Volume 13, Number 10
December 2018

EASTERN WATER LAW™

& POLICY REPORTER

CONTENTS

Continued on next page

Publisher's Note:

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

WWW.ARGENTCO.COM

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

EWL

FEATURE ARTICLE

THE TRUMP ADMINISTRATION AND THE FOURTH NATIONAL CLIMATE ASSESSMENT: IMPACTS TO WATER, FARMING, AND SPECIES WILL BE DIRE

By Kathryn M. Casey, and Eddy Beltran

Even before taking the presidency, Donald Trump freely expressed his climate change skepticism on Twitter®:

> The concept of global warming was created by and for the Chinese in order to make U.S. manufacturing non-competitive. [November 6, 2012];
>
> They changed the name from "global warming" to "climate change" after the term global warming just wasn't working (it was too cold)! [March 25, 2013];
>
> Ice storm rolls from Texas to Tennessee—I'm in Los Angeles and it's freezing. Global warming is a total, and very expensive, hoax! [December 6, 2013];
>
> NBC News just called it the great freeze—coldest weather in years. Is our country still spending money on the GLOBAL WARMING HOAX? [January 25, 2014].

While these statements are attention grabbers, climate change proponents have been more concerned about President Trump's actions. Since taking office, President Trump has changed the way scientific information is gathered at the federal level, has rolled back and continues to roll back many of President Barack Obama's climate change policies, and has questioned, distorted or otherwise ignored climate change conclusions in federal reports.

Climate change proponents are hopeful that the new make-up of Congress after the mid-term elections will alter the pattern established by President Trump and may once again bring back scientific climate change debate. The Trump administration's response to the release of the Fourth National Climate Assessment, however, shows that the hoped for change may be hard to come by.

The Trump Administration's Revised Scientific Approach to Climate Change

In October 2017, then acting U.S. Environmental Protection Agency (EPA) Administrator Scott Pruitt, eliminated a number of EPA scientist and academic advisory positions and also issued new rules that would prevent anyone who receives EPA grant money from serving on EPA scientific advisory panels. Some have opined that the new rule takes advisory positions away from academics and transfers them to industry representatives.

According to the EPA, in October 2018, EPA's acting Administrator, Andrew Wheeler, disbanded the Clean Air Scientific Advisory Committee Particulate Matter Review Panel, which, according to EPA, was:

> . . .charged with providing advice on the scientific and technical aspects of the policy-relevant science and the National Ambient Air Quality Standards (NAAQS) for particulate matter. The panel had been focused on developing more stringent standards for soot produced by cars and trucks and other sources. Similarly, the EPA also eliminated a plan for another panel of experts to review smog impacts. Some have described these EPA actions as attempts to cut science out of the rulemaking process.

Climate change proponents have also argued that even when federal reports acknowledge climate change, the Trump administration has used the information to propose actions contradictory to the information contained in the reports. One example is the recent Draft Environmental Impact Statement (DEIS) issued in connection with the Trump administration's proposed Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks (SAFE Vehicles Rule).

The proposed SAFE Vehicles Rule, announced by the Trump administration on August 1, 2018, is a plan to freeze vehicle emission standards at model year 2020 levels. It has been widely criticized by many, including environmentalists and the State of California. According to the DEIS, global temperatures are expected to rise by seven degrees by the end of the century. This DEIS conclusion, however, has not been used by the Trump administration as proof that climate change is real or to address or mitigate the potential impact from implementation of the SAFE Vehicles Rule. Instead, it is being used to support a conclusion that although the SAFE Vehicles Rule would likely increase greenhouse gas emissions, the amount would be infinitesimal when compared to the seven degree projected temperature rise.

The Fourth National Climate Assessment

While many in the United States were enjoying turkey leftovers, watching college football or Black Friday shopping, the Trump administration quietly released the Fourth National Climate Assessment. Known as "NC4," the report is required under The Global Change Research Act of 1990, which mandates that the U.S. Global Change Research Program (USGCRP) deliver a report to Congress and the President every four years that:

> 1) integrates, evaluates, and interprets the findings of the [USGCRP]…; 2) analyzes the effects of global change on the natural environment, agriculture, energy production and use, land and water resources, transportation, human health and welfare, human social systems, and biological diversity; and 3) analyzes current trends in global change, both human-induced and natural, and projects major trends for the subsequent 25 to 100 years.

The NC4, at over 1,600 pages, was prepared by a "team of more than 300 experts guided by a 60-member Federal Advisory Committee" and "was extensively reviewed by the public and experts, including federal agencies and a panel of the National Academy of Sciences." The NC4 concludes that global warming is attributable to human causes and that only:

> . . .steep reductions in greenhouse gas emissions can alter the upward trajectory of air and ocean temperatures and their related impacts.

According to the NC4, it "aims to present findings in the context of risks to natural and/or human systems."

In preparing the report, the NC4 authors considered the following questions: 1) What do we value? What is at risk? 2) What outcomes do we wish to avoid with respect to these valued things? 3) What do we expect to happen in the absence of adaptive action and/or mitigation? and 4) How bad could things plausibly get? Are there important thresholds or tipping points in the unique context of a given region, sector, and so on?

The 12 Summary Findings

The NC4 contains 12 summary findings, which represent "a very high-level synthesis" of the material in the report. The findings are addressed below.

- Communities—Climate change creates new risks and exacerbates existing vulnerabilities in communities across the United States, presenting growing challenges to human health and safety, quality of life, and the rate of economic growth.

- Economy—Without substantial and sustained global mitigation and regional adaptation efforts, climate change is expected to cause growing losses to American infrastructure and property and impede the rate of economic growth over this century.

- Interconnected Impacts—Climate change affects the natural, built, and social systems we rely on individually and through their connections to one another. These interconnected systems are increasingly vulnerable to cascading impacts that are often difficult to predict, threatening essential

services within and beyond the Nation's borders.

•Actions to Reduce Risks—Communities, governments, and businesses are working to reduce risks from and costs associated with climate change by taking action to lower greenhouse gas emissions and implement adaptation strategies. While mitigation and adaptation efforts have expanded substantially in the last four years, they do not yet approach the scale considered necessary to avoid substantial damages to the economy, environment, and human health over the coming decades.

•Water—The quality and quantity of water available for use by people and ecosystems across the country are being affected by climate change, increasing risks and costs to agriculture, energy production, industry, recreation, and the environment.

•Health—Impacts from climate change on extreme weather and climate-related events, air quality, and the transmission of disease through insects and pests, food, and water increasingly threaten the health and well-being of the American people, particularly populations that are already vulnerable.

•Indigenous Peoples—Climate change increasingly threatens Indigenous communities' livelihoods, economies, health, and cultural identities by disrupting interconnected social, physical, and ecological systems.

•Ecosystems and Ecosystem Services—Ecosystems and the benefits they provide to society are being altered by climate change, and these impacts are projected to continue. Without substantial and sustained reductions in global greenhouse gas emissions, transformative impacts on some ecosystems will occur; some coral reef and sea ice ecosystems are already experiencing such transformational changes.

•Agriculture and Food—Rising temperatures, extreme heat, drought, wildfire on rangelands, and heavy downpours are expected to increasingly disrupt agricultural productivity in the United States. Expected increases in challenges to livestock health, declines in crop yields and quality, and changes in extreme events in the United States and abroad threaten rural livelihoods, sustainable food security, and price stability.

•Infrastructure—Our Nation's aging and deteriorating infrastructure is further stressed by increases in heavy precipitation events, coastal flooding, heat, wildfires, and other extreme events, as well as changes to average precipitation and temperature. Without adaptation, climate change will continue to degrade infrastructure performance over the rest of the century, with the potential for cascading impacts that threaten our economy, national security, essential services, and health and well-being.

•Oceans and Coasts—Coastal communities and the ecosystems that support them are increasingly threatened by the impacts of climate change. Without significant reductions in global greenhouse gas emissions and regional adaptation measures, many coastal regions will be transformed by the latter part of this century, with impacts affecting other regions and sectors. Even in a future with lower greenhouse gas emissions, many communities are expected to suffer financial impacts as chronic high-tide flooding leads to higher costs and lower property values.

•Tourism and Recreation—Outdoor recreation, tourist economies, and quality of life are reliant on benefits provided by our natural environment that will be degraded by the impacts of climate change in many ways.

The NC4 notes that although climate change cannot be stopped overnight "or even over the next several decades," the amount of climate change can be limited "by reducing human-caused emissions of greenhouse gases." According to NC4, the:

> . . .challenge in slowing or reversing climate change is finding a way to make these changes on a global scale that is technically, economically, socially, and politically viable.

The Trump Administration Reacts to the Fourth National Climate Assessment

The NC4 was scheduled to be released in early

December 2018. When questioned about the draft NC4 by Axios on HBO® reporters in early November 2018, President Trump, while acknowledging that climate change is real, said he had not read it and disputed conclusions that humans are responsible for climate change and that actions are needed to prevent further harm. Instead, President Trump opined that climate change is cyclical and environmental conditions could "go back" on their own.

On Thanksgiving Eve, President Trump continued his criticism by tweeting:

> Brutal and Extended Cold Blast could shatter ALL RECORDS - Whatever happened to Global Warming? [November 21, 2018].

Then, after releasing the NC4 on "Black Friday," the White House moved quickly to discredit it. White House Deputy Press Secretary Lindsay Walters issued a statement noting that the preparation of the NC4 had begun during President Barack Obama's administration and stating that although there were many potential scenarios, the NC4 was "largely based on the most extreme scenario." Ms. Walters also remarked that the next National Climate Assessment, which would be issued during a second term for President Trump, would be prepared under a "more transparent and data-driven process that includes fuller information on the range of potential scenarios and outcomes."

Katherine Hayhoe, the NC4's co-author, provided a quick response on Twitter and defended the NC4:

> I wrote the climate scenarios chapter myself so I can confirm it considers ALL scenarios, from those where we go carbon negative before end of century to those where carbon emissions continue to rise. What WH says is demonstrably false. [November 23, 2018]

On November 26, 2018, reporters asked President Trump if he had read the NC4. President Trump said, "I've seen it. I've read some of it, and it's fine." One reporter followed up and asked him what he thought about the NC4's conclusion that the economic impact of climate change would be devastating. President Trump dismissed the conclusion stating: "I don't believe it." When the reporter said "You don't believe it?," President Trump again stated, "No, no, I don't believe it." President Trump then remarked that the United States is the cleanest it has ever been, but if the United States is "clean, but every other place on earth is dirty, that's not so good."

The Democrats' Response and the Green New Deal

Democrats in Congress opined that the Trump administration sought to bury the NC4 by releasing it on Black Friday. In a statement, United States Senator Edward Markey, chairman of the Senate Climate Change Task Force, said:

> The Trump administration may want to bury this report so that it doesn't get attention, but we can't bury our heads in the sand to the threat of climate change. We need to take action now to reduce carbon pollution and implement the clean energy solutions that will help save our planet.

On November 23, 2018, newly-elected representative Alexandria Ocasio-Cortez, a Democrat from New York, tweeted, "People are going to die if we don't start addressing climate change ASAP" when retweeting a CNN tweet about the release of the NC4. In her tweet, Representative-elect Ocasio-Cortez also pushed for her proposed Green New Deal, having previously posted a draft resolution on her website calling for the establishment of a United States House of Representatives Select Committee For A Green New Deal.

On November 25, 2018, in a retweet of a tweet by @thehill about her draft resolution, Representative-elect Ocasio-Cortez summarized her proposal as follows:

> 1. Aspirational Goals: Push the limits of what's possible.
> 2. Nuts + Bolts: Our lives are on the line. We shouldn't let the planet be destroyed because it's "too expensive" to save.
> 3. Supporters: Many
> 4. Opponents: Fossil fuel industry
> 5. Beyond Energy: A Federal Jobs Guarantee"

As set forth in the draft resolution, the select committee would have the:

> . . .authority to develop a detailed national, industrial, economic mobilization plan [the "Plan for a Green New Deal"] for the transition of the United States economy to become carbon neutral and to significantly draw down and capture greenhouse gases from the atmosphere and oceans and to promote economic and environmental justice and equality.

Specifically, the Plan for a Green New Deal would be developed in order to achieve the following within ten years from the start of the plan:

- 100 percent of national power generation from renewable sources;
- building a national, energy-efficient, "smart" grid;
- upgrading every residential and industrial building for state-of-the-art energy efficiency, comfort and safety;
- decarbonizing the manufacturing, agricultural and other industries;
- decarbonizing, repairing and improving transportation and other infrastructure;
- funding massive investment in the drawdown and capture of greenhouse gases;
- making "green" technology, industry, expertise, products and services a major export of the United States, with the aim of becoming the undisputed international leader in helping other countries transition to completely carbon neutral economies and bringing about a global Green New Deal.

Conclusion and Implications

Since being elected, President Trump has seemingly slowly backed away from his opinion that climate change is a hoax. However, he does not appear to agree that humans are responsible for climate change or that any action is needed to address climate change. In addition, President Trump and his administration continue to attack or attempt to discredit federal reports that detail the expected impacts from climate change.

The result of the recent Congressional mid-term elections may impact that approach, however, because many high-ranking Democrats have recently announced that the House of Representatives will hold hearings on the impacts of climate change and potential solutions when they take the majority in the House in 2019. Those hearings may include discussions of some of the goals outlined in Representative-elect Ocasio-Cortez's Green New Deal proposal, especially if she is able to obtain a seat on the House of Representatives' Energy and Commerce Committee.

Kathryn M. Casey is a Shareholder at Jackson Tidus, in its Irvine office and is a member of the firm's Environmental, Land Use Development, and Litigation departments. Kathryn represents clients before local agencies and special districts in defending air quality and permit violation notices, and in obtaining variances, permits, and other entitlements. Kathryn also represents clients regarding environmental mitigation and regulatory compliance in matters related to CEQA, NEPA, the Clean Air Act, Political Reform Act, Outdoor Advertising Act and other environmental, real estate and municipal law issues. Kathryn is a member of the Editorial Board of the *Climate Change Law & Policy Reporter*.

Eddy Beltran is Of Counsel at Jackson Tidus in its Irvine office. He is a member of the firm's Land Use Development group and advises clients on all aspects of CEQA compliance including the preparation of negative declarations and environmental impact reports. Prior to joining Jackson Tidus, Eddy spent over a decade providing legal counsel to public water agencies and helping them reach their goals of delivering safe and dependable water to their customers.

EASTERN WATER NEWS

PRESIDENT TRUMP ISSUES MEMORANDUM CALLING FOR STREAMLINED ESA AND NEPA COMPLIANCE FOR MAJOR WATER PROJECTS

President Donald Trump recently issued a memorandum with directives to minimize regulatory burdens and maximize efficiency for major water Projects in order to meet increasing water demands. The President called upon the U.S. Secretary of the Interior and the Secretary of Commerce (collectively: the Secretaries) to promptly prepare reports and action plans for major federal water and power Projects in California and the western United States.

Background

The "Presidential Memorandum on Promoting the Reliable Supply and Delivery of Water in the West" (Memorandum) recounts the federal government's extraordinary 20th Century investments in water infrastructure throughout the western United States. That infrastructure provided water supplies for farms, families, businesses, and fish and wildlife, as well as flood control and hydropower. The Memorandum proclaims that these investments have been jeopardized and that unnecessary conflicts have arisen as a result of decades of uncoordinated, piecemeal regulatory actions that have diminished the ability of that infrastructure to deliver water and power in an efficient, cost-effective way.

Streamline Western Water Infrastructure Regulatory Processes

The Memorandum directs the Secretaries to take specific actions within 30 days, including identifying all major water infrastructure projects (Projects) in California for which the U.S. Department of the Interior and the Department of Commerce have joint responsibility under the federal Endangered Species Act (ESA) or individual responsibilities under the National Environmental Policy Act (NEPA). For each of the identified Projects, the Secretaries must designate one official to coordinate the agencies' ESA and NEPA compliance responsibilities.

That designated official must, within the same 30-day timeframe, propose plans to:

> . . .suspend, revise, or rescind any regulations or procedures that unduly burden the Projects beyond the degree necessary to protect the public interest or otherwise comply with the law.

A "burden" is defined in the Memorandum as something that would:

> . . .unnecessarily obstruct, delay, curtail, impede, or otherwise impose significant costs on the permitting, utilization, transmission, delivery, or supply of water resources and infrastructure.

Within ten days after presenting those proposed plans for regulatory reduction and efficiency, the Secretaries must also present a timeline for completing applicable environmental compliance requirements for the Projects. The Memorandum directs environmental compliance requirements to be completed as expeditiously as possible and in accordance with applicable law, and specifically requires the Secretaries to:

- Ensure that the ongoing review of the long-term coordinated operations of the Central Valley Project (CVP) and the California State Water Project (SWP) is completed and that an updated plan of operations and record of decision is issued. The Secretary of the Interior is directed to issue a final biological assessment of those continued operations by no later than January 31, 2019.

- Issue their respective final biological opinions for the long-term coordinated operations of the CVP and SWP within 135 days of the final biological assessment. To the extent practicable and consistent with law, these shall be joint opinions.

- Complete the joint consultation presently underway for the Klamath Irrigation Project by August 2019.

The Secretaries are to fulfill these responsibilities to the maximum extent practicable and consistent with applicable law, including the authorities granted to them under the new Water Infrastructure Improvements for the Nation Act (see related article, page 281 in this issue).

Improve Forecasts of Water Availability and Use Technology to Increase Reliability

The Secretaries are directed to convene water experts and managers and to develop an action plan by January 2019 to facilitate greater use of weather forecast-based modeling for water and infrastructure management.

The Secretary of the Interior is also specifically directed to promote the expanded use of technology to improve the accuracy and reliability of water and power deliveries. That promotion should include investments in technology and reduction of regulatory burdens to enable broader scale deployment of desalination technology and use of recycled water. It should also include investments in programs that promote and encourage innovation, research, and development of technology that improve water management through real-time monitoring of wildlife and water deliveries.

Consider Locally Developed Plans in Hydroelectric Projects Licensing

Though with less detail, the Memorandum directs the Secretaries to "give appropriate consideration to any relevant information available to them in locally developed" hydroelectric projects to the extent the Secretaries participate in Federal Energy Regulatory Commission licensing activities and to the extent permitted by law.

Also, in order to address water and hydropower operations challenges in the Columbia River Basin, the Memorandum calls upon the Secretaries, as well as the Secretary of Energy and the Assistant Secretary of the Army for Civil Works, to develop and submit within 60 days a schedule to complete the Columbia River System Operations Environmental Impact Statement and the associated biological opinion that is due by 2020.

Reactions to the Memorandum

In response to the Memorandum, U.S. Secretary of the Interior Ryan Zinke said:

> Water is the lifeblood of any thriving economy, and its importance in the West cannot be overstated. We want to use water in the most practical sense, and make sure our water infrastructure is in world class shape for all uses. Working to get our farms the water they need is key to rural prosperity, and I applaud President Trump for making this key issue a top priority of his administration.

As the Memorandum was being signed by the President, U.S. Representative Tom McClintock (R-Calif.) stated that:

> . . .this order today and the other actions by this administration, and the bills that have been passed out of the House, move us back toward an era of abundance as the cornerstone of our water and power policy, rather than the scarcity and rationing that two generations of bad laws and bad regulations have imposed on one of the most water-rich regions of the country.

Not all stakeholders, of course, share Secretary Zinke's and Representative McClintock's views, and resistance to the Memorandum and its policies is anticipated from those who perceive its directives to jeopardize important environmental considerations.

Conclusion and Implications

The efficient use of water infrastructure and water management technology is critically important as California battles increasingly complex water supply and reliability challenges. The Memorandum puts into motion an expedited *process* to develop *plans* to reduce or eliminate *unnecessary* regulatory burdens and maximize the return on investments in major water infrastructure Projects in California and throughout the West. While the outcome of those recommendations and Projects will undoubtedly draw controversy and will deserve attention, neither California nor other western states can afford to allow major water infrastructure Projects to remain perpetually bogged down.

(Derek R. Hoffman, Michael Duane Davis)

PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS FILES CLIMATE CHANGE LAWSUIT ADDRESSING OCEAN TEMPERATURES

On November 14, 2018, the Pacific Coast Federation of Fishermen's Associations, Inc. (PCFFA) sued 30 oil and gas companies for harm to the crab fishing industry caused by rising ocean temperatures associated with global warming.

Background

According to a November 14, 2018 statement issued by PCFFA, the lawsuit seeks:

> . . .to hold 30 fossil fuel companies accountable for losses caused by four straight years of fishery closures that have harmed crabbers, their businesses, their families, and local communities in California and Oregon.

According to PCFFA, the repeated closures of significant portions of the dungeness crab fishery since 2015 has been the result of climate change—specifically:

> . . .algal blooms and domoic acid flare-ups [that] are linked to a warming of the Pacific Ocean knowingly caused by the fossil fuel industry.

The Complaint

The complaint, which was filed in San Francisco Superior Court, asserts five causes of action: 1) nuisance; 2) strict liability-failure to warn; 3) strict liability—design defect; 4) negligence; and 5) negligence—failure to warn. The complaint alleges, in part:

As an actual and proximate consequence of defendants' conduct, the crab fishing industry has been deprived of valuable fishing opportunities, and consequently suffered severe financial hardships. These injuries derive from rising ocean temperatures in the eastern Pacific Ocean generally and periodic extreme marine heatwaves—the results of anthropogenic ocean warming caused by the foreseeable and intended use of defendants' products. Recent marine heatwaves along the United States' west coast created the ideal conditions for the toxic algal group *Pseudo-nitzschia* to increase in abundance and invade the marine regions that correspond with some of the most productive dungeness crab fishery grounds. The massive *Pseudo-nitzschia* bloom generated unprecedented concentrations of the neurotoxin domoic acid, a compound which, when ingested by humans, causes "amnesic shellfish poisoning" which induces symptoms including vomiting, diarrhea, cramps, and other gastrointestinal upset, permanent short-term memory loss, and, in severe cases, death.

As detailed in the complaint, the California Department of Fish and Wildlife, in coordination with the California Department of Public Health, closed significant portions of the California Coast to commercial dungeness crab fishing in the 2015-16 fishing season, and again in 2016-17 in response to this public health threat. The Oregon Department of Fish and Wildlife and the Oregon Department of Agriculture also closed large areas of the Oregon coast to commercial crabbing during the 2015-16, 2016-17, and 2017-18 commercial crab season due to domoic acid toxicity.

PCFFA further alleges that the closures resulted in:

> . . .substantial economic losses due to those lost fishing opportunities. . .[and]. . .had damaging ripple effects throughout California's and Oregon's fishing families and communities, creating severe hardships that many fishermen and fishing businesses, including Plaintiff's members, have struggled to overcome.

According to the complaint, the "domoic acid incidents" and related injuries to the industry "are the new normal." "These phenomena will increase in severity and frequency as the oceans continue to change with anthropogenic global warming."

Conclusion and Implications

It will be interesting to see how the PCFFA lawsuit fares in relation to similar lawsuits filed by cities and counties in California against oil and gas companies, several of which remain embroiled in battles over whether the cases should ultimately be heard in state or federal court. A copy of the PCFFA complaint is available at the following location: https://www.sheredling.com/wp-content/uploads/2018/11/2018-11-14-Crab-Complaint-1.pdf
(Nicole Martin)

NEWS FROM THE WEST

In this month's News from the West we address the efforts in Colorado and other basin states to plan for contingency cut backs for use of the precious waters of the Colorado River in light of the severe drought the region is experiencing. We also report on a decision out of the Utah Supreme Court confirming the Court's lack of jurisdiction over an appeal regarding water rights on procedural grounds.

Colorado Agrees to Support New Colorado River Basin Drought Contingency Plan

The Colorado Water Conservation Board (CWCB) recently adopted a policy that "expressly endorsed" the Drought Contingency Plan being drafted by the seven Colorado River Basin states and the federal government. The unanimous resolution, adopted at the November 15 board meeting, pledges the CWCB's "full support" for finalizing various drought contingency plan documents.

The decision comes on the heels of federal directives encouraging each of the seven basin states to come up with draft Drought Contingency Plan to potentially deal with coming shortages. Last winter, 2018, was one of the driest on record and the combined storage in Lakes Mead and Powell is at the lowest point in almost 50 years. Although the discussions and negotiations regarding the Drought Contingency Plan have been ongoing for several years, there has been a recent push by the U.S. Bureau of Reclamation for the states to finalize their plans. In a statement in May, Bureau of Reclamation officials Terry Fulp and Brent Rhees:

> . . .encourage[d] the states to finalize their draft agreements by December 2018 to ensure the sustainability of the Colorado River system.

The Drought Contingency Plan

All seven of the basin states, plus the Bureau of Reclamation, are hopeful that long-term, basin-wide agreements can be reached at the annual Colorado River Water Users Association conference in December. The over-arching Drought Contingency Plan, the subject of the December meetings, is made up of several agreements involving all seven basin states and the federal government. As described by the CWCB, the:

> . . .DCP as a whole established the provisions and framework within which the seven Basin States may act in conjunction with the Secretary of the Interior to mitigate risks of extended drought, while protecting their respective rights and interest consistent with the 'Law of the Colorado River.'

Other documents in the DCP include a Drought Response Operations Agreement and Demand Management Storage Agreement.

The CWCB's new policy offers full support for the Drought Contingency Plan, but also makes clear that Upper Basin interest must be protected, specifically in the case of demand management programs. The CWCB, along with most Colorado water districts, has shown great interest in using demand management programs to combat increasing shortages in the upper basin. In a September 19 talk, Colorado River Water Conservation District General Manager Andy Mueller noted the early successes of demand management programs—like the Pilot System Conservation Program—but stressed that the goal of those programs is to protect the Upper Basin from a compact call. If the excess water saved under a voluntary, compensated demand management program was allowed to flow all the way to Mead, the lower basin states would be able to keep "sucking too much water down the river," according to Mueller.

Concerns and Support

The CWCB's November 15 policy noted these concerns and expressed that it will be the board's strategy operate within the proposed Upper Basin Demand Management Storage Agreement, but only provided that the conserved and stored water be used to avoid a compact call, and that the water will not be released from Powell:

> . . .except at the request of the Upper Colorado River Commission for the exclusive purpose of helping assure compact compliance.

However, the CWCB's policy specifically noted that there was no guarantee or requirement that the Upper Basin would establish a demand management program.

The CWCB policy enjoyed rare support from the entire state, with both the Western Slope and Front Range coming together to endorse the new policy. Representatives from the Front Range Water Council, Denver Water, and several western slope water districts all thanked the CWCB for a policy that they believes addresses a variety of concerns from all users. Patti Wells, who represents the Denver metro area on the CWCB said that:

> . . . [w]e ought to be able to figure out a way to get some water into Lake Powell without doing harm to anyone, and really making it a program that will benefit all of the participants to the extent that we can.

Her thoughts were echoed by Jim Lochhead, CEO of Denver Water, who thanked the CWCB for a policy:

> . . .that will allow Colorado to engage in further processes that will protect our collective interests in the Colorado Rivera and Upper Colorado River compacts.

An important concern, expressed by Mueller and reflected in the CWCB's policy is that demand management is clearly separated from involuntary curtailment, the worst-case scenario in the minds of Colorado water managers. If mandatory cutbacks ever became the reality in Colorado, the CWCB policy notes that it will have "the goal, but not the requirement, of achieving general consensus within the state."

Conclusion and Implications

The policy serves as a welcome bridge between the Western Slope and Front Range who are often at odds because of the radically different styles of water use—irrigation vs transmountain diversions for municipal use. The CWCB also said that it plans to utilize the public comment process to potentially create a demand management program.

The DCP, if agreed to in December, would most likely then need to be executed by the seven basin states before being sent to Congress for ratification during the spring term.
(John Sittler, Paul Noto)

Utah Supreme Court Finds It Lacks Jurisdiction Over Party Who Failed to Timely File Objection to Proposed Determination of Water Rights

EnerVest, LTD., v. Utah State Engineer and Michael Carson, 2018 UT 55 (2018).

The Utah Supreme Court determined that it lacked jurisdiction over a party that failed to timely file an objection to a Proposed Determination of Water Rights and that the District Court's certification of its ruling on motions for summary judgment was improper pursuant to Rule 54(b) of the Utah Rules of Civil Procedure.

Legal Background

Regarding the general adjudication process in the State of Utah:

> [T]he purpose of a general adjudication process is to prevent piecemeal litigation regarding water rights and to provide a permanent record of all such rights by decree. 2018 UT 55, ¶ 4 (*citing Jensen v. Morgan*, 844 P.2d 287, 289 (Utah 1992).)

Consequently, a party that fails to timely file a statement of claim "is forever barred and estopped from subsequently asserting the unclaimed right." UCA § 73-4-9(2). Following the submission of claims the Utah State Engineer prepares a proposed determination (PD) for the water rights in the area. *Id.* at ¶ 6; *see also* UCA § 73-4-11(1)(b). The PD is published and any "claimant who desires to object to the state engineer's proposed determination shall, within 90 days … file a written objection" with the District Court. *Id.* at 11(2). In the absence of a contest to a claim a claimant is not entitled to a hearing and the "court shall render a judgment in accordance with such proposed determination." UCA § 73-4-12. If an objection is filed, the District Court may, pursuant to UCA § 73-4-24(1), "hold an expedited hearing on an objection or objections." 2018 UT at ¶ 9.

Factual and Procedural Background

In or around 1956 the Utah Division of Water Rights (State Engineer) initiated a general adjudication of the area that included the rights in and to Minnie Maud Creek. The PD was issued in 1964, and allocated twelve water rights to the Minnie Maud

Corporation (MM). Four different objections were filed challenging MM's ownership of eight of these water rights. In 2012, EnerVest, a successor in interest to two other water rights, but who notably did not object to MM's water rights, filed a petition for expedited hearing on the objections under UCA § 73-4-24(1). The District Court granted the petition, but limited the scope of the hearing to whether the PD correctly lists MM as the owner of the water rights at issue.

A number of parties participated in the hearing and the District Court ultimately ruled on summary judgment motions in favor of Michael Carson (Carlson) and denying EnerVest's motion for partial summary judgment. At the parties' request, the District Court certified its decision as final under Utah Rule of Civil Procedure 54(b). EnerVest and a related party appealed. However, during the pendency of the appeal, the related party's appeal was voluntarily dismissed with prejudice. This left EnerVest, which did not file an objection to the PD, as the sole appellant in this action. As a result Carlson challenged EnerVest's standing to appeal.

The Supreme Court's Decision

The Utah Supreme Court evaluated two jurisdictional issues. First, the Court addressed whether the District Court's certification of its grant of summary judgment as final under Utah Rule of Civil Procedure 54(b) was proper. Second, the Court reviewed EnerVest's standing to pursue appeal of the rejection of other parties' objections. The first of these issues is a question of law that the Utah Supreme Court can review for the first time on appeal. The second issue is also a question of law, which the Utah Supreme Court reviews for correctness.

The Utah Supreme Court first addressed the issue of whether the District Court's ruling presents a final judgment over which there is jurisdiction on appeal. Unless one of three exceptions is met, the Supreme Court lack jurisdiction over a judgment that does not "end [ ] the controversy between the litigants." *Copper Hills Custom Homes, LLC v. Countrywide Bank, FSB*, 2018 UT 42, ¶¶ 10, 13-15. Rule 54(b) sets forth one of these exceptions. That rule states that an order can be appropriately certified if three requirements are met: 1) "there must be multiple claims for relief or multiple parties to the action;" 2) "the judgment appealed from must have been entered on an order that would be appealable, but for the fact that other claims or parties remain in the action;" and 3) "the [district] court, in its discretion, must make a[n express] determination that there is no just reason for delay." *Id* at ¶ 16.

The Supreme Court held that the certification suffered from three flaws. First, the District Court did not offer a rationale for why it determined there is no just reason for delay, which alone is fatal. 2018 UT at ¶ 18. Second, the District Court denied EnerVest's partial motion for summary judgment and granted Carson's motion for summary judgment. The denial of the partial motion(s) for summary judgment is not an "order that would be appealable but for the fact that the other claims or parties remain in the action" because they are not final. *Id.* at ¶ 19. Finally, the Supreme Court determined that the nature of a general adjudication is such that it "prevents complete finality of any water rights until the entire general adjudication has been completed." *Id.* at ¶ 20. A District Court can:

> . . .hold hearings between individual claimants and enter interlocutory decrees, but no final judgment should be entered until all the rights of all the claimants can be adjudicated. *Id.* (*citing Watson v. Dist. Court of First Judicial Dist. In and for Cache Cty.*, 163 P.2d 322, 323 (Utah 1945).)

Consistent with the foregoing, the Utah Supreme Court held that the appeal was not appropriately before it under Utah Rule of Civil Procedure 54(b). Further, the Court held that it EnerVest's appeal could not be treated as a "petition for permission to appeal an interlocutory order," because it concluded EnerVest lacked standing to appeal. *Id.* at ¶ 21. The basis for this conclusion is rooted in the fact that EnerVest (and its predecessors) failed to object to the water rights in the PD.

The Court held that the failure to object to the PD placed EnerVest in the position of a defaulting party. *Id.* at ¶ 28. As such, EnerVest has:

> . . .no interests in the water rights – at least no interests it can champion as a defaulting party – that have been adversely affected by the District Court's decision that leaves the [PD] intact. *Id.* at ¶ 31.

Therefore, EnerVest cannot be aggrieved by the District Court's judgment and lacks standing to pursue an appeal. *Id.*

Finally, the Court held that EnerVest cannot be allowed to pursue another party's objection to the PD. To allow EnerVest to pursue another party' objection would amount to a collateral attack on the PD. Such an outcome would defeat the purpose of a general adjudication and undermine the goal of certainty of water rights. Id. at ¶ 42.

Conclusion and Implications

This case sets out several key issues related to Utah's general adjudication process. First, and most importantly, the Court's conclusion that an appeal is not proper until the general adjudication is complete ignores the practical reality of general adjudications in Utah. Throughout the state a number of adjudications have been commenced, but never finalized. Under this ruling, absent an interlocutory appeal, it is not possible to appeal a ruling on an objection to the PD until a final Decree is issued, which could take decades or longer.

Second, this ruling narrows the definition of standing to those parties that have filed a timely objection to the PD. A party that does not object to the PD is considered a defaulting party and must rest on the findings of the PD. A non-objecting party may join in an action regarding an objection if its rights may be affected; however, it may not be the sole party to that action.

https://www.utcourts.gov/opinions/supopin/EnerVest%20v.%20Utah%20State%20Engineer20180927_20160394_55.pdf
(Jonathan Clyde)

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

•On October 15, 2018, EPA 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. The agreement also includes specific reporting requirements and allows for penalties should USFS fail to meet deadlines.

•On October 31, 2018, EPA announced a settlement with racehorse training-center operator Evangeline Enterprises LLC under which the company agreed to pay $300,000 in civil penalties and to make changes in its handling of polluted wastewater at its Louisiana facility to settle Clean Water Act claims filed by the U.S. Environmental Protection Agency (EPA) and the Louisiana Department of Environmental Quality (LDEQ). The settlement resolves claims by EPA and LDEQ that Evangeline was illegally discharging process wastewater, contaminated with horse manure, urine, and other biological materials, from its facility into the Vermilion River and its tributary Francois Coulee, in violation of the Clean Water Act and the Louisiana Environmental Quality Act. Under the federal Clean Water Act, facilities that house more than 150 horses for 45 days or more in any 12-month period and discharge pollutants must obtain a permit and comply with rules to ensure that pollutants are not discharged to waters of the United States or waters of the State. Evangeline discharged process wastewater into drainage ditches and pipes at its facility that then flowed into the Francois Coulee and Vermilion River. Under the settlement, Evangeline will pay the civil penalties and submit an application for a Louisiana National Pollutant Discharge Elimination System permit, comply with best management practices for waste at the facility, and construct a waste retention control structure in compliance with federal and state regulations. In the event that Evangeline chooses to close the facility, the agreement provides alternative measures to require the company to eliminate further discharges of pollution into area waterways.

•On November 7, 2018, EPA announced a settlement with American Cooling, Inc. over Clean Water Act violations at its refrigerated warehouse and storage facility in Salinas, California. The agreement requires the company to pay a $28,900 penalty to resolve violations associated with unauthorized stormwater and wastewater discharges between August 2013 and June 2018. EPA inspected American Cooling's SEMCO facility in November 2016 and found the company did not have a stormwater discharge permit from the California State Water Resources Control Board. Stormwater runoff from American Cooling's Salinas facility discharges into Alisal Creek, a tributary to the Salinas River, which flows into Monterey Bay. EPA also found the facility was discharging industrial wastewater into the City of Salinas municipal storm sewer system, rather than the Monterey One Wastewater Treatment Plant, due to improper operation of a system of storm drain

plugs and valves intended to control these discharges. In addition, the facility was operating without a stormwater pollution prevention plan, which details standard operating procedures designed to reduce or eliminate pollutants in stormwater runoff. The company has since obtained the necessary permit, developed an adequate stormwater pollution prevention plan, and has come into compliance with Clean Water Act requirements.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•On October 17, 2018, EPA announced a settlement with the owner and operator of the F-Street Sunoco service station, at 3951 Roosevelt Boulevard, Philadelphia under which the owner and operator agreed to pay a $22,080 penalty to settle alleged violations of underground storage tank regulations. 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.

•On October 29, 2019, EPA announced a settlement with IPS Corporation, located in Compton, Calif., under which the company will pay a $87,000 penalty for failing to provide required notifications for the handling of toxic chemicals. IPS Corporation, located in Compton, California is a manufacturer of structural adhesives and other supplies for construction, industrial and manufacturing applications. IPS manufactures products that contain trichloroethylene (TCE), a known human carcinogen. Between 2015 and 2016, the company exported the TCE-containing products to 11 foreign countries without submitting timely export notices to EPA. These notices are required by law so EPA can provide information about exported chemicals to importing governments.

Indictments, Convictions and Sentencing

•On November 2, 2018, MST Mineralien Schiffahrt Spedition und Transport GmbH (MST), a German shipping company, pleaded guilty to one count of violating the Act to Prevent Pollution from Ships and one count of obstruction of justice for using falsified log books to hide intentional discharges of oily bilge waste occurring over a nine-month period during which the ship regularly made port calls in Portland, Maine. U.S. District Court Judge Nancy Torresen sentenced the company pursuant to a plea agreement and ordered it to pay a $3.2 million criminal fine and serve a four-year term of probation during which vessels operated by the company will be required to implement an environmental compliance plan, including inspections by an independent auditor.

•On November 13, 2018, Andrew Guglielmo, Richard Guglielmo Jr., and Hamdi Latif, pleaded guilty in federal district court in Trenton, New Jersey, to felony charges of having conspired to violate federal pesticide laws and to evade EPA's ban on the use of the marine toxin tributyltin (TBT). Flexabar Corporation is a paint and coating manufacturer in Lakewood, New Jersey. Andrew Guglielmo is Flexabar's Chief Executive and Financial Officer, Richard Guglielmo Jr. is Flexabar's President, and Hamdi Latif is the company's Technical Director. In spite of repeated notices from EPA, the defendants evaded restrictions on their company's TBT pesticides and continued to produce and sell TBT antifouling paints to the fishing industry. They manufactured and sold TBT for marine uses after such applications were restricted by an act of Congress in 1988, by EPA's labeling requirements in 1991, by an international treaty in 2001, by EPA's TBT product cancellation in 2005, and by EPA's subsequent notices. Even after February 2013, when EPA banned the sale of Flexabar's TBT pesticides for any application, the defendants continued to surreptitiously purchase TBT, to manufacture more TBT antifouling paint, and to illegally sell it for use as a marine pesticide. Each defendant is subject to a maximum of up to five years imprisonment and a fine of up to $250,000, or twice the financial gain they derived from the offense.
(Andre Monette)

LEGISLATIVE UPDATE

PRESIDENT DONALD TRUMP SIGNS BIPARTISAN WATER RESOURCES INFRASTRUCTURE LEGISLATION

President Donald Trump signed into law the bipartisan bill entitled, "America's Water Infrastructure Act of 2018" (Act) on October 23, 2018. The Act authorizes funding for water infrastructure projects, expands water storage capabilities and upgrades to wastewater, drinking and irrigation systems, and authorizes many water infrastructure projects and programs, including projects in California.

Background

The Act comprehensively authorizes billions of dollars in federal spending on projects for ports, harbors, waterways, storage and irrigation, as well as long-awaited investment in drinking water infrastructure. It also de-authorizes what it determines to be inefficient spending on certain water projects. The House of Representatives unanimously approved the Act; and, the Senate passed the Act by vote of 99 to 1.

The Act authorizes more than $6 billion in spending over ten years for projects across the nation, affording benefits to almost every state. The Act comprises four distinct, title components: Title I—The Water Resources Development Act, which sets forth the legislative purposes and findings; Title II—Drinking Water System Improvement; Title III—Energy; and Title IV—Other Matters, which are summarized below.

Title I—The Water Resources Development Act

Title I of the Act does the following:

- Authorizes locally driven, but nationally vital, investments in water resources infrastructure, such as ports, channels, locks, and dams.

- Reauthorizes the Levee Safety Initiative and the National Dam Safety Program through 2023.

- Strengthens economic growth and competitiveness, helps move goods throughout the country and abroad, and protects communities by keeping American jobs in America.

- Follows the transparent process Congress established under the 2014 reforms for considering proposed U.S. Army Corps of Engineers (Corps) activities.

- Builds upon previous reforms of the Corps to further accelerate the process for moving projects forward more efficiently and at lower cost.

- Upholds Congress' constitutional duty to provide for infrastructure and facilitate commerce for the nation.

Title II—Drinking Water System Improvement

Title II of the Act does the following:

- Enhances investment in and modernization of the country's aging drinking water infrastructure.

- Authorizes more than $4.4 billion over three years for the state drinking water revolving loan fund program.

- Improves accountability by aiding states and utilities with compliance and asset management.

- Protects communities by updating antiterrorism and resilience measures for public water systems.

- Enhances transparency for consumers about the quality of their drinking water.

- Authorizes $100 million over the next 2 fiscal years for locales affected by natural disasters, for repairing drinking water systems or connecting to emergency supplies for potable water.

Title III—Energy

Title III of the Act does the following:

•Encourages the use of clean, baseload hydropower by streamlining the regulatory permitting process.

•Removes barriers to investments in hydropower.

•Strengthens transparency and public participation in the Federal Energy Regulatory Commission rate-setting process.

Title IV—Other Matters

Title IV of the Act does the following:

•Reauthorizes existing water infrastructure funding laws through 2021, including the Water Infrastructure Finance and Innovation Act.

•Eases administrative burdens and provides additional sources of funding for state infrastructure financing authorities seeking loans and other program funds.

•Provides technical assistance to small, disadvantaged and other communities to meet clean water needs.

•Provides for certain skill-development, training, apprenticeships and student-recruitment in the water utility sector.

Conclusion and Implications

The Act provides desperately-needed funding and authorizations for water infrastructure projects throughout the United States. This funding is particularly critical in California, where aging infrastructure has placed ever-increasing stress on the state to meet its dynamic and growing water demands. (Paula Hernandez, Derek R. Hoffman)

JUDICIAL DEVELOPMENTS

TENTH CIRCUIT FOLLOWS EIGHTH AND NINTH CIRCUITS IN LIMITING SCOPE OF CLEAN WATER ACT ALTERNATIVES ANALYSIS

Audubon Society of Greater Denver v. U.S. Army Corps of Engineers, ___F.3d___, Case No. 18-1004 (10th Cir. Nov. 5, 2018).

Joining the Eighth and Ninth circuits, the Tenth Circuit Court of Appeals has held that the federal Clean Water Act (CWA) requires a narrower scope of alternatives analysis than the National Environmental Policy Act (NEPA) when a project's objectives could be accomplished without any discharge of dredged or fill materials into waters of the United States.

Background

The Chatfield Reservoir southwest of Denver, Colorado, lies behind a dam built by the U.S. Army Corps of Engineers (Corps) on the South Platte River in 1973. The land surrounding the reservoir has been leased by the Corps to the State of Colorado since 1974, and the Chatfield State Park is one of the most popular in Colorado. The dam was authorized for flood control and recreational purposes, but in 1986 Congress authorized the Corps to study dedicating a portion of the reservoir's capacity for municipal, industrial and agricultural water storage:

> The resulting study predicted that, even taking into account water conservation programs, water providers will need approximately 50 [percent] more water in 2050 because of population growth in the Denver metropolitan area. Under current conditions, absent the development of additional water supply, the Denver metropolitan area will have 'approximately 90,000 acre-feet of unmet [water] needs' in 2050.

In 2009, Congress authorized the reallocation of capacity in the reservoir to water storage for consumptive and agricultural uses.

Various water providers applied to reallocate 20,600 acre-feet of storage for water supplies, the "Reallocation Project:

> The immediate practical effect of the Reallocation Project is that the maximum water level in the reservoir will rise by 12 feet, flooding 587 acres of Chatfield State Park. The flooded area includes various recreation facilities and sensitive environments.

The environmental-mitigation and recreational facility relocation plans that accompanied the Reallocation Project "involved the discharge of dredged and fill material into wetlands near" the reservoir in order to "raise parts of the shoreline above the new high water line."

The Corps prepared an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act, 42 U.S.C.A. § 4321 *et seq.*, identifying "thirty-eight alternatives for securing additional water supply for the Denver metropolitan area" and fully analyzing four alternatives. The Corps appended to its EIS "a separate analysis of the dredge and fill of discharge associated with the Reallocation Project" pursuant to the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, considering:

> . . .whether it could relocate the recreation facilities and mitigate environmental damage without discharging dredge or fill.

The Corps concluded that, while it was possible to avoid discharging dredge or fill, doing so "would result in a greater area of net disturbance and environmental impact[ ]"; prevent the Corps from fully replacing the recreational facilities affected by plan; and "complicate the construction, maintenance, and reliability of the [environmental] mitigation[.]" Because of these complications, the Corps instead modified the recreation relocation and environmental mitigation plans to "avoid[ ] and minimize[ ] the discharge of fill

material ... to the maximum extent practicable while still meeting the objective[s] of providing recreation facilities that maintain the existing recreational experience," [ ] and "fully mitigating the [environmental] impacts[.]"

The Corps approved the Reallocation Project, including by identifying the modified recreation relocation and environmental mitigation plans as the least environmentally damaging practicable alternatives, thereby allowing the agency to discharge fill into the reservoir in compliance with the CWA. The Audubon Society of Greater Denver (Audubon) challenged the Corps' CWA analysis on the basis that the agency only considered alternatives to the recreation relocation and environmental mitigation plans, rather than alternatives to the entire Reallocation Project.

The Tenth Circuit's Decision

The CWA prohibits "discharge of dredged or fill material into the" "waters of the United States." 33 U.S.C. §§ 1311(a), 1344(a), 1362(7):

> But the Corps may issue [Section 404] permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. *Id.* § 1344(a).

Section 404 (b)(1) Guidelines

The regulations governing the permitting process—the § 404(b)(1) Guidelines—are applied by the Corps when analyzing its own proposed activities that would result in the discharge of dredged or fill materials into waters of the United States. 33 C.F.R. § 335.2.

The 404(b)(1) Guidelines state that:

> . . .no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences. 40 C.F.R. § 230.10(a). . . .An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. *Id.* § 230.10(a)(2).

In other words, the Corps may authorize a proposed discharge when it is the least environmentally damaging practicable alternative (LEDPA). *Id.* § 230.10(a).

Here, the Corps "interpreted the phrase 'practicable alternative to the proposed discharge' to limit the scope of its CWA alternatives analysis to those portions of the Reallocation Project that caused the discharge of dredge or fill," *i.e.*, the environmental mitigation and recreation relocation plans. This contrasts with the scope of the Corps' NEPA alternatives, which analyzed alternatives to the Reallocation Project as a whole ("alternatives for securing additional water supply for the Denver metropolitan area").

Clean Water Act and NEPA Alternatives Analyses

The Tenth Circuit followed the Eighth and Ninth circuits in agreeing with the Corps' interpretation of the § 404(b)(1) Guidelines as requiring a narrower scope of alternatives analysis than that mandated by NEPA. In *Nat'l Wildlife Fed'n v. Whistler*, 27 F.3d 1341, 1345–46 (8th Cir. 1994), the Eighth Circuit reasoned that when the Corps was faced with "two severable projects" where one "would proceed even without" the § 404 permit, the Corps' CWA alternatives analysis properly focused only on alternatives to those portions of the project that would result in discharge of dredged or fill materials. And in *Sylvester v. U.S. Army Corps of Engineers*, 882 F.2d 407, 410–11 (9th Cir. 1989), the Ninth Circuit held:

> • . . .an alternative site does not have to accommodate components of a project that are merely incidental to the applicant's *basic* purpose.

Here, the Corps concluded it could approve the Reallocation Project—with its object of augmenting water supplies— "without allowing the discharge of dredge or fill," and therefore limited its analysis to only the ancillary plans for relocation of recreational facilities and mitigation of environmental effects.

Conclusion and Implications

A growing consensus among the Circuits supports the Corps' narrower alternatives analysis in the CWA context, as compared to the broad, whole-project approach mandated under NEPA. Nonetheless, the Tenth Circuit warns against the improper segmentation of projects "to minimize apparent environmental

damage," admonishing that the Corps may consider only the applicant's "legitimate" project objectives "when defining the scope of its CWA analysis." The court's decision is available online at: https://www.ca10.uscourts.gov/opinions/18/18-1004.pdf (Deborah Quick)

NINTH CIRCUIT REJECTS CHALLENGES TO CALIFORNIA MASTER PLANNED DEVELOPMENT'S EIS AND CLEAN WATER ACT 404 PERMIT

Friends of the Santa Clara River v. U.S. Army Corps of Engineers, 887 F.3d 906 (9th Cir. 2018).

Los Angeles County approved a specific plan for the Newhall Ranch Project (Project), which is a proposed master-planned development that would encompass 12,000 acres in the City of Santa Clarita. The Project would encompass 5.5 linear miles of the Santa Clara River and tributaries, a site, which is a critical habitat for the Southern California steelhead, an endangered species. To move forward with the project, a permit issued by the U.S. Army Corps of Engineers (Corps) under § 404 of the federal Clean Water Act (CWA) is necessary as the Project would have discharged dredge or fill material into the Santa Clarita River. After considering an Environmental Impact Statement and Environmental Impact Report (EIS/EIR) from the California Department of Fish and Wildlife, as well as considering numerous project alternatives as required by the CWA, the Corps issued the § 404 permit.

In Friends of the Santa Clara River v. U.S. Army Corps of Engineers, the Santa Clarita Organization for Planning the Environmental (SCOPE) and Friends of the Santa Clara River (Friends) (together: plaintiffs) claimed that the Corps' issuance of the permit violated the Clean Water Act (CWA), the federal Endangered Species Act (ESA), and the National Environmental Policy Act (NEPA). The Ninth Circuit rejected all challenges to the permit issuance and largely deferred to the Corps' agency discretion.

Background

Section 404 Permit and the Practicable Alternatives Requirement

The CWA makes a discharge of any pollutants into navigable waters of the United States unlawful unless the discharge complies with the CWA's statutory requirements. One method for satisfying statutory requirements is by obtaining a permit by the Corps pursuant to § 404 of the CWA. Section 404 states that the Corps may:

> . . .issue permits, after notice and opportunity for public hearings[,] for the discharge of dredged or fill material into the navigable waters at specified disposal sites. 33 U.S.C. § 1344.

A permit issued under § 404 must withstand scrutiny by the Corps, which includes an evaluation under a set of regulations developed by the U.S. Environmental Protection Agency (EPA) in consultation with the Corps. These regulations provide that:

> . . .no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences. 40 C.F.R. § 230.10(a).

This requirement is better known as the "practicable alternatives" requirement.

In determining whether or not there is a "practicable alternative," the EPA guidelines require the Corps to evaluate whether the alternative is:

> . . .available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

Thus, the Corps must first determine what a project's overall purpose as a project's overall purpose. Next, in evaluating a "practical alternative," the Corps must consider whether or not a project is "water dependent." A project is not "water dependent," if it:

> . . .does not require access or proximity to or sitting within the special aquatic site in question to fulfill its basic purpose. 40 C.F.R. § 230.10.

If a project's purpose is determined not to be water dependent, there is a presumption that practicable alternatives that do not involve bodies of water are available.

Compliance with NEPA and the ESA

Before issuing a § 404 permit, the Corps must also comply with NEPA. NEPA requires all federal agencies to prepare an environmental impact statement regarding whether the impact of any major federal action would "significantly affect…the quality of the human environment" and any "alternatives to the proposed action." 42 U.S.C. § 4332(C). The alternatives requirement under NEPA differs from the "practical alternatives" requirement in that the alternative under NEPA need not be focused on environmental sustainability. As noted by the Court of Appeals in *Friends*: " NEPA does not provide substantive protections, only procedural ones." The Corps must also comply with the ESA and:

> . . .insure that any action authorized, funded, or carried out by such agency…is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat. 16 U.S.C. § 1536.

The Ninth Circuit's Decision

The plaintiffs argued that the Corps: 1) did not chose the appropriate alternative as the "practicable alternative" under the CWA, 2) failed to consult with the National Marine Fisheries Service (NMFS) in its determination that the Project will not affect the endangered steelhead trout; and 3) reviewed an EIS submitted by NMFS that did not adequately discuss the negative consequences on the steelhead trout.

Standing

The Court of Appeals first considered whether the plaintiffs had standing. To have standing to bring claims of procedural violations, a plaintiff must demonstrate that: 1) the agency violated procedural rules, 2) those rules protect the plaintiff's concrete interests, and 3) it is reasonably probable that the challenged action will threaten the plaintiff's concrete interests. Intervenor Newhall argued that the plaintiffs could not satisfy the third prong of this test because their interests were limited to recreation and natural resources within the project area, where there were no steelhead.

Rejecting this argument, the Court of Appeals explained that the plaintiffs only needed to show that they would be harmed by the challenged agency action, not that the alleged procedural deficiency would threaten their interests. Thus, the court concluded, the plaintiffs had standing because they were harmed by the Corps' issuance of the § 404 permit: It did not matter whether the plaintiffs had an interest in steelhead. The court also held that the plaintiffs showed causation and redressability because there was a reasonable probability that additional analysis could have influenced the Corps' decision.

Challenging the Modified Alternative Three as the 'Practicable Alternative'

The Corps reviewed eight alternatives and chose Modified Alternative 3 as the "practicable alternative" under the CWA. Plaintiffs argued that the Corps arbitrarily and capriciously identified the Project's purpose, which resulted in an overly narrow range of alternatives. However, the Court of Appeals disagreed. Plaintiffs also argued that the Corps failed to properly designate the practicable alternative because further minimization of environmental impact was theoretically possible and that the Corps must consider costs in specific methodology. The court disagreed noting that the § 404 Guidelines do not require the Corps to consider costs in a particular way—it merely instructs the Corps to consider alternatives in light of their cost, existing technology, and logistics. The court held that it must defer to a decision with a reasonable evaluation of costs.

ESA and NEPA Challenges

Plaintiffs also challenged the Corps in its determination that the Project "will have no effect" on the endangered steelhead whose critical habitat is located further downstream as a violation of NEPA and the ESA. They claimed that the Corps must consult with NMFS and argued that the steelhead may be affected by stormwater discharges containing dissolved copper

from the Project flowing into the Santa Clara River. However, the Corps approved EIS/ EIR indicated that the discharge would have a lower concentration of copper than that of the existing concentration in the river. The Court of Appeals recognized that the Corps is entitled to substantial deference and deemed such determination of "no effect" as the "agency's special expertise." Ultimately, it deferred to the Corps decision-making process and held that it reasonably reached its "no effect" determination.

Conclusion and Implications

The Ninth Circuit in this case recognized that while an agency is required to review a project's environmental consequences under NEPA and the ESA, a court must refrain from interjecting itself within the Corps' area of discretion. In fact, the Court of Appeals largely deferred to the Corps' "no effect" determination as well as its choice of the "practicable alternative" in the issuance of the § 404 permit. This decision is an excellent example of the judiciary's deference to a federal agency's environmental impact determinations.
(Rachel Cheong, David Boyer)

THIRD CIRCUIT RECOGNIZES CERCLA'S JURISDICTIONAL BAR TO MEDICAL MONITORING CLAIMS RELATED TO POLLUTED WATER WELLS

Giovanni v. United States Department of the Navy, 906 F.3d 94 (3rd Cir. 2018).

When a federal government agency creates contamination or hazardous materials, what laws are available to remedy the resulting harm? Generally, the President has the authority to require federal agencies to remove and remediate environmental contamination. Specifically, the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (42 USC §§9601-9675) is a wide-ranging federal law that grants "the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (2009). To ensure that any CERCLA initiated clean-up plan can proceed without interference, CERCLA also explicitly states that federal courts do not have the jurisdiction under federal or state law "to review any challenges to removal or remedial action" initiated by the federal government under CERCLA. (42 USC §9613(h)) In other words, if the federal government initiates a "removal or remediation action" pursuant to CERCLA to address hazardous materials, parties cannot bring actions under state law or federal law that would interfere with the cleanup plan. Thus, federal courts have often addressed the specific meaning and scope of the "challenges to removal or remediation action" language in CERCLA. A recent Third Circuit Court of Appeals case provides more clarity as to what types of actions are barred as improper challenges under CERCLA.

Background and Analysis

In *Giovanni v. United States Department of the Navy*, hazardous chemicals released by properties owned by the Navy came under review. In summary, the Navy operated properties in Pennsylvania that polluted the local water supply, and specifically, the private wells of two local property owners (plaintiffs). The Navy acknowledged the contamination and initiated environmental cleanup efforts pursuant to CERCLA. In the meantime, each property owner initiated separate legal action against the Navy based on Pennsylvania state law, known as the Pennsylvania Hazardous Sites Cleanup Act. These actions sought orders requiring the Navy to pay for medical monitoring to assess any harm to the plaintiffs or other effected individuals and to conduct a health assessment or health effects study to generally assess the potential effects of the contamination on human health. Because the Navy had already initiated clean up measures, the cases where removed to federal court pursuant to CERCLA which grants exclusive original jurisdiction of all controversies arising under CERCLA to federal court.

42 USC §9613(b). The plaintiff's individual cases where then consolidated and the Navy argued that the entire matter should be dismissed because the relief sought by the plaintiffs constituted "challenges to removal or remediation actions" which is barred by CERCLA, specifically Section 9613. Thus, the court had to decide whether the two actions sought by the plaintiffs, namely: 1) payment for medical monitoring and 2) conducting a health assessment or effects study, constituted a barred challenge to either the Navy's removal or remedial actions.

After the U.S. District Court ruled in favor of the Navy, finding the relief requested by the plaintiffs was barred by CERCLA because it was a barred challenge to the Navy's removal and remedial actions, the plaintiffs appealed the matter to the United States Court of Appeals for the Third Circuit.

The Third Circuit's Decision

In its decision on the matter, the Court of Appeals provided a detailed analysis of what constitutes "challenges to removal or remediation actions" under CERCLA.

First, the court stated that prior case law establishes the word "challenges" to include any action that will delay, interfere with, or "call into question" a CERCLA-initiated removal or remediation action. Thus, any action that dictates a specific remedial action or alters the method of cleanup will constitute a challenge. However, the Court of Appeals also noted that practically any lawsuit could increase costs of cleanup or divert recourse from it and therefore, when assessing whether the cost of an action constitutes a challenge, the courts look to the nexus between the nature of the suit and the CERCLA cleanup.

While prior case law provides a well-established definition of the term "challenge", the Court of Appeals noted that CERCLA includes rather lengthy definitions for the terms "removal" and "remediation action." Thus, the court initiated a three-part analysis to determine whether either of the legal actions constituted challenges to either a removal or remediation plan.

Relief Sought and Removal and Remediation Classifications

The Court of Appeals began its analysis by considering whether the relief sought could be classified as a step in the removal or remedial process, in which case it would clearly interfere with the removal or remediation action initiated by the Navy. With respect to the request for medical monitoring, the court found that "monitoring" can generally be considered a removal action. However, CERCLA's language suggests that monitoring is only a removal action it if involves oversight activities directly related to addressing the hazardous waste, not monitoring the potential harm caused by the waste. The medical monitoring sought by the plaintiffs focused solely on the health of individuals who may be affected by the hazardous material, not the hazardous material itself. Similarly, medical monitoring is not a remedial action since it is not related to preventing or minimizing the release of hazardous materials.

The court came to a different conclusion regarding the plaintiff's request for a health assessment study. The court found that such a study is typically done by the federal government to help determine what actions should be taken to reduce human exposure to hazardous substances. Thus, the plaintiffs' requested report could have a direct effect on what removal or remediation actions are taken by the Navy. This type of assessment is left to the jurisdiction of the federal government through CERCLA and therefore, any attempt by a private party to initiate a general health assessment study would interfere with the removal and remediation efforts, which is banned per § 9613 of CERCLA.

The second part of the Court of Appeals' analysis focused on the form of relief sought by the plaintiffs. The court noted that generally, any request for injunctive relief that relates in any way to a current or pending response by the federal agency could constitute a challenge. For example, if the relief sought would require the federal agency to engage in any activity that could be part of a cleanup effort, it is likely an impermissible challenge under CERCLA. However, requiring the federal agency to pay money is not generally enough to establish a challenge. Here, even though the medical monitoring would require the Navy to take specific action, the court found that the monitoring was not related to cleanup and therefore, did not constitute a challenge. However, the health study was an action that could be contemplated in the Navy's cleanup plan since, again, general health assessment studies are usually part of the process to identify the specific removal or remediation actions

to take. Therefore, the plaintiffs' requested study could force the Navy to change the details of the assessment it would otherwise have conducted. Thus, the court concluded that the health study was a challenge under this factor as well.

Potentially Conflicting, Impacting or Interfering with Cleanup Efforts

Finally, the Court of Appeals looked at whether the medical monitoring would conflict, impact, or otherwise interfere with ongoing cleanup efforts. The Navy argued that the medical monitoring could interfere with its cleanup efforts because it required funding and may ultimately tie up or delay the Navy's cleanup efforts since it would have to deal with litigation and identifying funds to pay for the costs. The court rejected this argument, finding that the medical monitoring would only require the Navy to set up a trust to cover the costs of another party to conduct the monitoring. Conversely, the court again found that this factor indicated that the plaintiffs' health assessment request constituted an impermissible challenge because it would interfere with the Navy's efforts to assess how best to address the hazardous material. Again, the court noted that CERCLA generally contemplated health studies as part of remediation plans and therefore, the plaintiff's efforts to compel the Navy to conduct a specific health assessment would interfere with the Navy's cleanup work.

Based on this analysis, the Court of Appeals found that that the plaintiffs could seek medical monitoring relief but were barred pursuant to CERCLA from seeking their requested health assessment relief.

Conclusion and Implications

While the Court of Appeals generally followed prior case law addressing CERCLA and the language prohibiting prior challenges to federal agency "removal or remediation actions", the *Giovanni* decision case does break some new ground by providing a roadmap for analyzing what specific acts could constitute a challenge. Beyond this roadmap, the decision focused on, and indicated that the court's findings were consistent with, the overall goal of CERCLA which is to ensure federal agencies adequately address their contamination while allowing private parties to seek certain remedies without unduly interfering with remediation plans.

(Stephen M. McLoughlin, David Boyer)

DISTRICT COURT FINDS OWNER OF LAND ALLEGEDLY CONTAMINATED WITH LEACHATE WAS A NECESSARY PARTY IN CLEAN WATER ACT AND RCRA CITIZEN SUITS

PennEnvironment v. PPG Industries, Inc., ___F.Supp.3d___, Case No. 12-342 (W.D. Penn. Oct. 26, 2018).

The owner of a right of way allegedly in the path of leachate draining to the Allegheny River was held to be a necessary defendant in a citizen suit brought under the federal Clean Water Act (CWA) and federal Resource Conservation and Recovery Act (RCRA). Although the suit did not seek to hold the landowner liable for the contamination, in the event the suit is successful the court retained jurisdiction over the landowner in order to be able to order access to the site for testing and remediation.

Background

PPG Industries formerly operated a sandstone quarry in Armstrong County, Pennsylvania (Site). The Site contains "an area known as the Slurry Lagoon Area (SLA) where PPG deposited slurry waste it created." A railroad, within a right-of-way held by the Buffalo & Pittsburgh Railroad (BPRR) borders the SLA to the south, "and an area that PPG refers to [as] the 'solid waste disposal area' (SWDA)" borders the SLA to the east. PennEnvironment and other public interest plaintiffs alleged in consolidated Clean Water Act and Resource Conservation and Recovery Act citizen suits:

> . . .that leachate seeps through the cliff face on the south side of the Site and is then discharged into the Allegheny River through culverts un-

der the railroad tracks at the base of the cliffs.

The complaints also alleged that wetlands lie in the railroad right of way held by BPRR. Plaintiffs named BPRR as a defendant required to be joined under Federal Rule of Civil Procedure 19(a), reasoning that the relief sought would require access to the right-of-way for testing and remediation. Rule 19(a)(1) provides that:

> . . .a person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

The District Court's Decision

BPRR admits it owns the right-of-way and operates and maintains the railroad tracks, but sought to be dismissed on the grounds that the claims against it are:

> . . .contingent, speculative and unripe because BPRR is included in the case only on the possibility that it might be involved in the relief sought against PPG.

Further, in the event that the claims were successful and BPRR refused plaintiffs access to the right-of-way, the Pennsylvania Department of Environmental Protection could obtain access to the right-of-way for site investigation and remediation under state law.

Rule 19 and a 'Complete Remedy'

The District Court rejected BPRR's ripeness argument, reasoning that the plaintiffs' claims against PPG are unquestionably ripe because they are based on allegedly existing, rather than future speculative, harms. PPG is the only defendant against whom liability is sought, and BPRR is properly a defendant under Rule 19. And the court found the state agency's authority to access the right-of-way is irrelevant with respect to the plaintiffs' ability to access the right-of-way to obtain any relief they might be awarded.

> In this case. . .the court already has subject matter jurisdiction over plaintiffs' claims pursuant to two federal environmental laws. Plaintiffs are not using Rule 19 to expand jurisdiction over BPRR, against which plaintiffs assert no claims. Rather, BPRR is included as a defendant in order to allow for the fashioning of a complete remedy, which could include access to BPRR's right-of-way.

Further, plaintiffs argued that BPRR required, but had not yet entered into with plaintiffs, formal access agreements, relying on "a Site Access Agreement between [BPRR] and PPG" and "a September 16, 2013 Right of Entry Letter Agreement" to "show that BPRR requires formal access agreements from both them and PPG to access and conduct work on its right-of-way." These persuaded the court that "[p]laintiffs have demonstrated that a complete remedy cannot be fashioned without keeping BPRR in the case with respect to obtaining access to BPRR's right-of-way to implement aspects of a potential remediation"—establishing that BPRR is a necessary party under Rule 19.

Conclusion and Implications

Even when *no* liability is sought against a landowner, it may not be possible to avoid becoming a defendant when access to lands may be necessary in order to award successful plaintiffs complete relief that is dependent on site access as was the case here with suits under the Clean Water Act and RCRA. (Deborah Quick)

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

CHANGE SERVICE REQUESTED

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