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EWL

FEATURE ARTICLE

CIRCUIT COURT SPLIT MUDDIES THE WATERS: ARE POINT SOURCE DISCHARGES THROUGH GROUNDWATER TO NAVIGABLE WATERS SUBJECT TO THE CLEAN WATER ACT?

By Dakotah Benjamin and Rebecca Andrews

The U.S. Court of Appeals for the Fourth and Sixth circuits considered whether the federal Clean Water Act (CWA) prohibits the unpermitted discharge of pollutants from a point source to navigable waters through hydrologically connected groundwater. The Sixth Circuit, in two companion opinions authored by Judge Richard F. Suhrheinrich, split with the Fourth Circuit and Ninth Circuit and held that the CWA does not regulate pollutants discharged to navigable waters through hydrologically connected groundwater. The split increases the chances that the U.S. Supreme Court will consider the direct hydrologic connection theory of liability, which theory creates significant practical challenges for anyone whose activities may interact with groundwater. [*Sierra Club v. Virginia Elec. & Power Co.*, 903 F.3d 403 (4th Cir. 2018); *Kentucky Waterways All. v. Kentucky Utilities Co.*, ___F.3d___, Case No. 18-5115 (6th Cir. Sept. 24, 2018); *Tennessee Clean Water Network v. Tennessee Valley Authority*, ___F.3d___, Case No. 17-6155 (6th Cir. Sept. 24, 2018).]

Sierra Club v. Virginia Elec. & Power Co., 903 F.3d 403, 406 (4th Cir. 2018)

The Sierra Club filed a Clean Water Act citizen suit alleging that Virginia Electric & Power Company, d/b/a Dominion Energy Virginia (Dominion) violated the act when rainwater and groundwater seeped through coal ash stored in a landfill and settling ponds and leached arsenic into groundwater that eventually reached the navigable waters of the Elizabeth River and Deep Creek. After a bench trial, the District Court held that Dominion violated the CWA's prohibition against the unauthorized discharge of pollutants to a navigable water. The District Court found that the landfill and settling ponds were point sources that channeled arsenic to groundwater, and that the groundwater had a direct hydrologic connection to navigable waters. Dominion appealed the District Court's decision to the Fourth Circuit.

The Fourth Circuit's Decision

Dominion's appeal did not challenge the U.S. District Court's factual finding that the stored coal ash leached arsenic "directly" into groundwater, which then seeped "directly" into navigable waters. Accordingly, the Fourth Circuit upheld the District Court's order on this point, affirming its earlier decision in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018) petition docketed Case No. 18-268 (Sept. 4, 2018) (*Upstate Forever*) that a plaintiff may maintain a claim under the CWA by alleging the unauthorized discharge of a pollutant to navigable waters through groundwater with a "direct hydrologic connection" to the surface water.

The Fourth Circuit then addressed whether the landfill and settling ponds were "point sources." Recognizing that the CWA defines "point source" as a "discernible, confined and discrete conveyance," the court framed the question at issue as:

> . . .whether the landfill and settling ponds serve as 'point sources' because they allow precipitation to percolate through them to the groundwater, which then carries arsenic to navigable waters.

The court distinguished between "static" coal ash piles and ponds, on which rainwater and groundwater acted to leach out the arsenic through "diffuse seepage," and other widely understood discrete conveyances, such as pipes, ditches, and tunnels, which actively convey waters to a discrete point of discharge.

The court also noted that diffuse seepage from coal ash piles and ponds resulted in indeterminate and dispersed percolation which was not measurable as contemplated by the effluent limitations scheme in the CWA, explaining:

> When a source works affirmatively to *convey* a pollutant, the concentration of the pollutant and the rate at which it is discharged by that conveyance *can be measured*. But when the alleged discharge is diffuse and not the product of a discrete conveyance, that task is virtually impossible.

Finally, the court rejected the Sierra Club's argument that the settling ponds met the definition of a point source as "containers," one of the examples used to define point source in the CWA. The Fourth Circuit dismissed this claim on the basis that even if classified as a container, the ponds did nothing to convey the arsenic at issue.

Thus, even though the Fourth Circuit determined that point source discharges through hydrologically connected groundwaters are subject to the CWA, it concluded that the piles and ponds at issue were not point sources under the CWA.

Kentucky Waterways All. v. Kentucky Utilities Co., ___F.3d___, Case No. 18-5115 (6th Cir. Sept. 24, 2018); and *Tennessee Clean Water Network v. Tennessee Valley Auth.*, __F.3d__, Case No. 17-6155 (6th Cir. Sept. 24, 2018).

In the first case before the Sixth Circuit (*Kentucky Waterways*), Kentucky Waterways Alliance and Sierra Club brought a citizen suit alleging defendant Kentucky Utilities Company (Kentucky Utilities) violated the Resource Conservation and Recovery Act (RCRA) and the CWA by storing coal combustion residuals (CCRs) in two ash storage ponds that discharged selenium through groundwater to nearby Herrington Lake. The U.S. District Court dismissed plaintiffs' complaint, finding that the CWA does not regulate this type of pollution and that plaintiffs lacked standing on their RCRA claim.

In the second case (*Tennessee Clean Water Network*), plaintiffs alleged that defendant Tennessee Valley Authority's (TVA) storage of CCRs from its coal-burning Gallatin plant in two ponds leaked pollutants into groundwater that then flowed to the nearby Cumberland River in violation of the CWA and TVA's National Pollutant Discharge Elimination System (NPDES) permit. Following a bench trial, the District Court held that the CWA covers point source discharges of pollutants to navigable waters through hydrologically connected groundwater where the connection is "direct, immediate, and can generally be traced." The District Court found that the connection between TVA's storage ponds and the Cumberland River satisfied this requirement and that the ponds continued to leak pollutants into the groundwater. Based on these findings, the District Court held that TVA violated the CWA and TVA's NPDES permit conditions covering removed-substances and sanitary-sewer overflows, and ordered TVA to excavate the ponds and place the material in a lined facility.

Plaintiffs in *Kentucky Waterways* and defendants in *Tennessee Clean Water Network* appealed to the Sixth Circuit.

The Sixth Circuit's Decisions

The Sixth Circuit issued nearly identical 2-1 opinions in both cases, upholding the District Court's dismissal of plaintiffs' CWA claims against Kentucky Utilities and reversing the District Court's order against TVA, with Judge Clay dissenting to both holdings.

The court began its opinion in *Kentucky Waterways* by explaining that the CWA's text did not support either plaintiffs' argument that groundwater is a point source or plaintiffs' "hydrological connection" theory. Starting with the CWA's point source definition, the majority contrasted dictionary definitions of "convey," "discern," "discrete," and "confined," with a description of groundwater as a "'diffuse medium' that seeps in all directions, guided only by the general pull of gravity," and, therefore, finding that "the CWA's text forecloses an argument that groundwater is a point source."

The majority also dismissed plaintiffs' contention that the karst terrain underlying the settling ponds

supported a finding of a point source discharge. The court explained that karst is made of eroded, highly soluble-rock and characterized by sinkholes and tunnels through which groundwater may rapidly flow; however, the court held that simply because groundwater may move relatively quickly through karst than other soils, this "does not support the argument that either groundwater or the karst that carries it is a point source."

Plaintiffs argued in support of their "hydrological connection" theory that the applicable CWA prohibition does not contain any language requiring that the pollutant be discharged *directly* from a point source to navigable waters, and that a pollutant discharged from a point source that passes through nonpoint sources to navigable waters may violate the act. Relying on the CWA's use of effluent limitations prescribing the amount of pollutants that may be discharged into navigable waters, and dictionary definitions of "into," the majority rejected this argument, stating:

> The term 'into' indicates directness. It refers to a point of entry. . . . Thus, for a point source to discharge into navigable waters, it must dump *directly* into those navigable waters—the phrase 'into' leaves no room for intermediary mediums to carry the pollutants.

Plaintiffs also argued that their position was supported by Justice Scalia's plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), which stated that the CWA:

> . . .does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant to navigable waters.'

The Sixth Circuit found that this quote was *dicta* taken out of context, and, as a four-justice plurality opinion, not binding. The court explained that Justice Scalia's "true concern" in the quoted language was to explain that:

> . . .pollutants which travel through multiple point sources before discharging into navigable waters are still covered by the CWA.

After concluding that the text of the CWA did not support plaintiffs' arguments, the Court of Appeals looked to the context of the prohibition on the discharge of pollutants from a point source in the CWA as a whole and in the context of other federal environmental laws designed to partner with the CWA. Notably, the court dismissed the Fourth and Ninth circuits' reliance on the CWA's stated purpose to "restore and maintain . . . the Nation's waters" when those circuits adopted the hydrological connection theory. The court instead relied on language in the CWA, which states that the CWA was designed to preserve the states' primary responsibilities and rights to prevent and reduce pollution.

Next, the Sixth Circuit discussed the interaction between the CWA and RCRA. It determined that reading the CWA to cover discharges through groundwater would "upend the existing regulatory framework" and gut the U.S. EPA's CCR Rule. The court explained that RCRA exempts pollution subject to CWA regulation, and that requiring an NPDES permit for coal ash ponds discharging pollutants to hydrologically connected groundwater would effectively nullify the CCR Rule.

Based on its textual and contextual analysis, the majority affirmed the District Court's dismissal of plaintiffs' CWA claims. The court reversed the District Court's holding that plaintiffs' lacked standing to bring their RCRA claims.

In its opinion in *Tennessee Clean Water Network*, the Sixth Circuit quoted at length its textual and contextual analysis in *Kentucky Waterways*, concluding that "the District Court erred in, adopting [p]laintiffs' theory that the CWA prohibits discharges of pollutants through groundwater that is hydrologically connected to navigable waters."

A Closer Look at the Split in the Circuit Courts of Appeals

These opinions reflect a deepening Circuit split regarding the CWA's applicability to discharges through groundwater, raise questions regarding the current point / non-point source distinction under the CWA, and question whether federal environmental laws should create overlapping regulatory schemes. These questions should be of pressing concern to anyone whose activities interact with groundwater.

Circuit Split Regarding 'Direct Hydrologic Connection' Theory of Liability

The disagreement between the Fourth and Sixth circuits over the direct hydrologic connection theory started with the Ninth Circuit's adoption of its decision in the case of *Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737 (9th Cir. 2018), petition docketed Case No. 18-268 (Aug. 30, 2018) (*Maui*). In *Maui*, the Ninth Circuit determined that injection wells, which discharged to groundwater, required an NPDES permit, in addition to a Safe Drinking Water Act Underground Injection Control (UIC) permit, when the groundwater had a direct hydrologic connection to the Pacific Ocean and carried pollutants from the wells to the ocean.

The Fourth Circuit's affirmation of the direct hydrologic connection theory aligns that Circuit with the Ninth Circuit, while the Sixth Circuit's rejection of the theory presents a clear break with those Circuits. This split may increase the likelihood that the U.S. Supreme Court will grant one or both of the pending petitions in *Maui* and *Upstate Forever*.

One potential complicating factor in the future of the direct hydrologic connection theory is a potential rulemaking by the EPA on this topic. EPA solicited comments on whether it should consider clarifying or revising its position on the direct hydrologic connection theory of liability, and if so, how clarification or revision should be provided. 83 Fed.Reg. 7126, 7126-7128. The comment period closed in May 2018, but a rule has not yet been released.

Review of either *Maui* or *Upstate Forever* and EPA's rulemaking should interest anyone whose activities interact with groundwater and who may struggle to implement the practical requirements of the NPDES permitting program in the case of discharges through groundwater.

Point / Non-Point Source Program Disagreement

Sierra Club, Upstate Forever, Kentucky Waterways and *Tennessee Clean Water Alliance* highlight the challenges associated with distinguishing between the CWA's point source and non-point source programs. If discharges through groundwater are subject to the CWA under the direct hydrologic connection theory, it is unclear for example, how far removed or indirect a point source can be from the navigable water and still be subject to the CWA. In *Sierra Club*, for example, Dominion pumped coal ash slurry from the power plant to the piles and ponds, undoubtedly a point source discharge to the ground. The Fourth Circuit, however, relied on the "static" and "passive" nature of the piles and ponds as well as the "diffuse" seepage of water through the coal ash and soil to conclude that the discharges through the soil and groundwater were non-point source discharge.

Just five months before issuing its decision in *Sierra Club*, however, the Fourth Circuit decided *Upstate Forever*. In *Upstate Forever*, a crack in defendant's underground pipeline spilled oil into the soil, which then seeped into underlying groundwater, and eventually made its way through the groundwater into nearby navigable waters. Determining that the discharge in *Upstate Forever* may be subject to the CWA, the court explained that a pollutant does not have to be "directly" discharged from a point source to a navigable water if the groundwater has a direct hydrologic connection. Thus, the pipeline may require a permit to discharge to surface water even though the discharge first traveled through soil and then groundwater.

After these two decisions from the Fourth Circuit, one is left wondering whether the liability determination in *Sierra Club* would have been different if the plaintiffs and court focused on the act of pumping the slurry into the piles and ponds, similar to its focus on the pipeline spill in *Upstate Forever*, rather than on the "static" piles and ponds themselves. The court, however, simply notes that Dominion did not challenge the U.S. District Court's factual findings regarding arsenic from the coal ash ponds "seeping directly into groundwater, and from there, directly into the surface water." In effect, the court acknowledges that the point / non-point distinction becomes blurred under the direct hydrologic connection theory.

A similar concern is evident in Judge Clay's dissent in *Sierra Club*. The dissenting opinion identified the majority's reliance on the term "into" as problematic, in part, because the statutory prohibition at issue uses the word "to" rather than the word "into." The word "to" merely indicates movement or an action or condition suggestive of movement toward a place, person, or thing reached. The dissenting opinion would thus resolve any question regarding the scope of the NPDES program to capture any point source that discharges a pollutant through a non-point

source intermediary.

The Circuit split surrounding the validity of the direct hydrologic connection theory of liability and the apparent inconsistency within the Fourth Circuit reveals an emerging issue regarding the theory's impact on the regulatory lines drawn between the CWA's point and non-point source programs. Legal practitioners and industries alike should be concerned with the ability of the hydrologic connection theory to expand the CWA's point source permitting program to discharges that have long been considered safely within the non-point source program.

Disagreement Regarding the Overlap of Federal Environmental Laws

The decisions discussed in this article also reveal differing approaches to whether and how federal environmental laws should interact on questions of groundwater. One approach, reflected in the majority opinion in the Sixth Circuit cases, would limit duplicative or overlapping environmental regulations, especially where there is some indication that the regulatory structures are intended to be exclusive or comprehensive. Practical concerns, such as how to measure compliance with effluent limitations in discharges through groundwater, find a sympathetic ear in this approach.

Another approach, reflected in *Maui* and the dissenting opinion in the Sixth Circuit cases, would seek to reconcile apparent conflicts and apply the laws liberally, even if that application creates an overlapping or duplicative regulatory structure. Policy concerns, such as furthering the CWA's goal of protecting water quality from contaminated discharges, find a sympathetic ear in this approach.

Conclusion and Implications

The Circuit Court of Appeals split on the direct hydrologic connection theory of liability implicates a host of legal, practical, and policy concerns that may have direct consequences for anyone whose activities interact with groundwater. The Circuit split also increases the likelihood that the U.S. Supreme Court will grant review of *Maui* or *Upstate Forever*. Energy, wastewater management, water supply, and similar industries should watch for opportunities to participate in shaping the outcome of the current Circuit split by carefully evaluating the implications of Fourth and Ninth circuits' new theory of liability, participating in any rulemaking activity by the EPA on this topic, and, if review is granted, raising practical and policy concerns to the Supreme Court through *amicus curiae* briefing.

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EASTERN WATER NEWS

NEWS FROM THE WEST

In this month's News from the West we address the conclusion of a long-standing dispute between a very wealthy landowner and the public at large, regarding access to a geographically secluded beach along the Pacific Ocean. With the U.S. Supreme Court's denial of a petition for *certiorari*, the lower state court decision compelling access stands.

We also report on California's Oroville Dam and the myriad of state and federal regulation now in place overseeing the dam's repairs and operation. All of this stems from the dam's sudden spillway breach during one of California's wettest rainy season.

U.S. Supreme Court Denies Appeal in California Martins Beach Public Beach Access Case, Letting Stand the Decision of the California Court of Appeal

Martins Beach I, LLC et al, v. Surfrider Foundation, S. Ct No. 17-1198;
[S*urfrider Foundation v. Martins Beach 1, LLC, et al.*, 14 Cal.App.5th 238 (1st Dist. 2017).]

The long and winding road which was Vinod Khosla's attempt to establish the right to decide whether the public can access Martins Beach via his adjacent property came to an end on October 1, 2018 when the U.S. Supreme Court denied his petition for writ of *certiorari* challenging S*urfrider Foundation v. Martins Beach 1, LLC, et al.*, 14 Cal.App.5th 238 (2017).

This case, which pitted a nonprofit organization dedicated to the protection of oceans, waves, and beaches (including the preservation of access for recreation) against a Silicon Valley billionaire, who in 2008 purchased 89 acres adjacent to Martins Beach near Half Moon Bay, California, highlights the tension between California's laws regulating access to its beaches and the right of property owners to exclude others from their properties.

Factual and Procedural Background

This case started out in 2013 as a citizen enforcement action under the California Coastal Act brought by the Surfrider Foundation (Surfrider) against Martins Beach 1, LLC and Martins Beach 2, LLC (limited liability companies owned or controlled by Khosla) (Khosla) for alleged unpermitted development of their Martins Beach property.

Surfrider's complaint alleged that Khosla engaged in "development" within the meaning of the California Coastal Act by closing public access to the coast at Martins Beach (more specifically that Khosla closed the gate to Martins Beach Road, added a sign to the gate stating "BEACH CLOSED KEEP OUT," covered over another sign that had advertised public access, and stationed security guards to deny public access). The complaint sought: 1) a declaration that Khosla's conduct constituted development under the Coastal Act requiring a coastal development permit, 2) injunctive relief, 3) imposition of fines, and 4) an award of attorney fees. Khosla filed a cross-complaint seeking a declaration that its conduct did not constitute development under the Coastal Act and an injunction prohibiting trespassing.

In December 2014, the trial court found that Khosla was in violation of the Coastal Act when he failed to obtain a coastal development permit before posting signage and locking the public access gate that led to Martins Beach, and it issued an injunction requiring that Khosla open the gate in the same way it was left open in 2008 before Khosla's purchase of the property.

Khosla appealed the trial court's decision to the California First District Court of Appeal in San Francisco.

The First District Court rejected Khosla's position that the trial court's order amounted to an unconstitutional taking and affirmed the two key elements of the trial court's ruling in favor of Surfrider, namely: 1) the injunction issued by the trial court requiring Khosla to maintain the same level of public access that existed when he bought the property, and 2) that Khosla must apply to the California Coastal Commission for a coastal development permit before closing the access road leading to Martins Beach.

According to the First District:

> . . .[in] the present case, the claimed taking is not an interpretation of property law. It is an injunction designed to enforce the permit requirements of the Coastal Act.

It did not address the broader question of whether the public has a right to access Martins Beach.

Khosla appealed to the California Supreme Court, which denied review on October 25, 2017.

On February 22, 2018, Khosla filed a Petition for Writ of Certiorari with the U.S. Supreme Court.

Khosla's Appeal to The U.S. Supreme Court

The questions presented in Khosla's brief to the U.S. Supreme Court (the "Court") were:

> (1) whether a compulsory public-access easement of indefinite duration is a per se physical taking; and
>
> (2) whether applying the California Coastal Act to require the owner of private beachfront property to apply for a permit before excluding the public from its private property; closing or changing the hours, prices, or days of operation of a private business on its private property; or even declining to advertise public access to its private property, violates the takings clause, the due process clause, and/or the First Amendment.

The core of Khosla's argument can be found in the following quote taken from his brief:

> As a general matter, California is free to impose the Orwellian obligation to obtain a development permit to reduce the extent of coastal development. But when California demands a permit before a private property owner may exercise the fundamental rights to close or alter the terms of a business and exclude the public from private property, it crosses a constitutional line. And when the state demands a permit before painting over a private sign informing the public of their right to trespass, yet another constitutional line is crossed.

On October 1, 2018, the Court denied his petition for *certiorari*.

Conclusion and Implications

The U.S. Supreme Court grants *certiorari* review to only 100 cases or so each year (out of thousands of appeals filed with the Court), so Khosla's odds were not good from the start. That said, it only takes four justices to grant *certiorari*, the current Court has a solid conservative majority, and Khosla hired a high powered, experienced Supreme Court lawyer to brief and argue his appeal. It would seem then that the Court could have easily decided it was time to address the property rights issues presented by Khosla's case. For reasons at which we can only guess, the facts and circumstances of the Khosla case were not sufficiently compelling to the Court to grant review.

Following the Court's denial, Khosla's lawyers issued the following statements: "No business owner should be forced to obtain a permit from the government to shut down a private business, to change prices from those that existed in 1972 (as the state has demanded), or to change hours of operation," … "However, we will comply with the decision of the California Court of Appeal and apply for the required permit. If denied, we will start this process over again."

The petition for writ to the Supreme Court is available online at: https://www.supremecourt.gov/DocketPDF/17/17-1198/36238/20180222133434038_Petition%20for%20Writ%20of%20Certiorari%20-%20Martins%20Beach%20v.%20Surfrider%20Found.pdf

The California Coastal Commission's authority to regulate public access to California's beaches over and through private lands remains in tact—for now. (Lance Anderson, Matt Henderson)

The Multitude of Oversight for California's Oroville Dam—Will This Become a Model for Dams throughout the State and in the West?

The California Department of Water Resources (DWR) is overseeing repairs to the Oroville Dam in coordination with the Federal Energy Regulatory Commission (FERC) and the California Division of Safety of Dams (CDSD). In early 2017 FERC required DWR to arrange for an independent risk

analysis of the Oroville Dam. In July 2018, DWR established a local ad hoc committee in an effort to improve the DWR's relations with the community.

In September 2018, the California Legislature created a 19-member commission to provide a forum for residents and state officials to discuss reports, maintenance and other ongoing issues related to the Oroville Dam; and, Congress has enacted legislation requiring an independent risk analysis of the Oroville Dam, and of the DWR's dam safety practices.

Background

The world witnessed near-disaster at the Oroville Dam that started with a massive failure of the primary spillway at the nation's tallest dam in February 2017, threatening a 30-foot wall of water that would have washed away everything in its path. The water released from rising Lake Oroville caused a huge crater to develop in the main spillway. That triggered diversion to the emergency spillway, causing rapid downstream erosion and forcing nearly 200,000 people living and working downstream from the Oroville Dam to flee from the threat of an apparently imminent catastrophe. Reports from the scene were of panic in the streets as police drove through the town warning people to evacuate immediately, out of concern that, if the failure worsened, the Town of Oroville—and everything in it—might simply cease to exist. The scene was reported to be of near chaos, with people abandoning everything but their children, running through the streets and speeding away in cars, only to be caught up in massive traffic jams. It was anything but an organized evacuation.

Those that experienced the near failure claim to have not forgotten. Tourism in this part of California's Gold Country has declined and some residents have moved away, afraid to live in the shadow of the Oroville Dam and vowing never to return.

In the meantime, Kiewit Corporation is proceeding with repairs to the Oroville Dam under a contract that was awarded in April of 2017 at $275.4M, had grown to $870M at the beginning of this year, and is now projected to exceed $1.1B by 2019. DWR reportedly plans to ask the Federal Emergency Management Agency (FEMA) to assist with up to 75% of the total costs of repairs.

The ASDCO-USSD Team Investigation

In the aftermath of the near-catastrophe FERC required DWR to engage an independent forensic team (ASDCO-USSD Team) composed of representatives of the Association of State Dam Safety Officials (ASDSO) and the United States Society of Dams (USSD) to develop findings and opinions on the cause of the incident. The ASDCO-USSD Team issued a nearly 600-page report (ASDCO-USSD Report) in January of 2018 that accused DWR of being insular and overconfident, partially attributing the incident to a "long-term systemic failure" on the part of DWR, both in terms of design and construction. The ASDCO-USSD Report noted that cracks had been detected in the main spillway almost immediately after it had been constructed in 1968, though DWR had deemed them to be "normal," and that repeated attempts to repair the cracks had been ineffective and potentially detrimental. Regulatory and general industry practices to recognize and address inherent spillway design and construction weaknesses, poor bedrock quality, and deteriorating main spillway chute conditions were also identified as contributing causes of the incident.

Despite the many design, construction, inspection, operational, oversight and management causes identified by the ASDCO-USSD Team, DWR remained the focus of much of the criticism for the incident.

The Local Ad Hoc Committee

In an effort to improve its standing with the residents of Oroville, Butte County, the State of California and the federal government, in July 2018, California Senator Nielsen and Assemblyman Gallagher, working in conjunction with DWR, established a local ad hoc committee (Ad Hoc Committee), that was hoped would improve the DWR's relationship with the community and provide a forum for local input on the long-term changes under consideration for the Oroville Dam.

The Ad Hoc Committee, which is composed of Oroville residents, Butte County officials, a representative of UC Berkley's Center for Catastrophic Risk Management other technical experts, and representatives of DWR, plans to meet quarterly.

In mid-August, the Ad Hoc Committee sent its initial suggestions to DWR, advocating a "comprehensive needs assessment," proposing criteria to evaluate safety and reliability, and requesting relevant documentation intended to help the Ad Hoc Committee fulfill its role of communicating accurate information to the public.

The Citizens Advisory Commission

In September 2018, Senate Bill 955 became law, creating a citizens' advisory commission (Citizens' Advisory Commission) within the California Natural Resources Agency (CNRA) charged with serving as a representative of the public for the provision of input and the receipt of information from the Oroville Dam operator; serving as a unified community voice for the provision of public feedback, advice and best practices to the Oroville Dam operator; and the publication of a triennial report on ongoing maintenance and improvements to the Oroville Dam. The 19-member Commission includes representatives of the City of Oroville and the Counties of Butte, Sutter and Yuba; California legislators; and representatives of the CNRA, DWR, Governor's Office of Emergency Services, Department of Parks and Recreation, and California Highway Patrol. Commissioners' terms are limited to three years.

The Citizens' Advisory Commission is just beginning fact finding efforts.

The state hopes that the Citizens' Advisory Commission will provide a meaningful voice for those most affected by the near-catastrophe, bring about meaningful changes to the structure and operation of the Oroville Dam, and restore confidence in the state's ability to manage this component of the massive State Water Project. The Citizens' Advisory Commission will be unable to make regulations for dam operations, only recommendations that can be accepted or rejected as seen fit.

The Federally Mandated Independent Forensic Review

At the end of September 2018, President Trump signed a bill requiring FERC to conduct an independent review of the Oroville Dam. The 2019 Energy and Water Development Appropriations bill request that the licensee of the Oroville Dam request the USSD to nominate independent consultants (Consultants) to perform a risk analysis on the Oroville Dam facility.

According to Congressman Doug LaMalfa (R-Richvale):

> . . .[t]he previous forensic report raised many concerns with regards to the safety and design of the Oroville Dam, but I believe a completely independent investigation is required in which there are no current or former employees of DWR involved. … That could be a conflict of interest, and ensuring that this process is thorough is absolutely necessary when it concerns the involvement of federal dollars and the safety of nearby residents.

When the independent risk analysis is completed, the House and Senate Committees must be briefed on FERC's responses to the Consultants' risk analysis.

The Appropriations Bill also requires FERC to apply the lessons learned to dam safety reviews on a nationwide basis.

Conclusion and Implications

The near catastrophe of February 2017 left an indelible impression on the memory of the residents of Oroville and the Northern California Gold Country, and officials at the local, state and federal levels of government. It caused many to question the ability of DWR to manage and operate the Oroville Dam and other State Water Project facilities. It caused the creation of multiple committees, commissions, panels and independent risk analyses of Oroville and other state and national dams.

Naturally, questions arise: Are we doing enough to evaluate the Oroville Dam incident? Are we doing too much? If more needs to be done, what should be done and by whom? Who will assume full responsibility for fixing Oroville Dam? Will the monetary costs be so exorbitant as to discourage or preclude what needs to be done to fix every problem potentially uncovered at Oroville Dam? What about every other dam in the nation that is determined to be unsafe? Will all of these committees, commissions and analyses provide meaningful answers, the restoration of public confidence, make California's and nation's dams safer?

(Michael Duane Davis)

REGULATORY DEVELOPMENTS

IPCC ISSUES SPECIAL REPORT CAUTIONING AGAINST THE IMPACT OF GLOBAL WARMING ABOVE 1.5 DEGREES CELSIUS

The Intergovernmental Panel on Climate Change (IPCC), a panel of scientists convened by the United Nations, issued a special report on the impact of global warming of 1.5 degrees Celsius above pre-industrial levels (considered as 1850-1900 by the IPCC). The report, published on October 8, 2018 at the conclusion of a panel meeting in South Korea, highlights in dire terms the importance of limiting global warming to 1.5C as compared to 2C. One panel member summarized:

> Every extra bit of warming matters, especially since warming of 1.5C or higher increases the risk associated with long-lasting or irreversible changes, such as the loss of some ecosystems.

The report concludes that while the 1.5C warming limit can be achieved from a scientific standpoint, doing so will require "rapid and far-reaching" changes that would require unprecedented political and economic cooperation. Global carbon dioxide (CO2) emissions, which are currently rising, would need to fall by 45 percent from 2010 levels by 2030, and would need to reach 'net zero' by 2050.

Background

The IPCC, comprised of a body of scientists and economists, was first convened by the United Nations in 1988. It periodically publishes for policymakers summaries of "the scientific basis of climate change, its impacts and future risks, and options for adaptation and mitigation." As part of the 2015 Paris Agreement on climate change, in which 195 nations committed to halting global warming to "well below 2C above pre-industrial levels and to pursue efforts to limit temperature increase to 1.5C above pre-industrial levels," the IPCC was asked to develop this special 2018 report on the impacts of global warming above 1.5 degrees Celsius.

The 2018 report was authored by a team of 91 scientists and policy experts from 44 different countries. The US had the greatest representation with seven authors, followed by Germany with five and the UK by five. The report is the first in a series; next year the panel will publish a report on climate change impacts on the ocean and on land use.

The Implications of 1.5C

At present, global average temperatures have already warmed by approximately 1C since pre-industrial times. However, since the rate of warming is not consistent across the Earth's surface, some regions representing approximately 20-40 percent of the global population are already experiencing warming of more than 1.5C. As indicated in the report, even at levels of 1.5C severe climate impacts are already playing out on land and ocean ecosystems; the report noted that:

> Temperature rise to date has already resulted in profound alterations to human and natural systems, bringing increases in some types of extreme weather, droughts, floods, sea level rise and biodiversity loss, and causing unprecedented risks to vulnerable persons and populations.

The areas most impacted will include small islands, coastal regions, areas in poverty, and large cities. These and other areas will face greater extremes in weather conditions with increased rainfall and worsened drought conditions, resulting in flooding and wildfires. The report also states that if warming is limited to 1.5C, coral reefs would decline by 70-90 percent, whereas if 2C is reached, virtually all coral reefs would be lost.

Recommended Courses of Action

To avoid nearing levels of 2C warming, the report identifies a variety of pathways that could limit temperatures to 1.5C, but the pathways envision drastic changes from the status quo, and which may not be

politically or economically feasible. For example, one change recommends a fully decarbonized future by 2050, with an electricity mix comprised of 70-85 percent renewable energy. The pathways also envision a 33 percent reduction in methane emissions below 2010 levels by 2050. The transportation and industry sectors are expected to reduce emissions under set pathways to 75-90 percent below 2010 levels by year 2050.

The report also notes that to achieve 1.5C, negative emissions technologies (NETs) will have to be employed to remove CO2 from the atmosphere, and to compensate where emissions cannot easily be reduced to zero (e.g., air travel and food production, particularly meat and rice). Examples of NETs include carbon capture technologies and afforestation (planting trees in barren land).

Conclusion and Implications

If significant corrective actions are not pursued to drastically reduce existing CO2 levels, the IPCC report finds that a warming of 1.5C could be reached in as little as 11 years.

Given the current political climate and President Trump's statement of intent to withdraw from the Paris Climate Accord, the question remains whether other global, state, or industry players will take the lead in heeding the IPCC report. California's recently enacted SB 100 sets a path of reaching 100 percent renewable energy supply and a goal of carbon net neutrality by 2045. Its policies may provide a roadmap and help develop the technologies needed to reduce carbon emissions. In addition, some corporations have expressed a preference for carbon taxes or have worked to account for climate changes' cost to companies. The question remains whether such actions and interests can be implemented quickly enough to avoid the dire consequences listed in the IPCC report.

(Lilly McKenna)

NEW PROPOSED RULE AND PENDING SUPREME COURT CASE HAVE THE POTENTIAL TO LIMIT DESIGNATION OF UNOCCUPIED AREAS AS CRITICAL HABITAT UNDER FEDERAL ENDANGERED SPECIES ACT

The U.S. Fish & Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (together: the Services) have proposed revisions to one of the federal Endangered Species Act's key implementing regulations regarding the designation of unoccupied critical habitat. If formally adopted, the proposed revisions would limit the Services' ability to designate areas unoccupied by a listed species as part of their critical habitat. But the new proposed rule, like the currently operative rule, may not require that unoccupied areas actually be habitable at the time they are designated as critical habitat. The issue of whether an area must be habitable at the time of designations is currently pending before the U.S. Supreme Court in *Weyerhauser Co. v. United States Fish & Wildlife Service*, which could potentially limit the Services' ability to designate critical habitat even further.

The Existing Regulation and the Services' Proposed Revisions

The Endangered Species Act (ESA) permits the Services to designate geographic areas as critical habitat for an endangered or threatened species even if those areas are not actually occupied by the species at the time of the designation. 16 U.S.C. 1532(5)(A)(ii). Currently, the Services have broad discretion to designate areas unoccupied by a listed species as part of its critical habitat. Specifically, 50 C.F.R. § 424.12(b)(2) allows the Services to designate as critical habitat:

> . . .specific areas outside the geographical area occupied by the species that are essential for its conservation, considering the life history, status, and conservation needs of the species based on the best available scientific data.

In a proposed revision to that rule published on July 25, 2018, the Services recognized "continued perceptions that . . . the Services intend[] to designate as critical habitat expansive areas of unoccupied habitat." 83 Fed.Reg. 35197-98.

To address these perceptions, the Services' proposed rule emphasizes that unoccupied geographic areas may "only" be designated as critical habitat if such areas are essential to the conservation of the species, and requires the Services to evaluate occupied areas for designation as critical habitat before considering unoccupied areas for designation. *Id.* at 35201. More importantly, the proposed rule limits the Services' discretion to determine that unoccupied areas are essential to a species' conservation to situations in which:

> . . .a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species or would result in less efficient conservation for the species. *Id.*

In doing so, the Services must determine that "there is a reasonable likelihood that the area will contribute to the conservation of the species." *Id.* In determining that failure to designate an unoccupied area would result in less efficient conservation for a species, the Services must ensure that "societal conflicts" associated with the designation are minimized and perform a cost benefit analysis that compares the economic costs of the designation to the benefits gained from making it. *Id.* The Services have stated that the new proposed rule will result in greater predictability to the process of making critical habitat designations, and that it will permit them to be more thoughtful and focused in using agency resources to both designate critical habitat and consult on proposed actions that may affect such habitat.

Weyerhauser Co. v. U.S. Fish & Wildlife Service

A pending U.S. Supreme Court case may further limit the Services' ability to designate areas unoccupied by a listed species as critical habitat. *See, Weyerhauser Co. v. U.S. Fish & Wildlife Service* (*Weyerhauser*), 138 S.Ct. 924 (mem.) (Jan. 22, 2018) (granting petition for *certiorari*). In that case, FWS designated land as critical habitat for the endangered dusky gopher frog that included land owned by the petitioner in *Weyerhauser* in Louisiana—even though the species only occupied land in Mississippi, and even though the petitioner's land was not currently habitable for the species. *See, Markle Interests, LLC v. U.S. Fish & Wildlife Service*, 877 F.3d 452, 467 (5th Cir. 2016). In *Weyerhauser*, the petitioners have asked the Supreme Court to hold that habitat designated as critical must be an area in which the species in question can survive at the time of listing. *See,* Brief for Petitioner at 19. The outcome of the Supreme Court's decision on this issue could require that areas be habitable at the time of designation, a requirement that is not in the existing rule or the proposed changes.

Conclusion and Implications

Although it would constrain the Services' discretion to designate areas unoccupied by a listed species as part of its critical habitat, the proposed revisions to 50 C.F.R. § 424.12(b)(2) may not require that designated critical habitat actually be habitable at the time of listing, at least in some circumstances. The comment period on the proposed rule closed on September 24, and the Services are currently considering whether to adopt it as a final rule. Although many business and agricultural groups support the proposed rule, environmental interests have submitted thousands of comments asserting that it will place political and cost considerations above the best available science.

If the Services adopt the proposed rule, a Supreme Court decision in the *Weyerhauser* petitioners' favor could further limit the Services' discretion to require habitability at the time of designation. The regulated community thus faces the prospect of not one, but two significant developments when it comes to the Services' ability to designate areas unoccupied by a listed species as part of their critical habitat. Even if *Weyerhauser* does not impose a habitability requirement, however, the proposed rule would arguably still make it more difficult for the Services to designate unoccupied areas as critical habitat.
(Sam Bivins, Meredith Nikkel)

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

•October 15, 2018 - The U.S. Environmental Protection Agency announced an agreement with the U.S. Forest Service (USFS) to close 62 campground pit toilets, considered to be large capacity cesspools, at seven national forests across California. USFS, an agency of the U.S. Department of Agriculture, will have until December 2020 to comply with the federal Safe Drinking Water Act's ban on large capacity cesspools (LCC). USFS' Pacific Southwest Region disclosed that it continued to use LCCs despite a 2005 ban under the Safe Drinking Water Act's Underground Injection Control program. The agency will be closing 62 pit toilets in seven national forests across California: Angeles, Eldorado, Inyo, Los Padres, Plumas, Sierra, and Tahoe National Forests. USFS has estimated the costs to close and remove the non-compliant systems and install new toilets is over $1.1 million dollars. The agreement also includes specific reporting requirements and allows for penalties should USFS fail to meet deadlines. Cesspools collect and discharge waterborne pollutants like untreated raw sewage into the ground, where disease-causing pathogens can contaminate groundwater, streams, and the ocean.

•October 4, 2018 - The U.S. Environmental Protection Agency announced a settlement with J.G. MacLellan Concrete Co. that resolves alleged violations of the Clean Water Act. MacLellan, which manufactures ready-mix concrete in Lowell, Massachusetts and Milford, New Hampshire, has agreed to make environmental improvements at its Lowell plant worth $94,500 to settle claims that it violated federal clean water laws at both facilities. MacLellan also agreed to pay a penalty of $50,000 for its failure to fully comply with various Clean Water Act regulations related to its discharge of stormwater and storage of oil. The settlement is the latest in a series of enforcement actions taken by EPA New England to address stormwater violations from industrial facilities and construction sites around New England. Under the terms of the settlement, MacLellan Concrete Co., will remove a storm drain from a public road in front of the Lowell plant and re-grade the plant's entrances, which together will reduce pollution from stormwater discharges at the Lowell site. The Lowell facility discharges water into the Merrimack River, and the Milford facility discharges into the Skowhegan River. The case stems from a January 2017 inspection in Lowell and a November 2016 inspection in Milford. Following these inspections, EPA's New England office charged the company with failure to follow the requirements in its permits for discharging stormwater, unauthorized discharge of water used in washing down its concrete trucks at the Lowell facility, and failure to comply with the Clean Water Act's Spill Prevention, Control, and Countermeasure regulations. Process waste water discharges are prohibited under the Clean Water Act unless a company obtains a permit allowing those discharges. Wastewater from concrete plants typically contains high pH, oils, greases, and high levels of solids. When these solids settle they can form sediment deposits that destroy plant life and spawning grounds of fish. Alkaline waters that wash-off trucks and from concrete manufacturing sites are highly corrosive. Rather than get individual discharge permits with strict waste limits, most concrete manufacturing facilities treat, and often recycle, their process wastewaters onsite.

•October 3, 2018 - The U.S. Environmental Protection Agency and Kamehameha Schools (KS) announced a landmark agreement in which KS will

audit over 3,000 properties spanning more than 365,000 acres to identify and close large-capacity cesspools (LCCs). The voluntary effort marks a major milestone in Hawaii's effort to protect its unique natural resources. Cesspools collect and discharge waterborne pollutants like untreated raw sewage into the ground, where disease-causing pathogens can contaminate groundwater, streams and the ocean. In 2005, the federal government banned large-capacity cesspools, making closing all LCCs an ongoing EPA priority. The state of Hawaii has begun work to close or upgrade all small-capacity cesspools by 2050. Founded in 1887 by Princess Bernice Pauahi Bishop, Kamehameha Schools (KS) is a private, educational, charitable Native Hawaiian trust committed to improving the capability and well-being of the Native Hawaiian people through education. Income generated from its endowment portfolio, including commercial real estate and other diversified investments, funds KS' educational mission. As Hawaii's largest private landowner, Kamehameha Schools is responsible for stewarding over 365,000 acres of land across the state of Hawai'i. As part of the agreement, KS is also settling an administrative action for $99,531 related to a LCC at the Volcano Golf Course and Country Club, a property owned by KS and leased to Hawaii International Sporting Club, Inc., on the Island of Hawaii. In July 2017, the lessee closed the cesspool and replaced it with an approved septic system. Cesspools are used more widely in Hawaii than in any other state, even though 95 percent of all drinking water in Hawaii comes from groundwater sources. In the 13 years more than 3,400 large-capacity cesspools have been closed statewide, many through voluntary compliance.

•October 1, 2018 - The U.S. Environmental Protection Agency has reached an agreement with Keehi Marine, Inc. to reduce pollution in its stormwater discharges to Keehi Lagoon and the Pacific Ocean. By November, the Honolulu boatyard must ensure that discharges of copper, lead, zinc, and other pollutants meet the requirements of its state stormwater discharge permit. Keehi Marine will also develop an updated Stormwater Pollution Control Plan, conduct additional sampling and monitoring, and submit a final report to EPA once all requirements of the administrative order have been completed. Based on a tip from the public, EPA performed an inspection in April 2017 at Keehi Marine and found: 1) Accumulation of fine sediment and debris without controls that prevent stormwater and associated debris from entering stormwater discharges and flowing into Keehi Lagoon and the Pacific Ocean; 2) Evidence of recent flooding at a covered work area indicating pollutants had washed offsite; and 3)From September 2016 to December 2017, the facility reported five incidents in which stormwater monitoring results showed copper, lead and zinc were discharged above permit limits.

Many industrial operations, such as material handling and storage and equipment maintenance and cleaning, occur outside. Rainfall runoff flowing through such facilities can pick up pollutants and transport them directly to nearby waterways and degrade water quality. Federal regulations require facilities to obtain discharge permits, implement stormwater best management practices, and follow a stormwater pollution control plan.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•October 19, 2018 - An Ohio company has agreed to come into compliance with state and federal hazardous waste laws and to pay a penalty of $77,093 to settle claims by the U.S. Environmental Protection Agency that it violated state and federal hazardous waste laws at its facility in North Clarendon, Vermont, Ellison Holdings, the owner of the Vermont facility, and Ellison Surface Technologies, the operator of the facility, agreed to correct all violations of the federal Resource Conservation and Recovery Act and state hazardous waste management laws and to stay in compliance with both laws. EPA inspectors found that the Ellison Surface Technologies Vermont facility was storing numerous drums of hazardous waste for more than 180 days without a license. EPA also found that they were storing incompatible hazardous waste without segregating them. These sorts of violations are important to the health and safety of facility workers and the local community because this sort of storage could result in hazardous waste being released into the environment. This settlement will reduce the likelihood of a release of hazardous waste to the surrounding North Clarendon community. The company, headquartered in Mason, Ohio, makes coatings for industrial and aerospace parts. Ellison operates another facility in Vermont, as well as facilities in Kentucky, Tennessee, Canada and Mexico. The

North Clarendon facility is a small quantity generator of hazardous waste, including hydrochloric and nitric acid, sludge from the acetone filtration process and universal wastes including batteries and light bulbs.

•October 17, 2018 - The owner and operator of the F-Street Sunoco service station, 3951 Roosevelt Boulevard, Philadelphia have agreed to pay a $22,080 penalty to settle alleged violations of underground storage tank regulations, the U.S. Environmental Protection Agency announced today. The settlement with service station owner, 3951 Roosevelt Blvd. Realty Corporation, and operator Liberty Tradeplus, Inc., addresses compliance with environmental safeguards protecting communities and the environment from exposure to petroleum or potentially harmful chemicals. EPA cited the companies for violating safeguards designed to prevent, detect, and control leaks from the underground tanks. Based on a September 2017 inspection and follow-up investigations, EPA alleged that two underground gasoline tanks failed to comply with leak detection and recordkeeping requirements for a 27-month period in 2015 through 2017. The penalty reflects the companies' cooperation with EPA. As part of the settlement, the companies did not admit liability, but have certified that the station is now in compliance. With millions of gallons of petroleum products and hazardous substances stored in underground storage tanks throughout the country, leaking tanks are a major source of soil and groundwater contamination. EPA and state regulations are designed to reduce the risk of underground leaks and to promptly detect and properly address leaks thus minimizing environmental harm and avoiding the costs of major cleanups.

•October 4, 2018 - The U.S. Environmental Protection Agency and the California Department of Toxic Substances Control (DTSC) have reached a settlement with the Regents of the University of California (University) to begin an estimated $14 million cleanup of contaminated soil, solid waste, and soil gas at the Laboratory for Energy-related Health Research/Old Campus Landfill Superfund site in Davis, California. Contaminants found at the site include carbon-14, polychlorinated biphenyls, pesticides, solvents, such as chloroform, and metals, such as lead. The site, which contains laboratory buildings and undeveloped land, covers approximately 25 acres on the University's South Campus. Located south of Interstate 80 and east of Old Davis Road, the site is about 250 feet north of the South Fork of Putah Creek. From the 1950s to the mid-1980s, the University and the Department of Energy conducted studies on the health effects of radiation on animals at the laboratory. In addition, from the 1940s through the mid-1960s, low-level radioactive and mixed waste from the University and laboratory research activities were disposed of at the site. The University assessed the risk posed by the site's contaminated soil, solid waste, and soil gas. EPA then approved the soil cleanup plan, commonly known as a Record of Decision, in 2016. Under the settlement, the University will implement the site's cleanup remedy for soil, solid waste, and soil gas, which includes: 1) Excavating and consolidating soil and solid waste; 2) Installing protective caps in areas where contaminated soils and solid waste will be stored onsite, to reduce leaching of contaminants to ground water and limit human exposure; 3) Expanding the storm water drainage system to divert water away from the soil and solid waste; 4) Implementing institutional controls, such as deed restrictions, to protect cleanup equipment, prohibit residential land use, and restrict non-residential land use; and 5) Monitoring ground water to confirm the remedy's effectiveness.

In addition, the University will reimburse EPA and the State of California for costs related to the agencies' ongoing and future oversight of the cleanup. The EPA is also currently evaluating ground water contamination at the site, for which a remedy will be selected in the future. The agreement was reached under the federal Comprehensive Environmental Response, Compensation, and Liability Act, also known as the Superfund law, which requires parties responsible for contaminating a Superfund site to clean up the site, or reimburse the government or other parties for cleanup activities. The proposed consent decree for the contaminated soil, solid waste, and soil gas is subject to a 30-day public comment period and court approval.

•September 25, 2018 - The Bureau of Reclamation has settled federal hazardous waste handling violations with the U.S. Environmental Protection Agency at Grand Coulee Dam in Northeastern Washington. According to Chris Hladick, EPA Regional Administrator in Seattle, today's action was

undertaken at the request of the State of Washington's Department of Ecology. The Resource Conservation and Recovery Act (RCRA) violations discovered during EPA's 2017 inspection included:

> 1) Failure to conduct weekly inspections of hazardous waste accumulation areas; 2) Improper container management and failure to follow waste labeling requirements; 3) Improper hazardous waste storage (beyond 180 days) without a permit; 4) Violations of used oil and universal waste management requirements; 5) Failure to make a hazardous waste determination.

The waste in question included ignitable and corrosive compounds, used oil, mercury light ballasts and lithium batteries. As part of the Consent Agreement and Final Order with EPA, a $115,500 penalty was assessed. None of the violations outlined above occurred in publicly accessible areas. The Grand Coulee Dam remains one of America's most impressive engineering marvels, spanning almost a mile (5,223 ft.) across the majestic Columbia River. The Dam also sits astride the ancient, ancestral homeland of the Confederated Tribes of the Colville Indian Reservation. Grand Coulee Dam is one of most popular tourist attractions in Northeastern Washington, attracting up to 300,000 visitors a year for tours and laser light shows.

•September 24, 2018 - the U.S. Environmental Protection Agency announced settlements with two companies for the improper storage and labeling of agricultural pesticides. Nutrien Ag Solutions, Inc., formerly doing business as Crop Production Services, Inc., and Colusa County Farm Supply, Inc., a distributor of chemicals and fertilizers in northern California, have agreed to pay a total of $345,148 in civil penalties. The firms have corrected all identified compliance issues. EPA asserted both companies had multiple violations under the Federal Insecticide, Fungicide, and Rodenticide Act, which regulates the distribution, sale and use of pesticides in the United States. Nutrien Ag Solutions agreed to pay $331,353; Colusa County Farm Supply will pay $13,795. Nutrien Ag Solutions, one of the largest providers of crop nutrients in the world, operates one facility in Coolidge, Arizona, and seven facilities in California subject to EPA's enforcement action, including six in the Central Valley communities of Hanford, Delano, Cutler, Bakersfield, Huron and Stockton, and one in Santa Maria, Calif. Inspections between 2013 and 2017 by EPA, and the California Department of Pesticide Regulation and the Arizona Department of Agriculture on behalf of EPA, found 52 violations.

Federal Insecticide, Fungicide, and Rodenticide Act regulations help safeguard the public, the environment, and facility workers by ensuring that pesticides are used, stored, and disposed of safely, and that pesticide containers are adequately cleaned. Pesticide registrants, refillers (i.e., those that repackage pesticides into refillable containers), and others in the business of selling, distributing, or applying pesticides must comply with applicable regulations, while consumers are required to follow the label instructions for proper use and disposal.
(Andre Monette, Ana Schwab)

JUDICIAL DEVELOPMENTS

NINTH CIRCUIT REJECTS CHALLENGE TO OREGON SENATE BILL WHICH BANNED MOTORIZED MINING IN SALMONID HABITAT AREAS, FINDING NO FEDERAL PREEMPTION

Bohmker v. Oregon, 903 F.3d 1029 (9th Cir. 2018).

In *Bohmker v. Oregon*, the U.S. Court of Appeals for the Ninth Circuit held, in a divided opinion, that Oregon Senate Bill 3, which banned motorized mining activities in certain designated salmon and bull trout habitat, was not preempted by federal statute. We previously reported on *Campbell v. Oregon Department of State Lands*, (D. Or. 2017), in which the U.S. District Court for the District of Oregon stayed a different preemption challenge to a related law pending the Ninth Circuit's decision in *Bohmker*. (*See*, 22 *Western Water Law & Policy Reporter* 16).

Background

SB 3's mining ban was preceded by a moratorium. Oregon SB 838 placed a five-year moratorium on motorized precious metal mining in designated Oregon waters, including some waters located on federal land. The moratorium, scheduled to last from 2016 through 2021, applied to areas designated as "essential indigenous anadromous salmonid habitat" and/or containing "naturally reproducing populations of bull trout." SB 838 prohibited, in these designated areas:

> . . .motorized precious metal mining from placer deposits of riverbanks or riverbeds, and from other placer deposits, where mining would cause removal or disturbance of streamside vegetation and impact water quality.
>
> Such activities were prohibited:
>
> . . .up to the 'line of ordinary high water,' and '100 yards upland perpendicular to the line of ordinary high water' located 'above the lowest extent of the spawning habitat' in a river containing an essential salmonid habitat or a reproducing bull trout population.

Plaintiffs, who have mining claims on federal lands in Oregon, challenged SB 838 as preempted by federal statute. On summary judgment, the District Court ruled SB 838 was not preempted. Plaintiffs appealed.

After briefing on appeal was completed, the Oregon Legislature adopted Senate Bill 3, which:

> . . .repealed the moratorium imposed by Senate Bill 838 and imposed a permanent restriction on the use of motorized mining equipment in waters designated as essential indigenous anadromous salmonid habitat.

The parties agreed to treat the appeal as a challenge to Senate Bill 3, which the Ninth Circuit did.

Plaintiffs' Arguments

Plaintiffs advanced three preemption arguments: 1) SB 3 is field preempted because it constitutes state "land use planning"; 2) SB 3 is conflict preempted because it is "prohibitory, not regulatory, in its fundamental character"; and 3) SB 3 is conflict preempted because it does not constitute "reasonable state environmental regulation."

Field preemption occurs where Congress has passed comprehensive federal legislation governing a particular topic or activity. Where Congress has passed comprehensive legislation intended to occupy a particular "field," state legislation in the same field is precluded by the doctrine of field preemption. Conflict preemption can occur where federal and state laws conflict. Because federal law is supreme under the Supremacy Clause of the U.S. Constitution, where federal and state laws impose directly conflicting requirements, or it is impossible to comply with both, the federal law trumps the state law and thus the state law is preempted, or invalidated, pursuant to the doctrine of conflict preemption.

The Ninth Circuit's Decision

The Court of Appeals first traced in some detail federal laws governing mining on federal lands and federal laws governing national forests. These include the Mining Act of 1872, the Surface Resources and Multiple Use Act of 1955, the Mining and Minerals Policy Act of 1970, the Organic Administration Act of 1897, the Multiple-Use and Sustained Yield Act of 1960, the National Forest Management Act of 1976, and the Federal Land Policy and Management Act of 1976. A full discussion of these laws is beyond the scope of this article, but interested readers are encouraged to reference the Ninth Circuit's useful overview of these statutes.

Field Preemption Claim

The court next addressed plaintiffs' field preemption argument. In *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987), the U.S. Supreme Court:

> . . .'assumed without deciding that 'the combination of the [National Forest Management Act of 1976] and the [Federal Land Policy and Management Act of 1976] pre-empts the extension of state land use plans onto unpatented mining claims in national forest lands.'

The Ninth Circuit in *Bohmker* accepted that same assumption. However, it concluded SB 3 was not field preempted as impermissible land use planning because it was in fact "an environmental regulation." The court noted SB 3:

> . . .does not choose or mandate land uses, has an express environmental purpose of protecting sensitive fish habitat, is not part of Oregon's land use system and is carefully and reasonably tailored to achieve its environmental purpose without unduly interfering with mining operations.

De Facto Prohibition Preemption Claim

The court also rejected plaintiffs' second argument, which was based largely on *South Dakota Mining Association v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998). In that case, the U.S. Court of Appeals for the Eighth Circuit held a county ordinance was preempted by the Federal Mining Act of 1872 because it banned "the only practical way to 'actually mine the valuable mineral deposits located on federal land in the area'" and was thus a *de facto* prohibition on mining. The Ninth Circuit rejected plaintiffs' contention that *South Dakota Mining* supported their proposed distinction between regulations that are "prohibitory" versus "regulatory" in their "fundamental character." The court found "no indication that Congress intended to preempt state environmental regulation merely because it might be viewed as 'prohibitory'" and rejected the argument that:

> Senate Bill 3 stands as an obstacle to the accomplishment of the full purposes and objectives of Congress merely because it 'prohibits' a particular method of mining in the portions of rivers and streams containing essential habitat for threatened and endangered salmonids.

Finally, the court evaluated plaintiffs' assertion that SB 3 is conflict preempted because it does not constitute "reasonable state environmental regulation." The Ninth Circuit "ha[s] consistently held that Congress intended to permit reasonable environmental regulation of mining claims on federal lands." While acknowledging "that unreasonable, excessive or pretextual state environmental regulation that unnecessarily interferes with development of mineral resources on federal land may stand as an obstacle to the accomplishment of the full purposes and objectives of Congress," the court concluded "that line has not been crossed" in this instance.

The Dissent

Judge N.R. Smith dissented. A full discussion of Judge Smith's opinion is beyond the scope of this article, but in short, Judge Smith concluded that:

> . . .[b]ecause the permanent ban on motorized mining in Oregon Senate Bill 3 does not identify an environmental standard to be achieved but instead restricts a particular use of federal land, it must be deemed a land use regulation preempted by federal law.

Judge Smith found merit in plaintiffs' arguments that SB 3:

> . . .impermissibly…identifies a particular use of the land that is prohibited without reference to an identifiable environmental standard and… renders mining within the identified zones impracticable.

Conclusion and Implications

As of this writing, supplemental briefing in *Campbell* is in progress. SB 3's ban on motorized mining activities in certain designated salmon and bull trout habitat remains in effect pending the outcome of the constitutional preemption challenge in *Campbell*. The Ninth Circuit's decision is available online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2018/09/12/16-35262.pdf
(Alexa Shasteen)

DEEPENING A CIRCUIT SPLIT, TENTH CIRCUIT HOLDS SIX-YEAR STATUTE OF LIMITATIONS FOR MANY FEDERAL ENVIRONMENTAL STATUTES IS SUBJECT TO EQUITABLE TOLLING

Chance v. Zinke, 898 F.3d 1025 (10th Cir. 2018).

Joining the Sixth, Fifth and Ninth circuits the Tenth Circuit Court of Appeals held that 28 U.S.C. § 2401(a)'s six-year statute of limitations for bringing non-tort claims against the government is not jurisdictional, and therefore may be equitably tolled. Section 2401(a) is applied to claims under many environmental statutes. Until the U.S. Supreme Court resolves this split among the Circuits, claims with similar or the same facts will face vastly different outcomes.

Background

When Oklahoma was granted statehood in 1906, Congress "disestablished" the Osage Nation's reservation in Osage County. The surface and subterranean mineral estates of Osage County were severed, with "most" of the surface being deeded to tribal members while ownership of the mineral estate was retained to be held in trust by the federal government for the benefit of the Osage Nation. The mineral estate is administered by the Osage Agency of the Bureau of Indian Affairs (BIA). In 1963, the Osage Agency granted a drilling lease for the estate underlying plaintiff Merrill Chance's lands to Eason Oil, which drilled two wells; that lease was assigned to Great Southwestern Exploration (GSE) in 1991 and the drilling of a further three wells was permitted.

In 2016 Chance sued BIA and GSE, alleging that BIA had failed to comply with the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (NEPA), in approving the 1991-assignment and additional wells, and that it "failed to notify his predecessors-in-interest that it approved the new [drilling] permits." Chance acknowledged that his claims were late, coming 25 years after the actions challenged, but argued he was entitled to equitable tolling. Chance also brought various non-federal claims against GSE for damage to his property.

The U.S. District Court held that the general six-year federal law statute of limitations for non-tort claims, 28 U.S.C. § 2401(a), governed Chance's claims against BIA, and that § 2401(a) is jurisdictional so that equitable tolling is not available. In the alternative, the trial court found equitable tolling did not apply.

The Tenth Circuit's Decision

The federal courts are courts of limited jurisdiction, so that plaintiffs seeking to litigate in federal rather than state court bear the burden of establishing subject matter jurisdiction:

> For the last decade, the Supreme Court has been on a mission to rein in profligate uses of 'jurisdiction,' a word with 'many, too many, mean-

> ings.' *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 813 (6th Cir. 2015) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006)).

The Circuit Courts of Appeals campaign is rooted in legitimate concern. Treating a rule as jurisdictional is more than just semantics; it has real-world effects on the parties and can be detrimental to judicial economy. *See*, *Henderson* [*ex rel. Henderson v. Shinseki*, 562 U.S. 428,] 434 [(2011)]. A case can be dismissed for lack of subject-matter jurisdiction at any stage in the litigation—or even after litigation has ended—so "[t]ardy jurisdictional objections can ... result in a waste of adjudicatory resources and can disturbingly disarm litigants." [*Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145,] 153 [(2-13)] ("Indeed, a party may raise such an objection even if the party had previously acknowledged the trial court's jurisdiction. And if the trial court lacked jurisdiction, many months of work on the part of the attorneys and the court may be wasted." (internal citation omitted)). Additionally "[b]randing a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system" by requiring courts to sua sponte address that rule. *Henderson*, 562 U.S. at 434.

The Supreme Court has "made plain that most time bars are nonjurisdictional." *United States v. Kwai Fun Wong*, ___U.S.___, 135 S.Ct. 1625, 1632 (2015). To further its interest in discouraging the profligate denomination of statute of limitations as jurisdictional:

> . . .the Court has 'adopted a 'readily administrable bright line' for determining whether to classify a statutory limitation as jurisdictional. . . .we may treat a rule as jurisdictional only when 'Congress has 'clearly state[d]' that the rule is jurisdictional. *Auburn Reg'l*, 568 U.S. at 153. . . .Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional. *Kwai Fun Wong*, 135 S.Ct. at 1632.

The Circuit Courts of Appeals are currently split on whether § 2401(a) is jurisdictional. The Sixth (*Herr*, 803 F.3d at 812), Fifth (*Clymore v. United States*, 217 F.3d 370, 374 (5th Cir. 2000)), and Ninth (*Cedars-Sinai Med. Ctr. v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997)) Circuits hold that it is not. The D.C. Circuit (*Mendoza v. Perez*, 754 F.3d 1002, 1018 (D.C. Cir. 2014)), Eleventh (*Ctr. for Biological Diversity v. Hamilton*, 453 F.3d 1331, 1334 (11th Cir. 2006), Federal (*Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576–77 (Fed. Cir. 1988)), and Eighth (*Konecny v. United States*, 388 F.2d 59, 61–62 (8th Cir. 1967)) Circuits hold that it is not.

This split arises from the Supreme Court's decisions categorizing two other federal statutes of limitations as, respectively, jurisdictional and non-jurisdictional. In *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 132 (2008), the Court held 28 U.S.C. § 2501, establishing the limitations period for bringing contract claims against the federal government in the Court of Claims, is jurisdictional. But in 2015's *Kwai Fun Wong* the Court declined to extend jurisdictional status to 28 U.S.C. 2401(b)—providing the statute of limitations for tort claims against the federal government. None of these statutory provisions—neither § 2501, § 2401(a), nor § 2401(b)—include language expressly making them jurisdictional. And they share a complicated statutory history as well as similar language. What distinguishes *John R. Sand* from *Kwai Fun Wong*, in the view of the Tenth Circuit, was that in *John R. Sand* the Supreme Court decided it was bound by its own decisions holding the statute of limitations for contract claims against the federal government to be jurisdictional, decisions that pre-dated any statutory scheme establishing a time-bar. As the Supreme Court stated, "[w]hat is special about [§ 2501]'s deadline, *John R. Sand* recognized, comes merely from this Court's prior rulings." *Kwai Fun Wong*, 135 S.Ct. at 1636. In contrast, § 2401 implicates no *stare decisis* concerns.

On that basis, the Tenth Circuit joined the Sixth, Fifth and Ninth circuits in holding § 2401(a) is non-jurisdictional. Chance's claims against BIA, however, were not entitled to equitable tolling, and were properly dismissed, as were his claims against GSE, for which there was no longer any basis for dependent federal jurisdiction.

Conclusion and Implications

Section 2401(a)'s six-year limitations period applies to claims under many federal environmental laws, and equitable tolling is a recurring issue in lawsuits under those laws. The property-based nature of many environmental claims may lessen the extent to which parties can seek a favorable Circuit to

litigate such issues, by requiring that certain claims be brought in certain District Court based on where the alleged environmental harms occurred. Nonetheless, when claims are brought outside the six-year limitations period all parties should factor into their analysis this Circuit split.
(Deborah Quick)

FEDERAL CIRCUITS SPLIT ON APPLICABILITY OF CLEAN WATER ACT TO GROUNDWATER CONTAMINATION WITH SIXTH CIRCUIT'S SEPTEMBER 2018 DECISION

Tennessee Clean Water Network, et al v. Tennessee Valley Authority,
___F3d___, Case No. 17-6155 (6th Cir. Sept 24, 2018).

On September 24 the Sixth Circuit Court of Appeals found that Tennessee Valley Authority was not liable under the federal Clean Water Act (CWA) for groundwater contamination that had migrated to the Cumberland River. This decision was in direct conflict to a Fourth Circuit decision in April 2018, creating a circuit split that is almost certain to eventually receive Supreme Court review. [*See also, Upstate Forever v. Kinder Morgan Energy Partners LP* (4th Cir. April 12, 2018).]

Background

The Clean Water Act regulates the discharge of pollutants into the waters of the United States. Importantly, the CWA only regulates discharges from "point sources" such as pipes or man-made ditches. That means that general run-off or seepage is not regulated by the CWA. The two cases discussed below examine if the CWA can be applied to groundwater: if a point source leak into groundwater (not a water of the United States) eventually contaminates a water of the United States, does the CWA apply?

Upstate Forever v. Kinder Morgan (4th Cir.)

Kinder Morgan Energy Partners operates, through a subsidiary, the Plantation Pipeline network that runs 3,180 miles from Louisiana to Washington, D.C. The pipeline and its various branches serve Birmingham, Atlanta, Charlotte, and D.C., as well as 90 shipper delivery terminals throughout the 8 states. In December 2014, the Plantation Pipeline leaked more than 369,000 gallons of gasoline into the surrounding groundwater in South Carolina. Although Kinder Morgan immediately repaired the pipeline and began cleanup and recovery, an estimated 160,000 gallons remained in the groundwater. There is currently ongoing remediation under the supervision of the South Carolina Department of Health and Environmental Control in an attempt to mitigate any further impacts.

However, by 2016 the plume of contaminants had reach Browns Creek and Cupboard Creek, both tributary to the Savannah River. The pipeline leak was approximately 1,000 feet upgradient from the two tributaries. A coalition of environmental groups filed suit in the District Court for South Carolina in December 2016, claiming that the pollutants had now reached the two creeks (waters of the United States) and therefore Kinder Morgan was polluting those waters without a permit in violation of the CWA. The CWA allows for citizens suits giving the public the ability to enforce the act through the courts. 33 U.S.C. 1365(a).

The U.S. District Court found that it lacked subject matter jurisdiction because CWA suits may only be brought for point source discharges into navigable waters, i.e. waters of the United States. Because Kinder Morgan had repaired the pipeline and the leak did not discharge directly into a navigable water, the District Court said, the CWA was not implicated in the spill. The plaintiffs then appeal to the Fourth Circuit.

The Fourth Circuit's Decision

On appeal, Kinder Morgan argued first that any CWA violation ceased once the pipeline was repaired (in 2014), and alternatively that seepage into ground-

water is not a point source that is able to be regulated by the CWA. The court dismissed the first argument holding that nothing in the CWA bars plaintiffs from seeking relief after the initial cause of the pollution has been repaired.

Turning to actual CWA liability, the Fourth Circuit reversed the lower decision holding that:

> . . .a discharge that passes from a point source through groundwater to navigable waters may support a claim under the CWA.

It was not disputed that a pipeline leaking directly into a navigable water would impose CWA liability. Rather, Kinder Morgan's argument was that groundwater is so dispersed that eventual groundwater seepage into a navigable water would not meet the definition of a point source.

The Court of Appeals was purposely narrow in its decision, clarifying that groundwater contamination would not always support CWA liability. "Instead, the connection between a point source and the navigable waters must be clear." Therefore a fact inquiry will always be necessary to determine the hydrological connection between the point source and the navigable waters. If that connection is clear, like the 1,000 seepage between the Plantation Pipeline and Browns and Cupboard Creeks, then the CWA will apply.

Kinder Morgan filed a writ of *certiorari* to the U.S. Supreme Court on August 28. Since that time, the Pacific Legal Foundation, American Petroleum Institute, the State of West Virginia, and the Chamber of Commerce of the United States of America have all filed *amicus* briefs.

Tennessee Clean Water Network v. TVA (6th Cir.)

Tennessee Valley Authority (TVA) is a major source of electricity generation throughout the South, providing power to most of Tennessee as well as parts of Alabama, Mississippi, Georgia, North Carolina, and Kentucky. One of its power plants is coal-fired system on the banks of the Cumberland River. The plant disposes of the coal ash in several man-made ponds directly adjacent to the river. The plant holds a discharge permit for some wastewater, but the Tennessee Clean Water Network (TCWN) alleges that the unlined ash ponds have been leaking, and those contaminants are then transported through the groundwater a short distance to the Cumberland River.

In 2017, the U.S. District Court found in favor of TCWN, using the same "hydrological connection theory" that the Fourth Circuit eventually relied on in *Kinder Morgan*. Holding that "a cause of action based on authorized point source discharge may be brought under the CWA…if the hydrological connection between the source of pollutants and navigable waters is direct, immediate, and can be generally traced," the court directed TVA to move the coal ash to lined pits at a cost of $2 billion. TVA then appealed to the Sixth Circuit.

The Sixth Circuit's Decision

On appeal, the Sixth Circuit reversed, basing its decision on the CWA's definition of point sources and thereby finding that it "excludes the migration of pollutants through groundwater." The CWA provides that a point source must be "a discernible, confined, and discrete conveyance." The court hinged on that definition to say that the point of discharge into the Cumberland River (groundwater seepage) did not meet that standard. Clarifying its position, the court said:

> . . .while groundwater may indeed be a 'conveyance' in that it carries pollutants…it is not 'discernible,' 'confined,' or 'discrete.'

This position was supported by the court's finding that the ash ponds themselves were not point sources because the seepage was diffuse.

The dissenting opinion called the decision "way off the rails" and pointed out that polluters can now escape CWA liability by "moving [their] drainage pipes a few feet from the river bank." The majority opinion acknowledged TVA's contamination as a "major environmental problem" but held that the Resource Conservation and Recovery Act is a more appropriate avenue for relief because groundwater does not fit within the definitions of the CWA.

TCWN has not yet filed a writ of *certiorari*, but an appeal is likely, especially in light of the circuit split from the Fourth Circuit.

Conclusion and Implications

The Circuit split has made it likely this case will be taken up by the Supreme Court. The two Circuit

decisions used essentially the same law and reasoning to arrive at opposite conclusions, making Supreme Court review the proper avenue to decide the issue. The EPA seems to support the Fourth Circuit, as it has previously endorsed the hydrological connection theory. Under the Trump administration, EPA is apparently reconsidering its previous statements. The EPA requested comments on "whether the Agency should consider clarification or revision of those statements." The period to provide comments closed on May 21, 2018, so a rule is expected in late 2018 or early 2019.
(John Sittler, Paul Noto)

DISTRICT COURT EXPANDS ENVIRONMENTAL PROTECTIONS IN THE U.S.-MEXICO BORDER REGARDING WATER CONTAMINATION IN THE TIJUANA RIVER VALLEY

City of Imperial Beach, et al. v. International Boundary Commission-United State Section, ___F.Supp.3d___, Case No. 18cv457-JM-JMA (S.D. Cal. 2018).

On August 29, the Honorable Jeffrey T. Miller, U.S. District Judge in San Diego, denied in part the United States International Boundary and Water Commission's (IBWC) motion to dismiss the lawsuit brought against it by the City of Imperial Beach, Chula Vista, and the Port of San Diego (plaintiffs) for violations of the federal Clean Water Act (CWA). The intent of the suit is to force the USIBWC to take action against the cross-border flows that routinely close the Imperial Beach shoreline and have even come to impact the Coronado beaches. The Judge's ruling means that the suit can move forward.

The International boundary and Water Commission and the Parties

The IBWC is an international body that was formed by the United States and Mexico in 1889 to resolve disputes over the Mexican-American boundary line formed by the Colorado and Rio Grande rivers. The IBWC is comprised of its U.S. Section (USIBWC) and its Mexican counterpart, the Comision Internacional de Limites y Aquas (CILA) to conquer water quality issues created by the discharges of the Colorado, Rio Grande, and Tijuana Rivers at the U.S. and Mexican border.

Transboundary currents often bring in large amounts of contaminants and pollutants from the Tijuana River Valley to other beaches in and around the Greater San Diego Area in California, affecting the area's marine environment through oxygen depletion and chemical toxicity. The City of San Diego has declared a continued state of emergency since 1993 due to these sewage discharges. More recently in March of 2017, the state of Baja California also declared a state of emergency due to the vast amount of raw sewage flowing from the Tijuana sewage collection system into the waters of Tijuana and the Tijuana River valley.

In 1944 the U.S. and Mexico entered into a Treaty (1944 Treaty) to monitor and maintain the boundary and transboundary rivers and streams of the Colorado, Rio Grande, and Tijuana Rivers. The 1944 Treaty gives the IBWC jurisdictional authority to resolve "border sanitation problems" or instances where:

> . . .the waters that cross the border, including coastal waters, or flow in the limitrophe reaches the Rio Grande and Colorado River, have sanitary conditions that present a hazard to health and well-being of the inhabitants of either side of the border or impair the beneficial uses of these waters. (Minute No. 261 at 2.)

Today, the USICWC and CILA work cohesively to exercise the rights and obligations of their respective governments in accordance with the 1944 Treaty. Under the 1944 Treaty:

> . . .[n]either Section shall assume jurisdiction or control over works located within the limits of the country of the other without the express

consent of the Government of the latter. (1944 Treaty, Art. 2.)

On September 24, 1979, both the USIBWC and CILA agree to:

> . . .give permanent attention to border sanitation problems and give currently existing problems immediate and priority attention.

In an effort to further address border sanitation, the Sections approved the Conceptual Plan for the International Solution to the Border Sanitation Problem in San Diego, California/Tijuana, Baja California on July 2, 1990. (Minute No. 283 at 4.) The conceptual plan provides the framework for the design, construction, and operation of the South Bay International Wastewater Treatment Plan and its facilities (South Bay Plant), an international sewage collection and secondary treatment plant.

The South Bay Plant

The South Bay Plant is located in the Tijuana River Valley in the City of San Diego and is owned by USIBWC. By way of six canyon collectors, the South Bay Plant collects and treats overflow wastewater from Mexico from the Tijuana River and its tributaries. The South Bay Plant is maintained and operated by Veolia, a limited liability company headquartered in Delaware.

Due to the wastewater's ultimate discharge in the Pacific Ocean, the South Bay Plant and its canyon collectors are subject to the terms of the Clean Water Act National Pollutant Discharge Elimination System (NPDES) permit. The NPDES permit only authorizes discharges in the Pacific Ocean through the South Bay Ocean Outfall, and only after the pollutants have undergone a second treatment at the South Bay Plant.

Flooding Issues and Flood Control Conveyance

There has been an increasing problem with uncontrolled transboundary flows that lead to frequent beach closures in the City of Imperial Beach and its adjacent areas. Tijuana's sewer system frequently fails, resulting in uncollected waters flowing across the U.S. -Mexican Border. Often times, these flows exceed South Bay Plant's capacity and as a result, the wastewater goes untreated. Similarly, CILA's wastewater treatment facility's capacity is also exceeded, leading to further drainage from Mexico into the U.S. via the Tijuana River.

The USIBWC constructed a flood control conveyance (Conveyance) that begins at the U.S. border with Mexico. It directs overflow water and waste in a route that is west of the Tijuana River's natural route. As a result, the water now flows in a manner that carves a new path of the Tijuana River (New Tijuana River) which flows downstream to the Conveyance, redirecting it to a CILA Diversion. However, the redirection often does not protect against high volume flows.

Procedural Background

In March 2, 2018, plaintiffs filed a complaint in federal court against the USIBWC and Veolia (defendants). Plaintiffs allege a total of three causes of actions against the defendants: (1) against the USIBWC discharges of pollutants from the flood control conveyance without a NPDES permit in violation of the Clean Water Act § 1311(a), 1342; (2) against both defendants' discharges of pollutants from the canyon collectors in violation of the CWA and NPDES permit, and (3) against both defendants for violation of § 6972 the federal Resource Conservation and Recovery Act (RCRA). Defendants filed separate motions to dismiss, aiming to dismiss all three causes of actions.

The District Court's Decision

As to the alleged violations of the CWA, the U.S. District Court stated that the plaintiffs must establish that the USIBWC "discharged" a pollutant to navigable waters from a point source. The main dispute is whether the polluted water collected and flowing through the Conveyance which created the New Tijuana River, qualifies as a "discharge" under the CWA. Other courts have considered the transfer of polluted water within two portions of the same body of water not to constitute a discharge. Following, the court noted that a factual determination was necessary to determine whether or not the New Tijuana River is considered a distinct body of water or merely a tributary.

The court also reviewed the merits of the alleged violations of the NPDES permit for the South Bay Plant. The NPDES permit prohibits any discharge of waste to a location other than the South Bay Ocean Outfall. The USIBWC argued that the overflow from the canyon collectors does not constitute a discharge under the NPDES permit but constitutes a Flow Event Type A, which is defined as a:

> . . .dry weather transboundary treated or untreated wastewater or other flow through a conveyance structure...and not diverted into the canyon collector system for treatment.

The court disagreed and interpreted "discharge," in this instance, to include the flow of untreated water through a conveyance structure. Therefore, the court denied defendants' motion to dismiss the second cause of action.

The court also denied Veolia's motion to dismiss for lack of subject matter jurisdiction. Veolia claimed that the plaintiffs' lack of standing in their suit against the LLC for two main reasons. First, Veolia claimed that it was not the source of the pollution and therefore, the plaintiff's cannot trace the pollution to Veolia. However, the court disagreed and determined that the NPDES permit under which Veolia operates requires it to clean up wastewater from Mexico and therefore, Veolia failed fulfill its duty and caused the plaintiffs' harm. Second, Veolia argued that the primary cause of the overflow is attributed to inadequate wastewater facilities—an issue that can only be resolved with the IBWC, not Veolia. Again, the court disagreed and stated that Veolia's failure to mitigate and clean up the overflow was a redressable issue.

Lastly, the court reviewed plaintiff's argument as to alleged violations of the Resource Conservation and Recovery Act by the USIBWC for contributing to the:

> . . .design, construction, operation, maintenance, and monitoring of the transnational wastewater collection treatment system originating in Mexico.

Section 6972(a)(1)(b) of RCRA grants any citizen the authority to commence of a civil action against a past or current owner or operator a wastewater treatment facility who has:

> . . .contributed or who is contributing to the past or present handling, storage, treatment , transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

Because Mexico is obligated to operate and maintain its own water treatment systems, the USIBWC argued that it cannot be held liable under RCRA for maintaining a treatment plant in Tijuana. The court agreed with USIBWC and granted the motion to dismiss on this cause of action.

Conclusion and Implications

The court's handling of this international water pollution issue is a clear example that courts are moving toward providing greater protections to the environment. Not only did the court broadly interpret the NPDES permit definition of "discharge" to include flows of water through a conveyance structure, but it also held entities liable for their failure to mitigate a source of pollution that the entity did not create itself. A continued increase of rulings in favor of environmental protections can be expected. (Rachel S. Cheong, David D. Boyer)

NATIONWIDE INJUNCTION HALTS TRUMP ADMINISTRATION RULE SUSPENDING THE OBAMA-ERA RULE DEFINING 'WATERS OF THE UNITED STATES'

South Carolina Coastal Conservation League et al. v. Pruitt, 318 F.Supp.3d 959 (D. S.C. 2018).

In February 2018, the U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) promulgated a rule to suspend the Obama-era regulatory definition of "waters of the United States" (WOTUS) in the federal Clean Water Act (CWA) for two years. The so-called "Suspension Rule" has itself been suspended.

In *South Carolina Coastal Conservation League et al. v. Pruitt*, 318 F.Supp.3d 959 (D. S.C. 2018), a U.S. District Court in South Carolina held that the EPA and the Corps were arbitrary and capricious in promulgating the Suspension Rule and issued a nationwide injunction enjoining it. However, over half the states have obtained injunctions against the 2015 WOTUS Rule. *Texas v. U.S. EPA*, Case No. 3:15-cv-00162 (S.D. Tex. Sept. 12, 2018); *Georgia v. Pruitt*, Case No. 2:15-cv-00079 (S.D. Ga. June 8, 2018); *North Dakota v. U.S. EPA*, 127 F.Supp.3d, 1047 (D. N.D. 2015). The South Carolina decision regarding the Suspension Rule only affects the remaining states.

Background

The Clean Water Act, enacted in 1972, provides certain protections for "navigable waters." The act defines "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362 (7). The term "waters of the United States" was in turn defined by the EPA and the Corps starting in the early 1980s. For more than 30 years, the 1980s definition informed farmers' and businesses' practices in complying with the CWA and the agencies' practices in administering the Act. In that time, judicial interpretation of the agency definition scrutinized the scope of the term. *Rapanos v. U.S.*, 547 U.S. 715, 739 (2006). In 2015, under the Obama administration, the EPA and the Corps revisited the definition of WOTUS. The resulting regulation, the WOTUS Rule, redefined the term to be more expansive. 80 Fed. Reg. 37054-01. This brought previously unprotected bodies of water into the purview of the CWA.

Several lawsuits were brought in different District Courts to challenge the 2015 WOTUS Rule. The Judicial Panel on Multi-District Litigation (JPML) declined to centralize the actions, so each case proceeded independently. In one of these cases, the North Dakota District Court granted thirteen states an injunction against the WOTUS Rule. *North Dakota v. U.S. EPA*, 127 F.Supp.3d, 1047 (D.N.D. 2015). The scope of that injunction was limited to the states involved in the action.

Other suits were filed directly in the Courts of Appeals. The JPML did consolidate these suits, and transferred the case to the U.S. Court of Appeals for the Sixth Circuit. The Sixth Circuit issued a stay of the rule in 2015 and later, in 2016, explicitly decided that it had original jurisdiction over challenges to the WOTUS Rule. *In re U.S. Department of Defense*, 817 F.3d 261 (6th Cir. 2016); *In re EPA*, 803 F.3d 804 (6th Cir. 2016). As a result, each of the pending U.S. District Court cases across the country were either stayed or administratively closed, but the North Dakota injunction stayed in place. The government appealed the Sixth Circuit Court of Appeals' decision, and the U.S. Supreme Court agreed to hear the case.

Meanwhile, in February 2017, as one of his first acts as President, Donald Trump issued Executive Order 13778 directing the EPA and the Corps to review the WOTUS Rule and rescind or reverse it to ensure consistency with the administration's policy objectives. One of the main goals stated in the Executive Order was to "minimize regulatory uncertainty."

On January 22, 2018, the Supreme Court ruled that the Sixth Circuit Court of Appeals did not have original jurisdiction to review the WOTUS rule. *National Association of Manufacturers v. Department of Defense et al.*, 138 S.Ct. 617 (2018). The lower court accordingly vacated the nationwide stay of the rule. *In re U.S. Dep't of Defense*, 713 F.App'x 489 (6th Cir. 2018). In the wake of that decision, 14 more states obtained District Court injunctions against the 2015 WOTUS Rule from District Courts in Texas and

Georgia. *Texas v. U.S. EPA*, Case No. 3:15-cv-00162 (S.D. Tex. Sept. 12, 2018); *Georgia v. Pruitt*, Case No. 2:15-cv-00079 (S.D. Ga. June 8, 2018).

Earlier this year, on February 6, the EPA and the Corps promulgated the Suspension Rule, which aimed to suspend the Obama-era WOTUS Rule until 2020, and restore the 1980s definition in all states in the interim. Again, litigation ensued.

The South Carolina Case

On the same day the Suspension Rule went into effect, environmental plaintiffs in South Carolina brought suit to challenge the rule under the Administrative Procedure Act (APA). Plaintiffs alleged inadequate notice and comment, failure to consider substantive implications of suspending the 2015 WOTUS Rule, and failure to publish the language of the 1980s definition, which the government intended to have legal effect.

Judge David C. Norton of the U.S. District Court for the District of South Carolina granted summary judgement for the plaintiffs. *South Carolina Coastal Conservation League et al. v. Pruitt*, 318 F.Supp.3d 959, 967 (D. S.C. 2018). The court pointed out that in promulgating the Suspension Rule, the agencies did not allow the public to comment on the substance of either the 2015 WOTUS Rule or the 1980s regulation. The court concluded that the agency action was arbitrary and capricious, explaining:

> . . .the APA 'requires that the pivot from one administration's priorities to those of the next be accomplished with at least some fidelity to law and legal process.' *Id.*

The EPA and Corps did not meet this standard. Accordingly, the judge issued a nationwide stay of the Suspension Rule, restoring the 2015 WOTUS Rule to full effect.

Conclusion and Implications

Because 27 states have essentially suspended the 2015 WOTUS Rule through the courts, the nationwide injunction against the Suspension Rule only affects the remaining twenty-three. The future of the WOTUS Rule in those twenty-three states still hangs in the balance. The American Farm Bureau Federation and other interested parties have urged the Georgia District Court to amend the scope of its injunction against the WOTUS Rule to cover all the states. At the same time, the EPA and the Corps have appealed the South Carolina case to the Fourth Circuit, docket number 18-01988, to challenge the validity of the nationwide stay of the Suspension Rule. However, both cases may become moot. It has been reported that Acting EPA Administrator Andrew Wheeler has indicated that a new WOTUS rule will be proposed before the end of the year. It is likely that a new WOTUS rule will spawn more legal challenges, so the certainty the Trump administration had intended to restore may still be beyond reach. (Chelsie Liberty, Meredith Nikkel)

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