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EWL

FEATURE ARTICLE

DEFINING 'WATERS OF THE UNITED STATES' AND 'WATERS OF THE STATE'—CLEAR AS MUD

By David C. Smith

As many rally to the cry, "Drain the Swamp!," many others are actually fighting diligently to define, defend, and even expand it. From Washington, D.C., to Sacramento, regulators, politicians, and litigants of all stripes are fighting over what constitutes a "water" worthy of protection, what those protections should be, and who bears the burden and cost of such protection. "Waters of the United States" versus "Waters of the State," "three-prong wetlands" versus "two-prong wetlands," and Obama versus Trump have left this critical resource area clear as mud.

On the federal front, the decades-long battle to define "Waters of the United States" or "WOTUS" within statutory and constitutional bounds acceptable to the U.S. Supreme Court remains elusive. Regulations from 1987 were superseded by an Obama Administration Rule in 2015 (2015 WOTUS Rule), but multiple rounds of battling litigation have left it valid in only 22 of the 50 states. The Trump administration on February 14 of this year published its proposed replacement to the 2015 WOTUS Rule (2019 WOTUS Rule), but with at least a 60-day public comment period and the promise of litigation should it be finalized, enactment of the 2019 WOTUS Rule is certainly not imminent.

On the state level in California, the threat of what opponents of the 2019 WOTUS Rule characterize as a severe curtailment of the scope of federal regulatory protection for aquatic resources has breathed new life and urgency into another decade-long undertaking—an effort launched in 2008 by the California State Water Resources Control Board (SWRCB) to adopt a statewide policy and related regulatory procedures to govern the discharge of dredge or fill material to "Waters of the State" (State Program). The state having largely piggy-backed on the federal program since the inception of regulating such resources, critics of the proposed State Program question the state's staffing, resources, and sophistication to take on such a broad sweeping program apart from the feds. Critics also find the proposed State Program duplicative and at the same time conflicting with the federal program rendering it, at best, unnecessary and, at worst, costly and will expose the state and its economy to significant peril and litigation.

How We Got Here—Blame The 'Supremes'

How indeed? The High Court's first grappling with the issue was back in 1985. In *United States v. Riverside Bay View Homes*, 474 U.S. 121 (1985), the U.S. Supreme Court ruled that wetlands that were adjacent to a clearly jurisdictional resource such as a major lake or river are sufficiently intertwined with the ecology and hydrology that the wetlands themselves warranted protection under § 404 of the federal Clean Water Act that prohibits filling a WOTUS.

However, over 15 years later, the Court ruled that U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) had failed to provide a legitimate justification for exerting federal regulation over large, abandoned mining pits that had filled with water. A majority of the justices held that those pits were "isolated" in that they had no hydrologic or other appreciable connection to true WOTUS, and they were contained only within a single state and had no apparent impact on interstate commerce. Thus, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) or "*SWANCC*" became the catalyst for many to define regulatorily a consistent, predictable regime by which to identify and, where appropriate, regulate WOTUS.

The failure of those regulatory efforts (by administrations of both ideological perspectives) was evidenced in *Rapanos v. United States*, 547 U.S. 715 (2006). There, the only thing a fractured Supreme Court could agree upon was that the Corps and EPA had not yet figured it out. In a 4-1-4 ruling with no majority rationale being held, the conservative plurality, led by Justice Scalia, said that to be subject to federal regulation under the Clean Water Act as a WOTUS, a resource must be a "relatively permanent water" as the term "water" is generally understood in common parlance. Conversely, the liberal plurality, led by Justice Stevens, would largely defer to the agencies' expertise and allow them to regulate any resources they believed warranted protection.

On his own was Justice Kennedy who felt that the "relatively permanent" standard was too restrictive, but he did feel the agencies would have to demonstrate that a given resource had a "significant nexus" to another clear WOTUS. Though he was the only justice to embrace this perspective, Justice Kennedy's "significant nexus" test largely became the governing standard nationwide in the years that followed.

And the question of what is and is not a WOTUS took on new urgency courtesy of the High Court in 2016. Up until then, the Corps or EPA designating a given area as a WOTUS escaped oversight or judicial review. Having been characterized as not "final agency action," the assertion of jurisdiction by the agencies could not be challenged in court. But in *U.S. Army Corps of Engineers v. Hawkes*, 136 S. Ct. 1807 (2016), the Supreme Court found that an exertion of jurisdiction had a sufficient tangible impact on property ownership that it is itself final agency action subject to judicial review.

WOTUS—Where Are We? It Depends Where You Are

The 2015 WOTUS Rule (Obama), 80 Federal Register 37054 (2015)

A major problem for the agencies with Justice Kennedy's "significant nexus" test from *Rapanos* was that it was very field-intensive. Demonstrating and documenting that any given resource had the requisite nexus to an indisputable WOTUS necessitated many hours of boots on the ground, both by private industry consultants and regulators themselves. The costs and work backlog became significant.

Accordingly, the Obama administration sought to craft a rule that would clearly identify criteria that would establish WOTUS status indisputably based on the language of the rule itself. Thus, the 2015 WOTUS Rule established clear and quantifiable criteria—such as a specified linear-feet between one resource and another or presence in a flood plain—that could be affirmed from a desk in an office with access to Google Earth as sufficient for the exertion of jurisdiction.

Critics of the 2015 WOTUS Rule were widespread, both geographically and across industries. They argued that the criteria were arbitrary and cast a jurisdictional net far beyond what Justice Kennedy articulated in *Rapanos*. Upon the 2015 WOTUS Rule's final adoption on June 29, 2015, the lawsuits were immediate and numerous. States, agriculture, and industry interests all challenged the rule as beyond the agencies' authority under the Clean Water Act. Multiple courts agreed that the rule was likely invalid and enjoined its implementation. All such courts, however, only enjoined the 2015 WOTUS Rule in states that were parties to that given lawsuit. Thus, a haphazard patchwork of injunctions speckled the nation.

In an effort to reestablish uniformity and to buy itself time to craft its own replacement rule, the Trump administration adopted a separate rule delaying the implementation of the 2015 WOTUS Rule by an additional two years. Defenders of the 2015 WOTUS Rule, primarily environmental interests, sued to challenge the two-year delay, and they were successful. Two federal district courts held that the means by which the Trump administration adopted the delay failed to comply with the Administrative Procedure Act and invalidated the delay. These two courts, however, issued injunctions nationwide, reestablishing the patchwork.

As if that wasn't confusing enough, in the midst of this swirl and prior to President Trump's inauguration, the Obama administration in trying to fend off the challenges to the 2015 WOTUS Rule, contended that only a Circuit Court of Appeals had jurisdiction to hear the challenge, not the multiple district courts in which the states had filed their lawsuits. The Sixth Circuit Court of Appeals agreed and consolidated all of the pending challenges to itself. But then, to the great dismay of the Obama administration, the Sixth

Circuit granted the states' request for a nationwide injunction against implementation of the 2015 WOTUS Rule finding that it was likely illegally expansive beyond the bounds of the Clean Water Act.

Still wanting to pursue their actions in local district courts, however, the states appealed to the Supreme Court the Sixth Circuit's procedural decision as to the proper court to hear the matter(s). The High Court made no ruling whatsoever on the merits of WOTUS, but disagreed that the Sixth Circuit had jurisdiction and sent the individual matters back to the district courts in which they were originally filed.

Thus, with sporadic local injunctions against implementation of the 2015 WOTUS Rule, and a nationwide injunction against the Trump administration's two year delay in implementation, we are squarely back at the haphazard patchwork. At the time of this publication, the 2015 WOTUS Rule is the law of the land in 22 states (including California), the District of Columbia, and all U.S. territories. In the other 28 states, the agencies have reverted back to the prior regulations defining WOTUS adopted in 1987. EPA maintains a webpage dedicated to tracking this saga in real time: https://www.epa.gov/wotus-rule/definition-waters-united-states-rule-status-and-litigation-update .

The [Proposed] 2019 WOTUS Rule (Trump)—84 Federal Register 4154 (2019)

Amidst then-candidate Trump's promise of regulatory relief and rollback on the campaign trail, particularly in the agricultural heartland, rolling back the 2015 WOTUS Rule was near the top of the list. Opponents of that rule viewed it as a regulatory property and power grab by the federal government, grossly expanding the reach of federal regulation into local land use and water rights. Supporters of Trump called on him to look to Justice Scalia's approach in *Rapanos* and limit the bounds of federal regulation clearly to resources that are only "relatively permanent" in terms of water content and flow.

On December 11, 2018, EPA Acting Administrator Andrew Wheeler and Assistant Secretary of the Army for Civil Works R.D. James "unveiled" the Trump administration's proposed replacement for the 2015 WOTUS Rule. The proposal was merely "unveiled" because a proposed rule is not officially "released" until it is published in the Federal Register which did not occur until February 14, 2019. Official publication commences the public comment period for the proposed 2019 WOTUS Rule which is presently slated for 60 days, expiring on April 15, 2019.

Immediately upon unveiling, proponents praised and critics panned the proposed 2019 WOTUS Rule. Those in favor said it would provide clarity and consistency, allowing a property owner to walk onto his or her land and readily understand which resources would and would not be subject to federal regulation. Critics decried the pullback asserting that it would leave a significant portion of wetlands, streams, and other features without federal protection. Many have promised immediate litigation should the proposed rule be finalized.

Comparing the Two WOTUS Rules

Although the 2019 WOTUS Rule is clearly closer to the Scalia approach in *Rapanos* than the 2015 WOTUS Rule, it likely extends the jurisdictional net somewhat more broadly than the four corners of Scalia's "relatively permanent" boundaries.

One of the most-stark examples of the differences in the respective WOTUS rules is the jurisdictional character, or lack thereof, of streams. Streams that flow constantly and uninterrupted largely qualify as "traditional navigable waters" and are regulated under both rules. Streams with less consistent flows are another matter.

On the far extreme are "ephemeral" streams. These are features that only flow when it rains. They collect and convey rainwater flows, but have no separate and independent source of water, such as snow melt or groundwater. Other streams are labeled "intermittent tributaries." These features also flow only occasionally, but those flows are not limited just to rainwater. Other sources of water—again, such as snow melt or groundwater—provide an at least partially consistent source of flows.

Under the 2015 WOTUS Rule, both ephemeral streams and intermittent tributaries have the potential to be regulated. The 2015 WOTUS Rule would not focus on how much or how often the respective feature flows. Rather, if the feature has indicators that it *ever* flows, i.e., bed, bank, and "ordinary high water mark," it is subject to regulation.

Conversely, the 2019 WOTUS Rule would not regulate ephemeral streams at all. And as to intermittent tributaries, the question would turn on just how often and how much that tributary actually does flow

with water.

Wetlands are another difference in approach. The 2015 WOTUS Rule would regulate all wetlands with a surface or subsurface connection to another WOTUS. The 2019 WOTUS Rule would, generally, regulate wetlands with a surface connection, but would not allow a subsurface connection to establish jurisdiction.

As to wetlands lacking a surface connection, this is where the 2015 WOTUS Rule sought to establish criteria establishing jurisdiction "by rule." Factors such as being located within a 100-year flood plain or being within 4,000 feet of another WOTUS would be sufficient, *by rule*, for the feature's regulation. The 2019 WOTUS Rule, conversely, does away with all such criteria and largely excludes such isolated wetlands that lack a surface connection to another WOTUS.

There are, of course, additional differences beyond these illustrative examples.

Again, at the time of this publication, the public comment period for the proposed 2019 WOTUS Rule closes on April 15, 2019. However, in a letter dated February 11, 2019, 36 Democrat senators, led by Thomas Carper, ranking member of the Senate Environment and Public Works Committee, called on EPA to extend the comment period to at least the period for which the 2015 WOTUS Rule was open for comment, 207 days.

California's Proposed State Program and Regulating Fills of Waters of the State

Overview and Background

On April 15, 2008, the California State Water Resources Control Board adopted a resolution directing staff to embark on a three-phase effort to adopt policies and procedures necessary to ensure that aquatic resources in the state were sufficiently protected under state law and not solely dependent on federal law. Nearly 11 years later, SWRCB members and staff continue to grapple with the proper policy and procedures to carry out just phase one of the 2008 resolution. As recently as February 22, 2019, SWRCB staff circulated yet another revised draft to be presented to the SWRCB for consideration. Recognizing that the content and schedule for the proposed State Program is constantly subject to change, at the time of publication of this article, SWRCB staff was scheduled to present the latest proposed State Program to the SWRCB at a March 5, 2019 workshop at which no action would be taken. The matter is tentatively set for SWRCB action on April 2, 2019. The latest information on the State Program and related processes can be found at: https://www.waterboards.ca.gov/water_issues/programs/cwa401/wrapp.html

Key elements of the proposed State Program include: 1) a new definition of "wetlands" that is different than the federal definition; 2) processes separate and distinct from existing federal processes, including alternatives analyses, in seeking a permit to fill or alter jurisdictional features; and 3) mitigation ratios for impacts, again, frequently different from standards applied in the federal arena.

But Why?

California, like most states, has relied on the Corps and EPA and their authority under the federal Clean Water Act to analyze and regulate proposed fill and impacts to wetlands and other jurisdictional waters. Under this regime, the state had at least two strong authorities under which it could require project modifications or mitigation beyond what the federal agencies imposed. The first is the state's authority to "certify," or not, that granting of the federal permit will not implicate state-established water quality standards. This authority is required under § 401 of the federal Clean Water Act. Additionally, the state has broad authority under California's Porter-Cologne Water Quality Control Act to impose "Waste Discharge Requirements" or "WDRs." Quite often the 401 Certification and WDRs are processed by the state concurrently based largely on the work and analyses performed by the federal agencies.

This existing regime led many opponents of the proposed State Program to question why the SWRCB was even pursuing a separate and seemingly conflicting policy. The initial proffered justification dates back to the Supreme Court decision in 2001, *SWANCC*. Once the High Court held that wholly intrastate isolated features were not subject to federal regulation, fears of a purported "*SWANCC* gap" spread rapidly. There was a sense that an untold and significant number of resources would simply fall through the regulatory cracks and be lost if urgent action was not taken.

But critics are quick to point out that the specter of a *SWANCC* gap was one of the primary drivers of the original 2008 SWRCB Resolution calling for the proposed State Program. But here we are nearly 11 years later, and the absence of any credible record of lost aquatic resources, opponents assert, demonstrates that the hypothetical *SWANCC* gap has proven to be a fiction.

The SWRCB staff has also said a uniform state policy is necessary to establish consistency by and between the nine Regional Water Quality Control Boards (RWQCBs) throughout the state. But, again, opponents of the proposed State Program—largely the regulated community that has to deal with the respective RWQCBs on these matters—state that there is no evidence of any such inconsistent operations. Further, they say that if there were inequitable and disparate treatment at the RWQCBs, it would be them, the ones subject to such hypothetical regulatory irregularities, that would be complaining. Nonetheless, the proposed State Program soldiers onward.

Defining 'Wetlands'

Notwithstanding the confusion surrounding the bounds of jurisdiction related to aquatic resources at the federal and state levels, one component has been dependably clear—what actually *is* a "wetland"? A Corps- and EPA-promulgated regulation has long established that for a feature to be a true "wetland," three components must be present: 1) hydrology (it is wet); 2) soils of specified characteristics rendering them "hydric" based on saturation; and 3) indictor hydrophytic vegetation. As noted above, there has been much legal debate as to whether any given wetland is jurisdictional, isolated, or otherwise bears the requisite significant nexus to another WOTUS, but the foundational definition has been pretty stable—either all three components are present or they are not.

One of the most controversial aspects of the proposed State Program is a new and different definition of "wetland" for California. The new definition in the State Program would keep the first two components, but effectively eliminate the third, vegetation. Opponents of the State Program have offered multiple alternatives and language supplements that would keep the textbook definition consistent with the federal agencies, and still explicitly loop in resources SWRCB staff says it feels may escape regulation under the federal definition. Critics, again, point out that there is no record of a regulatory gap under the longstanding federal definition.

Alternatives Analysis and the 'LEDPA'

The most impactful and cumbersome aspect of the proposed State Program is its requirement for the preparation of an alternatives analysis and the lack of alignment with that requirement with the federal process. The proposed State Program does authorize use and deferral to a federally authorized alternatives analysis in limited circumstances, but there are many instances in which a state analysis will be required either in addition to the federal analysis or when the federal agencies do not require one. For example, if the proposed activity is authorized under a federal "general" permit (Nationwide Permits), generally an alternatives analysis is not required. Nonetheless, the proposed State Program almost always requires the alternative analysis unless the state has already certified the federal general permit, and even then, there are multiple disqualifiers that will resurrect the alternatives requirement anew. The magnitude of impact on the aquatic resource—designated as "Tier 1," "Tier 2," or "Tier 3"—will dictate how extensive and elaborate the alternatives analysis must be.

Attempting to mirror the federal regulations, the proposed State Program would require the respective RWQCB conducting the alternatives analysis to certify that the proposed activity is the least environmentally damaging practicable alternative or "LEDPA." In the federal regime, if your impact includes the fill of a wetland or another "special aquatic site" (*e.g.*, a mudflat), you must overcome a rebuttable presumption that an alternative does exist that can avoid the impact to the special aquatic resource. Depending on the region, this presumption, though labeled "rebuttable," is actually regarded as an insurmountable death knell, so the resource must absolutely be avoided to have any chance of getting the permit. The proposed State Program includes both the LEDPA mandate and presumption for fills to waters of the state, not just resources recognized as independently "special."

Conclusion and Implications

Notwithstanding the flurry of regulatory activity at both the federal and state levels, clarity on what is or is not a regulated resource in any given context is

unlikely in the foreseeable future. And litigation on all fronts is a veritable certainty. Specifically, as to the proposed State Program, advocates on both sides of the issue have questioned whether it is in California's interest to seek delegation of the federal program under Clean Water Action § 404(g) so as to allow for one integrated program. One of the major gating issues for the regulated community on that front is whether a federal program delegated to the state still operates as a jurisdictional link to § 7 for interagency consultation under the federal Endangered Species Act.

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WATER NEWS

PROPOSED INTERSTATE WATER TRANSFER PIPELINE PROJECT REVIVED UNDER NEW TERMS

A Colorado entrepreneur, through a newly created LLC, has filed for water rights in Utah's Green River in the latest iteration of a decade-old plan to bring additional water to Colorado's Front Range. That application, like its predecessors, faces steep opposition from a variety of environmental, private, and governmental groups.

Background

Aaron Million originally conceived of this plan 15 years ago while working on his master's thesis at Colorado State University. Since then, Million's plans have been defeated and then re-hatched multiple times, giving the project the nickname "zombie pipeline." An early version called for pumping 250,000 acre-feet to Colorado and was quickly dismissed. In 2010 the project was called the Flaming Gorge Pipeline and proposed to pump more than 200,000 acre-feet water from Flaming Gorge Reservoir in Wyoming to Colorado annually. That 500-mile pipeline was slated to run all the way to Pueblo, Colorado on the southern tip of the Front Range. After being opposed on all fronts, it was finally rejected by the Colorado Water Conservation Board and Federal Energy Regulatory Commission in 2012.

A New Proposal

Undeterred, the project has again surfaced, this time under Million's new entity Water Horse Resources, LLC. Water Horse submitted an application to the State of Utah in January of 2018, this time claiming 76 c.f.s. for a total of 55,000 acre-feet, annually, from the Green River below Flaming Gorge. This revised version of the pipeline project is only about a quarter of the 2010 proposal, which Million hopes will allay the 2012 concerns that there was simply not enough water in the river.

Nevertheless, the application was opposed by almost 30 individuals, environmental groups, river districts in Colorado and Utah, and governmental agencies including the Bureau of Reclamation and the BLM. The State of Colorado has taken a wait-and-see approach, noting that it will remain neutral for the time being.

One of the chief concerns raised by opposers is that the plan is widely speculative, considering that Water Horse has not yet revealed a buyer for the large volumes of water. Million claims that he does in fact have a buyer interested in purchasing the entire 55,000 acre-feet to use on the Front Range. However, the only evidence presented in the application were letters of interest from potential buyers relating to the 2010 proposal. The Central Colorado Water Conservancy District (CCWCD) is the only Colorado entity to have openly expressed interest in the water from the Water Horse pipeline. The CCWCD, which has since joined an advisory board for the Water Horse project, is very interested in the pipeline because water shortages have left the district about 50 percent short on its deliveries in an average year.

This latest proposal plans for an underground pipeline, approximately 40 inches in diameter, that would divert from the Green River—below Flaming Gorge and above Dinosaur National Monument—and then run east across Wyoming before turning south into Colorado along the Front Range. Water Horse has estimated that the project will cost between $860 million and $1.1 billion to construct. Million has mentioned the possibly of using existing oil and gas pipelines to transport the water, but there have been no official plans yet revealed so it is unclear how viable such a plan would be.

Water and Hydroelectricity

In addition to revenue from the sale of water, the pipeline is projected to generate 70 megawatt hours of hydroelectric power per year thanks to a 3,800-foot vertical drop from the Continental Divide to the Front Range. After the pipeline is up and running, Million has discussed a second phase involving pumped-storage facilities to increase hydropower efficiency, generating an additional 500 to 1,000 megawatt hours annually. At a November hearing of the Utah Board of Water Resources, Million noted

that, "[i]t's becoming as much a renewable-energy project as water supply." In that hearing the proposal was roundly criticized by groups and individuals as disparate as Utah ranchers and Colorado environmental groups. The only group to support the project had a clear agenda—Pipeliners Local Union 798. Much of the other criticism brought up at the hearing dealt with the vagueness of the proposal, with the initial plans leaving the public unable to determine the viability of the plan. Those concerns led to the Utah State Engineer's office on December 10, 2018 to request additional information from Million and Water Horse to prove, principally, that water is available and that the project is feasible.

Update: Water Rights, Environmental Concerns

Water Horse answered those questions on February 8, 2019 in a sprawling response that totaled almost 250 pages, including exhibits. Responding to the questions about physically and legally available water, Water Horse noted that the Green River has so few diversions compared to users that "it has never been necessary to regulate Green River water rights by priority." Turning to a legally available water supply, Water Horse claims that: 1) the Law of the River dictates that this water would be charged to Colorado because the 1922 Colorado River Compact focuses on place of use, and 2) the 2010 CWCB Statewide Water Supply Initiative found that Colorado has between 445,000 and 1,438,000 acre-feet per year available under its Compact entitlements. Therefore, the response claims, the Water Horse proposal would use both a physically and legally available water supply.

Pivoting to environmental issues, Water Horse admitted that the most straightforward legal approach would have been to divert from the Green River in Colorado, run the pipeline through Colorado, and therefore file the application in Colorado. However, Water Horse claims that technical and environmental issues make that current proposal the most feasible. Other environmental issues, particularly those concerning fish and other wildlife, have been a contentious point through the various iterations of this project. In the February 8 response, Water Horse seemed to punt on this issue, claiming that there is plenty of water in the Green River at the point of diversion to support fish habitat, but that's also a moot point at this time because federal involvement will necessitate Endangered Species Act and National Environmental Policy Act (NEPA) review in the future.

Conclusion and Implications

All opposers now have 30 days from February 8 in which to offer any comments to Water Horse's response. There is no timetable on an expected resolution of this proposal, but if the past applications are any guide, it will be several years before the application is granted or denied.
(John Sittler, Paul Noto)

NEWS FROM THE WEST

In this month's News from the West, the theme would seem to be planning for the water supply future during times and plenty and drought. First, we report on efforts by the State of Washington to better plan for and make use of recycled water. We also report on the State of Oregon's Five-Year Strategic Plan for the efficient use of water and administration of water rights.

Washington State Depts. of Ecology and Health Publish the 'Purple Book' Helping Define Implementation of the Recycled Water Rule

In February 2019, the Washington State Department of Ecology (Ecology) and the Washington State Department of Health jointly published a new Reclaimed Water Facilities Manual, dubbed the "Purple Book."

Details of the Purple Book

Ecology makes it clear right out of the gates that the Purple Book is not a certified regulation. It functions solely as a "guidance document. . .intended to clarify the requirements in the Rule." The Rule quoted above refers to the Reclaimed Water Rule (Rule) which appears at: https://apps.leg.wa.gov/WAC/default.aspx?dispo=true&cite=173

The purpose of the Purple Book is:

> This manual provides assistance for reclaimed water project proponents, applicants, permittees, owners, generators, distributors, design engineers, and users regulated by [the Reclaimed Water Rule]. . . . The Purple Book provides additional process and technical information, including design criteria, intended to guide and assist reclaimed water permittees, project proponents, planners, and/or designers to better understand the Rule requirements.

Ecology further cautions that:

> this guidance document is not designed to, nor does it, cover every aspect of the Rule that you might think needs further clarification.

The Importance of Reclaimed Water in Washington State

The Purple Book reminds the reader of the importance of reclaimed water by restating the Washington Legislature legislative intent on reclaimed water:

> The legislature further finds and declares that the utilization of reclaimed water by local communities for domestic, agricultural, industrial, recreational, and fish and wildlife habitat creation and enhancement purposes, including wetland enhancement, will contribute to the peace, health, safety, and welfare of the people of the state of Washington.

The book further confirms the importance of recycled water to the state:

> Use of reclaimed water constitutes the development of new basic water supplies needed for future generations and local and regional water management planning should consider coordination of infrastructure, development, storage, water reclamation and reuse, and source exchange as strategies to meet water demands associated with population growth and impacts of global warming.

The Regulatory Framework

The Purple Book goes through, extensively, the statutory framework for requiring recycled water in the state. It also provides detail as to the regulatory framework that Ecology and Health are tasked with. As to the overreaching task to the agencies, it states:

> The legislature's direction to Health and Ecology is to coordinate efforts towards developing an efficient and streamlined process for review, approval, and permit issuance in order to encourage and enable the use of reclaimed water. The two state agencies have developed the assignment of the lead agency role to correspond with permit issuance already done by that agency. For example, a wastewater utility that has an existing discharge permit from Ecology and wishes to produce reclaimed water from its effluent will work with Ecology as the lead agency.

The Purple Book confirms in great detail the Reclaimed Water Rule. It also lists in table form the several regulations that govern it all.

The Chapters

In addition to substantial coverage to definitions and acronyms, The Purple Book further divided into nine substantive coverage areas via chapter as follows:

- Water Rights,
- The Planning and Permitting Process,
- Treatment, Performance, Monitoring and Reliability,
- Storage, Distribution and Use,
- Commercial, Residential, Industrial and Institutional Uses,
- Land Application/Irrigation Uses,
- Wetlands,
- Streamflow and Surface Water Augmentation, and
- Groundwater Recharge and Recovery.

The Purple Book is clear in its emphasis of the importance of recycled water via the Reclyed Water

Rule, by affirming the Legislative intent as follows:

> The legislature finds that by encouraging the use of reclaimed water while assuring the health and safety of all Washington citizens and the protection of its environment, the state of Washington will continue to use water in the best interests of present and future generations. ...It is hereby declared that the people of the state of Washington have a primary interest in the development of facilities to provide reclaimed water to replace potable water in non-potable applications, to supplement existing surface and groundwater supplies, and to assist in meeting the future water requirements of the state.

Conclusion and Implications

Overall, Washington State has historically been "blessed" with substantial rain and snow. But portions of the state are more arid and with climate change, which the Purple Book acknowledges is a very real issue, the future of water access is unknowable. In preparation for that unknown future, the state Departments of Ecology and Health have taken the time action. And at the same time, Washington would seem to recognizes the additional goal of being a good steward of water. The complete Purple Book link is available online at: https://fortress.wa.gov/ecy/publications/SummaryPages/1510024.html
(R. Schuster)

Oregon Water Resources Department Announces Five-Year Strategic Plan

In December 2018, the Oregon Water Resources Commission (Commission) approved the Oregon Water Resources Department's (OWRD or the Department) Strategic Plan for 2019-2024. OWRD administers Oregon's laws governing surface water and groundwater resources; its duties include processing applications for new water rights and regulating water uses based on existing water rights of record. The Plan identifies the Department's priorities for the next five years and objectives that further each of these priorities.

Integrated Water Resources Strategy

The Plan complements Oregon's Integrated Water Resources Strategy (IWRS), which was adopted pursuant to legislative directive. The Commission adopted Oregon's first IWRS in 2012; it was updated in 2017. The 2017 IWRS identifies 18 critical issues facing Oregon and describes 51 recommended actions to address those issues. The Strategic Plan identifies IWRS recommended actions that correlate with each plan objective.

Strategic Plan Development and Priorities

The Strategic Plan was developed in consultation with the Commission, Department staff, and agency stakeholders. Through the process of developing the Plan, the Department identified three priorities for the next five years:

1. Modernize management of Oregon's surface water and groundwater resources to meet instream and out-of-stream uses

2. Work to secure Oregon's instream and out-of-stream water future in the face of increased water scarcity

3. Foster a forward-looking team dedicated to serving Oregonians with integrity and excellence

Modernizing Oregon's Water Management

Within this priority, OWRD identified four objectives:

1. Advance responsible groundwater and surface water management

2. Modernize water transactions systems and processes

3. Increase protection of public safety and health

4. Improve instream protections and increase water conservation

Improved data gathering is a key theme of this priority. Possible action items include increased installation of water use measurement devices and use of the data, more stream measurements and groundwater level measurements collected and processed,

and elimination of the backlog of unprocessed surface water and groundwater data. Within the realm of public health and safety, dam safety is a key focus. The Department aims to increase the number of high-hazard dams with completed and exercised Emergency Action Plans. This goal coincides with new recommended actions added to the 2017 IWRS, including ensuring dam safety and preparing for a Cascadia subduction earthquake event.

Securing Oregon's Water Future

OWRD identified three objectives to aid in securing Oregon's water future:

1. Understand Oregon's expected future water supply

2. Equip basins to plan for their water future

3. Invest in Oregon's built and natural water infrastructure

Most Oregon surface water sources are fully appropriated in the summer, and water users must increasingly rely on conservation, reuse, transfers, and/or storage to satisfy their water needs. Needs are only expected to grow as Oregon's population increases and climate changes like declining snowpack and increased drought frequency put pressure on Oregon's water supply.

The Department hopes to better understand the effects of changes in precipitation and patterns of water availability brought on by climate change through an updated Water Availability Reporting System and other tools. The Department will also endeavor to increase the number of basins and communities with a water plan such as a drought contingency plan, place-based plan, or water management and conservation plan. Infrastructure improvements are another key component of securing Oregon's water future, but progress on infrastructure will be heavily dependent on the identification of available funding sources. These objectives align with new recommended actions in the 2017 IWRS, including investing in local and regional water planning efforts and investing in implementation of water resources projects.

Develop a Dedicated Team

In the next five years, OWRD aims to:

1. Maintain technical excellence and improve customer service by investing in training for staff

2. Improve agency communications

Examples of action items within this priority include developing succession plans, increasing the number of positions with a back-up, establishing an onboarding plan and/or desk manual for each position to ensure the continuity of institutional knowledge; and improving inter-division communication. Attention to these objectives will better equip OWRD to further its other priorities and objectives.

Budgetary Considerations

A key variable in the implementation of the Strategic Plan will be the availability of sufficient budgetary resources to pursue the desired objectives. The Plan acknowledges that:

> . . .[s]ome of the outcomes in this plan may require additional resources to make further progress. . .[and states]. . .[t]he Department will continue to pursue those resources but will also identify targets for what we can expect to achieve with our existing resources.

Interested readers may wish to peruse OWRD's 2019-2021 Agency Budget Request for insight into OWRD's initial prioritization of Plan objectives.

Conclusion and Implications

OWRD's Strategic Plan represents the next step in operationalizing Oregon's IWRS, but, as the Plan itself states, it "describes the overall strategic direction the Department will take over the next five years but does not specifically identify how we will do it." Specific initiatives and tactics will follow from the Strategic Plan in the years to come.
(Alexa Shasteen)

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

•January 31, 2019 - In the latest joint federal-state Clean Water Act enforcement action, Sunoco Pipeline L.P. has agreed to pay civil penalties and state enforcement costs and to implement corrective measures to resolve alleged violations of the federal Clean Water Act and state environmental laws by Sunoco and Mid-Valley Pipeline Company stemming from three crude oil spills in 2013, 2014, and 2015, in Texas, Louisiana, and Oklahoma. The Department of Justice, the U.S. Environmental Protection Agency (EPA), and the Louisiana Department of Environmental Quality (LDEQ) jointly announced the settlement. Under a proposed consent decree lodged in the U.S. District Court for the Western District of Louisiana, Sunoco will pay the United States $5 million in federal civil penalties for the Clean Water Act violations and pay LDEQ $436,274.20 for civil penalties and response costs to resolve claims asserted in a complaint filed today. Additionally, Sunoco agreed to take actions to prevent future spills by identifying and remediating the types of problems that caused the prior spills. This includes performing pipeline inspections and repairing pipeline defects that could lead to future spills. Sunoco is also required to take steps to prevent and detect corrosion in pipeline segments that Sunoco is no longer using. Mid-Valley, the owner of the pipeline that spilled oil in Louisiana, is responsible, along with Sunoco, for payment of the civil penalties and state costs relating to the Louisiana spill. The complaint alleges federal and state claims relating to three crude oil spills: a 2013 spill of 550 barrels in Tyler County, Texas; a 2014 spill of approximately 4,500 barrels in Caddo Parish, near Mooringsport, Louisiana; and a 2015 spill of 40 barrels in Grant County, Oklahoma. The Texas spill affected Russell Creek, which flows to the Neches River. The Louisiana spill—the largest of the three—flowed to Tete Bayou, a tributary of Caddo Lake. The Oklahoma spill flowed into two creeks that flow to the Arkansas River, affecting an area of about a half a mile. All three spills resulted from pipeline corrosion. The Clean Water Act makes it unlawful to discharge oil or hazardous substances into or upon the navigable waters of the United States or adjoining shorelines in quantities that may be harmful to the environment or public health. The penalty paid to the United States will be deposited in the federal Oil Spill Liability Trust Fund managed by the National Pollution Funds Center. Those funds will be available to pay for federal response activities and to compensate for damages when there is a discharge or substantial threat of discharge of oil or hazardous substances to waters of the United States or adjoining shorelines. The proposed consent decree is subject to a public comment requirements and court review and approval.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•February 19, 2019 - The U.S. Environmental Protection Agency (EPA) today announced an Emergency Planning and Community Right-to-Know Act (EPCRA) settlement with Integrity Applied Science in which the company has agreed to pay a $24,335 penalty and comply with requirements to report hazardous chemicals stored at their facility at 10765 Turner Boulevard in Longmont, Colorado. This case is part of EPA's National Compliance Initiative to reduce risks from chemical accidents, and addresses compliance within an industrial sector—chemical manufacturing-- that can pose serious risks from such accidents. The settlement resulted from a 2018 EPA inspection at the facility which revealed violations of EPCRA's hazardous chemical storage reporting regulations. EPA was made aware of potential violations at the facility due to complaints from the Weld County

Local Emergency Planning Committee (LEPC) and the Mountain View Fire Protection District. The Integrity Applied Science facility is subject to EPCRA reporting regulations because it holds hazardous chemicals above regulatory threshold quantities. Section 312 of the Act requires facilities to submit an annual Emergency and Hazardous Chemical Inventory Form to state and local emergency responders. The Emergency Planning and Community Right-to-Know Act establishes requirements for federal, state and local governments, Indian tribes, and industry regarding emergency planning and "Community Right-to-Know" reporting on hazardous and toxic chemicals. Failure to comply with these requirements prevents emergency responders from preparing for, and safely responding to, emergencies at facilities where chemical hazards may exist. These and additional Community Right-to-Know provisions help increase public's knowledge and access to information on chemicals at individual facilities, their uses, and releases into the environment.

Indictments Convictions and Sentencing

•January 28, 2019—Under a settlement reached with the U.S. Department of Justice's Environment and Natural Resources Division and the U.S. Environmental Protection Agency, P.H. Glatfelter Company will pay $20.5 million for reimbursement of EPA past costs and natural resource damages and then reimburse all future government costs of overseeing one of the nation's largest Superfund cleanup projects at Wisconsin's Lower Fox River and Green Bay Site. Flatfelter also is agreeing to take on responsibility for long-term monitoring and maintenance activities required by EPA. Georgia-Pacific Consumer Products LP is joining this settlement and agreeing to minor adjustments to its commitments under prior settlements. An enormous amount of cleanup and natural resource restoration work has already been done in Fox River and Green Bay under a set of partial settlements, an EPA administrative cleanup order, and court orders in a federal lawsuit brought by the United States and the State of Wisconsin. The total cleanup costs for the Fox River Site will exceed $1 billion. The cleanup work will reduce the risks to humans and wildlife posed by polychlorinated biphenyls (PCBs) in bottom sediment of the Fox River and Green Bay. The cleanup remedy for the Fox River Site was jointly-selected by EPA and the Wisconsin Department of Natural Resources. The remedy will remove much of the PCB-containing sediment from the Fox River by dredging. In other portions of the River, contaminated sediment is being contained in place with specially-engineered caps. The dredging and capping will reduce PCB exposure and greatly diminish downstream migration of PCBs to Green Bay. In 2010, the United States and Wisconsin sued NCR Corporation, Glatfelter, Georgia-Pacific and other parties in a Superfund lawsuit to require them to continue the ongoing cleanup at the Site and pay government costs and natural resource damages. The defendants in the government's lawsuit included paper companies like Glatfelter and Georgia-Pacific that contaminated the sediment when they made and recycled a particular type of PCB-containing "carbonless" copy paper. NCR and its affiliates produced that paper with PCBs from the mid-1950s until 1971. Under another settlement reached in 2017, NCR agreed to complete all remaining dredging and capping work at the Site. Today's settlement requires Glatfelter and Georgia-Pacific to take responsibility for long-term tasks that will continue for many years after the dredging and cap installation is completed in 2019, including periodic monitoring of PCB levels in water and fish and maintenance of the sediment containment caps. This new settlement expands the companies' obligations under earlier partial settlements and government orders, which already required at least $66 million in expenditures by Glatfelter and at least $154 million by Georgia-Pacific. This settlement, lodged with the U.S. District Court for the Eastern District of Wisconsin on Jan. 3, 2019, will be subject to a 30-day public comment period after notice of the settlement is published in the Federal Register.

•February 8, 2019 - An Elizabeth, New Jersey, biodiesel fuel company was sentenced for discharging more than 45,000 gallons of wastewater from its commercial biodiesel fuel production facility into the Arthur Kill, a waterway separating New Jersey from Staten Island, New York, announced the Department of Justice and the U.S. Environmental Protection Agency (EPA). The company had pleaded guilty in June 2018 to one count of violating the Clean Water Act. Fuel Bio One LLC was sentenced by U.S. District Judge William J. Martini to pay a criminal fine of $100,000. The company was also sentenced to probation for a period of five years, during which the com-

pany must: 1) provide biannual reports to the court and the government documenting its waste generation, handling, and disposal practices; 2) develop, implement, and fund an employee training program to ensure that all employees are aware of proper waste handling and disposal practices and to ensure that all storage, treatment, and disposal of wastewater complies with the Clean Water Act; and 3) allow the EPA full access to all offices, warehouses, and facilities owned or operated by the company. According to court documents filed in this case and statements made in court, Fuel Bio One generated wastewater that included methanol, biodiesel, and other contaminants as a byproduct of biodiesel fuel production at its Elizabeth, New Jersey, plant. On Sept. 6, 2013, and Nov. 9, 2013, employees of Fuel Bio One released approximately 45,000 gallons of wastewater into a storm water pit at the Elizabeth plant, causing the pump to operate and, as a result, wastewater to be discharged into the Arthur Kill. A representative of Fuel Bio One admitted to this conduct in court yesterday.

•February 11, 2019 - The Department of Justice, the U.S. Environmental Protection Agency and the West Virginia Department of Environmental Protection (WVDEP) announced that they have reached a settlement with Antero Resources Corporation resolving alleged violations of *§* 404 of the Clean Water Act at 32 sites in Harrison, Doddridge, and Tyler Counties in West Virginia. The settlement filed in U.S. District Court for the Northern District of West Virginia requires Antero to pay a civil penalty of $3.15 million and to conduct restoration, stabilization, and mitigation work at impacted sites. Antero will also provide mitigation for aquatic resource impacts. Impacts to aquatic resources will be partially offset at a 51.5-acre permittee-responsible mitigation site that will restore, enhance, create, and preserve over 11,500 linear feet of streams and more than 3 acres of wetlands. The EPA-estimated value of the proposed mitigation and restoration is $8 million. The violations involved the unauthorized disposal of dredged and fill materials into waters of the United States at or near sites where Antero had constructed well pads, compressor stations, impoundments, pipeline crossings, access roads, and other structures associated with Marcellus Shale natural gas extraction by means of hydraulic fracturing, also known as fracking. While each of the 32 sites varied regarding the extent of the impact to wetlands and streams, the unauthorized activities impacted more than 19,000 linear feet of streams and over four acres of wetlands and included: stream impoundments; filling wetlands and streams for compressor station pads; realigning and culverting stream segments; and failing to fully restore "temporary" impacts.

•February 14, 2019 - Interorient Marine Services Limited, a vessel operating company, was convicted and sentenced yesterday in the Western District of Louisiana, for maintaining false and incomplete records relating to the discharge of oil from the tank vessel Ridgebury Alexandra Z. Interorient Marine Services Limited admitted that oil cargo residues and oily bilge water were illegally dumped from the Ridgebury Alexandra Z directly into the ocean without being properly processed through required pollution prevention equipment. The company also admitted that false entries were made in the vessel's Oil Record Book to conceal the illegal dumping. Specifically, senior ship officers employed by Interorient Marine Services Limited discharged oily waste into the ocean by flushing the vessel's pollution prevention equipment sensor with fresh water. This flushing of the sensor tricked the system into detecting a much lower effluent oil content than what was actually being discharged. These senior officers then falsified the vessel's Oil Record Book, recording that 87,705 gallons of oily wastewater had been discharged properly through the pollution prevention equipment, when in fact they knew that this pollution prevention equipment had been tampered with. Interorient Marine Services Limited pleaded guilty to a felony violation of the Act to Prevent Pollution from Ships, 33 U.S.C. § 1908(a), for failing to accurately maintain the Ridgebury Alexandra Z's Oil Record Book. Under the terms of the plea agreement, the company will pay a total fine of $2 million and serve a 4-year term of probation, during which all vessels operated by the company and calling on U.S. ports will be required to implement a robust Environmental Compliance Plan. The vessel's captain, Vjaceslavs Birzakovs, was charged in a six-count indictment by a Grand Jury in the Western District of Louisiana on Nov. 29, 2018, for his involvement in this case. The indictment alleges that Birzakovs directed circumvention of the vessel's pollution prevention equipment, falsified records, obstructed justice, made false statements, and

conspired with other crewmembers to falsify the vessel's Oil Record Book and to obstruct the U.S. Coast Guard's enforcement of the law in conjunction with the illegal discharges from the Ridgebury Alexandra Z. The charges and allegations contained in Birzakovs' indictment are merely accusations, and he is presumed innocent unless and until proven guilty. (Andre Monette)

JUDICIAL DEVELOPMENTS

FOURTH CIRCUIT UPHOLDS VIRGINIA STATE WATER BOARD'S CWA § 401 CERTIFICATION FOR THE ATLANTIC COAST PIPELINE

Appalachian Voices v. State Water Control Board, 912 F.3d 746 (4th Cir. 2019).

The U.S. Court of Appeals for the Fourth Circuit recently upheld the Virginia State Water Control Board's (Board) decision to issue a federal Clean Water Act (CWA) § 401 certification for the Atlantic Coast Pipeline, a proposed 42-inch-diameter interstate natural gas pipeline (Pipeline). Over 300 miles of the Pipeline will cross the Commonwealth of Virginia, and its proposed route would include hundreds of water body crossings.

Factual and Procedural Background

Pipeline developer, Atlantic Coast Pipeline LLC (Atlantic) was required to obtain numerous environmental approvals, including: a certificate of public convenience and necessity from the Federal Energy Regulatory Commission (FERC) under the Natural Gas Act (NGA); a CWA § 404 dredge and fill authorization from the U.S. Corps of Engineers (Corps); and a § 401 certification from the Board under Virginia's Water Protection Program (Streams and Wetlands Certification). Additionally, Virginia's regulations implementing the NGA required Atlantic to obtain a CWA § 401 upland certification covering the impact of activities in upland areas outside of wetlands and streams (Upland Certification).

Atlantic obtained the FERC certificate of public convenience and necessity in October 2017. Pursuant to the Board's delegation of review authority, in April 2017 the Virginia Department of Environmental Quality (DEQ) approved the CWA § 401 Streams and Wetlands Certification for the Corps § 404 permit. In November 2017, the DEQ issued its recommendation that the Board approve Atlantic's application for the § 401 Upland Certification, which the Board approved with conditions in December 2017. The conditions required Atlantic to obtain approval for a "Karst Mitigation Plan" before the Upland Certification would be effective.

Petitioners, environmental groups, filed two petitions for review with the Fourth Circuit under the NGA, against the Board, DEQ, and Atlantic (collectively: respondents). The petitions challenged the approval of the Upland Certification.

The Fourth Circuit's Decision

Standing

As a preliminary matter, the court determined that the environmental groups had standing to bring the petitions, citing an earlier decision finding that petitioners satisfied the standing requirements. The court applied the Administrative Procedure Act's arbitrary and capricious standard of review, explaining that the standard is "highly deferential, with a presumption in favor of finding the agency action valid."

The Issues Before the Court

Petitioners argued that the Board's issuance of the Upland Certification was arbitrary and capricious for four reasons: 1) the Board's reopening of the public comment period on the § 401 Streams and Wetlands Certification nullified the DEQ's required "reasonable assurance" finding that "the activity will be conducted in a manner which will not violate applicable water quality standards," 2) the Board and the DEQ did not analyze the cumulative impact on water quality from construction activities in different areas within individual watersheds; 3) the Board's water quality anti-degradation review was inadequate; and 4) the Board's approval of the Upland Certification did not protect water quality in karst geology regions.

The Upland Certification

The court quickly disposed of petitioners' first argument, finding that the Board's decision to reopen the public comment period on the Streams and Wetlands and Certification did not make the approval of the Upland Certification arbitrary and capricious.

Cumulative Impact Argument

The court also rejected petitioners' cumulative impact argument. First, the court noted that the § 401 Upland Certification was not intended to be a standalone document, and instead supplemented the Streams and Wetlands Certification and the FERC certificate. Further, because the Corps reviewed cumulative impacts as part of its CWA § 404 review, requiring the Board to also conduct such a review would be "redundant and inefficient." The court found that the cumulative review regulations raised by petitioners applied to the Corps and not state agencies implementing § 401.

The court distinguished three cases petitioners raised in support of their claim that the Board was required to consider combined effects and all relevant data. The court first noted that two of the cases involved challenges under the National Environmental Policy Act (NEPA), not the CWA, and that NEPA requires a cumulative impact analysis, unlike the CWA. The third case did not discuss cumulative effects or the CWA, and thus did not provide a basis for holding the Board's action arbitrary and capricious.

Finally, the court found that while petitioners may have preferred the Board to consider the cumulative impacts of multiple construction areas in individual watersheds, there is no regulatory provision requiring such review. Therefore, the Board exceeded its duties in considering both upland activities and stream and wetland impacts.

Reliance on Existing Water Quality Standards

As to petitioners' third argument, the court found that the Board's reliance on existing Virginia water quality standards in making its reasonable assurance determination was not arbitrary and capricious. The court explained that the CWA's anti-degradation policy requires state water quality standards be "sufficient to maintain existing beneficial uses of navigable waters, preventing further degradation." Virginia's regulations require natural gas projects to comply with the state's Annual Standards and Specifications program (AS&S) as opposed to the normally applicable Construction General Permit program. The court found that the AS&S program imposed the same water quality standards as the Construction General Permit program, and there was no basis for finding that the AS&S program did not protect water quality in Virginia. Additionally, the court found that because FERC's environmental impact statement determined the Pipeline's sediment impacts would be temporary, the Board's decision not to conduct a separate anti-degradation review for the § 401 Upland Certification was further justified.

Impacts to Karst Geology

On petitioners' final argument regarding impacts to karst geology, the court noted that the Board's approval of the Upland Certification was subject to five conditions designed to protect karst terrain. Accordingly, the court found that these conditions demonstrated the Board had adequately considered petitioners' concerns about the Pipeline's potential impact on karst terrain, and its decision to approve the Upland Certification was not arbitrary and capricious.

Conclusion and Implications

This case emphasizes that where state agencies conduct detailed, methodical reviews of a project's potential environmental impacts, federal courts are unlikely to second guess those determinations, even if it disagrees with the agency's ultimate decision.
http://www.ca4.uscourts.gov/Opinions/181077.P.pdf
(Dakotah Benjamin, Rebecca Andrews)

D.C. CIRCUIT FINDS STATES WAIVE CLEAN WATER ACT WATER QUALITY CERTIFICATION LEVERAGE WHEN THEY CONTRACTUALLY AGREE TO DELAY CERTIFICATION FOR MORE THAN ONE YEAR

Hoopa Valley Tribe v. Federal Energy Regulatory Commission, 913 F.3d 1099, (D.C. Cir. 2019).

In a seemingly pedestrian statutory-interpretation ruling, on January 25, 2019, the D.C. Circuit undercut a widespread tactic by which states, project applicants, and interested third parties have used their water quality certification authority to routinely delayed federal dam licensing proceedings.

Background

In 1954, the Federal Energy Regulatory Commission (FERC) licensed a "hydropower project ... consisting of a series of dams along the Klamath River in California" (Project), pursuant to Subchapter I of the Federal Power Act (FPA), 16 U.S.C. § 791a–823g. As the "licensing, conditioning, and development of hydropower projects on navigable waters" pursuant to the FPA "may result in any discharge into the navigable waters," water quality certification under the federal Clean Water Act (CWA) § 401 (33 U.S.C. § 1341(a)(1)) is a precondition to FERC's issuance of a license or other FPA-approval. The CWA provides that the "state certification requirements 'shall be waived with respect to'" a FERC application:

> . . .if the state 'fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request.' . . . .[T]he purpose of the waiver provision is to prevent a State from indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification under Section 401. *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011).

In this matter, the original license expired in 2006; PacifiCorp, the successor in interest to the dams, has since operated the Project under "annual interim licenses pending [a] broader licensing process." PacifiCorp's proposed "broader licensing" included decommissioning various downstream dams, presumable on the basis that bringing them into compliance with modern environmental standards would not be cost-effective; the upstream dams would be modernized and relicensed. Currently, "[a]ll milestones for relicensing have been met except for the states' water quality certifications under Section 401."

In 2010, California, Oregon, various environmental groups, business interests and Native American tribes entered into

> . . .a formal agreement in 2010, the Klamath Hydroelectric Settlement Agreement [KHSA or the Agreement], imposing on PacifiCorp a series of interim environmental measures and funding obligations, while targeting a 2020 decommission date.

Under the KHSA, the states and PacifiCorp agreed to defer the one-year statutory limit for § 401 approval by annually withdrawing-and-resubmitting the water quality certification requests that serve as a pre-requisite to FERC's overarching review. The Agreement explicitly required abeyance of all state permitting reviews.

A 2016 amendment to the KHSA provided for the dams slated to be decommissioned to be transferred to a separate entity, and in 2018 FERC approve splitting the licensing proceedings, but has not yet approved the transfer of the annual, interim licenses (and pending application for decommissioning) to a new entity.

The Hoopa Valley Tribe was not a party to the original or amended KHSA. In 2012, the Tribe:

> . . .petitioned FERC for a declaratory order that California and Oregon had waived their Section 401 authority and that PacifiCorp had correspondingly failed to diligently prosecute its licensing application for the Project.

That petition and a 2014 rehearing request were both denied by the agency; the Tribe then sought review by the D.C. Circuit Court of Appeals. The D.C. Circuit Court held the matter in until the amended KHSA had been adopted, but as:

> . . .the decommissioning the agreement contemplated has yet to occur, and in light of Hoopa's

pending petition, [the Court] removed the case from abeyance on May 9, 2018.

The D.C. Circuit's Decision

The D.C. Circuit formulated the issue before it as:

> . . .whether a state waives its Section 401 authority when, pursuant to an agreement between the state and applicant, an applicant repeatedly withdraws-and-resubmits its request for water quality certification over a period of time greater than one year. If this type of coordinated withdrawal-and-resubmission scheme is a permissible manner for tolling a state's one-year waiver period, then (1) California and Oregon did not waive their Section 401 authority; (2) PacifiCorp did not fail to diligently prosecute its application; and (3) FERC did not abdicate its duty. However, if such a scheme is ineffective, then the states' and licensee's actions were an unsuccessful attempt to circumvent FERC's regulatory authority of whether and when to issue a federal license.

As an exercise in statutory construction, the Court of Appeals described its task as "undemanding inquiry because Section 410's text is clear"—waiver occurs if a state:

> . . .fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request.

The inclusion of a temporal element defines "the absolute maximum" time a state can take to act without waiver occurring as one year:

> Indeed, the Environmental Protection Agency ("EPA")—the agency charged with administering the CWA—generally finds a state's waiver after only six months. Citing 40 C.F.R. § 121.16.

Here, the states have kept the licensing-decommissioning proceedings in suspended animation for more than a decade by annually, since 2006, withdrawing and refiling identical applications "*in the same one-page letter*" (emphasis by the court). Thus, the Court of Appeals did not have to decide if submitting "a wholly new" application would trigger a new one-year certification period, or just how different a refiled request must be to qualify as "new."

While the opinion is technically narrow, disallowing "California and Oregon's deliberate and contractual idleness" in furtherance of "a coordinated withdrawal and resubmission scheme," its practical impact is potentially broad:

According to FERC, it is now commonplace for states to use § 401 to hold federal licensing hostage. At the time of briefing, 27 of the 43 licensing applications before FERC were awaiting a state's water quality certification, and four of those had been pending for *more than a decade*.

Conclusion and Implications

The byzantine delays and intricacies involved in many environmental permitting proceedings, followed inevitably by litigation, all of which provide ample entry points for third parties to gain leverage, make the kind of contractual circumventions of statutorily-proscribed procedures attractive when a global settlement is on the table. Weighing whether to enter into any such deal should always include a cold-eyed assessment of whether there are any interested parties not included in the deal, and whether the courts may disagree with the legal theories and assumptions underlying the parties' bargain. The D.C. Circuit's decision is available online at: https://www.cadc.uscourts.gov/internet/opinions.nsf/DC412967A23D8B368525838D0052E4CD/$file/14-1271-1770168.pdf
(Deborah Quick)

NINTH CIRCUIT REJECTS TRIBE'S EFFORTS TO 'ENGINEER FEDERAL JURISDICTION' VIA ANTICIPATORY DEFENSE OF SOVEREIGN IMMUNITY CLAIM

Stillaguamish Tribe of Indians v. State of Washington, 913 F.3d 1116 (9th Cir. 2019).

The Stillaguamish Tribe of Indians (Tribe) constructed a revetment in the Stillaguamish River intended to protect salmon. Following a deadly landslide linked to the revetment, the Tribe filed suit in the U.S. District Court against the State of Washington (State) and the Washington Attorney General (Attorney General). The Tribe's suit sought to preemptively establish the Tribe's sovereign immunity in anticipation of an indemnification claim by the State. The Ninth Circuit Court of Appeals vacated the District Court's grant of summary judgment to the Tribe and remanded the case to be dismissed for lack of subject matter jurisdiction. The court determined the well-pleaded complaint rule did not net federal question jurisdiction when applied to an anticipatory federal defense to a contract claim.

Factual and Procedural Background

The Stillaguamish Tribe of Indians is a federally-recognized sovereign Indian Tribe with its reservation in Arlington, Washington. In 2005, the State entered into a series of agreements, including one with the Tribe, for projects designed to protect salmon populations in the Stillaguamish River from habitat-damaging sediment. The agreement provided the Tribe with a grant of $497,000 to construct the Steelhead Haven Landslide Remediation project. The Tribe completed the project in 2006.

Several years later, a large landslide occurred at the site of the remediation project, leading to the loss of 47 lives. In a separate lawsuit against the State, the remediation project was identified as a possible contributing cause to the landslide. The suit settled without any finding as to cause or assessment of responsibility. In the context of that lawsuit, the State approached the Tribe about indemnification under the agreement.

Anticipating an action by the State for contribution, the Tribe filed suit in the U.S. District Court for the Western District of Washington against the State and its Attorney General, requesting declaratory and injunctive relief. The Tribe sought a declaration that its tribal sovereign immunity barred any lawsuit for indemnification arising from the agreement with the State. The Tribe argued the agreement was not binding because the employee executing the agreement on behalf of the Tribe's governing body lacked the authority to waive the Tribe's sovereign immunity.

The District Court's Rulings

Both parties filed cross motions for summary judgement. The District Court found two provisions of the agreement relevant: an indemnity clause and a waiver of sovereign immunity. The indemnity clause required the Tribe to "indemnify, defend and hold harmless [the State] from and against all claims ... arising out of or incident to the [Tribe's] ... performance." The waiver clause provided:

> Any judicial award, determination, order, decree or other relief, whether in law or equity or otherwise, resulting from the action shall be binding and enforceable. Any money judgment against the Tribe, tribal officers and members, or the State of Washington…may not exceed the amount provided for in Section F-Projection Funding of the Agreement. … [¶] The Tribe hereby waives its sovereign immunity as necessary to give effect to this section, and the State of Washington has waived its immunity to suit in state court.

The District Court identified the enforceability of the sovereign immunity waiver as dispositive. As quasi-sovereign nations, Indian tribes are generally immune from suit. Tribal immunity is intended to safeguard tribal self-governance, promote economic development, and tribal self-sufficiency. Tribal sovereign immunity can only be waived through an unequivocal expression of waiver by the Tribe. The District Court determined that even though the agreement included a waiver of sovereign immunity, the Tribe's resolution authorizing negotiation and execution of the agreement did not include an unequivocal waiver. Relying heavily on the presump-

tion of sovereign immunity, the District Court denied the State's motion and granted the Tribe's motion for summary judgement. The State appealed the case.

The Ninth Circuit's Decision

The Ninth Circuit did not reach the merits of the Tribe's sovereign immunity defense in its January 22, 2019 decision. Instead, the Ninth Circuit concluded the District Court lacked subject matter jurisdiction. Federal District Courts have original jurisdiction over "federal question" cases, which are cases arising under the Constitution, laws, or treaties of the United States. Courts generally identify federal question cases using the "well-pleaded complaint rule." The Ninth Circuit explained that:

> . . .federal question jurisdiction exists only if the plaintiff's cause of action is based on federal law, . . .[and]. . .neither a defense based on federal law nor a plaintiff's anticipation of such a defense is a basis for federal jurisdiction.

Although the existence of tribal sovereign immunity is a question of federal law, the court noted that the Tribe filed its lawsuit in anticipation of a state court action.

Relying on U.S. Supreme Court precedent, the Tribe argued that seeking injunctive relief from state regulation on the basis that the state regulation was preempted by federal law presents a federal question. The court was not persuaded by the Tribe's argument, finding there was no question of federal preemption in the Tribe's case:

> Parties cannot circumvent the well-pleaded complaint rule by filing a declaratory judgment action to head off a threatened lawsuit. *See Atay v. Cty. of Maui*, 842 F.3d 688, 697–98 (9th Cir. 2016). When a declaratory judgment action "seeks in essence to assert a defense to an impending or threatened state court action," courts apply the well-pleaded complaint rule to the impending or threatened action, rather than the complaint seeking declaratory relief. *Id.*

The Tribe argued, inter alia, that since tribal sovereign immunity is a matter of federal common law, federal jurisdiction should automatically follow. The court agreed in theory, but emphasized that while an immunity *defense* might have triggered federal jurisdiction, that was not the case here as no defensive position in suit was present:

> The Tribe points out that tribal sovereign immunity is a question of federal common law. True enough. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). But tribal immunity is a federal *defense*. *Okla. Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989) (per curiam). As such, "[t]he possible existence of a tribal immunity defense . . . did not convert [Washington contract claims] into federal questions, and there was no independent basis for original federal jurisdiction." *Id.* It makes no difference that the Tribe asserted its defense in a declaratory judgment action rather than in a lawsuit brought by the state.

The Ninth Circuit vacated the District Court's judgment and remanded with instructions to dismiss for lack of subject matter jurisdiction.

Conclusion and Implications

Application of the well-pleaded complaint rule to an anticipatory defense based on federal law does not create federal jurisdiction for a state-law based cause of action. A potential defendant in an anticipated state court action who may be entitled to sovereign immunity or other federal law defense cannot count on the federal courts as a means of preemptively asserting that defense and evading the state court process.

http://cdn.ca9.uscourts.gov/datastore/opinions/2019/01/22/17-35722.pdf

(Derra Leigh Purnell, Rebecca Andrews)

TENTH CURCUIT FINDS PROTECTIONS FOR GOOD-FAITH THIRD PARTY PURCHASER OF LANDS BURDENED BY CERCLA LIEN MOOT CHALLENGE TO SALE

United States v. Parish Chemical Company, ___F.3d___, Case No. 174192 (10th Cir. Jan. 3, 2019).

The holder of an easement over lands held in trust for the benefit of the federal government seeking to recoup cleanup costs challenged the sale of those land free-and-clear of its easement. Applying protections for good faith third-party purchasers developed in the bankruptcy context, the Tenth Circuit Court of Appeals refused jurisdiction on constitutional mootness grounds. As the court lacked the power to undo the sale, it could not order any meaningful relief for the easement holder, even if it concluded the U.S. District Court had exceeded its authority in ordering the sale.

Background

The Parish Chemical Company owned and operated in approximately two-acre site (Property) in Utah that it contaminated with thousands of gallons of hazardous substances. The U.S. Environmental Protection Agency (EPA), pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, 42 U.S.C. §§ 9601-9675), began response activities to clean up the Property in 2008. By the time cleanup was complete in 2016, EPA had spent more than $2.5 million in federal funds. At the beginning of the cleanup process in 2009, EPA recorded a "Notice of Federal Lien" against the Property for recovery of EPA's cleanup costs, pursuant to CERCLA's § 9607(l). EPA provided a notice of the recorded Lien to the owner of the Property and made the it available to the public in a Lien Filing Record.

RW Investments (RWI) owns land adjacent to the Property. In 2011, RWI purchased from Parish an option to purchase or acquire a perpetual parking easement on a half-acre of the Property, and later that same year exercise the easement option and recorded an easement:

> . . .more than two–and–a–half years after the United States recorded the CERCLA lien on the Property. It is undisputed that the CERCLA lien appeared in the chain of title for the Property at this time.

Following the recording of the circle of lien, the United States had sued Parish to recover past and future cleanup costs. That suit was resolved via a Consent Decree and Stipulated Judgment providing for "entry of judgment against Parish for the more than $900,000 in response costs EPA had incurred at the Property to date."

Because Parish was unable to pay for these and anticipated future response costs at the site, the Consent Decree provided that Parish would satisfy this obligation by conveying the Property to a trust that would hold the land for the benefit of the United States. The Trust Agreement attached to the Consent Decree provided that the Property could be sold for the United States' benefit. The Consent Decree and its attachments further identified RWI's purported easement interest in the Property as subordinated to the United States' earlier recorded CERCLA lien and provided for EPA to receive the proceeds of the Property's sale, after payment of fees and expenses, until the obligations to it were satisfied.

RWI had notice of the Consent Decree but did not object when it and the Judgment were made available for public comment.

The cleanup was complete in 2016 and the Trustee sought an order approving the sale of the Property by auction. The Sale Motion was served on RWI "to satisfy due process requirements." RWI objected to the Sale Motion on the basis that:

> . . .its easement interest was senior to the CERCLA lien and that the District Court lacked authority to approve sale of the Property as proposed.

In approving the Sale Motion, the District Court found that the United States was the senior interest holder on the Property and that RWI was on at least constructive notice of that interest at the time it acquired the option and easement. The District Court further held it had equitable authority to order the sale free and clear of any encumbrances and to transfer all interests in the Property to the proceeds of the sale and the order of their priority, that equitable considerations justified the Property's sale as proposed

by the Trustee, and that RWI had received sufficient due process with respect to the Property's sale.

In connection with its appeal from the District Court's order, RWI sought a stay of the sale, which was denied.

The Property, free of all encumbrances, was sold at auction to an unrelated third-party in January 2018, and the sale closed in May 2018. The Trustee distributed the sale proceeds shortly thereafter as required by the Consent Decree and trust agreement and authorized by the District Court's Sale Order. Because the sale proceeds were less than the amount of the United States' senior CERCLA lien, RWI did not receive proceeds from the sale.

The Tenth Circuit's Decision

Constitutional Mootness

The Trustee and the United States sought to have the appeal dismissed as constitutionally moot. The Tenth Circuit observed that:

> . . .[c]onstitutional mootness is a threshold question we must address 'because the existence of a live case or controversy is a constitutional prerequisite to federal court jurisdiction.' Quoting *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1109 (10th Cir. 2010). . . .An appeal is constitutionally moot if the court can fashion no meaningful relief. At the same time, if a court can fashion some form of meaningful relief, even if it only partially redresses the grievances of the prevailing party, the appeal is not moot. *Search Mkt. Direct, Inc. v. Jubber (In re Paige)*, 584 F.3d 1327, 1336 (10th Cir. 2009).

The Tenth Circuit's constitutional mootness inquiry first focused on:

> . . .whether the District Court exceeded its authority in ordering the sale of the Property free and clear of RWI's easement and any other encumbrances while remitting these interests to the proceeds of the sale in order of their priority," asking whether, if RWI prevailed on this theory, "any meaningful relief is available?

Applying a rule developed in the bankruptcy context, "[i]t is well-established that courts lacked the power to undo a court-approved sale of the property to a good-faith purchaser." *See, e.g., Thompkins v. Frey (In re Bell Air Assocs., Ltd.)*, 706 F.2d 301, 304-05 & n.10 (10th Cir. 1983)," the Tenth Circuit concluded:

> RWI's contention that the District Court erred in extinguishing its easement on the Property and transferring that interest to the sale proceeds is constitutionally moot because it challenges the sale of the Property under the terms ordered by the District Court.

The court went on to find that it was undisputed "that the Property was sold to a good-faith purchaser [and] that the sale cannot be undone." Without the power to undo the sale, the court concluded no meaningful relief was available and there was no jurisdiction to further consider this issue. With regard to the extension of the "good-faith purchaser" rule outside the bankruptcy context, the court cited the Fourth Circuit for the proposition that federal courts "'are without jurisdiction to impose substantial adverse consequences upon" persons absent from the proceedings.'" *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 841 F.2d 92, 96 (4th Cir. 1988).

In contrast, the Court held the issue of whether the District Court properly found RWI's easement to be junior to the CERCLA lien was not constitutionally mood. In response to the United States' argument for mootness on the basis that the proceeds had already been distributed by the Trustee, the Court explained:

Neither the United States nor the Trustee has explained why we or the District Court could not order the United States to disgorge the proceeds it received from the Property's sale if RWI were to prevail on its priority claim on appeal. Accordingly, they have not demonstrated that there is no relief the court could order should RWI prevail on this issue, with the result that RWI's challenge to the District Court's priority determination is not constitutionally moot.

Conclusion and Implications

Those dealing with property interests that may be affected by contamination or cleanup efforts should keep in mind basic principles of protection for good-faith or bona fide third-party purchasers, constructive notice, and priority.

(Deborah Quick)

SUMMARY JUDGMENT MOTIONS FAIL BUT SEPTIC SYSTEM LEAKAGE AND THE REACH OF THE CLEAN WATER ACT REMAINS A HOT POTATO FOR THE DISTRICT COURT

Peconic Baykeeper v Rose Harvey, ___F.Supp.3d___, Case No. 13-CV-6261 (E.D. N.Y. Feb 12, 2019).

A U.S. District Court Magistrate's recent findings and opinion in a decision in New York, regarding the federal Clean Water Act (CWA), highlight the tangle of situations the U.S. Environmental Protection Agency (EPA) and Congress will face if the U.S. Supreme Court decides that discharges to groundwater can lead to CWA liability. The millions of installations of septic systems throughout the country could face scrutiny, depending on whether and to what degree discharges to subsoil or groundwater that can be traced to "waters of the United States" (WOTUS) are involved.

Background

In *Peconic Baykeeper v Rose Harvey*, Magistrate Steven I. Locke reviewed cross motions for summary judgment. The plaintiffs are environmental groups whose members are concerned with the water quality in the waters of Long Island, including the Long Island Sound and other surrounding and adjacent U.S. waterways and their tributaries. In many instances it is well established that groundwater contributes to the body and flow of these waterways. Rose Harvey, in her official capacity as commissioner of Parks and Recreation in New York State, administers numerous septic systems that are made available to people enjoying Park facilities. Much of the factual development in the case deals with Suffolk County, on Long Island.

None of the septic systems that the Parks manage have CWA National Pollutant Discharge Elimination System (NPDES) permits. However, (the defendants assert) they are regulated under state environmental discharge regulations. The septic systems are considered class V injection, *i.e.* "well injection" systems, and their flow is permitted expressly where there are established septic outfalls. However, the regulations involved are derived from the Safe Drinking Water Act, not the CWA.

The District Court's Rulings

The Magistrate examined a number of cases that deal to one extent or another with the issue of the scope of CWA permit regulation. The court found no Second Circuit Court of Appeals case directly on point. However, there is a discussion of the split between the Sixth Circuit and the Fourth and Ninth circuits and their rationale. The opinion rejects reliance on the comments of Judge Scalia in the *Rapanos* decision as being exactly germane, inasmuch as the issue discussed there dealt with physical piping or man-made conveyances of water, rather than natural flows in groundwater.

According to the EPA, the U.S. Bureau of the Census reports that the distribution and density of septic systems vary widely by region and state, from a high of about 55 percent in Vermont to a low of about 10 percent in California. New England states have the highest proportion of homes served by septic systems. New Hampshire and Maine both report that about one-half of all homes are served by individual systems.

More than one-third of the homes in the southeastern states depend on these systems, including approximately 48 percent in North Carolina and about 40 percent in both Kentucky and South Carolina. In all, EPA estimates more than 60 million people in the nation are served by septic systems. About one-third of all new development is served by septic or other decentralized treatment system.

Unless the septic system is characterized as being of "large capacity," EPA does not regulate it. The systems for institutional use, such as parks, hotels, shopping malls, highway rest areas and schools are generally "large capacity," or more than 20-person equivalence in daily load. The millions of people served by individual home or small systems rely on state, county or tribal resources for regulation.

The Magistrate in the *Peconic Baykeeper* case found that there is a serious factual dispute between the plaintiffs and the defendant that precluding summary judgment for either party on CWA liability. While the plaintiffs see direct and inevitable connection between the septic discharges and waters of the U.S., the defense asserts that well-functioning septic sys-

tems are designed to naturally breakdown the components of septic waste to the point that the effect on such waters of concern is *de minimis*.

Interestingly, the Magistrate found that the plaintiffs could not point to any instance of Safe Drinking Water Act violation at any downgradient water supply well due to the Parks septic systems. He therefore granted summary judgment for the Commissioner on the SDWA counts.

Since he found disputed issues of fact on the CWA issue, Magistrate Locke avoided a recommendation of what the law is or should be in the Second Circuit on the fundamental legal issue of whether groundwater discharges can be the basis for NPDES permit violations.

Conclusion and Implications

Despite finding factual issues for disposition at trial [making summary judgment motions unsuccessful] the court's discussion of the conflicts and the rationale of the disparate cases dealing with point sources and the scope of the CWA is quite illuminating. Given that many people expect the U.S. Supreme Court to grant *certiorari* in either the Ninth or Sixth Circuit cases presently on petition there, the District Court herself may get some binding guidance to rely on in that regard before she must rule.
(Harvey M. Sheldon)

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