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EWL

FEATURE ARTICLE

WATER IN THE UNITED STATES COMMODITIZED?—A NEW PRICING INDEX EMERGES ON THE NASDAQ® FOR THE VALUE OF WATER

By Derek Hoffman and Michael Duane Davis

On the first day of one esteemed university economics course, a professor circulates physical objects around the classroom for students to heft and examine—things like corn, wheat, soybeans, gold, silver, copper, spices and wood. These items, the lesson goes, are valuable natural resources. They also comprised the means of trade in the earliest of civilizations—gold for wheat; spices for wood—that is, until the concept of *money* took hold as the primary currency of trade. "Currency" is commonly defined as the fact or quality of being generally accepted or in use. So long as money is "generally accepted" and "in use" in the marketplace, those with gold can simply *buy* wheat. Those with spices can simply *buy* wood. No longer must one commodity be directly exchanged for another.

In today's sophisticated and global marketplace, thousands if not millions of commodities transactions occur daily. Data-driven financial indexes inform buyers and sellers regarding commodity prices. Tradable financial instruments enable transactions not only to meet today's commodity demands but also future demands, and can hedge against anticipated fluctuations in price and availability.

But what about water? More specifically, what about California water? Is it—or should it be—considered a commodity? How does such a characterization reflect and respect established water rights, laws and regulations? How are—or should—water rights transactions be priced, and based on what types and quality of information?

A New Index on the NASDAQ®

Indexes have long existed to track value and provide investors with access to *companies and utilities* that develop, produce, treat and supply water resources (*e.g.*: S&P Global Water Index, ticker symbol: SPGTAQD). Likewise, indexes for commodities like those mentioned above are ubiquitous.

On October 31, 2018, a new index emerged. The NASDAQ Veles California Water Index (ticker symbol: NQH20) (NQH20 or Index) tracks what it describes as the "spot price" of *water* in California based on certain types of groundwater and surface water transactions in specific California water markets. Veles Water Limited's (Veles) Chief Executive Officer expects the Index:

> . . .to facilitate tradeable cash-settled futures contracts within [a year] to allow farmers, utilities and industrial water users to hedge the financial risk of volatile water availability [and] provide investors with a means to speculate on the future price of water without taking on the underlying risk of owning assets. (*See*, https://www.globalwaterintel.com/news/2019/2/california-water-pricing-index-launches-on-nasdaq, last visited February 21, 2019.)

NQH20 was developed and is maintained by NASDAQ, Veles and WestWater Research LLC (WestWater). NASDAQ created the world's first electronic stock market and today provides global trading, clearing, exchange technology, listing, information, and public company services, including supporting more than 100 marketplaces in 50 countries and over 4,000 total listings with a market value of approximately $15 trillion. (*See*, https://business.nasdaq.com, last visited February 21, 2019.) Veles is a financial products company based in the United Kingdom specializ-

ing in water pricing, water financial products, and water economic and financial methodologies. (*See*, www.veleswater.com, last visited February 21, 2019.) Data for the Index is provided exclusively by WestWater, an economic and financial consulting firm specializing in water rights and water resource acquisition and development throughout the United States.

Index Calculations, Adjustments, Pricing

While many aspects of the Index are deemed proprietary, NASDAQ provides some information about the functionality of the Index in its "NQH20 Methodology Report" (Index Report) (*See*, https://indexes.nasdaqomx.com/docs/methodology_NQH2O.pdf, last visited February 21, 2019.) The Index Report states that listed figures reflect the "commodity value of water" at the source, and do not include additional costs associated with transportation or losses such as through evaporation. Index data is also limited to transactions resulting from arms-length negotiations, and excludes transactions that do not include financial consideration.

The Index is priced in terms of U.S. Dollars per acre-foot and uses a "modified volume-weighted average" of prevailing prices in selected underlying water markets after adjusting for "idiosyncratic pricing factors" specific to those water markets and specific types of eligible transactions. The Index is calculated and published following the close of business each Wednesday based on data obtained through the end of the prior week.

On opening day, the Index listed a California water "spot price" of $511.33 per acre-foot based upon 293 water transactions between approximately January and August 2018. Since then, the listed spot price has ranged between a low of $ 447.64 per acre-foot and a high of $576.30 per acre-foot. (*See*, https://indexes.nasdaqomx.com/Index/History/NQH2O, last visited February 21, 2019.)

Index Data: Eligible Water Markets and Transactions

Only certain groundwater and surface water markets and transactions are deemed eligible data sources for the Index. As described in the Index Report, current Index-eligible data sources are limited to five large and actively traded markets in California, including four groundwater markets and a generally-described surface water market.

Central Basin—Groundwater

The Central Basin underlies an approximately 227-square-mile area in Los Angeles County. The original judgment in Central Basin adjudication was entered in 1965 (*Central and West Basin Water Replenishment District v. Charles E. Adams et al.*, Los Angeles County Superior Court Case No. 786656) and has since been amended several times including most recently in 2013. The Central Basin adjudication establishes limits on total annual groundwater production and establishes allowed pumping allocations (APA) among the parties. The total APA exceeds the natural yield of the basin and relies upon recharge from imported and reclaimed water. The adjudication authorizes parties to purchase or lease APA through an established "Exchange Pool". Unused APA may be carried over into the following administrative year subject to certain timing and volumetric limitations; and, carryover water may also be traded. Eligible transactions for inclusion in the Index include permanent transfers of APA, single- and multi-year leases of APA and leases of carryover water.

Chino Basin—Groundwater

The Chino Basin underlies an approximately 235-square-mile area of the Upper Santa Ana River Watershed within portions of San Bernardino, Riverside, and Los Angeles counties. The original judgment in the Chino Basin adjudication was entered in 1978 (*Chino Basin Municipal Water District v. City of Chino et al.*, San Bernardino Superior Court Case No. RCV 164327 (now Case No. RCV 51010)), and has since been amended several times including most recently in 2012. The Chino Basin adjudication established a basin safe yield and allocated water rights among three distinct producer "Pools", including an Overlying Agricultural Producers Pool, an Overlying Non-Agricultural Producers Pool and an Appropriative Producers Pool.

Transfers and leases of water rights are subject to specific limitations. Transfers are generally not permitted within the Agricultural Pool; though, unused water is made available annually to the Appropriative Pool. Overlying Non-Agricultural Pool producers may both permanently transfer and temporarily lease water within their Pool and may lease water annually to Appropriative Pool producers pursuant to specific regulatory requirements. Appropriative Pool produc-

ers which primarily comprise municipal water providers, may both permanently transfer and temporarily lease water within their Pool. Both Overlying Non-Agricultural Pool and Appropriative Pool producers may carry over unexercised rights subject to certain limitations. Supplemental water may be stored, and both carryover and storage water may be transferred following the same rules applicable to the use of groundwater rights for each Pool.

Eligible transactions for the Index include temporary (single- and multi-year) transfers within the Appropriative Pool and within the Overlying Non-Agricultural Pool, and annual leases from the Overlying Non-Agricultural Pool to the Appropriative Pool pursuant to the regulatory framework. Eligible temporary transfers include those with single or multi-year terms. Temporary transfers of carryover and storage water are also considered eligible. The Index also includes permanent transfers of rights among Appropriative Pool and Overlying Non-Agricultural Pool producers.

Main San Gabriel Basin—Groundwater

The Main San Gabriel Basin underlies an approximately 167-square mile area in the southeasterly portion of Los Angeles County. The original judgment in the Main San Gabriel adjudication was entered in 1973 (*Upper San Gabriel Valley Municipal Water District v. City of Alhambra, et al.*, Los Angeles County Superior Court Case No. 924128), and has since been amended several times including most recently in 2012. Among many of its major components, the judgment established a Watermaster responsible to determine an annual basin Operating Safe Yield (OSY). The judgment allocated prescriptive water rights (and other types of rights in certain circumstances) among producers, which also provides the basis for each party's share of the OSY. Unused OSY may be carried over one fiscal year. Eligible transactions for the Index include both temporary (single- and multi-year) transfers of production rights and carry over, as well as permanent transfers of water rights.

Mojave Basin Alto Subarea—Groundwater

The Mojave Basin Area underlies an expansive approximately 3,400-square-mile area the high desert region of San Bernardino County. The original judgment in the Mojave Basin Area adjudication was entered in 1996 (*City of Barstow, et al. v. City of Adelanto, et al.*, Riverside County Superior Court Case No. CIV 208568) comprising a stipulation among over 75 percent of the parties and representing over 80 percent of the verified water production within the basin. The judgment was partially amended in 2002 following a decision of the California Supreme Court (*City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224 (2000)) arising from appeals pursued by certain non-stipulating parties.

The judgment recognized five distinct but hydrologically interconnected Subareas including the Alto (including a portion referred to as the "Transition Zone"), Centro, Este, Oeste and Baja Subareas. The judgment required each Subarea to ensure a certain amount of Mojave River flow to adjacent downstream Subareas. The Judgment established Base Annual Production Rights (BAP) within each Subarea, and imposed Rampdown obligations to achieve basin sustainability. Each year, the court reviews and determines the volume of water to be allocated to water producers in the form of a Free Production Allowance (FPA), which is a portion of BAP that may be produced during without incurring a Replacement Obligation necessary to fund imported supplemental water. Unproduced FPA may be carried over for one administrative year. The judgment authorizes both temporary and permanent transfers of BAP and FPA.

Eligible transactions for the Index are limited to those within the Alto Subarea, which is the largest and most active Subarea market. The Index includes temporary (single- and multi-year) transfers, including carryover, and permanent transfers of Alto Subarea BAP.

Surface Water

As noted in the Index Report, the majority of California's surface water resources originate north of the Sacramento-San Joaquin River Delta (Delta), while the majority of demand for that water is located south of the Delta. The extensive California State Water Project (SWP) and federal Central Valley Project (CVP) storage and conveyance facilities enable a surface water market through which (complex) water transfers are established among parties throughout California. The Index Report describes eligible surface water transactions for the Index to include temporary (single- and multi-year) and permanent

transfers of SWP entitlements, CVP entitlements, and "other surface water entitlements.

A First Step—To Where?

According to Veles' CEO:

> . . .[w]ater is our most important commodity and until now, there were no financial risk management instruments available in the global financial markets. We see the [Index] as an important first step to understanding water as a commodity, which means a more transparent and accessible marketplace for all.

Similarly, NASDAQ's Vice President and Head of Research and Product Development for NASDAQ's Global Indexes, Dave Gedeon, stated that:

> . . .[t]he NASDAQ Veles California Water Index can bring dramatic change to the way we quantify and value an important resource. (*See*, https://www.nasdaq.com/press-release/nasdaq-launches-water-pricing-index-20190108-00379, last visited February 21, 2019.)

Notably, these comments declare the Index to be a first step toward dramatic change in the way water is valued. This begs the question, "a first step to where?" One notable financial industry leader has painted a picture of what he believes this "dramatic change" will be. In a lengthy report principally authored by Willem Buiter, Global Chief Economist for Citi Investment Research & Analysis (a division of Citigroup Global Markets Inc.) (Citi) Citi predicted in 2011:

> I expect to see in the near future a massive expansion of investment in the water sector, including the production of fresh, clean water from other sources (desalination, purification), storage, shipping and transportation of water. I expect to see pipeline networks that will exceed the capacity of those for oil and gas today. I see fleets of water tankers (single-hulled!) and storage facilities that will dwarf those we currently have for oil, natural gas and LNG … I expect to see a globally integrated market for fresh water within 25 to 30 years. *Once the spot markets for water are integrated, futures markets and other derivative water-based financial instruments—puts, calls, swaps—both exchange-traded and OTC will follow. There will be different grades and types of fresh water, just the way we have light sweet and heavy sour crude oil today. Water as an asset class will, in my view, become eventually the single most important physical-commodity based asset class, dwarfing oil, copper, agricultural commodities and precious metals.* (Citi, "Global Themes Strategy: Thirsty Cities—Urbanization to Drive Water Demand, July 20, 2011, http://www.capital-synthesis.com/wp-content/uploads/2011/08/Water-Thirsty-Cities.pdf, last visited February 21, 2019.)

Water Rights and SGMA

The changes predicted by Citi are, indeed, dramatic. While price indexing may serve to inform market participants and transactions, water markets themselves are governed by established and (generally) orderly water rights laws and principles —at least in California and the United States.

In California, one potentially fertile testing ground for the Index's informational value may be through the implementation of the Sustainable Groundwater Management Act of 2014 (SGMA). As of today, the California Department of Water Resources has identified 517 distinct groundwater basins and sub-basins, approximately a quarter of which are required to develop and implement first-ever Groundwater Sustainability Plans to achieve long-term basin sustainability.

Among its many features, SGMA authorizes newlyformed Groundwater Sustainability Agencies (GSAs) to establish groundwater pumping allocations and transferability as a management tool to achieve basin sustainability. (California Water Code, § 10726.4). GSP allocation schemes are, however, subject to limitations including, for example, generally complying with established land use plans and occurring only within the GSA's jurisdictional boundaries. (*Id.*) Of course, neither a GSP nor a GSA has authority to determine or alter water rights, which also delimits the parameters of an allocation framework. (*Id.* at § 10720.5.)

In this context, the question to be tested in the coming years would be whether and to what extent the Index (or something like it) might meaningfully inform a specific buyer and/or seller regarding an appropriate price in transacting a pumping alloca-

tion transfer in a specific groundwater basin pursuant to a specific allocations framework that is subject to specific GSP provisions and other State laws and municipal ordinances. Extending the hypothetical, the question becomes more acute with respect to inter-basin transfers (subject to the same, if not more, legal limitations). In other words, the ultimate informational value of the Index will likely be shaped by the extent to which the underlying assumptions and data that are used for the Index are considered to be similar to and reflective of the local conditions of a particular basin and transaction.

As GSAs implement allocation frameworks through their GSPs resulting in new local markets, more transactional data will presumably become available for inclusion in the Index, which may reduce perceived data asymmetry and build confidence in the Index. Regardless, buyers and sellers will need sufficient information about the Index itself, including how it functions and the data upon which it is based, in order to evaluate its appropriateness in valuing a particular transaction.

Conclusion and Implications

Clearly, the value of water as a natural resource necessary to life and economy in California will only continue to rise. The whiplash of the recent historic Drought followed by dramatic wet years has triggered major changes in California water law and policy, including providing for the development of new water markets and more expansive and robust databases and information.

Transferability of water resources will continue to serve an important management tool. The price attributed to a particular transfer is expected to be governed by *market conditions*, the applicable *laws and ordinances* and the nature and value of the underlying water *rights* upon which the transaction is based. The informational value of the Index to any particular transaction remains to be seen and will depend on these and many other factors. A buyer and seller would need to evaluate whether and to what extent the "spot price" of the Index reflects the unique local conditions and aspects of the transaction. That informational value may grow over time as new and broader market data is incorporated.

So long as that buyer and seller are transacting in a system still governed by water rights laws, they are probably not confronted with the naval-gazing question of whether water is simply a commodity.

Derek Hoffman is a senior associate attorney at Gresham | Savage practicing extensively in the areas of California water rights and natural resources law, real estate, business and eminent domain. In his water law practice he represents landowners, agricultural interests, developers, water districts, mutual water companies and regional to multi-national businesses in evaluating, protecting and litigating water rights and supply. He actively represents clients in SGMA implementation and provides guidance for effective water resources management and compliance with state and federal water law and regulation. Derek writes regularly for the *California Water Law & Policy Reporter*.

Michael Duane Davis is of counsel and vice president of Gresham | Savage who has represented businesses, individuals and governmental clients in complex real estate and business transactions and litigation for nearly 40 years. Mr. Davis has decades of experience evaluating water rights and resources and in water rights disputes, with an emphasis on groundwater basin adjudications. He has represented dozens of clients in the Mojave and Antelope Valley Groundwater Adjudications. He provides business and land use guidance, and water resources management under the Sustainable Groundwater Management Act, and regarding Urban Water Management Plans, Integrated Regional Water Management Plans, Water Supply Assessments and Proposition 218. He has extensive experience serving as general counsel to numerous county water districts and mutual water companies. Mr. Davis serves on the Editorial Board of the *California Water Law & Policy Reporter*.

EASTERN WATER NEWS

NEWS FROM THE WEST

In this month's News from the West we report on water related legislation that passed at the conclusion of New Mexico's 54th Legislative Session. We also report on the status of one of California' s most ambitious water projects: California WaterFix, which would move water under the habitat-sensitive San Francisco Bay/Sacramento-San Joaquin Delta. The water would move from north where water supply is mostly plentiful, to the Central Valley's farming communities and on to parched southern California. With a new Governor of California, the plans for WaterFix have changed.

Water in the New Mexico 2019 Legislative Session: The Year of the Acequias, but Not So Much for Prescriptive Water Planning

The 54th New Mexico Legislative Session convened in mid-January for its extended, 60-day session. As in years past, water, agriculture and natural resource issues were at the forefront of the nearly 1,300 pieces of legislation introduced. While most of the proposed legislation amounted to updates of bill versions introduced in prior years, there were a few new initiatives.

Background

New Mexico's acequias were successful in gaining passage of significant pieces of legislation aimed at affirming acequia governance, establishing a stable revenue stream for acequia infrastructure and improving transparency and due process at the New Mexico Office of the State Engineer.

Acequias are local ditch organizations that are modeled on those in Spain and even earlier based upon traditions of the moors under Arabic law. These community operated watercourses were used in Spain and former Spanish colonies. In New Mexico, acequias persist as a transplanted Iberian civil and social institution. These organizations have flourished in New Mexico since long prior to the Treaty of Guadalupe Hidalgo and the disputes between these acequias and some of the Indian Pueblos have formed the basis for the longest ongoing case in the federal court system—the *Aamodt* case. *State of New Mexico, et al v. Aamodt, et al.*, No. 6:66-cv-06639-WJ-WPL (D. N.M.).

Bills Passed

New Mexico's collection of acequias have developed political expertise over the decades banning together through the New Mexico Acequia Association. The fruits of their decades of effort at organizing resulted in great progress in the 2019 Legislative Session. While the Governor has yet to sign all of the bills that have come before her, there is little reason to expect opposition to any of the acequia legislation. These include SB 438 / HB 517, Acequia and Community Ditch Irrigation Fund. This legislation establishes a $2.5 million annual fund for the Interstate Stream Commission's Acequia Program.

Senate Bill 5, Interstate Stream Commission Membership, changes the composition of the Interstate Stream Commission by specifying which sectors of water stakeholders will have seats on the Commission. This legislation includes one seat for an acequia representative.

House Bill 379, Acequia Liens, clarifies that an acequia may obtain a money judgment from a magistrate court that can serve as a lien on delinquent property. This legislation significantly simplifies the process of obtaining a lien by removing the necessity of going through district court.

Other significant water legislation includes Senate Bill 12, Water Notifications, which requires that the New Mexico Office of the State Engineer post notices of water applications on its website. This is an additional notice requirement expanding upon the current requirement of publishing in the newspaper. This additional requirement of posting notices online contributes to the protection of due process rights of persons whose water rights may be affected by a decision of the State Engineer.

Finally, House Bill 651, Water Data Act, establishes a newly created water data council with agen-

cies and higher education institutions to standardize the management of water data in New Mexico. This legislation directs the water data council to develop consistent water data standards backed by data collections' best practices.

Other Bills

There were numerous other water bills put forward that met with mixed success. These included proposed appropriations for massive water planning support both at the Interstate Stream Commission and the Utton Center at the University of New Mexico School of Law. Recently appointed State Engineer, John D'Antonio, was sworn in by newly elected Governor Michelle Lujan Grisham. D'Antonio previously served as New Mexico's State Engineer from 2003-2011. State Engineer D'Antonio expressed reservation about the major legislative funding for "prescriptive" water planning included in HB 560. However, State Engineer D'Antonio committed to work on water planning issues before next year's legislative session. Governor Lujan Grisham is committed to putting together a 50-year Water Plan that takes into account climate change.

Conclusion and Implications

As a result, most of these seeping legislative proposals stalled and did not reach fruition. However, the momentum behind water planning and further efforts to streamline the processes of distribution of water and for the State of New Mexico to possibly reach a settlement on current interstate water litigation will likely see much more attention in next year's legislative session.
(Christina J. Bruff)

California WaterFix Update: Governor Newsom Calls for Single-Tunnel Project While Legislative Proposal Seeks to Increase Oversight

The California WaterFix project, also known as the "Twin Tunnels," is the statewide plan to address water supply and delivery needs by constructing two 30-mile long tunnels, each 40 feet in diameter, to transport up to 9,000 cubic feet per second of Sacramento River water to state and federal export facilities in the southern Sacramento-San Joaquin Delta. Originally proposed as the Bay Delta Conservation Plan in 2006, WaterFix has undergone a number of reconfigurations over the years. Now, in another major shift, Governor Gavin Newsom has announced that he intends to scale the project back to a single tunnel as part of a broader portfolio approach to water security. The Governor's announcement prompted requests to stay pending litigation and other proceedings, giving WaterFix proponents time to map out a path forward. Meanwhile, Delta legislators have introduced Senate Bill (SB) 204, which would impose additional review requirements on any contracts used to finance, design, and construct the project.

Governor Newsom's State of the State Address

Governor Newsom's first State of the State address on February 12, 2019 discussed water issues in California, including drinking water safety and infrastructure. Notably, the Governor broke from former Governor Jerry Brown's longstanding conveyance vision of two tunnels in the Delta, in favor of a single-tunnel WaterFix. Governor Newsom also announced his appointment of Laurel Firestone, co-founder of the Community Water Center, to the State Water Resources Control Board (SWRCB) and appointment of Joaquin Esquivel as the new SWRCB Chair. The Governor underscored that these changes will help balance the state's diverse water needs by promoting a portfolio approach to water infrastructure and long-term planning.

Ongoing Court and Administrative Proceedings Temporarily Stayed

Governor Newsom's February 12th announcement left participants in the various ongoing WaterFix proceedings guessing as to how the Department of Water Resources (DWR) intends to reconcile the two-tunnel version of the project that was approved in 2017 with the Governor's vision of a one-tunnel project. On February 28, 2019, parties in the coordinated WaterFix cases pending in Sacramento Superior Court sought a 60-day stay to allow DWR to determine the extent to which the Governor Newsom's direction affects the project's environmental review documents and approval. The following day, DWR itself requested a 60-day stay in the long-running SWRCB hearing on DWR and the U.S. Bureau of Reclamation's joint water right change petition, and a 90-day stay in federal court litigation challenging the validity of the federal Biological Opinions for the project. As

of the writing of this article, stays have been granted in the SWRCB hearing and CEQA litigation, while the federal district court directed that DWR must confirm it will cease all preparatory activity related to WaterFix (other than review of the project in light of Governor Newsom's announcement) before it considers granting the 90-day stay.

Proposed Oversight under Senate Bill 204

On the legislative front, State Senator Bill Dodd introduced SB 204 on February 1, 2019, which would add an additional layer of legislative oversight and public scrutiny to the WaterFix implementation process. SB 204 would require DWR and the Delta Conveyance, Design and Construction Authority, the entity tasked with financing WaterFix through participant contracts, to provide information on pending WaterFix-related State Water Project contracts and contract amendments to the legislature for review prior to finalization. Under the bill, all proposed contracts and amendments for the planning, design, or construction of WaterFix must be submitted to the Joint Legislative Budget Committee (JLBC) 60-days in advance of their execution. If the JLBC chooses to hold a public hearing to review a contract, DWR would be prohibited from approving the contract for 90 days after the first hearing.

SB 204 supporters argue that the proposed oversight is necessary to protect the Delta economy, culture, and environment, and to prevent increased contractor reliance on Delta water. Opponents of the bill contend that the additional restrictions will significantly and unnecessarily delay any action on WaterFix and undermine efficiency and cost-effectiveness in the contracting process. The bill cleared its first committee hurdle on March 12, 2019, passing the Natural Resources and Water committee with a unanimous 6-0 vote.

Conclusion and Implications

As can be expected for a project of this scale, WaterFix has undergone numerous revisions and refinements in the past 13 years. Advocates may see these changes as hurdles potentially slowing the project down, but not ending it. To that end, the Governor emphasized that he wants to build on the important work that has already been done. However, his departure from his predecessor's vision at this stage of planning may be a more significant setback that requires additional administrative, environmental and court or even legislative review. With the temporary stays of the SWRCB hearing and the state court proceedings, it can be expected that DWR will announce its plans to implement Governor Newsom's direction in the coming months.
(Austin C. Cho, Meredith Nikkel)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

Editor's Note: Complaints and indictments discussed below are merely allegations unless or until they are proven in a court of law of competent jurisdiction. All accused are presumed innocent until convicted or judged liable. Most settlements are subject to a public comment period.

Civil Enforcement Actions and Settlements—Water Quality

•March 14, 2019 - The U.S. Environmental Protection Agency (EPA) has announced a civil settlement with Mora Development Corporation and Mora Development S.E., two affiliated Puerto Rico real estate development companies, for violations of the Clean Water Act. The companies built two housing developments—the Cascadas in Toa Alta, Puerto Rico, and Montecielo in Guaynabo, Puerto Rico—with sewage collection systems that illegally discharged sewage into local waters. Under the settlement, Mora Development will pay a $242,400 penalty. Today's settlement is in addition to actions and penalties required when Mora Development Corporation pled guilty to violating sewage regulations. The violations at the housing developments were corrected under prior orders issued by EPA. In 2012, EPA received a citizen complaint that sewage discharges from the Cascadas sewage collection system retention pond were seeping into the citizen's front yard and that sewage was entering the Cascadas storm sewer collection system. EPA inspected and confirmed the claims and, in 2013, issued an order to Mora Development Corporation requiring the immediate termination of sewage discharge into surrounding water. The order also required submission of records proving that sewage was being properly hauled to a wastewater treatment plant and a schedule for removal of all unauthorized connections (by-pass pipes) between the Cascadas' sewage and storm water collection systems. In 2013, EPA received citizen complaints claiming sewage from Montecielo was emptying into an unnamed creek, a tributary of Rio Bayamón, which in turn discharges into the Atlantic Ocean. EPA inspected Montecielo and confirmed the discharges. Mora Development did not have a permit to allow those discharges. In 2013, EPA issued an order to bring Mora Development S.E. and Mora Development Corporation into compliance with the Clean Water Act, including the immediate cease of sewage discharge into waters of the United States. In 2018, Mora Development Corporation pled guilty in a 2016 criminal case involving a felony violation for discharging sanitary wastewater from residences at the Cascadas Development in Toa Alta. Mora Development Corporation violated the Clean Water Act by discharging from a holding tank through a by-pass pipe into the Toa Alta municipal storm water system and then into a local waterbody without a National Pollutant Discharge Elimination System permit. The plea required Mora Development Corporation to pay a fine of $3 million, serve a five-year term of probation, and pay restitution to the victims affected by its criminal conduct. The civil settlement involves both Mora Development Corporation and Mora Development S.E. for their involvement in Montecielo and Mora Development Corporation's non-criminal violations in Cascadas.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•March 7, 2019 - The United States and the Commonwealth of Virginia have entered into an agreement under which the U.S Environmental Protection Agency (EPA) and Virginia will recover nearly $64 million to address cleanup costs at the Atlantic Wood Industries (AWI) Superfund Site in Portsmouth, Virginia. In a proposed consent decree filed today in federal court, the U.S. Department of Defense (DoD) and the Department of the Navy will pay EPA $55.3 million for cleanup costs, and pay Virginia $8.5 million for past costs and future activities Virginia will conduct at the site. Along with cleanup costs, DoD and the Navy will fund a $1.5 million oys-

ter restoration project to be implemented by Virginia in the Southern Branch of the Elizabeth River. The settlement also provides that Atlantic Wood Industries and Atlantic Metrocast, the AWI Site owners/operators, will reimburse EPA and Virginia $250,000 plus interest for site cleanup costs. The agreement was reached under the federal Superfund law—formally known as the Comprehensive Environmental Responsibility, Compensation, and Liability Act (CERCLA)—which requires landowners, current and former operators, waste generators and waste transporters responsible for contaminating a Superfund site to clean up the site or reimburse the government or other parties for cleanup activities. The AWI site, located on the Southern Branch of the Elizabeth River and immediately north of the Norfolk Naval Shipyard's Southgate Annex, was the former location of a wood treating facility and includes approximately 50 acres of land and more than 30 acres of river sediments. Since 2010, EPA has been performing the cleanup at the site to remediate hazardous substances, including polycyclic aromatic hydrocarbons from creosote, pentachlorophenol, and associated dioxin, as well as heavy metals present in soils, ground water, and sediments at the site. The EPA-approved plan for the cleanup of contaminated soils, river sediments, and groundwater at the site includes: construction of an offshore sheet pile wall; dredging with consolidation and capping of contaminated sediments behind the wall and at the west portion of the site; excavation or on-site treatment of contaminated soils; monitoring natural attenuation of ground water and natural recovery of contaminated sediments; operation and maintenance of the remedy; and land-use controls. The proposed consent decree is subject to a 30-day public comment period and court approval.

•February 25, 2019 - The U.S. Environmental Protection Agency (EPA) announced four settlements with companies in Connecticut and Maine for violations of federal oil spill laws. The three companies in Connecticut and a company in Maine have all created oil spill prevention plans and come into compliance with federal oil pollution prevention laws, ensuring that the environment in the communities where they operate are better protected from damaging oil spills. According to the agreements, the four companies will pay penalties ranging from $4,000 to $9,900 to settle claims by EPA that they each violated federal laws meant to prevent oil spills. These settlements were reached under an expedited settlement program whereby EPA agreed to resolve these cases for reduced penalties with companies that were able to quickly correct violations of the oil pollution prevention regulations. The companies involved in settlements were GCA Logging of Avon, Maine; Superior Fuel Oil Company, of Waterbury, Conn.; Academy Bus of Bridgeport, Conn., and GBC Metals of Waterbury, Conn. Federal oil spill prevention, control, and countermeasure rules provide requirements for business that store oil and prevent oil discharges into nearby water resources. The rules require certain businesses to prepare, amend, and implement oil spill prevention and response plans, which are part of the oil pollution prevention regulation requirements of the Clean Water Act. These cases include the following:

1. GCA Logging of Avon, Maine, on Sept. 20, 2018 agreed to pay a $4,000 penalty and to address violations of the Oil Pollution Prevention regulations of the Clean Water Act. In February 2018, a fuel delivery company over-filled an above-ground storage tank, causing a spill, which resulted in oil discharging into a nearby stream that flows into the Sandy River. At the time of the spill, the facility did not have a required Spill Prevention, Control and Countermeasure plan. In a separate action, the Maine Department of Environmental Protection penalized both GCA Logging and the fuel delivery company for causing the oil spill.

2. Superior Fuel Oil Company, of Waterbury, Conn., on Sept. 6, 2018, agreed to pay a $9,900 penalty and to address violations of federal Oil Pollution Prevention regulations. During an inspection at the company, EPA saw that the facility did not have adequate spill containment for oil truck loading racks and wasn't fully implementing its oil spill prevention, control and countermeasure plan.

3. Academy Bus of Bridgeport, Conn., on Aug. 13, 2018, agreed to pay a $4,700 penalty and address violations of the oil pollution prevention regulations. The state responded to an oil spill at the company and referred the facility to EPA. During an inspection at the company, EPA saw that the facility did not have an adequate oil spill preven-

tion control, and countermeasure plan. Academy Bus amended its plan and put in place measures to prevent future spills.

4. GBC Metals of Waterbury, Conn., also known as Somers Thin Strip, agreed in June 2018 to pay a $6,100 penalty and to take measures to prevent future spills. In January, piping associated with an external valve on an oil cooling tower system at the facility failed, causing a release of about 5,790 gallons of oil from the system into a nearby storm drain. Between 625 and 650 gallons of oil was recovered from the Naugatuck River. The company responded promptly to the spill and did a cleanup.

•February 21, 2019 - The U.S. Environmental Protection Agency (EPA) ordered Greka to conduct sampling at its Santa Maria, California refinery to determine whether improper storage and management of hazardous wastes contaminated local soil and groundwater. A December 13, 2018 EPA inspection found Greka's facility, which does not have a required permit to store hazardous waste, had improperly stored, labeled and managed hazardous waste from their refinery processes. EPA inspectors documented waste dumped directly into an unlined pit, also known as a surface impoundment, located 90 feet from agricultural lands. The order requires Greka to develop a plan to determine and catalogue the magnitude and extent of possible off-site migration of hazardous wastes. The work plan must provide extensive information on the surface impoundment, including age, capacity, structural integrity, construction, and maintenance procedures. Greka must analyze the hazardous waste and develop a comprehensive groundwater and soil monitoring plan to ensure contamination is not migrating off-site. The company has 45 days to submit the plan to EPA for approval. The EPA is coordinating its investigation with the California Department of Toxic Substances Control and the Regional Water Quality Control Board to ensure effective oversight of the facility. Greka's Santa Maria facility is surrounded by agricultural land and close to residential neighborhoods of Santa Maria and Guadalupe.

Indictments, Convictions and Sentencing

•March 18, 2019 - The Department of Justice and the U.S. Environmental Protection Agency (EPA) announced that the United States filed suit under the federal Safe Drinking Water Act against the city of New York and the New York City Department of Environmental Protection for their longstanding failure to cover the Hillview Reservoir located in Yonkers, New York. A consent decree requiring the City to make improvements and cover the Reservoir at an estimated cost of $2.975 billion and to pay a $1 million civil penalty was also lodged with the Court. The State of New York will be a co-plaintiff and is a party to the consent decree. The Reservoir is part of New York City's public water system, which delivers up to a billion gallons of water a day. The Reservoir is an open storage facility and is the last stop for drinking water before it enters the City's water tunnels for distribution to city residents. The 90-acre reservoir is divided into two segments, the East and West Basins. Prior to the water entering the Reservoir, it receives a first treatment of chlorine and ultraviolet treatment. Since the Reservoir is an open storage facility, the treated water in the Reservoir is subject to recontamination with microbial pathogens from birds, animals, and other sources, such as viruses, Giardia, and Cryptosporidium. Giardia and Cryptosporidium are protozoa that can cause potentially fatal gastrointestinal illness in humans. The City has been required to cover the Reservoir since it first executed an administrative order with the State of New York on March 1, 1996. Under the Safe Drinking Water Act and its regulations, the City also became obligated, as of March 6, 2006, to cover the Reservoir by April 1, 2009. In May 2010, EPA entered into an administrative order with the City requiring the City to meet a series of milestones to cover the Reservoir. The first milestone was Jan. 31, 2017. When the City failed to meet that date, this lawsuit followed. The consent decree requires construction of two projects in addition to the cover, the Kensico Eastview Connection (KEC) and the Hillview Reservoir Improvements (HRI). The KEC entails the construction of a new underground aqueduct segment between the upstream Kensico Reservoir and Eastview ultraviolet treatment facility. The HRI requires extensive repairs to the Hillview Reservoir, including replacing the sluice gates that control water flow and building a new connection between the reservoir and water distribution tunnels. The completion of the KEC is expected to take until 2035. The City estimates the construction cost of the KEC to be approximately $1 billion. The

HRI project will be conducted concurrently with the KEC and is anticipated to be completed by 2033. The City estimates the construction cost of the HRI to be approximately $375 million. Following the completion of the KEC and the HRI, the East Basin cover will be constructed, with expected commencement of full operation in 2042, and then the West Basin cover will be constructed, with expected commencement of full operation in 2049. The City's estimate in 2009 for the cost of its then planned concrete cover for the 90-acre Reservoir was $1.6 billion. Until the cover is in operation, the consent decree also requires the City to implement Interim Measures to help protect the water, including enhanced wildlife management at the Reservoir and Reservoir monitoring. In addition, under the consent decree, the City will pay the United States a civil penalty of $1 million for its past violations of federal requirements. The consent decree also provides that the City will pay New York State $50,000, and implement a state Water Quality Benefit Project in the amount of $200,000, to settle the State's claim for penalties for violations of a state administrative order. The proposed settlement which is subject to a 30-day public comment period. (Andre Monette)

LAWSUITS FILED OR PENDING

WHAT IS A POINT SOURCE? U.S. SUPREME COURT SET TO ADDRESS THIS AND THE SCOPE OF THE CLEAN WATER ACT IN *COUNTY OF MAUI*

The federal Clean Water Act protects the "Waters of the United States" by regulating the release of pollutants into the nation's waterways. In sum, the Clean Water Act prohibits "any addition of any pollutant to navigable waters from any point source" unless the U.S. Environmental Protection Agency (EPA) issues a National Pollutant Discharge Elimination System (NPDES) permit for the specific activity. 33 USC 1251(a). The NPDES permit requirement does not apply to pollution that ends up in navigable waters from "non-point sources." Thus, cases often arise over what constitutes a "point source" versus "non-point source" pollutant. The U.S. Supreme Court is preparing to further consider this issue taking up *County of Maui, Hawaii v. Hawaii Wildlife* Fund, Case No. 18-260, which was recently decided by the Ninth Circuit Court of Appeals.

Point Sources and Non-Point Sources under the Clean Water Act

Section 502(14) of the Clean Water Act defines point source as:

> . . .any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

Any other water sources that does not fit this definition is deemed a "non-point source." Usually, non-point source pollutants result from ground contaminants that end up water from human or natural activity, such as groundwater or run off. In other words, point source pollution comes from physical structures or conditions that collect and/or transfer water while nonpoint sources create water pollutants through non-water contaminants that end up in water incidentally.

The *Maui* Decision

At issue in the *Maui* case are four water wells at the Lahaina Wastewater Reclamation Facility, (LWRF) used by the County of Maui (County) as municipal wastewater treatment. The LWRF treats daily sewage from the local community and either sells the treated water for irrigation purposes or injects the treated water into the wells. The County acknowledges that some of the treated water in the wells ends up in the Pacific Ocean. However, the County contends that the wells do not require an NPDES permit because the wells do not directly release the treated water into the Ocean. Instead, some of the treated water in the wells seeps out to the ground, mixes with general groundwater, and flows to the ocean.

The plaintiffs in the *Maui* Case, including the Hawai'i Wildlife Fund, Sierra Club Maui Group, Surfrider Foundation and West Maui Preservation Association, sued the County, claiming the wells are a point source because they cause pollution to enter the Pacific Ocean and, therefore, the County violated the Clean Water Act by failing to obtain a NPDES permit.

The U.S. District Court of Hawai'i granted the plaintiff's motion for summary judgment and the Ninth Circuit Court of Appeals affirmed the ruling on February 1, 2018, both agreeing that the wells constitute point sources, caused polluted water to enter into the Pacific Ocean, and therefore, must receive NPDES permits. Thus, the County petitioned the U.S. Supreme Court, who granted the County's petition on February 19, 2019. Specifically, the Supreme Court will consider the question of whether the Clean Water Act requires a NPDES permit when pollutants originate from a point source but are

conveyed to navigable waters through groundwater, which is typically considered a non-point source.

The County's Argument on Appeal

The County acknowledges that the wells themselves may constitute "point sources" that could be subject to the NPDES permit requirement. However, the County contends that the NPDES permit requirement only applies to point sources if the pollutants are conveyed directly from the point source. In the case of the wells, the pollutants that end up in the Pacific Ocean result from groundwater. Since groundwater pollution is typically understood to be a non-point source pollutant, the County argues that no NPDES permit is required since the wells are not directly causing pollution and the groundwater pollution is a nonpoint source of pollution.

The County points to case law that further fleshes out what constitutes a "nonpoint source" of pollution. Specifically, the County notes that point source pollution occurs when "the pollution reaches the water through a confined, discrete conveyance." (See, *Trs. for Alaska v. EPA.*, 749 F.2d 549, 558 (9th Cir. 1984).) Although the wells may constitute a point source since they are confined spaces, the treated water that ends up in the Pacific ocean is not coming through the wells but instead through groundwater. The County notes that the groundwater mixture that ultimately ends of in the ocean has a different chemical composition than the treated water injected into the wells due to the natural changes that result as groundwater migrates through the ground.

The Plaintiffs' Argument on Appeal

In response, the plaintiffs contend that the pollution that ends up in the ocean results directly from the wells which are point sources. According to the plaintiffs, the mechanism by which pollution enters waterways should be immaterial. Instead, the courts must only determine whether a point source causes the pollution at issue. The plaintiffs argue that the intent of the Clean Water Act is to regulate any point source that causes water pollution and any suggestion that the point source must directly dump pollution into a waterway would defeat the purpose of the Clean Water Act. To support this contention, the plaintiffs cite to case law and examples of "indirect discharges" from point sources that require NPDES permits. For example, stormwater drain systems that channel channeling polluted water and funnel it to oceans constitute discharge from a point source even though the water travels through various pipes to the ultimate waterway. Further, courts have found that a NPDES permit was required for tankers that spread liquid manure on fields because the polluted discharge from the fields ended up in waterways. *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 118 (2nd Cir. 1994)

Conclusion and Implications

In the *Maui* case, both parties agree that the wells constitute point sources. However, the U.S. Supreme Court must consider the question of how closely linked the point source must be to the release of pollution in a water way. The County contends that the groundwater component of the pollution at issue effectively cuts off the connection between the wells and the pollution which therefore, does not require NPDES permitting. If the Court affirms the lower court's determination, the County argues that NPDES permitting would be expanded to any point source that is vaguely connected to pollution run off. This could ultimately adversely affect water program that are designed to protect the environment, such as the reuse of treated water, similar to the wells. The plaintiffs counter by arguing that the County's interpretation of the Clean Water Act would enable polluters to avoid the permitting requirement by using indirect systems for dumping pollution into water ways. The lower courts noted that both the County and the plaintiffs have case law to support their respective positions since wells are generally considered point sources while groundwater and other runoff is general considered non-point sources. Thus, the *Maui* Case occupies a unique position at the intersection of these two lines of cases and the Supreme Court's decision could have far reaching effects on how water pollution is addressed and the future of the NPDES permitting scheme, which has been a bedrock of Clean Water Act.

(Stephen M. McLoughlin, David D. Boyer)

JUDICIAL DEVELOPMENTS

FOURTH CIRCUIT AFFIRMS EPA'S DECISION DISAPPROVING A REVISED STANDARD FOR THE RECEIVING OF WATERS TO A STATE BOARD'S WASTEWATER TREATMENT FACILITY

Sanitary Board of Charleston v. Wheeler, ___F.3d___, Case No. 18-1592 (4th Cir. Mar. 12, 2019).

The Fourth Circuit Court of Appeals handed down a recent decision that reviews the structure and operation of the state-federal relationship under the federal Clean Water Act with respect to review of state proposals for achieving water quality standards. In *Sanitary Board of Charleston v. Wheeler*, the plaintiff Sanitary Board was appealing from an adverse decision of the U.S. District Court denying it relief it had sought via a "citizens suit" under *33 U.S.C.S. § 1365(a)(2)*.

Background

The Sanitary Board of Charleston (Sanitary Board) operates a municipal treatment plant that discharges to a stretch of the Kanawha River, a tributary of the Ohio River. Several years ago, the Sanitary Board became concerned that its National Pollutant Discharge Elimination System (NPDES) permit contained too tight a standard for copper in the effluent. In 2013 the Sanitary Board's representatives consulted with the state of West Virginia. Based on comment from the state, they funded a scientific analysis of the copper issue, and they submitted it to the state. The study supported their contention that there could be greater leeway for copper in the River. The U.S. Environmental Protection Agency (EPA) commented at the time that the study appeared to be consistent with EPA guidance as to its methodology; however, EPA also noted that the issue would eventually receive formal review if the state proposed a standards change.

The state proceeded to propose a less stringent copper-related rule for formal approval by the EPA. Under the federal Clean Water Act, the EPA is given 60 days to approve or disapprove such a submitted proposal, plus an additional 30 days in the event of disapproval to explain its decision. When EPA did not meet the 60-day deadline, the Sanitary Board brought its citizen suit. The Sanitary Board contended that EPA had a non-discretionary duty to be timely and that the agency must be ordered to act in keeping with the deadline in the Clean Water Act. The Sanitary Board's complaint also asserted that the EPA by law had to approve the new state submittal.

The EPA asked for and obtained additional time from the U.S. District Court judge for it to finalize its decision, and it acted within the 45 days he allowed. The EPA formally denied the proposed new copper standards, indicating that its own evaluation of the situation led it to conclude that the State's rule was not going to be adequately protective of water quality.

The Fourth Circuit's Decision

The Fourth Circuit panel reviewed the EPA's announced decision. The court noted that although the state standards had been developed using what had once been the standard technology, the EPA found that the proposed copper limit for the Sanitary Board's facility was so high as to warrant additional scrutiny even under those standards. Applying more recently developed scientific methods, the EPA "determined that, based on the available information, the site specific criteria" proposed for the Sanitary Board "would not be protective of . . . fish and other aquatic life . . . in the Kanawha River." Id. The EPA's disapproval letter included a detailed enclosure, which "provide[d] the data and analysis that EPA conducted to evaluate the protectiveness" of the revised standard for the Sanitary Board.

The receipt of the adverse decision prompted the Sanitary Board to amend its complaint and to allege an Administrative Procedure Act (APA) violation, asserting that the EPA action of disapproval was "arbitrary and capricious," contrary to the APA and relied on inappropriate procedures for analysis. Thereafter the U.S. District Court, on motion of

EPA, ruled against the Board's contention that the EPA was required to approve the state's submittal as a matter of law.

The Fourth Circuit panel proceeded to analyze whether: 1) the EPA's decision about the standard for copper was required to be an approval of the state's submittal, and 2) if not, whether the EPA had made its decision within the bounds of its statutory discretion.

The Fourth Circuit reasoned that the citizen's suit provision in the Act was strictly limited to a party being able to compel the agency to conform to deadlines, but the duty to be prompt was separate from the exercise of the Agency's discretion as to what the substantive decision should be:

> The procedure for EPA review of state standards contemplated by the [Act] thus uses a familiar and entirely sensible structure, whereby the agency has latitude to exercise its judgment, but must do so with a fixed time period. The judgment is discretionary; the timing is not . . . .

The court's opinion goes on to explain the discretionary and expert nature of the EPA's decision on whether the state's standards would adequately protect water quality. The court viewed the EPA's action here as a paradigmatic example of the Agency's evaluative role under the statute:

> The [Clean Water Act] provides no fixed criterion that clearly delineates when approval is required. Instead, the EPA's determination necessarily involves an independent judgment as to whether the state's proposed standards are "based on sound scientific rationale" and are actually capable of meeting the environmental ends that have been identified for each body of water.

Conclusion and Implications

The Fourth Circuit noted that the EPA's decision was extensively explained and rationally reasoned, such that it was well within the standards required by the APA of agencies when they exercise discretion. The judgments of the District Court were affirmed. The Fourth Circuit's decision is available online at: https://www.courthousenews.com/wp-content/uploads/2019/03/charleston-water.pdf
(Harvey Sheldon)

DISTRICT COURT HOLDS THAT FEDERAL STATUTES PREEMPT LOCAL LAND USE ZONING ORDINANCE FOR NATURAL GAS PIPELINE PROJECT

Algonquin Gas Transmission, LLC v. Town of Weymouth, ___F.Supp.3d___, Case No. CV 18-10871-DJC (D. Mass. Feb. 11, 2019).

The U.S. District Court for the District of Massachusetts held that the Federal Energy Regulatory Commission's (FERC) issuance of a Certificate of Public Convenience and Necessity (Certificate) for a natural gas pipeline preempted the Town of Weymouth (Weymouth) from applying a local zoning ordinance to prohibit the construction of a compressor station in the town.

Factual and Procedural Background

Algonquin Gas Transmission, LLC (Algonquin) filed an application with FERC for a Certificate under the federal Natural Gas Act (NGA) to construct and operate a natural gas pipeline and associated facilities (AB Project). Pursuant to its obligations under the National Environmental Policy Act (NEPA), FERC prepared an Environmental Assessment (EA), finding that with mitigation the AB Project would have no significant impact. Accordingly, FERC did not prepare a more detailed Environmental Impact Study (EIS).

In January 2017, subject to specific environmental conditions, FERC granted Algonquin's application for a Certificate for the AB Project. FERC's issuance of the Certificate authorized Algonquin to construct a

compressor station in Weymouth, in a "coastal zone" under the federal Coastal Zone Management Act. (CZMA). Accordingly, Algonquin was required to obtain a consistency certification from the Massachusetts Office of Coastal Zone Management (MCZM), the state agency charged with implementing the Massachusetts Coastal Management Program (Program) under the CZMA.

In considering an application for a consistency certification for a project requiring federal permits in a coastal zone, the MCZM must determine whether the proposed project complies with the "enforceable policies" of the Program. The MCZM maintains a policy guide listing all of the state and local enforceable policies approved by the National Oceanic and Atmospheric Administration (NOAA), the federal agency responsible for administering the CZMA. One of the enforceable policies listed in MCZM's Program policy guide requires applicants to obtain a license from the Massachusetts Department of Environmental Protection (DEP) under the Massachusetts Public Waterfront Law (Chapter 91 License).

In May 2017, the DEP issued a written determination stating that it intended to approve Algonquin's application for a Chapter 91 License, subject to Algonquin submitting documentation demonstrating it had obtained local approval for the project. Weymouth filed an administrative appeal with the DEP, arguing that Algonquin's construction and operation of the compressor station would violate a Weymouth's wetlands ordinance and a zoning ordinance prohibiting buildings from emitting noxious or offensive odors (Zoning Ordinance). In November 2018, the DEP officer considering Weymouth's appeal ruled that Algonquin was required to obtain a local zoning certificate prior to the DEP issuing the Chapter 91 License. In a separate case, *Algonquin Gas Transmission, LLC v. Weymouth Conservation Commission et al.*, Case No. 17-cv-10788-DJC (D. Mass. Dec. 29, 2017), the same court held that the NGA preempted Weymouth's application of the wetlands ordinance. That case is currently under review in the First Circuit Court of Appeal.

In May 2018, Algonquin filed a declaratory relief action seeking an order that the NGA preempts application of the Zoning Ordinance to the construction and application of the AB Project. Weymouth moved to dismiss Algonquin's complaint and Algonquin moved for summary judgment.

The District Court's Decision

The court initially rejected Weymouth's claims that because Algonquin had not applied for a zoning certificate Algonquin lacked standing and the dispute was not ripe for adjudication. Relying on statements from the DEP presiding officer that if the Zoning Ordinance was preempted the DEP could issue the Chapter 91 License without the zoning certificate, the court found that Algonquin had suffered a redressable concrete injury traceable to Weymouth's conduct, noting that the Zoning Ordinance dispute had delayed the DEP's issuance of the Chapter 91 License for almost two years. With respect to Weymouth's ripeness argument, the court determined that a "question of preemption may be ripe for review even where 'regulatory approval . . . is ongoing.'"

Federal Preemption

As to preemption, Weymouth argued that the NGA's savings clause, which preserves state's rights under the Clean Water Act, Clean Air Act, and the CZMA, protected the Zoning Ordinance from being preempted. While the court agreed that the NGA did not preempt Massachusetts' rights under the CZMA, the court explained that the Zoning Ordinance is not included among the enforceable policies in the MCZM's Program policy guide. The court also found that the Program did not otherwise incorporate the Zoning Ordinance by reference. Based on this analysis, the court concluded that the Zoning Ordinance was not "immune from preemption" under the NGA, CZMA, or the Program.

Having found that Weymouth's Zoning Ordinance was subject to preemption, the court easily found its application to the AB Project preempted under the doctrine of conflict preemption. The court explained that Weymouth repeatedly argued to the DEP that the Zoning Ordinance prohibited Algonquin's construction of the compressor station, and concluded:

> Because FERC has already 'carefully reviewed the very' proposal Weymouth 'seeks [ ] to further regulate and, after considering the environmental impact CZMAs, authorized the project,' the Ordinance 'clearly collides with FERC's delegated authority and is preempted' in its entirety.

Conclusion and Implications

This case illustrates the complex, interlocking levels of federal, state, and local environmental regulations, and suggests that, despite this complexity, careful reading and methodical analysis can produce straight-forward answers to difficult questions. In the end, federal law often trumps the normal sanctity of land use decisions which are often decided at the municipal level of government.
(Dakotah Benjamin, Rebecca Andrews)

DISTRICT COURT HOLDS ARMY CORPS' DECISION TO MAINTAIN TIDAL WATERS DEFINITION OF 'HIGH TIDE LINE' IS FINAL AGENCY ACTION FOR SUBJECT MATTER JURISDICTION

Sound Action v. U.S. Army Corps of Engineers, ___F.Supp.3d___, Case No. C18-0733 (W.D. Wash. Feb. 5, 2019).

In January of 2018, the Commander of the U.S. Army Corps of Engineers' Northwestern Division (Corps) issued a memorandum putting on hold any further consideration of a change in the Corps' method, in use since the 1970s, for determining its jurisdiction over tidal waters. That memorandum had the effect of bringing to an abrupt halt consideration of the recommendation of an interagency, multi-disciplinary working group to adopt a new method for establishing the high tide line, which would have brought an additional 8,600 acres of Washington state shoreline within the Corps' jurisdiction. The U.S. District Court for the Western District of Washington found the memorandum constituted final agency action sufficient to establish subject matter jurisdiction.

Background

The federal Clean Water Act defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1363. Tidal waters "up to the high tide line" are included within navigable waters. 33 C.F.R. § 328.4(b). Clean Water Act § 404 prohibits the discharge of dredged or fill materials into navigable waters, including tidal waters, without a permit. 33 U.S.C. § 1344. "The construction of seawalls, bulkheads, and similar structures for shoreline armoring within navigable waters constitutes a discharge" requiring a § 404 permit. 33 C.F.R. 323.2.

Since 1986, the Corps has defined the "high tide line" as "the line of intersection of the land with the water's surface at the maximum height reached by a rising tide." 33 C.F.R. § 328.3(c)(7). "The parties do not dispute that this is the current definition of high tide line." The Corps' definition provides that:

> . . .[t]he line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm. 33 C.F.R. § 328.3(c)(7).

Beginning in the 1970s, the Corps' Northwestern Division has used "the mean higher high water" (MHHW) datum to determine the high tide line and, consequently, the limit of its § 404 jurisdiction in tidal waters. According to plaintiffs, MHHW "is unequivocally significantly lower than the maximum height reached by a rising tide" and "is surpassed between three to five times a week in Washington state." In other words, "about a quarter of high tides" in the Seattle District's region are above MHHW.

In January 2016, the Corps along with the U.S. Environmental Protection Agency's Region 10 and the West Coast Region of the National Oceanic and Atmospheric Administration (NOAA) "formed an interagency workgroup to address the Seattle District's high tide line datum." The workgroup considered two other "datums" that could be used to establish the high tide line: the "highest astronomical tide (HAT) and mean annual highest tide (MAHT)." The court pointed out that, according to plaintiffs:

> . . .the difference between MHHW and HAT on a shoreline in Puget Sound varies by location, ranging from 15 to 32 vertical inches. The difference between MHHW and MAHT ranges from 13 to 29 inches. Plaintiffs claim that 'the area between [MHHW] and [MAHT] represents up to 8,600 acres of shoreline area in Washington state.'

In November 2016, "the workgroup recommended to the Corps' Northwestern Division (which oversees the Seattle District) that the Seattle District use MAHT as its high tide line datum," explaining that MAHT[ ] is an elevation that is reasonably representative of the intersection of the land and the water's surface at the maximum height reached by the rising tide, is based on gravitational forces, is predictable, reliable, repeatable, reasonably periodic, measurable, simple to determine, scientifically defensible, and based on data that is reasonably available and accessible to the public.

Nonetheless, on January 19, 2019, the Corps' Northwestern Division Commander Spellmon issued a memorandum (Spellmon Memo) stating that while he had reviewed the workgroup's recommendation:

> . . .in light of the EPA and Army's efforts to review and revise the 'waters of the United States' definition as directed by. . . [President Trump's 2017 Executive Order] . . .the Corps' 'current focus must shift to other initiatives,' and that '[f]urther efforts to study, re-evaluate or reinterpret the [high tide line] definition would not be an organizationally consistent use of resources within the Corps.'
>
> Further, the Spellmon memo stated that:
>
> . . .'elevations such as MAHT as they would be applied in Puget Sound are not consistent with the intent of the current definition of [high tide line]' [and] 'direct[ed]' the Seattle District 'to shift away from further consideration of changing the Corps Clean Water Act jurisdiction limit in tidal waters.'

The environmental group plaintiffs alleged that the Northwest Division's use of MHHW to determine the high tide line allows substantial amounts of environmentally-damaging shoreline armoring to proceed each year without first undergoing the § 404 permit process. The Corps sought to dismiss this claim on the grounds that the Spellmon Memo is not a final agency action subject to review under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551(13), 704 and 706(2).

The District Court's Decision

Examining the motion to dismiss as a facial attack on the plaintiffs' assertion of subject matter jurisdiction, the District Court assumed the allegations in the Complaint were true, and considered along with the Complaint the Spellmon memo and the Workgroup Report.

The APA allows review of "final agency action[s]." 5 U.S.C. § 704.

When analyzing whether an agency action is final:

> . . .[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties. *Franklin v. Massachusetts*, 505 U.S. 788, 796-97 (1992).

The Supreme Court has established a two-part test to determine if an agency action is "final." *See, Bennett v. Spear*, 520 U.S. 154, 177-78 (1997):

> First, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.' *Id.* (citations omitted).

The District Court rejected the Corps' argument that the Spellmon memo "deferred" action on the Workgroup Report, or expressed an intent by the agency to "establish law and policy in the future." Quoting *Am. Portland Cement All. v. EPA*, 101 F.3d 772, 777 (D.C. Cir. 1996). Rather,

> . . .the Spellmon memo direct[s]' the Seattle District to stop evaluating high tide line datum and 'shift away from further consideration of changing the Corps [CWA] jurisdictional limit.'

The District Court went to state that:

> By reiterating that the Seattle District will use MHHW as its high tide line datum, and by precluding future consideration of the issue, the Corps, 'for all practical purposes, has ruled definitively' on the Seattle District's § 404 jurisdiction. *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1814 (2016).

And the Spellmon memo was issued on the basis of an evaluation of "new information from a group of experts that the Corps assembled"—the workgroup—"support[ing] a finding of final agency action." Citing *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 14 (D.C. Cir. 2005).

> The Spellmon Memo's conclusion that the Seattle District maintain MHHW and halt any future consideration of its high tide line datum reflects the consummation of the Corps' decision-making process regardless of the documents that the Corps relied upon to reach that conclusion.

Thus, the court found:

> . . .that Plaintiffs have properly challenged a specific agency action: the Corps' decision to indefinitely maintain MHHW as the Seattle District's high tide line datum. The Spellmon Memo marks the consummation of the Corps' decision-making process on this point.

Conclusion and Implications

In this era of abrupt regulatory about-turns arising from executive agency communications in a wide variety of forms and guises, District Courts continue to apply established precedent to determine whether public interest plaintiffs have standing to challenge various agency decisions as "final" under the APA. It remains to be seen whether the Circuit Courts will shape the controlling law to shield any of these regulatory actions from review. The court's decision is available online at: https://earthjustice.org/sites/default/files/files/21_Judge_Order-Denying-MTD_02-05-2019.pdf
(Deborah Quick)

DISTRICT COURT FINDS IT HAS JURISDICTION UNDER CERCLA OF UK ENTITY FOR 'DIRECTED' ACTIVITIES IN IN THE U.S. DURING CORPORATE MERGER

Successor Agency to the Former Emeryville Redevelopment Agency v. Swagelok Co., ___F.Supp.3d___, Case No. 17-cv-00308 (N.D. Cal. Jan. 30, 2019).

A United Kingdom-based corporate entity may be sued under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and other environmental statutes in the Northern District of California based on its California "directed" activities during a corporate merger in the 1980s, by which the UK entity's affiliate took title to a contaminated industrial site in Emeryville, California. The U.S. District Court found the UK entity controlled the corporate merger, including the dissemination of press releases and advertising directed at the California market, and that the target of the merger had contributed to the contamination of the property at issue, and therefore the plaintiffs established a *prima facie* case the court could exercise personal jurisdiction over the UK entity.

Background

From 1910 through 1999, an industrial property at 5679 Horton Street in Emeryville, California, was the site of various manufacturing processes—including mechanical calculating machines, machine valves and vale parts—resulting in soil and groundwater contamination with "various oils, chemical solvents, and other chemicals." In 1999, the city's Redevelopment Agency purchased the property and investigated the contamination as well as the identity of various potentially liable parties.

In 2017 the city sued various individuals and entities, seeking contributions to clean-up costs. Defendant Hanson Building Materials Limited (HBML), a UK entity, was named on the basis of alleged successor liability arising from HBML's relationship to Smith-Corona Marchant Inc. (SCM). SCM was created as a result of a 1958 merger involving the original owner-operator of the property, and owned the property until the mid-1960s. SCM was later, in the 1980s, the target of a successful hostile takeover by HBML.

The District Court's Decision

HBML moved for dismissal on the basis that the District Court had neither general nor specific personal jurisdiction over it; the city opposed solely on the basis that the court had specific jurisdiction. Therefore, the court analyzed only whether it had specific jurisdiction over HBML applying the "three-factor test:

> (i) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
>
> (ii) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
>
> (iii) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable. *Boschetto v. Hansing*, 539 F.3d 1011, 1016 (9th Cir. 2008) (internal citation and quotations omitted).

Purposeful Availment

The court found that:

> . . .[t]he first factor may be satisfied by 'purposeful availment of the privilege of doing business in the forum; by purposeful direction of activities at the forum; or by some combination thereof.' *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006).

The "purposeful availment" analysis is generally applied in the contract context, while "purposeful direction" typically is applied to torts. In *Pakootas v. Teck Cominco Metals, Ltd.* 905 F.3d 565, 577 (9th Cir. 2018), the Ninth Circuit applied the "purposeful direction" analysis to a defendant facing allegations of liability under CERCLA "because the statute sounded in tort more so than in contract":

> To determine whether activities directed at a forum are sufficient, courts require facts indicating the defendant: '(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.' *Yahoo!*, 433 F.3d at 1206 (internal quotation and citations omitted).

HBML's hostile takeover of SCM was first considered in 1985, with discussions by HBML's board of directors "preceding any press release that HBML would announce a tender offer:"

> When the takeover efforts began, HBML announced that the tender offer would be 'advertised nationally by use of the national financial press and by the interstate mail.'

HBML's "national press strategy" with respect to the takeover continued "[f]rom 1986 to 1993," during which time "HBML ran advertisements in California, at times through the Los Angeles Times." Also during this time HBML "periodically filed SEC documents involved in the tender offer and liquidation of SCM." The District Court rejected HBML's attempt to liken its actions to those of the facts in *Callaway Golf Corp. v. Royal Canadian Golf Ass'n*, 125 F. Supp. 2d 1194, 1198 (C.D. Cal. 2000), where "the District Court found that a nationwide press release" issued by the defendant seeking to evade personal jurisdiction:

> . . .was not sufficient to establish purposeful availment because '[n]one of the four U.S. media publications ... [were] located in California, nor did defendant send press releases to any entity or person with a California address.' Quoting *Callaway*, 125 F. Supp. 2d at 1198–1200.

But HBML's nationwide press releases were accom-

panied by:

> . . .advertising directed towards California specifically. Given HBML's direct involvement in the nationwide press coverage of its tender offer, and subsequent ads in California, it purposefully availed itself of California.

Citing *Farmers Ins. Exchange v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911 (9th Cir. 1990), as:

> . . .finding that the decision to provide a nationwide press coverage permitted jurisdiction in Montana where the claims happened to be filed . . . .Lord Hanson and Sir Gordon White, who were partners in managing HBML, lived part-time in California and conducted business there.

As for the second factor, whether the city's CERCLA claim "arises out of or relates to the defendant's forum-related activities," *Boschetto*, 539 F.3d at 1016, the District Court found that the city alleged sufficient facts to establish successor liability, thereby satisfying this factor:

> A court has personal jurisdiction over an alleged successor company, here HBML, if: (i) 'the court would have had personal jurisdiction over the predecessor' and (ii) 'the successor company effectively assumed the subject liabilities of the predecessor.' *Lefkowtiz v. Scytl USA*, No. 15-CV-05005-JSC, 2016 WL 537952, at *3 (N.D. Cal. Feb. 11, 2016).

Here, it was undisputed that HBML obtained the assets, rather than just the stock, of SCM and that SCM had owned and operated the property (thus, the court would have had jurisdiction over SCM). The city argued that HBML's "dominat[ion] and control[]" of the takeover established that HBML essentially owned and controlled SCM "while SCM allegedly contributed to the contamination of the Property." HBML's argument that affiliates it did not control had actually acquired SCM foundered on evidence from HBML's own witnesses that it was doubtful those entities:

> . . .had the resources (employees, bank accounts, phone and fax numbers) to perform the merger with SCM independent of HBML.

And even if HBML successfully spun-off SCM's liabilities via a series of entity-level transactions in 1988, that did not shield it from successor liability for SCM's pre-1988 contaminating activities.

Conclusion and Implications

The city having established a *prima facie* case that the District Court has personal jurisdiction over HBML, the defendant did not succeed in carrying its burden of demonstrating it would not be reasonable to force it to litigate in California, as, among other reasons, the alternative would be to force the city to litigate in the UK.

The long-arm of successor liability for contribution costs under CERCLA and other environmental statutes drives the structure of many contemporary transactions. This case is a reminder that long-ago transactions can come back to haunt defendants, decades later. The court's decision is available online at: https://scholar.google.com/scholar_case?case=8469295132104795911&q=Successor+Agency+to+the+Former+Emeryville+Redevelopment+Agency+v.+Swagelok+Co&hl=en&as_sdt=2006&as_vis=1
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