 1996 revisions as the applicable water quality standards of the state, issuing permits to salmon farms under the exemption from generally applicable sediment quality guidelines.

The Conservancy's 2008 lawsuit spurred the EPA to approve the 1996 revisions, following "informal consultation with" the National Marine Fisheries Service (NMFS) pursuant to the federal Endangered Species Act's (ESA) § 7(a) (16 U.S.C. § 1536(a)(2)) and 50 C.F.R. § 402.14(b)(1), concluding that the proposed amendments may affect, but were not likely to adversely affect, listed salmonid species. The Conservancy challenged the 2008 informal consultation, and the District Court ordered the agencies to reconsider their concurrence no formal consultation was required under the ESA in light of the "best available scientific and commercial data," including specifically "two NMFS studies, the Salmon Recovery Plan and Orca Recovery Plan." In 2011 EPA once again approved the 1996 revisions on the basis of an informal consultation—this time incorporating the two studies cited by the court. That second informal consultation is the subject of this lawsuit.

The District Court's Decision

An intervening commercial salmon farm defendant, Cooke Aquaculture, argued the Conservancy's claims that the 2011 informal consultation was inadequate were barred by *res judicata* on the basis of the order resulting from the Conservancy's 2008 challenge to the prior informal consultation.

Res Judicata, or claim preclusion, is an affirmative defense that bars claims in a second lawsuit when the defendant can show "(1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties." *Turtle Island Restoration Network v. U.S. Dep't of State*, 673 F.3d 914, 917–18 (9th Cir. 2012) (citations omitted).

Whether there is an "identity of claims" depends on

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) wheth-

> er substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right;. . . . [and, mostly importantly]. . .(4) whether the two suits arise out of the same transactional nucleus of facts. *Id.* at 918.

The 2008 and 2011 Consultation Challenges

Here, the intervenor argued the Conservancy's challenge to the 2011 informal consultation were the same claims previously litigated in the Conservancy's challenge to the 2008 consultation. The District Court disagreed, finding that "[w]hile from 30,000 feet it can be said that both cases relate to the adequacy of the interagency consultation regarding Washington's 1996 revisions to its water quality standards," the Conservancy's present challenge does not "arise out of the same transactional nucleus of facts." The Conservancy:

> . . .is *not* challenging the EPA's 2008 approval in the case now before this Court. There are certainly overlapping facts and law involved in the two cases. But without a time machine, the instant case, which challenges a 2011 action, could not have been brought in 2008.

More importantly, in response to the order on the 2008 informal consultation, as described in the intervenor's own motion in the 2011 consultation "EPA *updated* its 2008 biological evaluation." (Emphasis added by the court.)

The 2011 consultation was not a mere *pro forma* repeat of the 2008 consultation, with the added consideration of two discrete studies as ordered by Judge Coughenour. According to Cooke, the second consultation was in fact a materially different process. Distinct from the 2008 consultation, the 2011 consultation included a review of the two recovery plans, plus:

> . . .the science concerning the risk of sea lice infestations in Puget Sound. . .[and]. . .217 publications related to marine finfish rearing collected by Plaintiff that it submitted *after NMFS had rendered its concurrence in 2008*. . . .It also considered potential impacts on species listed on the endangered species list *after its 2008 decision*. *Id.* (emphases added).

The two "transactional nuclei of facts" related to the consultations at issue in *WFC I* and in this case are not only distinct in time, but in substance as well.

In addition, the prior litigation did not result in "a final judgment on the merits." The prior ruling was narrow in scope, the court confining itself to:

> . . .the narrow question of whether the agencies used the best available science in the 2008 consultation. . . .Judge Coughenour took pains to clarify that he was *not* holding that aside from the omission of the two recovery plans, the agencies' consultation was based on the best available science and therefore legally adequate.

The court "explicitly declined to rule on the Conservancy's other claims because additional rulings would not have affected the Court's decision to set aside the consultation." This "judicial restraint" meant there was no final judgment on the Conservancy's other arguments that the 2008 consultation was legally inadequate, and therefore those claims were not barred by *res judicata* in their challenge to the 2011 consultation.

Conclusion and Implications

The scenario of successive challenges, interspersed by agency proceedings on remand, is a familiar one in environmental law. Agencies and project proponents should consider arguing for a narrow scope of remand for further agency proceedings, where doing so may preserve *res judicata* as a defense in subsequent litigation. The court's decision is available online here: https://scholar.google.com/scholar_case?case=6056818320819684062&q=WILD+FISH+CONSERVANCY+v.+UNITED+STATES+ENVIRONMENTAL+PROTECTION+AGENCY&hl=en&as_sdt=2006&as_vis=1

(Deborah Quick)

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

CHANGE SERVICE REQUESTED

FIRST CLASS MAIL
U.S. POSTAGE
PAID
AUBURN, CA
PERMIT # 108