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EWL

FEATURE ARTICLE

THE PUBLIC TRUST DOCTRINE AS APPLIED TO GROUNDWATER

By Roderick E. Walston, Esq.

In *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892) (*Illinois Central*), the U.S. Supreme Court held that under the public trust doctrine, the states hold their navigable waters and underlying lands in trust for the public, and that the state has the right to revoke private interests in the underlying lands in order that they can be used for public purposes. In *National Audubon Society v. Superior Court,* 33 Cal.3d 419 (1983) (*National Audubon*), the California Supreme Court, extending *Illinois Central*, held that the public trust doctrine applies not only to lands underlying navigable waters but also to the state's regulation of the waters themselves, and that the state is required to consider, although not necessarily protect, public trust uses in its planning and allocation of the state's surface waters. In *Environmental Law Foundation, et al. v. State Water Resources Control Board, et al.,* 26 Cal. App.5th 844 (2018) (*Environmental Law*), the California Court of Appeal, extending *National Audubon*, recently held that the public trust doctrine applies not only to surface waters but also to groundwater, to the extent that extractions therefrom affect public trust uses in the surface waters, and that the state and its counties are required to consider whether such groundwater extractions affect public trust uses.

This article will trace the development of the public trust doctrine from *Illinois Central* to *National Audubon* and to *Environmental Law*, and will conclude that—in light of California's recent enactment of a comprehensive statutory system for regulation of groundwater, the Sustainable Groundwater Management Act (SGMA)—*Environmental Law* may result in potentially inconsistent regulation of groundwater in California, under which different and potentially conflicting standards of regulation apply to the same groundwater resource, and that courts in future cases may need to grapple with these potential inconsistencies in providing for uniform and consistent regulation of groundwater in California.

Development of the Public Trust Doctrine: *Illinois Central*

As a result of the American Revolution, the original 13 states acquired sovereignty over all navigable waters and underlying lands within their respective borders that had formerly belonged to the English Crown, subject to the rights granted to the United States by the Constitution. *PPL Montana, LCC v. Montana*, 565 U.S. 576, 590 (2012); *Martin v. Waddell*, 41 U.S. 367, 410 (1842). Under the equal footing doctrine, new states are admitted to statehood in an equal footing with other states, and thus also acquire sovereignty over their navigable waters and underlying lands. *PPL Montana*, 565 U.S. at 591. When California was admitted to statehood in 1850, California acquired sovereignty over the waters and lands within its borders.

In *Illinois Central*, 146 U.S. 387, the U.S. Supreme Court in 1892 held that the states hold their navigable waters and underlying lands in trust for the public for certain purposes, namely navigation, commerce and fisheries, *id.* at 435, 452, although the list of public trust uses has been expanded to include other water-related uses. *Illinois Central* stated that a state could:

> . . .no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, than it can abdicate its police powers in the administration of government and the preservation of the peace. *Id.* at 453.

Illinois Central applied this principle—the public trust doctrine—in upholding the right of the Illinois Legislature to revoke its grant of a fee interest to a private railroad company in the submerged lands of Lake Michigan, so that the state could provide for commercial development of the lands for the benefit of the people of Illinois.

Although the public trust doctrine is a doctrine of federal law in holding that the state acquires sovereignty over its navigable waters and underlying lands upon its admission to statehood, and in determining whether the waters were navigable when the state was admitted to statehood and thus has sovereignty over them, the doctrine is a state law doctrine to the extent it addresses the nature and scope of a state's public trust duties. *PPL Montana*, 565 U.S. at 603-604. As the Supreme Court recently stated:

> . . .[u]nder accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine. *Id*.

Thus, the public trust doctrine does not establish nationally-uniform regulatory standards that apply equally in all states; rather, each state is responsible for determining its own public trust responsibilities. Although *Illinois Central* on its face appeared to embrace the public trust doctrine as a principle of federal law, since the decision cited federal cases and not Illinois cases, the Supreme Court subsequently held that *Illinois Central* was based on Illinois law rather than federal law. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 285 (1997); *Appleby v. New York City*, 271 U.S. 364, 395 (1926).

California's Public Trust Doctrine: *National Audubon*

In a series of decisions in the 1970s and 1980s, the California Supreme Court embraced the public trust principles established in *Illinois Central*, holding that the state has sovereign ownership of lands underlying navigable waters, such as tidelands, and that the state has the right to regulate the lands notwithstanding that private landowners might ostensibly have title to the lands. *E.g., City of Berkeley v. Superior Court*, 26 Cal.3d 515 (1980); *Marks v. Whitney*, 6 Cal.3d 251, 260-61 (1971). In *City of Berkeley*, the California Supreme Court, in a split 4-3 decision, ruled that—notwithstanding that the state had conveyed certain interests in tidelands to private parties—the tidelands were still subject to the public trust, and would remain so as long as the lands were still physically capable of supporting public trust uses. *City of Berkeley*, 26 Cal.3d at 534. As in *Illinois Central*, the California Supreme Court applied the public trust doctrine only in determining the state's ownership interest in lands underlying navigable waters, and not to the state's regulation of the waters themselves.

In *National Audubon*, 33 Cal.3d 419, however, the California Supreme Court held in 1983 that the public trust doctrine applies to the state's regulation of the navigable waters themselves. There, the National Audubon Society (NAS) brought an action against the Los Angeles Department of Water and Power (DWP), alleging that DWP, by diverting water from Mono Lake tributaries for use by people in the City of Los Angeles, was violating the public trust doctrine by impairing public trust uses in Mono Lake. DWP argued that it had a vested right to divert the water because California's State Water Resources Control Board (SWRCB), which regulates appropriative water rights, had issued an appropriative permit to DWP in 1940 authorizing the diversions. The State of California, which intervened on behalf of the SWRCB, argued that the SWRCB was authorized to reconsider its permit to DWP and impose additional conditions to protect public trust uses in Mono Lake, and that the SWRCB's authority to reconsider the permit derived from Article X, § 2 of the California Constitution, which provides that water may be used in California only if the water is put to reasonable and beneficial use.

The California Supreme Court held that the SWRCB was authorized to reconsider its decision granting an appropriative permit to DWP in order to determine whether to impose additional conditions to protect public trust uses in Mono Lake, and that the SWRCB's authority to reconsider its decision was based on the public trust doctrine. (The Court did not reach or decide the state's argument that the SWRCB was authorized to reconsider its decision under the constitutional reasonable and beneficial use provision.) The Court undertook to "integrate" the public trust doctrine and the statutory water rights system, which the Court viewed as on a "collision course." *National Audubon*, 33 Cal.3d at 425.

Specifically, the Court held that the state as sovereign retains "continuing supervisory authority" over navigable waters and underlying lands under the public trust doctrine; that the state has an "affirmative duty" to consider public trust uses in the planning and allocation of water resources, and to protect public trust uses when "feasible"; and that the state has a "duty of continuing supervision" over the appropriated water after the state has approved an appropriation. *Id.* at 445-447. The Court also recognized, however, that as a "matter of current and historical necessity" the Legislature and the SWRCB may authorize water diversions even though they may impair public trust uses, *id.* at 446; that the state has the right to "prefer one trust use over another," and thus to determine whether to prefer commerce uses over fishery uses, or vice versa, *id.* at 439 n. 21, 440; and that the state is required to protect public trust uses only to the extent consistent with the "public interest." *Id.* at 447. *National Audubon* also held that the public trust doctrine applies to non-navigable tributaries of navigable waters, because activities in the tributaries may affect public trust uses in the navigable waters. *Id.* at 435-437.

In short, *National Audubon* held that state is required to *consider* public trust uses in the planning and management of the state's water resources, but is not necessarily required to *protect* such uses. *National Audubon* reflected the state's argument that the state had continuing authority over water rights in order to impose additional conditions, but reflected NAS's argument that the state's continuing authority was based on the public trust doctrine. *National Audubon* flatly rejected DWP's argument that it had a vested water right that could not be reconsidered as a result of the state-issued permit.

Although many heralded the *National Audubon* decision as establishing a new principle of water law that would significantly change how water rights are regulated in California, the doctrine, to date, has not had this effect. Instead, the lower courts have relied principally on the statutory laws and the traditional common law in considering the SWRCB's regulation of water rights. The statutory laws establish precise and detailed standards that the SWRCB must apply in regulating water, Cal. Water Code §§ 1200 *et seq.*, and the courts have applied these precise and detailed statutory standards rather than the more amorphous standards of the public trust doctrine in reviewing the SWRCB's decisions. For example, in *United States v. State Water Resources Control Board*, 182 Cal.App.3d 82 (1986), the Court of Appeal extensively discussed and applied the statutory standards in determining whether the SWRCB had properly imposed conditions in appropriative permits issued to the federal Central Valley Project and the State Water Project, 182 Cal.App.3d at 115-149, and applied the public trust principles established in *National Audubon* only as a basis, among others, for the Board's continuing authority to impose the conditions. *Id.* at 149-152. Similarly, in *State Water Resources Control Board Cases*, 136 Cal.App.4th 674 (2006), the California Court of Appeal spent more than a hundred pages addressing whether the SWRCB had properly fulfilled its statutory responsibilities in adopting a water quality control plan for the San Francisco Bay-Delta, 136 Cal.App.4th at 720-77, 779-844, and only a few pages in dismissing the plaintiff's public trust arguments, *id.* at 777-79. Thus, the SWRCB's regulatory authority, at least as judicially interpreted to date, appears to primarily rest on the statutes rather than the public trust doctrine.

The Public Trust Doctrine as Applied to Groundwater: *Environmental Law*

Background and Issues

In *Environmental Law*, 26 Cal.App.5th 844, the California Court of Appeal considered whether the public trust doctrine applies to groundwater extractions from new wells—to the extent that the groundwater extractions affect public trust uses in nearby surface waters—and if so, whether California's counties and the SWRCB have public trust duties to regulate such groundwater extractions. The public trust doctrine does not directly apply to groundwater itself, because groundwater is not navigable. Although counties are authorized to regulate groundwater under their police power, *Baldwin v. Tehama County*, 31 Cal. App.4th 166 (1994), they have the option of deciding whether to do so. The question in *Environmental Law* was whether counties and the SWRCB nonetheless have public trust duties to regulate groundwater extractions that may affect public trust uses in surface waters.

Like many counties in California, Siskiyou County regulates construction of new wells, by requiring

the wells to meet statewide construction standards established by the California Department of Water Resources (DWR); the construction standards are enforced by issuance of building permits for the wells. The groundwater extractions by the wells might, conceivably, reduce the flows of the nearby Scott River and thus affect public trust uses in the river. In issuing the building permits, the county does not consider whether the groundwater extractions may affect public trust uses in the river, although the county imposes a setback condition in the permits that requires the wells to be located a sufficient distance from the river to avoid or minimize any harmful effects on the river flows.

In *Environmental Law*, the Environmental Law Foundation (ELF) brought an action to compel both the SWRCB and Siskiyou County, and by extension other counties, to consider whether groundwater extractions by new wells affect public trust uses in surface waters. ELF alleged, first, that the SWRCB has both the right and duty under the public trust doctrine to determine whether groundwater extractions from the wells affect public trust uses in the Scott River, and second, that Siskiyou County, in issuing building permits for new wells, also has a public trust duty to consider whether the groundwater extractions affect such public trust uses. ELF's argument relied on *National Audubon*, which had broadly construed the public trust doctrine in holding that the doctrine requires the state to consider public trust uses in the planning and allocation of water resources.

The SWRCB agreed with ELF's contention that the SWRCB has the *right* under the public trust doctrine to determine whether the groundwater extractions affect public trust uses, but the Board argued that it has discretion in deciding whether to regulate the groundwater extractions and does not have a *duty* to do so.

Siskiyou County, on the other hand, argued that neither the county nor the SWRCB has a public trust duty to determine whether groundwater extractions from the wells affect public trust uses. First, the county argued that a recent legislative enactment, SGMA, Cal. Water Code §§ 10720 *et seq*., provides for comprehensive regulation of groundwater and establishes the regulatory duties of agencies in regulating groundwater, including groundwater extractions from wells, and thus the county is not required to regulate the same groundwater extractions under the public trust doctrine. Specifically, SGMA provides that local agencies in a groundwater basin are required to form a Groundwater Sustainable Agency (GSA) to regulate groundwater in the basin, *id*. at § 10723(a), and that the GSA must adopt a Groundwater Sustainability Plan (GSP) that provides for management and regulation of groundwater in the basin, including groundwater extractions from wells. *Id*. at §§ 10725(a), 10727. The county argued that counties do not have an independent public trust duty to regulate the same groundwater extractions from wells that are regulated by GSAs under SGMA.

Second, Siskiyou County argued that SGMA limits the SWRCB's authority to regulate groundwater, by providing that the SWRCB may regulate groundwater only if the board designates the groundwater basin as a "probationary" basin, *id*. at § 10735.2, in which case the SWRCB may adopt an "interim plan" for the basin. *Id*. at §§ 10735.4, 10735.8. Siskiyou County argued that the SWRCB may not circumvent SGMA's statutory limitations by regulating groundwater extractions under the public trust doctrine where the Board has not designated a basin as a "probationary" basin.

Third, Siskiyou County argued that, apart from SGMA, California's counties are not responsible for the planning and management of water, or groundwater, and thus do not have a public trust duty to regulate groundwater extractions under *National Audubon*, which held that the state has a public trust responsibility to consider public trust uses in the planning and allocation of the state's water resources. *National Audubon*, 33 Cal.3d at 446.

The Court of Appeal's Decision

The Court of Appeal held that Siskiyou County and the SWRCB are required under the public trust doctrine to consider whether groundwater extractions from new wells affect public trust uses in the Scott River. Since the court held that the county and the board are required to *consider* whether groundwater extractions affect public trust uses, the court held, in effect, that they are required to *regulate* the groundwater extractions, because the only point of considering whether the extractions affect public trust uses would be to determine whether the new wells should be approved or disapproved, or should be subject to conditions to protect public trust uses.

Before addressing Siskiyou County's arguments

that the county and the SWRCB did not have such public trust duties, the Court of Appeal first addressed an argument the county did not make. Addressing what it described as the threshold issue in the case, the court held that—although the public trust doctrine may not directly apply to groundwater—the doctrine applies to groundwater extractions that affect public trust uses in navigable waters. *Environmental Law*, 28 Cal.App.5th at 859. The court reasoned that—since *National Audubon* held that the public trust doctrine applies to tributary diversions that affect public trust uses in navigable waters—the doctrine also applies to groundwater extractions that affect such uses, because groundwater extractions may have the same impact on public trust uses in navigable waters as tributary diversions. *Id.* In fact, Siskiyou County had conceded that the public trust doctrine may apply to groundwater extractions that affect public trust uses, and argued only that the county and the SWRCB did not have public trust responsibilities in regulating the extractions. The court apparently believed, nonetheless, that it was important to establish a statewide precedent that the public trust doctrine applies to groundwater extractions that affect public trust uses, even though the county did not contend otherwise.

The Court of Appeal then rejected all of Siskiyou County's arguments. First, regarding the county's argument that counties do not have a public trust duty because SGMA comprehensively establishes the regulatory duties of agencies in regulating groundwater, the court held that SGMA did not "occupy the entire field of groundwater management" and "abolish all fiduciary duties" of the county to consider the impacts of groundwater extractions. *Environmental Law*, 26 Cal.App.5th at 862. Citing *National Audubon*, the court stated that SGMA's statutory system and the public trust doctrine "can live in harmony," *id.* at 866, and that SGMA "accommodate[s] the perpetuation of the public trust doctrine." *Id.* The court concluded that in both *National Audubon* and the instant case, the Legislature established "parallel systems" of regulation, in that the regulatory duties of agencies are found in both the statutes and the public trust doctrine. *Id.* at 865, 867.

Second, regarding Siskiyou County's argument that SGMA limits the SWRCB's authority to regulate groundwater, the court did not directly address the argument. The court stated that—although the SWRCB has statutory authority to regulate water rights in surface water—the board's authority to regulate water, and groundwater, under the public trust doctrine is "independent of and not bounded by" the statutory limitations on its authority. *Id.* at 862. In fact, Siskiyou County acknowledged that the SWRCB's regulatory authority extends beyond its statutory authority, and argued instead that SGMA expressly limits the SWRCB's authority to regulate groundwater. But since the court held that the public trust doctrine and SGMA establish "parallel systems" of regulation, *id.* at 865, 867, the court implied that the SWRCB is authorized to regulate groundwater under the public trust doctrine regardless of any limitations on the board's authority imposed under SGMA.

Third, regarding Siskiyou County's argument that counties are not responsible for the planning and management of groundwater and thus do not have a public trust duty to regulate groundwater extractions that affect public trust uses, the court held that the "state" as sovereign is responsible for administering the public trust, and that—since the county is a "subdivision of the state"—the county shares responsibility for administering the public trust and must consider public trust uses in issuing building permits for new wells. *Id.* at 867-68.

'Parallel Systems' of Regulation

Perhaps the most significant and far-reaching part of *Environmental Law* is its conclusion that the public trust doctrine and SGMA establish "parallel systems" of regulation, and that the regulatory duties of agencies as applied to groundwater are found in both SGMA and the public trust doctrine. If SGMA and the public trust doctrine establish parallel systems of regulation, these parallel systems may result in the application of different and potentially conflicting standards of regulation to the same groundwater resource, and thus lead to inconsistent regulation of groundwater in California. For example, a county pursuant to its public trust authority may establish regulatory standards for groundwater extractions that conflict with statutory standards established by a GSA under SGMA. Or, the SWRCB may pursuant to its public trust authority establish regulatory standards for groundwater extractions from basins even though SGMA precludes the Board from establishing such standards unless it first designates the basin

a "probationary" basin. Cal. Water Code § 10735.2. *Environmental Law* did not address these potential conflicts, or indicate how they are to be resolved.

Although *Environmental Law* stated that its decision was consistent with *National Audubon* because *National Audubon* also established a "parallel system" of regulation, *Environmental Law*, 26 Cal.App.5th at 865, 867, *National Audubon* did not establish a parallel system that invites conflicts between the statutory system of regulation and the public trust doctrine. *National Audubon* sought to reach an "accommodation" between the statutory water rights system and the public trust doctrine, which the court viewed as having "developed independently of each other." *National Audubon*, 33 Cal.3d at 445. But the accommodation *National Audubon* reached was fully compatible with the statutory system, and did not infringe on the statutory system. Specifically, *National Audubon* held that the state is required to consider, but not necessarily protect, public trust uses in administering water rights, and is required to protect public trust uses only to the extent consistent with the "public interest." *Id.* at 447. The "public interest" standard is the standard that the SWRCB is expressly required to apply in administering the statutory water rights system. Cal. Water Code §§ 1253, 1255, 1257. *National Audubon* grafted onto the SWRCB's statutory responsibilities a common law responsibility to consider public trust uses that is fully compatible with the Board's statutory responsibilities.

Environmental Law raises an additional question, which the Court of Appeal did not answer, of whether a county that does *not* regulate construction of new wells nonetheless has a public trust duty to determine whether groundwater extractions from new wells affect public trust uses. The Court of Appeal held that Siskiyou County, in regulating construction of new wells, has a public trust duty to consider whether groundwater extractions from the wells affect public trust uses, but the court did not consider whether other counties that do not regulate construction of new wells have the same public trust duty. If *all* counties have a public trust duty to regulate groundwater extractions irrespective of whether they regulate construction of new wells, then those counties that do not currently regulate such new well construction, or regulate groundwater in other ways, would nonetheless apparently have a public trust duty to affirmatively adopt programs regulating groundwater extractions from wells. If, instead, only those counties that regulate construction of new wells have such a public trust duty, then the public trust duties of counties would vary from county to county, depending on whether they regulate new well construction. The Court of Appeal did not address whether the public trust duty it identified applies to all counties, or only those that regulate construction of new wells.

In support of its SGMA argument, Siskiyou County cited numerous California Supreme Court decisions holding that the California Legislature (Legislature) is responsible for administering the public trust, and that its judgment is "conclusive" as long as it does not impair the authority of future legislatures to administer the public trust. *E.g.*, *Marks v. Whitney*, 6 Cal.3d 151, 260-61 (1971); *Mallon v. City of Long Beach*, 44 Cal.2d 199, 205-207 (1955); *City of Long Beach v. Mansell*, 3 Cal.3d 462, 482 n. 17 (1955); *People v. California Fish Co.*, 166 Cal. 576, 597 (1913). In *Marks*, for example, the Supreme Court stated that:

> . . .[i]t is a political question, within the wisdom and power of the Legislature, acting within the scope of its duties as trustee, to determine whether public trust uses should be modified or extinguished. *Marks*, 6 Cal.3d at 260-261.

Environmental Law—mentioning only two of the decisions cited by the county, *Mallon* and *Mansell*—stated that the two decisions applied to tidelands and not water, and that the decisions held that the Legislature's judgment was conclusive only as applied to tidelands. *Environmental Law*, 26 Cal.App.5th at 868-69. Thus, *Environmental Law* held that the Legislature's judgment is *not* conclusive as applied to regulation of water, which means, apparently, that the Legislature is powerless to establish the public trust duties of agencies in regulating water, or groundwater—no matter how clearly the Legislature evinces its intent. *Environmental Law*'s suggestion that the Legislature does not exercise "conclusive" judgment in regulating water appears inconsistent with constitutional principles separating the legislative and judicial powers, which provide that the legislative branch is responsible for managing and regulating the state's water resources.

Environmental Law held that Siskiyou County's SGMA argument would "obliterate," "eviscerate" and

"dismantle" the public trust doctrine, by absolving counties of their public trust duty. *Environmental Law*, 26 Cal.App.5th at 862, 867, 869. The county argued that its argument would not have this effect, because the Legislature fulfilled its public trust responsibility in enacting SGMA, in that SGMA requires GSAs to consider beneficial uses, including public trust uses, in regulating groundwater. *Environmental Law* dismissed the county's argument as a "clever word play." *Id.* at 865 n. 7. The county's argument, however, went to the core issue of the nature of the public trust doctrine—whether the doctrine imposes a duty on the Legislature to consider public trust uses in enacting a statutory system of regulation, which the Legislature fulfills in requiring consideration of public trust uses, or instead whether the doctrine establishes a regulatory system that exists outside and independently of the statutory system, and which may override the statutory system in the case of conflicts. *Environmental Law* stated that it was not addressing whether the Legislature could "supersede or limit" the SWRCB's public trust authority, *id.* at 869, but the logic of the decision suggests that the public trust doctrine may override the statutory standards where conflicts occur. Perhaps the courts in future cases may probe more deeply into the nature of the public trust doctrine, to determine whether the doctrine establishes the Legislature's regulatory duties or instead establishes standards that may override the Legislature's judgments.

Conclusion and Implications

Although *Environmental Law* held that the public trust doctrine logically applies to groundwater extractions that affect public trust uses—and thus the Legislature is required to consider public trust uses in providing for regulation of groundwater, as the Legislature did in enacting the Sustainable Groundwater Management Act—*Environmental Law* went further by holding that the public trust doctrine establishes a "parallel system" of regulation to the Legislature's statutory system, which may result in the application of different and potentially conflicting standards of regulation to the same groundwater resource. Perhaps these potential conflicts may be avoided in future cases by agreements among regulatory agencies in sorting out their statutory and public trust responsibilities. Failing that, the courts in future cases may be called on to address more fully the nature of the public trust doctrine, in terms of whether the doctrine establishes common law standards that the Legislature must apply in regulating water or instead establishes common law standards that may potentially override the

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Legislature's statutory system of regulation.

EASTERN WATER NEWS

THE 'NEW' PROBLEM OF FIRE SUPPRESSION AND THE INVERSE CORRELATION TO WET WINTERS

Wet winter, mild wildfire season. For hundreds of years in the West and other parts of the nation, that correlation was true. A new report, however, concludes that the correlation no longer exists and that the devastating 2017 wildfire season, following a 2016 wet winter, could be the new normal.

The North Pacific Jet Stream and the Last 400 Years

The 2016-17 winter rainfall season ranks as one of the top five rainfall seasons in over 100 years. According to the California Department of Forestry and Fire Protection, the 2017 wildfire season resulted in 7,117 fires, impacting 505,956 acres. By comparison, the five-year average, through 2017, is 4,835 fires, impacting 202,786 acres.

A report released in March 2019 analyzed historical North Pacific jet stream (NPJ) data to determine the correlation between wet winters and wildfire risk. The report is entitled "Jet Stream Dynamics, Hydroclimate, and Fire in California: 1600 CE to Present" and appears in the March 4, 2019 issue of the *Proceedings of the National Academy of Science*.

The report modeled simulations of winter NPJ characteristics since 1571 to "identify the influence of NPJ behavior on moisture and forest fire extremes in California." What the report discovered surprised many, including the report's authors.

Broken Correlation Between Wet Winters and Wildfire Risk

From 1600 to 1903, the amount of winter rain was linked to the severity of the next wildfire season. According to the report, beginning in 1904, the correlation weakened due to inception of fire suppression policy on U.S. federal lands, eventually disappearing altogether in 1977. Equally important, the report highlights that the "period of 1600 to 1903 does not contain a single case of a high-precipitation year coupled with a high-fire year, as occurred in 2017."

A report co-author, Valerie Trouet, opined that although "moisture availability over California is still strongly linked to the position of the [NPJ]…fire no longer is." She noted that when the NPJ is positioned over California, "it's like a fire hose—it brings storms and moisture straight over California," but, since 1900, although its position is still critical for moisture, there is a "disconnect with fire." Ms. Trouet also said:

> I didn't expect there to be no relationship between [NPJ] dynamics and fire in the 20th century. I expected it to be maybe weaker than before, but not to completely disappear.

According to a press release for the report, fuel buildup and "rising temperatures from climate change means any year may have large fires, no matter how wet the previous winter." The report also notes that fire management plays a role, with Ms. Trouet stating:

> . . .[i]t's not either climate change or historical fire management—it's really a combination of the two that's creating a perfect storm for catastrophic fires in California.

Additional Challenges

The report notes that the last drought, from 2012 to 2015, impacted California's economy and environment, affecting water availability and increasing tree mortality and wildfire risk. The drought occurred as a result of "low winter precipitation [coinciding] with unusually high temperatures," conditions which the report notes as occurring more frequently in recent decades. On the other hand, the heavy 2016-17 winter season and others like it can cause flooding and lead to power outages.

Another report co-author expanded on the fuels problem. Alan Taylor stated:

> . . .[f]ire not being influenced by moisture anymore? That is surprising. It's going to be a

problem for people, for firefighters, for society. . . . [and…t]he only thing we can control is fuels, so what it suggests is that we take that very seriously.

Conclusion and Implications

The main point from the report is also the title of this article "Wet Winter No Longer Means Mild Wildfire Season." It will be interesting to track, however, whether another point—the role of fire management- gathers more attention, especially since President Donald Trump has often blamed California's fire management for the severity of California's wildfires.
(Kathryn Casey)

NEWS FROM THE WEST

In this month's News from the West we cover a recent decision from the Colorado Supreme Court addressing the nature of priority rights within the spectrum of first in time water rights.

We also cover efforts in the California Legislature to establish a "water tax" on all water use but designed to insure a clean and plentiful water supply, especially to parts of the state that during drought, have faced water scarcity.

1909 Water Rights "Decree" Overturned by Colorado Supreme Court for Lack of 'Indicia of Enforceability'

Yamasaki Ring v. Dill, 2019 CO 14 (Colo. 2019).

The Colorado Supreme Court has held that, because a priority date is the most important element of a water right, a 1909 water decree lacking that detail was unenforceable. The complex facts of this case confirm a basic tenant of Colorado water law—a decree must set forth certain required "indicia of enforceability" to be valid against other water rights users.

Background and Water Court Decision

This case relies on a string of 100-year-old decisions, and therefore a detailed recitation of the factual history is necessary to understand the Colorado Supreme Court's recent decision. In 1909 Messrs. Horton and Alexander were in the District Court of Fremont County litigation a 1905 decree to the Campbell Ditch. Because of errors in that decree, the 1909 court annulled that decision and entered a new decree, declaring that the Campbell Ditch, in addition to receiving water from Cherry Creek is "entitled to received and conduct water" from nearby springs.

Turning to the present dispute, appellant Yamasaki Ring (Yamasaki) owns certain water rights in the Campbell Ditch. Appellees the Dills and Pearces (Dills) own property upon which spring water has been put to beneficial use since at least 1903. In its semi-natural state, water from the springs would flow (via a 1903 ditch extension) directly into Cherry Creek and shortly thereafter to the Campbell Ditch headgate. Along with that extension, a 40-foot culvert was constructed upstream of the Campbell Ditch that carries water from the springs over Cherry Creek into a series of ditch that serve what is now the Dills' land. The pertinent question, then, is whether that 1909 decree granted the Campbell Ditch an enforceable right to that spring water, specifically as against the Dills.

The 1905 decree (later annulled) importantly split its definitions of the Campbell Ditch water rights. Regarding the Cherry Creek rights, the court included appropriation dates, priority numbers (for both Cherry Creek and the Arkansas River which is fed from Cherry Creek), and quantification information. For the springs, the court said only that the Campbell Ditch was entitled to "receive and conduct water." The 1909 correction decree similarly did not include that specific information but only the "receive and conduct" language in relation to the springs.

This 100-year-old issue first resurfaced in 2011 when the Division Engineer for Water Division 2 (Arkansas River) issued the Dills a cease and desist order instructing them to stop using water from the springs, thereby allowing that water to flow to the Campbell Ditch where it was used by Yamasaki. The Dills then sued the State and Division Engineers seeking a declaratory judgment that "water from [the springs] have always been treated as separate and distinct" from Cherry Creek water rights. The Dills

concurrently filed a water rights application to adjudicate their springs' water rights. Yamasaki filed both an answer and statement of opposition to these claims.

In January 2016 the Water Court issued two identical orders for both cases ruling that:

> The 1909 Decree fails to establish a priority number, date or flow rate for this supplemental water source. Therefore, [Judge Bailey] did not confirm a specific water right attributable to the springs but only decreed an entitlement to receive and conduct the springs' water without adjudicating any appropriation date or priority enforceable or administrable for a water right in the springs.

Therefore, the Water Court held, Yamasaki does not have an enforceable right to the spring water. The water rights application then went to trial in 2017 where the court ruled that: 1) the springs' water is actually tributary to Stout Creek, not Cherry Creek, 2) the Dills' predecessors had been using that spring water since 1903, six years before the 1909 decree, and 3) the Dills were therefore "entitled to a decree for 0.46 cfs absolute and 0.54 cfs conditional, for irrigation and domestic purposes." Yamasaki appealed that ruling leading to this current Supreme Court case, questioning whether the Water Court was correct in determining that "the Campbell Ditch water rights have no legally enforceable right to the springs."

Water Rights in Colorado

As a brief overview of Colorado water doctrine, a water decree does not confer a right but rather "confirms a pre-existing water right." *Shirola v. Turkey Canon Ranch Ltd. Liab. Co.*, 937 P.2d 739, 748 (Colo. 1997). Critically, a water right "is not legally enforceable until it is adjudicated." *Id.* at 749. A decree is then first reviewed by analyzing its plain language, and extrinsic evidence may only be introduced if it is ambiguous. *Select Energy Servs. LLC v. K-LOW LLC*, 394 P.3d 695, 698 (Colo. 2017). That plain language must "measure, limit and define both the nature and extent" of the water right," including such essential elements as "priority, location of diversion at the source of supply, and amount of water for application to beneficial uses." *Orchard City Irr. Dist. v. Whitten*, 361 P.2d 130, 135-36 (Colo. 1961); *Empire Lodge Homeowners' Ass'n. v. Moyer*, 39 P.3d 1139, 1148 (Colo. 2001). Perhaps the most critical statement in regards to this case: a water right's priority is "the most important stick in the water rights bundle." *Empire Lodge*, 39 P. 3d at 1148.

The Colorado Supreme Court's Decision

In the present case, both parties agreed that the 1909 decree was clear and unambiguous, therefore the analysis should be limited to the plain language of the decree. Agreeing with the Water Court, the Supreme Court noted that the 1909 decree lacks "typical decree language" and "is wholly lacking in indicia of enforceability" regarding the springs. Although water rights were governed by a different statutory scheme in 1909, the statutes then still made clear that "adjudication was required in order to obtain the benefits of *priority* administration." *Id.* at 1149 (emphasis added by Colorado Supreme Court). Therefore, the Water Court reasoned, the Campbell Ditch's entitlement to the spring water:

> . . .cannot be deemed an adjudicated water right that can be enforced or administered against other adjudicate water rights.

On appeal, Yamasaki countered this finding, arguing that the springs' water is merely supplemental to Cherry Creek, and therefore a separate water right was never necessary for the springs because that water was tied to the clearly adjudicated Campbell Ditch claims on Cherry Creek. To make this argument, Yamasaki relied on the 1909 language that the springs were "adjudged." Importantly, the 1909 decree discussed the springs in a stand-alone paragraph (separate from the Cherry Creek water rights) starting with the phrase "And it is further adjudged." This distinction mattered, the Supreme Court ruled, because clearly something was different in the two water rights to necessitate two separate distinctions.

Further, and perhaps more pertinent, "that something was 'adjudged' is not what matters most to use; it's *what* was 'adjudged.'" Even if the 1909 decree adjudged some right to the springs on behalf of the Campbell Ditch, it was lacking a priority number, appropriation date, and quantification information and therefore fell well short of anything that could be called an adjudicated water right.

As an aside, the Court noted that Yamasaki tried to raise claims of extrinsic evidence. For the reasons discussed above, the Court held that that evidence not appropriate (the decree was unambiguous) but that even if it were admissible, the evidence would support the Dills' claims.

Conclusion and Implications

In sum, the Supreme Court doubled down on the idea that a priority date, among other pertinent information, is the "most important stick in the water rights bundle." Any court decision lacking this critical indicia of enforceability is therefore moot when a party attempts to enforce a claim against other water rights users. Therefore Yamasaki "does not have an adjudicated water right in the springs; instead it has 'an unenforceable entitlement to water from the springs when the two [Cherry Creek] water rights are not fully satisfied.'" The Dills' spring water rights were consequently adjudicated, dating back to 1903, and they now have the superior claims to the springs with respect to Yamasaki.
(Paul Noto, John Sittler)

Proposed California Water Tax and Legislative Funding Proposals for Water Projects Compete for Support

California Governor Gavin Newsom is proposing to tax water users throughout California to help fund projects and programs to assist low-income communities where water quality and water supply issues are dire. Competing proposals urge utilizing existing funding sources rather than imposing a new and controversial water tax. Meanwhile, some Democratic California legislators are also pushing to lower the voting threshold to impose new local special taxes.

With more than supermajority democratic control of both houses of the California legislature in place, Governor Newsom wasted no time proposing a new and controversial tax on water. In January, Governor Newsom released a California budget proposal that included spending millions of dollars for a "Safe and Affordable Drinking Water Fund." That money would be used to help water systems, domestic wells and water users secure and maintain clean water supplies, primarily in small and disadvantaged communities.

The Water Tax

The details of Newsom's plan trickled out recently, revealing that water customers would be taxed from 95 cents to $10 a month in order to raise about $140 million annually. The amount of the tax would vary depending on factors such as the size of water meters and would include exceptions for certain disadvantaged communities. More than 3,000 local water suppliers throughout California would be made responsible for collecting the tax. Animal farmers, dairies and fertilizer producers and handlers would also pay sizeable fees for programs to remedy nitrate and other types of groundwater contamination.

Newsom describes the water quality and water supply conditions for many in low income communities through the state, "a moral disgrace and a medical emergency." According to Newsom, one million Californians live without clean water for drinking or bathing, and hundreds of water systems are out of compliance with primary drinking water quality standards due to contamination. Many struggling systems are located in the Central Valley and San Joaquin Valley.

Opposition

Similar legislative proposals were made and killed last year, including under threat of veto by then-Governor Jerry Brown. Newsom's water tax also faces stiff opposition, not only from taxpayer associations but also from Democratic legislators representing largely agricultural districts and from the vast majority of public water agencies. Last year's recall of a Democratic senator who voted to raise California's gas tax also has many legislators nervous. Despite Democratic supermajorities, the water tax may have difficulty reaching the required two-thirds threshold of votes necessary to impose or increase new taxes.

Those opposed to the water tax note that voters have approved no less than eight water bonds totaling more than $30 billion since 2000, and they cite concerns that little of that funding has been used to create new water storage or develop new sources of water supply. Water tax opponents assert that statewide funding efforts should focus on these statewide water supply needs rather than directing funds to select local areas. Association of California Water Agencies (ACWA) representatives have taken the

position that taxing a resource that is essential to living does not make sense and is not necessary when alterative funding solutions exist and the state has a substantial budget surplus.

The California Legislative Analyst's Office, which is the Legislature's non-partisan fiscal and policy advisor, recommends that the Legislature consider several issues as it deliberates and evaluates Newsom's Safe and Affordable Drinking Water proposal, including: 1) its consistency with the state's existing human right to water policy, 2) uncertainty about the estimated revenues that would be generated and the amount of funding needed to address the problem, 3) a comparison of the beneficiaries of the program with those who would pay the new charges, 4) the limited nature of alternative fund sources for the proposed program, and 5) trade-offs associated with the proposal's safe harbor provisions.

Competing Proposals

Democratic State Senator Anna Caballero (D - 12th Senate District) has proposed a competing proposal that appears to be gaining traction. Rather than imposing a new tax, Senator Caballero would utilize money from California's multi-billion-dollar budget surplus to create a trust fund to pay for water system and water supply related improvements.

Similarly, earlier this year California Assemblyman Devon Mathis (R - 26th Assembly District) introduced the Clean Water for All Act, a California Constitutional amendment that would cause, beginning with the 2021–22 fiscal year, not less than 2 percent of California's General Fund revenues to be set apart for the payment of principal and interest on bonds authorized under the Water Quality, Supply, and Infrastructure Improvement Act of 2014, for water supply, delivery, and quality projects administered by the California Department of Water Resources, and water quality projects administered by the State Water Resources Control Board.

Local Tax Thresholds

As these statewide tax proposals move their way through the legislative process, so too does a proposed major Constitutional amendment to reduce the voter approval threshold to approve bonds and impose or raise *local* special taxes. California Assemblywoman Cecilia Aguiar-Curry (D - 4th Assembly District)'s proposed amendment, which could potentially be placed on the November 2020 ballot, would reduce that threshold from a two-thirds vote to a 55-percent majority.

According to Assemblywoman Aguiar-Curry:

> I have heard about deteriorating buildings, decrepit community facilities and our extreme lack of affordable housing. This will empower communities to take action at the local level to improve the economies, neighborhoods and residents' quality of life.

Taxpayer advocate David Wolfe, legislative director for the Howard Jarvis Taxpayers Association, however, says "If this passes it's going to be devastating for property owners," asserting that the new taxes and bonds that might be approved under the lowered thresholds would significantly increase costs of homeownership and burden taxpayers with long-term debt that lasts for decades.

Conclusion and Implications

Funding water projects and programs at practically any level in California is often difficult. While stakeholders across California largely share the view that such projects and programs are necessary to sustain life and economy in California, there is significant disagreement in how to fund them. As the proposed water tax and competing and related proposals work their way through the legislative process, stakeholders will surely demand to know how existing revenues and funding sources are—or could be—utilized to tackle these significant challenges before imposing new taxes, fees or charges on all or any Californians. (Derek Hoffman, Michael Duane Davis)

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 18, 2019 - The U.S. Environmental Protection Agency (EPA) and the Department of Justice 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

•March 19, 2019 - The U.S. Environmental Protection Agency (EPA) and Georgia-Pacific Wood Products, LLC, of Coos Bay, Oregon, reached a federal Clean Water Act settlement that is expected to reduce uncontrolled industrial stormwater threats to Isthmus Slough and Coos Bay. The EPA found that Georgia-Pacific Wood Products committed numerous violations of their Oregon state industrial stormwater permit at their Coos Bay facility. As part of the two-part agreement settling the matter, Georgia-Pacific agreed to comply with existing Oregon industrial storm water regulations and pay a $79,000 penalty. Georgia-Pacific agreed to the settlement terms under Oregon's industrial stormwater permit regulations. Oregon's program requires facilities to implement comprehensive stormwater controls to minimize the amount of sediment and other pollutants from being discharged in stormwater runoff. EPA performed the inspection and is taking this action as part of a compliance work sharing agreement with the Oregon Department of Environmental Quality. Stormwater runoff from the facility discharges—through a series of outfalls—directly to tidally influenced Isthmus Slough, which is considered a tributary to Coos Bay and the Pacific Ocean. Isthmus Slough has "impaired" water quality and does not meet the state of Oregon's water quality standards. Some of the violations found during the EPA inspection were: Failure to collect representative samples; Failure to maintain control measures; Failure to complete adequate Tier 1 corrective action response; Failure to monitor outfall 3A; Failure to properly monitor oil and grease. Georgia-Pacific neither admits nor denies the factual allegations contained in the Consent Agreement and Administrative Order on Consent.

•April 4, 2019 - The U.S. Environmental Protection Agency announced a settlement with Detroit Diesel Corporation (DDC) for failing to close a large-capacity cesspool (LCC) in Campbell Industrial Park Kapolei, Oahu. Detroit Diesel will pay a $129,000 fine and the cesspool was replaced with an individual wastewater treatment system in January. Detroit Diesel owns the property where Freightliner of Hawaii operates a heavy-duty truck dealership and truck service center. EPA inspectors found a large-capacity cesspool serving the bathrooms on the property. DDC is the fifth facility in the Campbell Industrial Park area where EPA has identified illegal LCCs over the past two years. Large capacity cesspools were banned under the federal Safe Drinking Water Act in 2005. Cesspools are used more widely in Hawaii than in any other state, even though 95 percent of all drinking water in Hawaii comes from groundwater sources. In the 13 years more than 3,400 large-capacity cesspools have been closed statewide, many through voluntary compliance. Cesspools collect and discharge untreated raw sewage into the ground, where disease-causing pathogens and harmful chemicals can contaminate groundwater, streams and the ocean. The settlement is subject to a 30-day comment period.

Indictments, Convictions, and Sentencing

•April 15, 2019 - United States District Judge Joan M. Azrack entered judgment holding liable Lawrence Aviation Industries, Inc. (LAI), a former defense contractor, and its long-time owner and CEO, Gerald Cohen, for environmental cleanup costs and penalties under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). As proven at trial, LAI and Cohen, in violation of several environmental laws and regulations, discharged a number of hazardous substances at LAI's Port Jefferson facility on Long Island that could pose threats to human health and the environment. The court found that, in addition to contaminating the LAI facility itself, LAI and Cohen were responsible for a mile-long contaminant plume in the groundwater beneath Port Jefferson. The court's judgment found LAI and Cohen jointly liable for $48,116,024.31 in costs incurred by the EPA in cleaning up the site, and imposed civil penalties of $750,000 against both LAI and Cohen, individually, for their failure to comply with requests for information issued by EPA. In a separate, 37-page Memorandum and Order, the Court detailed the evidence establishing LAI's and Cohen's long history of disregard for federal, state and county environmental laws. In the early 1980s, for example, after the Suffolk County Department of Health issued a series of recommendations for LAI to come into compliance with various pollution control laws, LAI used a front-end loader to crush 55-gallon drums containing hazardous substances (among more than 1,600 of such drums identified on the property), resulting in a massive discharge of waste directly onto the ground. Samples taken from those drums revealed impermissibly high levels of trichloroethylene (TCE), among other

pollutants. Nearly two decades later, in 1999, testing performed by the New York State Department of Environmental Conservation revealed contamination of groundwater and surface water at the site. Thereafter, in March 2000, the site was placed on the National Priorities List. For these and other reasons, the groundwater in the vicinity of the site is not currently used for drinking water. EPA's cleanup of the site, now into its 19th year, has included an exhaustive remedial investigation into the nature and scope of the contamination, various hazardous waste removal and stabilization activities, and the implementation and maintenance of two groundwater treatment systems designed to capture and treat contaminated groundwater. As noted in the Court's decision, EPA's activities at the LAI site have resulted in a decrease in size of the groundwater TCE plume and the removal of over 18,000 tons of soil contaminated with polychlorinated biphenyls, among other hazardous substances, including asbestos containing materials. Various creditors have asserted claims against LAI and Cohen properties based on their respective liens. Those claims remain pending before the court. Previously, in 2008, Cohen and LAI pleaded guilty to violating the Resource Conservation and Recovery Act for storing hazardous wastes at the LAI Facility without a permit issued by the EPA or New York State. Cohen was sentenced to a term of imprisonment of one year and a day, and supervised release of 36 months. He and LAI were ordered to pay restitution to the EPA of $105,816.
(Andre Monette)

JUDICIAL DEVELOPMENTS

U.S. SUPREME COURT ADDRESSES INTERSECTION OF FEDERALLY RESERVED WATER RIGHTS, NATIONAL ALASKA LANDS ACT AND SCOPE OF THE NATIONAL PARK SERVICE'S AUTHORITY OVER ALASKA'S NATION RIVER

Sturgeon v. Frost, et al., ___U.S.___, 139 S. Ct. 1066 (U.S. Mar 26, 2019).

The U.S. Supreme Court has held that the National Park Service (Park Service) may not apply a regulation banning hovercraft use on navigable waters within national parks to the Nation River in Alaska's Yukon-Charley Preserve (Preserve). The Court's unanimous decision overturned a prior ruling of the Ninth Circuit Court of Appeals in favor of the Park Service, whereby the Ninth Circuit held that the reserved water rights doctrine permitted the Park Service to exercise regulatory authority over the state-owned Nation River in accordance with the Alaska National Interest Lands Conservation Act (ANILCA). *Sturgeon v. Frost, et al.*, 872 F.3d 927 (9th Cir. 2017). The Court's decision addresses the extent of federal regulatory over national parks in the State of Alaska under ANILCA and the nature of interests retained by the federal government under the reserved water rights doctrine.

Factual and Statutory Background

The dispute before the Court arose when Park Service rangers in the Preserve informed John Sturgeon, a hunter traveling by hovercraft on a stretch of the Nation River leading to moose hunting grounds, that Park Service regulations prohibit the use of hovercraft on navigable waters located within the boundaries of national parkland (Regulation). 36 C.F.R. § 2.17(e). The rangers ordered Sturgeon to remove his hovercraft from the Preserve. Sturgeon complied with the order and subsequently filed an action for an injunction against the Park Service, claiming that the Regulation could not be enforced on the Nation River under § 103(c) of ANILCA. 16 U.S.C. 3103(c).

The Secretary of the Interior, through the Director of the Park Service, issued the Regulation pursuant to the National Park Service Organic Act, 39 Stat. 535 (Organic Act), which allows the Park Service to regulate both lands and waters within all national park system units in the United States, without regard to ownership. *See*, 54 U.S.C. §§ 100751, 100501, 100102. Specifically, the Organic Act allows the Park Service to issue rules thought "necessary and proper" for "System units," and that the Park Service may prescribe rules regarding activities on "water located within system units." 57 U.S.C. §§ 100751(a), 100751(b). While ordinarily the Regulation would fall within the broad regulatory authority granted by the Organic Act, ANILCA alters the Park Service's usual authority with respect to national parks in Alaska, such as the Preserve. As noted in the Court's decision, "if Sturgeon lived in any other state, his suit would not have a prayer of success." *Sturgeon*, 139 S. Ct. at 1081.

ANILCA set aside certain federal land in Alaska for conservation purposes, and divided such land into "conservation system units" that became part of the National Park System. 54 U.S.C. § 100102(6). Unlike most national park territory, ANILCA created conservation system units in Alaska with boundaries that follow natural features of the land rather than boundaries drawn to encompass only federal property. This approach resulted in the inclusion of an unusual amount of non-federally owned property within Alaskan national parks, referred to as "inholdings," which elicited concerns from the state and native Alaskans prior to ANILCA's enactment regarding the Park Service's regulatory powers over the inholdings. Partially in response to such concerns, ANILCA includes both a goal of protecting the national interest in public lands in Alaska as well as a goal of satisfying the economic and social needs of the people of Alaska. 16 U.S.C. § 3101(d).

In its discussion of § 103(c) of ANILCA, the language on which Sturgeon's claim relies, the

Court's decision explains that the legislative history and stated purposes of ANILCA show that Congress intended to assure the state and native Alaskans that their inholdings would not be treated the same as other federal property. *Sturgeon*, 139 S. Ct. at 1076. Section 103(c) of ANILCA provides that only "public lands" are deemed included as part of a "conservation system unit" over which normal Park Service regulatory authority extends, and that no lands conveyed to the state, a Native Corporation or any private party are subject to the regulations "applicable solely to public lands within such units." 16 U.S.C. § 3103(c). Sturgeon argued that Nation River does not constitute "public lands" subject to federal regulation under § 103(c) of ANILCA; thus, the Park Service did not have the authority to enforce the Regulation on Nation River. *Sturgeon*, 139 S. Ct. at 1077.

Procedural History

Previous rulings by the U.S. District Court and Ninth Circuit upheld the application of the Regulation to the portion of the Nation River within the Preserve. The Ninth Circuit determined that the Nation River qualified as "public land" under ANILCA due to the implied reservation of water rights retained by the federal government pursuant to the reserved water rights doctrine as interpreted by prior holdings of the Ninth Circuit by which that court was bound. *Sturgeon v. Frost, et al.*, 872 F.3d 927 (9th Cir. 2017).

Following the lower court decisions in favor of the Park Service, the Supreme Court granted *certiorari* to examine whether: 1) the Nation River constitutes "public land" for purposes of ANILCA, and 2) if not, would the Park Service still have the authority to regulate Sturgeon's use of the hovercraft on the Nation River.

The Supreme Court's Decision

'Public Land' under ANILCA and Federal Reserved Water Rights

The Court determined that Nation River is not "public land" as defined under ANILCA. *Sturgeon*, 139 S. Ct. at 1079. As defined in ANILCA, "public lands" includes "lands, waters, and interests therein" to which the United States has title, except for certain lands selected for future transfer to the state or a Native Corporation. 16 U.S.C. § 3102(1)(2)(3). Accordingly, the Court reasoned that Nation River is non-public land because title cannot be held to running water, and the state owns the land beneath the Nation River as a result of the Submerged Lands Act, which vested title to the lands beneath navigable waters in the United States to the states in which such navigable waters are located. *Sturgeon*, 139 S. Ct. at 1078.

The Park Service argued that even if United States did not have title to the water flowing in Nation River or the land beneath it, but the United States has "title" to an "interest in the river under the reserved water rights doctrine, because ANILCA requires that waters within the land set aside by ANILCA be safeguarded from "depletion and diversion." *Id.* At 1079. The reserved water rights doctrine provides that:

> [W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. *Cappert v. United States*, 46 U.S. 128 (1976).

Dismissing the Park Service's contention, the Court explained that the reserved water rights doctrine merely permits the federal government to use (by withdrawing or maintaining) certain waters it does not own, and that such rights do not convey title. *Sturgeon*, 139 S. Ct. at 1079. Further, the Court explained that any federal right to Nation River under the reserved water rights doctrine would be limited, and if the right related to safeguarding against depletion or diversion as suggested by the Park Service, that purpose would not support the application of the Regulation to Nation River. *Id.*

ANILCA Exemption from Ordinary Park Service Authority

After concluding that Nation River constitutes non-public land for purposes of ANILCA, the Court further held that § 103(c) of ANILCA means that the Park Service does not have authority to enforce the Regulation on Nation River, because § 103(c) generally exempts non-public lands from the ordinary regulatory authority of the Park Service. *Id.* at 1081. The Court rejected the Park Service's assertion that language of § 103(c) stating that non-federally owned

lands "shall be subject to the regulations applicable solely to public lands within such units" should be interpreted to mean that non-public lands are exempt only from regulations specific to public lands, but not from rules that apply generally. *Id.* at 1082. The Court noted that if the Park Service's interpretation of this language were correct, it would mean that the sentence does "nothing but state the obvious." *Id.* at 1083. Further, the Court noted that the Park Service's construction would severely impair the core function of the third sentence of § 103(c), which provides that inholdings acquired by the federal government become part of a conservation unit at such time and may be administered as other federally-owned lands. *Id.*

ANILCA and Navigable Waters

The Court also rejected the Park Service's argument that the "overall statutory scheme" of ANILCA at least gave it the ability to regulate navigable waters, finding that navigable waters are similarly exempt from the ordinary regulatory authority of the Park Service pursuant to § 103(c) of ANILCA. *Id.* at 1086. The Park Service specifically cited statements regarding the protection of rivers in ANILCA's general statement of purposes and in sections regarding specific conservation units formed thereunder. *Id.* Nonetheless, the Court found no reason to treat navigable waters differently than other non-federally owned lands under ANILCA, especially since the definition of "land" set forth in ANILCA specifically includes "waters." *Id.* In its concluding discussion, the Court's decision emphasizes that ANILCA provides the Park Service with alternate methods for safeguarding rivers in Alaskan national parks, including the regulation of lands flanking the rivers or at the very least, purchasing the submerged lands under a river and regulating it as part of the federally-owned conservation unit pursuant to third sentence of § 103(c). *Id.*

Conclusion and Implications

Though the much of the Court's ruling applies only to the Park Service's regulatory authority over national park territory in Alaska, the Court's holding as to the nature of rights held by the United States under the reserved water rights doctrine is more broadly applicable. The Court's decision confirms that reserved water rights relate only to the use of water and do not represent an interest in which "title" can be held within the common understanding of the term. The Court's decision further establishes that the reserved water rights doctrine does not grant absolute authority over a particular waterway; rather, the government may take or maintain only the amount of water required for the purpose of the land reservation giving rise to reserved water rights.
(Andrew D. Foley, David D. Boyer)

SEVENTH CIRCUIT JOINS NUMEROUS OTHERS IN HOLDING RCRA DOES NOT REQUIRE SHOWING OF IMMINENT HARM TO OBTAIN INJUNCTIVE RELIEF

Liebhart v. SPX Corp., ___F.3d___, Case No. 18-2598 (7th Cir. Mar. 6, 2019).

A lower court applied traditional standards for obtaining injunctive relief in granting summary judgment to a defendant accused of having caused PCB contamination of residential property while demolishing a nearby abandoned transformer factory, and on that basis awarded summary judgment to the defendant because the plaintiffs did not establish an "imminent and substantial danger" to their health. Considering the matter for the first time, the Seventh Circuit Court of Appeals joined numerous courts in holding that the federal Resource Conservation and Recovery Act's citizen suit provision authorizes the issuance of an injunction on the basis of a "risk of harm"—a far more lenient standard.

Background

A transformer factory in Watertown, Wisconsin, operated from 1920 through 2005. Until 1971, the transformers produced at the factory included "polychlorinated biphenyls (PCBs), a carcinogenic chemical banned by the [U.S.] Environmental Protection

Agency in 1979." In 2009, defendant SPX commissioned a study of the factory property to:

> . . .determine the extent and precise location of any PCB contamination. Those studies revealed that the concrete floor of the factory was generally contaminated, with concentrated amounts located in specific areas throughout the site.

In 2015, SPX began demolition of the factory pursuant to a "self-implementing cleanup plan" it had submitted to the U.S Environmental Protection Agency (EPA) pursuant to 40 C.F.R. §761.61(a).

The plaintiff-Liebharts own three houses on the same block as the SPX property. They were unhappy with how the demolition proceeded, in particular the amount of dust generated that entered their properties. They "collected a dust-covered sample of snow from their yard and placed it in a mason jar." SPX's contractor also:

> . . .collected samples of the surface soil (roughly down to eight inches below ground) on both the industrial and residential properties. Sure enough, the properties tested positive for the presence of PCBs.

The Liebharts vacated their property in August 2015 on the advice of their physician, and filed suit in October 2015, alleging SPX's demolition contractor:

> . . .demolished the building recklessly, failing to use appropriate safety methods to control the dust generated by demolition equipment. They assert that their properties were covered in dust, and they submitted hundreds of photos and videos of dust from the facility blowing toward their homes to support their allegation.

Their complaint sought injunctive relief under RCRA and the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 *et seq*. The Liebharts also brought a variety of state-law tort claims, relying on supplemental federal jurisdiction.

At the District Court

The parties brought cross-motions for summary judgment. The Liebharts' expert Woodyard submitted a report testifying regarding:

> . . .standard methods used when demolishing PCB-contaminated buildings and an analysis of the purported ways in which the defendants deviated from those practices, thereby causing the contamination of the residences.

Their medical expert Dr. Carpenter:

> . . .opined on ways in which the Liebharts might have been exposed to PCBs and the potential health effects of continuing exposure. He concluded that 'there is no 'safe' level of exposure to PCBs that does not increase the risk of disease.

SPX's expert toxicologist Dr. Russell:

> . . .analyzed the survey data and determined that it was impossible to determine whether the presence of PCBs on the Liebharts' property was due to the recent demolition or to runoff that occurred over the last several decades.

The District Court excluded Woodyard's report, explaining it "was 'equivocal' as to the issue of causation; it hedged on whether the contaminants came from demolition or from runoff during the preceding decades" and that Woodyard relied on "'unreliable or uninformative'" evidence, including the snow sample that had been improperly collected and stored by the Liebharts themselves. The court also excluded Dr. Carpenter's opinion that "'there is no "safe" level of exposure to PCBs that does not increase the risk of disease.'"

With that expert testimony off the table, the District Court concluded that the Liebharts failed to present any admissible evidence to support their RCRA and TSCA claims. The remaining photos and videos certainly showed dust migrating onto the Liebharts' property, but there was no reliable evidence proving that the dust contained PCBs. Given that any PCBs detected in the soil may have been there prior to the demolition, the lack of evidence doomed the Liebharts' case.

The Seventh Circuit's Decision

Addressing an issue of first impression in the Sev-

enth Circuit, the court focused on the District Court's "assumption that RCRA plaintiffs must demonstrate 'an imminent and substantial danger with evidence of health problems they have already suffered'" in order to obtain injunctive relief. It began with RCRA's citizen suit provision, § 6972, which provides in relevant part:

> . . .any person may commence a civil action on his own behalf ... against any person, ... including ... any past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which *may present* an imminent and substantial endangerment to health or the environment. (Emphasis in Opinion.)

The court went on to state that:

> Notably, Congress amended the language in 1980 by substituting the phrase 'may present' for the original 1976 wording is presenting. . . .[t]he critical question in this case is how to determine whether alleged contamination 'may present an imminent and substantial endangerment to health.'

Following the First, Second, Third, Fourth, Fifth, Ninth and Tenth circuits, the Seventh Circuit found § 6972's "'statutory language "unequivocal," demonstrating that Congress "intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate" the risks posed by toxic waste, and specifically that the statute:

> . . .enhanced the courts' traditional equitable powers by authorizing the issuance of injunctions when there is but a risk of harm, a more lenient standard than the traditional requirement of threatened irreparable harm. *United States v. Price*, 688 F.2d 204, 211 (3d Cir. 1982); *see also, Mallinckrodt*, 471 F.3d 277, 287 (1st Cir. 2006), *Dague v. City of Burlington*, 935 F.2d 1343, 1355–56 (2d Cir. 1991); *United States v. Waste Indus., Inc.*, 734 F.2d 159, 165 (4th Cir. 1984); *Cox v. City of Dallas*, 256 F.3d 281, 299-301 (5th Cir. 2001); *Price v. United States Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994); *Burlington N. and Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1019–22 (10th Cir. 2007); *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1014–15 (11th Cir. 2004).

In the end, the Seventh Circuit found that the District Court erred in finding the Liebharts failed to show violation of regulatory standards for acceptable levels of PCBs in industrial equipment, as RCRA "merely requires" that plaintiffs "show that contaminants. . .are seriously dangerous to human health (or will be, given prolonged exposure over time)." Thus, on remand the District Court was commanded to "reevaluate its exclusion of Dr. Carpenter's assertion regarding PCB safety under the standards we have outlined above and determine whether, if admissible, the report demonstrates that a substantial and imminent threat to the Liebharts' health may be present" justifying injunctive relief.

Conclusion and Implications

RCRA's citizen suit provisions are relatively lenient standards for obtaining injunctive relief allow the plaintiffs to not only obtain extraordinary equitable relief, but also to maintain numerous state-law tort claims in federal court. That combination can result in plaintiffs obtaining significant leverage over defendants. The Seventh Circuit's decision is available online at: https://scholar.google.com/scholar_case?case=7437864755235771882&q=Liebhart+v.+SPX+Corp&hl=en&as_sdt=2006&as_vis=1
(Deborah Quick)

FIFTH CIRCUIT DECLARES CERTAIN EPA 'BAT' WASTESTREAM LIMITATION GUIDELINES FOR FOSSIL FUEL ELECTRIC PLANTS TO BE UNLAWFUL

Southwestern Electric Power Co. v. U.S. Environmental Protection Agency, ___F.3d___, Case No. 15- 60821 (5th Cir. Apr. 12, 2019).

The Fifth Circuit Court of Appeals recently issued its decision on the legality of the U.S. Environmental Protection Agency's (EPA) Effluent Limitations Guidelines for coal-fired steam driven electric generating plants. The court found EPA's analysis of Best Available Technology (BAT) standards lacking.

Background

The court pointed out the black and white of coal-fired electric power generation in the United States and its unquestionable impact on the environment. In particular the court pointed out the impacts to water quality and the role of the federal Clean Water Act—and the EPA, to oversee and regulate this form of pollution:

> Steam-electric power plants generate most of the electricity used in our nation and, sadly, an unhealthy share of the pollution discharged into our nation's waters. To control this pollution, the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, empowers the Environmental Protection Agency to promulgate and enforce rules known as "effluent limitation guidelines" or "ELGs." *Id.* §§ 1311, 1314, 1362(11). For quite some time, ELGs for steam-electric power plants have been, in EPA's words, "out of date." 80 Fed. Reg. 67,838. That is a charitable understatement. The last time these guidelines were updated was during the second year of President Reagan's first term, the same year that saw the release of the first CD player, the Sony Watchman pocket television, and the Commodore 64 home computer. (*Southwestern Electric Power*, Pages 1 & 2)

EPA last updated standards for ELGs for this problem a long time ago and EPA acknowledged the need for new guidelines:

> The guidelines from that bygone era were based on "surface impoundments," which are essentially pits where wastewater sits, solids (sometimes) settle out, and toxins leach into groundwater. *Id.* at 67,840, 67,851. Impoundments, EPA tells us, have been "largely ineffective at controlling discharges of toxic pollutants and nutrients." *Id.* at 67,840. Consequently, in 2005 the agency began a multi-year study to bring the steam-electric ELGs into the 21st century. *Id.* at 67,841 (Ibid, P. 2)

Back in November 2015, EPA unveiled the final rule: the "Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category," 80 Fed. Reg. 67,838 (Nov. 3, 2015). The rule updated guidelines for six of the waste streams that issue from the steam electric plants. In accordance with the federal Clean Water Act, EPA deemed the following treatment methods to be Best Available Control Technology (BAT) for specific wastewaters:

WASTE STREAM	BAT
Fly Ash Bottom Transport	Dry Handling
Bottom Ash Transport Water	Dry Handling/Closed Loop
Flue Gas Mercury Ctrl. Wastewater	Dry Handling
Gasification Wastewater	Evaporation
Combustion Residual Leachate	Impoundments

The Southwestern Electric Power Company Claims

Several petitions for review of the November 2015 rule were filed in several U.S. Circuit Courts of Appeals. The Fifth Circuit Court of Appeals was designated to decide the environmental petitioners' complaints. Environmental petitioner challenges were based both on Administrative Procedure Act and on an application of *Chevron* deference (*Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)) which would render the challenged standards as arbitrary, capricious or inconsistent with the law. Two waste streams in particular were the

target of the petitioners' attack: 1) the new ELGs for "legacy wastewater" (wastewater from five of the six streams generated before a specific date) and 2) for "combustion residual leachate" (liquid that percolates through landfills and impoundments). The Court's own opinion notes:

These two categories account for massive amounts of water pollution. For instance, leachate alone would qualify as the 18th-largest source of water pollution in the nation, producing more toxic-weighted pound equivalents than the entire coal mining industry.

The opinion goes on to analyze at some length whether the decision of EPA to choose "impoundments" as BAT was within the Agency's discretion and whether it was consistent with the Clean Water Act.

The Fifth Circuit's Decision

In the lead-up to its case specific ELG analysis, the Court of Appeals explained that the courts generally, including the U.S. Supreme Court, have recognized ELGs that prescribe BAT, *i.e.* "best available technology economically feasible," are supposed to be based on a serious review of technology and to be "technology forcing" in the sense that over time, increasing stringency of control is expected to be required as time goes on.

The Court of Appeals noted:

> In describing the relationship between BAT and BPT, the Supreme Court has explained that a BAT must achieve "reasonable further progress" towards the Act's goal of eliminating pollution, and BPT serves as the "prior standard" for measuring that progress. See Nat'l Crushed Stone, 449 U.S. at 75 (explaining that "BPT serves as the prior standard with respect to BAT['s]" reasonable further progress requirement). [*EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64 (1980)]

The court also recognized that EPA is to be accorded considerable discretion in reaching its decisions on what BAT should be.

BAT and Steam Electric Generating Plants

Having established the EPA's task respecting BAT promulgation, the court turned to whether the agency did a proper job on BAT respecting steam electric plants. The court examined the prefatory work and analysis that EPA performed, and details several innovative technologies EPA identified as feasible, and indeed, in use already in some places. These included biological treatment, chemical precipitation, dry handling, and others. The Court of Appeal noted that EPA chose from among those candidate technologies in setting BAT for five of the six categories of wastewater involved in the Rule. For the sixth category, "Combustion Residual Leachate" and so-called "legacy" waste streams (*i.e.* discharges from all categories after the Rule is promulgated but before the date new ELG for BAT become effective) EPA's 2015 Rule originally designated impoundment as BAT until November, 2018 was reached, after which a more stringent technology or BAT would be required. This date was subsequently changed by EPA in 2017, such that when reviewed by the Fifth Circuit the applicable date was: "as soon as possible beginning November 1, 2020 but no later than December 31, 2023." The later applicable date could be sought by an individual permittee subject to approval by the applicable agency (usually the state).

In defense of its decisions, the actual November 2015 Federal Register reasoning of the EPA shows that the EPA was making a more complex set of circumstances the basis for the use of impoundment as BAT for legacy water. After all, it was imposing new BAT regulation on five other wastewater streams that had been eligible for impoundment BPT previously. Factors making legacy wastewater analysis difficult for the Agency are articulated by it, such as varying patterns of mixing waste streams among various generation plants such that there is no uniform chemistry to subject to treatment. EPA said this was complicated further by both natural precipitation and process variations that would dilute the potency of the legacy streams. As to the "leachate" category), the EPA designated the current BPT of impoundment as the future BAT. (Leachate includes liquid, including any suspended or dissolved constituents in the liquid, that has percolated through or drained from waste or other materials placed in a landfill, or that passes through the containment structure (*e.g.*, bottom, dikes, berms) of a surface impoundment.) The agency justified this on lack of data that could sufficiently justify an alternative rule and by the fact that the advanced BAT for other waste streams would work to reduce future leachate volume. The EPA said this would satisfy

the reasonable further progress aspect of BAT.

The court's decision subjected EPA's published analysis to a lengthy and detailed criticism. The bottom line for the court's analysis is its belief that it would be arbitrary and capricious for EPA to designate an existing BPT standard as the BAT standard. Due to the technology forcing principle, that decision of EPA was seen by the court as both arbitrary and not consistent with the law itself. The court deemed the reasoning of EPA arbitrary in that there were ways for EPA to impose additional controls, even if data was limited or technology not demonstrated for the specific waste stream. The court concluded up deciding the issues as a matter of law in favor of the environmental petitioners, invoking *Chevron* analysis. The defective portions of the ELG rules were remanded to the EPA for reconsideration.

Conclusion and Implications

The Court of Appeals opinion at times uses rather derisive and strong critical language when it examines what EPA provided as justifications for its 2015 rules. Some have pointed out that the Fifth Circuit paid short shrift to the fact that the rules it reviewed were directed at six specified categories of wastewater that do not include "legacy wastewater" *per se*—legacy wastewater is an inevitable phenomenon of a rule promulgated with future compliance date. Perhaps if further review were to be sought and to be granted by either the Fifth Circuit *en banc* or by the U.S. Supreme Court, a second set of judges might find sufficient rationality to the EPA justifications of its ELG rules to overrule the opinion's absolutist legal view that something more than prior BPT must be required for every gallon of wastewater and hold that the EPA acted rationally and within the range of its statutory discretion as to the leachate and legacy wastewater streams. The court's decision is available online at: https://earthjustice.org/sites/default/files/files/2019-04-12%20-%20Opinion%20ELG.pdf
(Harvey M. Sheldon)

DISTRICT COURT RULES EPA ACTED ARBITRARILY AND CAPRICIOUSLY IN REFUSING TO REGULATE CERTAIN STORMWATER DISCHARGES

Blue Water Baltimore, Inc. v. Wheeler, ___F.Supp.3d___,
Case No. GLR-17-1253 (D. Md. Mar. 22, 2019).

The U.S. District Court for Maryland recently granted summary judgment against the U.S. Environmental Protection Agency (EPA) for acting arbitrarily and capriciously when it refused to regulate stormwater discharges from privately-owned commercial, industrial, and institutional sites on the basis of other state and federal programs' efforts to control stormwater discharges.

Factual and Procedural Background

Plaintiffs Blue Water Baltimore, Inc., Natural Resources Defense Council, and American River filed a petition with EPA under § 402(p)(2) of the federal Clean Water Act (CWA), asking the EPA to determine whether stormwater discharges from privately-owned commercial, industrial, and institutional (CII) sites were contributing to violations of water quality standards in the Back River Watershed (Baltimore, Maryland). EPA denied plaintiffs' petition on three factors: 1) the likelihood of the pollutants' exposure to precipitation at the CII sites; 2) the sufficiency of available data to evaluate the stormwater discharges' contribution to water quality standards at the CII sites; and 3) whether other federal, state, or local programs adequately addressed the known stormwater discharge. Plaintiffs then sued the EPA, Andrew Wheeler, and Cosmo Servidio (collectively: EPA), alleging that EPA violated the CWA and the Administrative Procedure Act (APA) because: 1) EPA's denial of the petition was arbitrary and capricious for relying on other federal, state, or local programs, and 2) EPA's denial ran counter to the evidence before it. The court granted a prior motion to dismiss plaintiffs' Clean Water Act claims, and therefore only the APA claims remained at issue.

Plaintiffs filed a Motion for Summary Judgment on their two claims of the APA violations. EPA filed a Cross-Motion for Summary Judgment.

The District Court's Decision

Under the APA, a court is required to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

The court considered four main arguments raised by the EPA: 1) that the court should defer to the EPA's determination that it may consider other federal, state, and local programs; 2) that consideration of existing programs is a "reasonable explanation" for declining to act; 3) that the § 402(p)(2) set forth prerequisites that EPA must establish prior to exercising its discretion to regulate stormwater discharges; and 4) that § 402(p)(6) expands the permissible grounds on which EPA may make its decision. The court rejected each argument.

Agency Deference

First, EPA argued it was entitled to *Chevron* deference for its interpretation that the Clean Water Act allows consideration of other federal, state, and local programs. The court rejected this argument, reasoning that *Chevron* deference applies only when the statute is ambiguous or silent as to the question at issue. Here, § 402(p)(2)(E) was not silent or ambiguous—the statute left no room for open interpretation when directing EPA to determine whether the discharge contributed to water quality violations. The court therefore did not accord any deference to EPA's interpretation of the statute. In reaching this conclusion, the court relied on an analogous provision in the federal Clean Air Act, and the U.S. Supreme Court's determination in *Massachusetts v. U.S. EPA*, 549 U.S. 497 (2007) that considering other programs was arbitrary and capricious under the Clean Air Act.

Instead of deferring to EPA's interpretation of § 402(p), the court determined that EPA was required to conduct a scientific inquiry when making its decision. EPA's first two factors, 1) the likelihood of the pollutants' exposure to precipitation at the CII sites and 2) the sufficiency of available data to evaluate the stormwater discharges' contribution to water quality standards at the CII sites, were proper grounds for EPA to make its scientific finding of whether stormwater discharges from CII sites contribute to violations of water quality standards. The third factor, looking at other existing programs, was "unrelated to this scientific inquiry and is, therefore, 'divorced from the statutory text,'" because it deferred to other existing programs and how they addressed environmental impacts of the stormwater discharge. The court determined that although EPA can consider data from existing programs for the purpose of determining whether the stormwater discharges from the CII sites contribute to water quality violations, it could not rely on the environmental impacts of stormwater discharges through existing programs.

Reasonable Explanation

Second, the court rejected EPA's argument that consideration of existing programs is a "reasonable explanation" as to why EPA declined action. EPA also argued that EPA should be allowed to consider policy concerns in making its findings. The court also rejected this misinterpretation of the *Massachusetts*' decision, stating that the Supreme Court in *Massachusetts* never reached question of allowing EPA to factor in policy concerns, but nevertheless emphasizing that the *Massachusetts* decision made it clear EPA must base its decision in the statute, not external factors. Here, EPA failed to do that.

Discretion to Regulate and Expansion

Third, EPA argued that § 1342(p)(2)(E) merely sets forth prerequisites that EPA must establish prior to exercising its discretion to regulate stormwater discharges. The court disagreed, holding that in light of *Massachusetts*, EPA may only decline to regulate if it answers the scientific question that stormwater discharges do not violate water quality standards, or concludes that there is not enough information to answer this question.

Finally, the court dismissed EPA's argument that § 402(p)(6) expands the permissible grounds on which EPA may make its decision. The court found that §§ 402(p)(2) and 402(p)(6) are mutually exclusive. EPA's decision in refusing to regulate stormwater discharges from CII sites must be grounded solely in the text of § 1342(p)(2)(E).

Conclusion and Implications

This case provides two excellent examples of the relationship between environmental statutes. First, this case demonstrates how the Clean Air Act often serves as an interpretive guide for the Clean Water Act. Second, this case outlines the limits that a regulatory action under one environmental program has to other programs. That is, the EPA cannot rely solely on the existence of other regulatory programs to refuse to regulate under Clean Water Act, § 402(p)(2). The court's decision is available online at: https://www.nrdc.org/sites/default/files/media-uploads/baltimore_rda_district_court_decision_3-22-19.pdf (Rebecca Andrews, Hannah Park)

DISTRICT COURT ADDRESSES MOTIONS TO DISMISS AND STAY IN CASE WITH POLLUTANT DISCHARGES INTO THE TENNESSEE RIVER

King v. West Morgan-East Lawrence Water and Sewer Authority, ___F.Supp.3d___, Case No. 5:17-CV-01833 (N.D. Ala. Mar. 13, 2019).

The U.S. District Court for the Northern District of Alabama dismissed a private nuisance class action claim based on the discharge of perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) into the Tennessee River. Remaining claims survived the motion to dismiss.

Factual and Procedural Background

Plaintiffs, individually and as a class, sued 3M®, Daikin, and the West Morgan—East Lawrence Water and Sewer Authority (Authority) under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and under state law. Plaintiffs alleged that 3M and Daikin own and operate manufacturing and disposal facilities in Decatur, Alabama that released and continue to release PFOA-PFOS, and related chemicals into ground and surface waters. Plaintiffs also claim the Authority's intake of PFOAs and PFOS and distribution of these chemicals through the water supply system, and collection of these chemicals from 3M's wastewater discharge caused kidney, cancer, thyroid disease, hyperthyroidism, thyroid cancer, or ulcerative colitis.

The court noted that PFOA and PFOS persist in the environment because they have no known environmental breakdown mechanism. The human body readily absorbs PFOS and PFOA, and the chemicals tend to accumulate over time with repeated exposure. Studies have found a probable link between PFOA and PFOS exposure to various cancers and other diseases. Plaintiffs alleged that 3M knew for over three decades that PFOA and PFOS are toxic, accumulate in the human body, and that 3M continues to discharge the chemicals into the River upstream from the Authority's water intake source. 3M filed a motion to stay and motion to dismiss the amended complaint

The District Court's Decision

First, the court rejected 3M's motion to stay, finding that plaintiffs' claims were not substantially similar to the claims in a similar case against 3M wherein the Authority is the plaintiff.

The court then turned to 3M's motion to dismiss and considered two primary arguments for dismissal: 1) that the claims against 3M are time-barred by the statute of limitations, and 2) that the plaintiffs have failed to plead viable claims.

Statute of Limitations

Under Alabama law, a two-year statute of limitations applies to negligence, nuisance, fraudulent concealment, and wantonness claims. In toxic exposure cases, the two-year period generally begins to run when the plaintiff sustains "a manifest, present injury." Under Alabama law, when a defendant commits a continuing tort, the statute of limitations is tolled until the defendant ceases the tortious conduct. Here, the amended complaint alleged that 3M continued to release PFOA, PFOS, and related chemicals into the Tennessee River and its tributaries, and that 3M continued to deny and conceal the harmful effects of

these chemicals. 3M contended that the continuing tort doctrine did not apply because plaintiffs alleged specific, manifest personal injuries caused by exposure to PFOA and PFOS, which meant the statute of limitations should have begun when each plaintiff received a diagnosis of disease. The court rejected 3M's argument because plaintiffs did not allege when the individual plaintiffs received a diagnosis of their condition.

3M also argued that the statute of limitations under CERCLA, barred the claims. CERCLA's statute of limitations preempts a state's statute of limitations to the extent state law provides for a date of accrual before the "federally required commencement date" (FRCD) imposed by CERCLA. 3M argued the FRCD was no later than October 5, 2015. The court rejected 3M's argument because CERCLA only preempts the state's statute of limitations when a claim would accrue before the FRCD under state law, and 3M had not shown the plaintiffs' claims accrued before October 5, 2015.

Failure to Plead a Viable Claim

3M sought to dismiss plaintiffs' negligence and wantonness claims because the plaintiffs failed to allege the existence of a duty owed to them by 3M and because the Authority's intervening acts were the proximate cause of plaintiffs' injuries. The court rejected 3M's arguments, finding that plaintiffs' allegations suggest that 3M could have reasonably foreseen that discharging PFOA and PFOS into the Tennessee River would injure the plaintiffs, and were sufficient to plead the existence of a duty. The court also found 3M's intervening cause argument unpersuasive. It reasoned that 3M could foresee that the Authority would collect, treat, and distribute drinking water from the river, and that the Authority's water treatment processes were incapable of removing the chemicals from the plaintiffs' drinking water.

3M also contended that the plaintiffs failed to state a claim for nuisance because they did not specify whether the nuisance was public or private and failed to allege facts to support the claim. While the plaintiffs conceded that they did not allege facts to support a private nuisance claim, the court upheld the viability of the public nuisance claim finding that plaintiffs sufficiently alleged they suffered special injuries as a result of the contamination that is different in degree and kind from the injury sustained by the public at large.

Finally, the court allowed a fraudulent misrepresentation claim to survive, reasoning that 3M knew PFOS and PFOA were present in the discharge used for public consumption, and that consumption was harmful to human health.

Conclusion and Implications

As the debate surrounding regulation of PFOS and PFOA continues among federal agencies, CERCLA and state law claim continue to serve an important role in the courts. The District Court's rulings are available online at: https://scholar.google.com/scholar_case?case=7343086878446377193&q=King+v.+West+Morgan-East+Lawrence+Water+and+Sewer+Authority&hl=en&as_sdt=2006&as_vis=1
(Benjamin Bodell, Rebecca Andrews)

DISTRICT COURT DENIES STATES' REQUEST FOR PRELIMINARY INJUNCTION IN CHALLENGE TO CLEAN WATER RULE

Ohio v. U.S. Environmental Protection Agency,
___F.Supp.3d___, Case No. 2:15-CV-2467 (S.D. Ohio Mar. 26, 2019).

The U.S. District Court for the Southern District of Ohio has held that the States of Ohio and Tennessee were not entitled to a preliminary injunction in their challenge to the U.S. Environmental Protection Agency's (EPA) 2015 'Waters of the United States' (WOTUS or the Clean Water Rule).

Factual and Procedural Background

EPA and the U.S. Army Corps of Engineers (Corps) adopted the Clean Water Rule on June 29, 2015, clarifying the waterbodies covered by the Clean Water Act's (CWA) definition of "waters of the United States." *See*, 33 U.S.C. §§ 1251 *et seq*. Ohio and Tennessee (Plaintiff States) sued to enjoin the Clean

Water Rule and moved for a preliminary injunction in November 2015. Plaintiff States alleged that EPA's and the Corps' (Defendant Agencies) Clean Water Rule impermissibly extends the scope of the CWA in conflict with the language of the CWA and the Tenth Amendment to the U.S. Constitution, and that the Defendant Agencies violated the Administrative Procedure Act in promulgating the Clean Water Rule.

Before the U.S. District Court considered Plaintiff States' initial motion for preliminary injunction, the Sixth Circuit Court of Appeals issued an order staying application of the Clean Water Rule nationwide in order to determine whether circuit courts have original jurisdiction to hear challenges to the Clean Water Rule. *In re E.P.A.* 803 F.3d 804 (6th Cir. 2015). The Sixth Circuit's stay was lifted following the U.S. Supreme Court's opinion in *National Association of Manufactures. v. U.S. Department of Defense, et al.*, 138 S. Ct. 617 (2018), in which the Court held that the District Courts have original jurisdiction to hear challenges to the Clean Water Rule.

Subsequently, Defendant Agencies issued a rule suspending application of the Clean Water Rule until February 2020 (Suspension Rule), in order for Defendant Agencies to officially repeal the Clean Water Rule and replace it with a new set of regulations defining the "waters of the United States" subject to the CWA. However, in August 2018, the U.S. District Court for the District of South Carolina enjoined the Suspension Rule in all states that had not previously obtained an injunction against application of the Clean Water Rule, making the Clean Water Rule effective in Ohio and Tennessee. Accordingly, Plaintiff States renewed their request for a preliminary injunction prohibiting application of the Clean Water Rule in their states.

The District Court's Decision

The court first granted an unopposed motion to file *amicus* brief brought by the District of Columbia, the Commonwealth of Massachusetts, and the states of New York, Washington, California, Maryland, New Jersey, Oregon, Rhode Island, and Vermont (Amici States). Plaintiff States argued that the court should grant a preliminary injunction because: 1) they are likely to succeed on the merits of their challenge; 2) they are currently suffering, and will continue to suffer, irreparable harm without an injunction; 3) a balancing of interests favors granting an injunction; and 4) granting an injunction would serve the public interest. Defendant Agencies opposed Plaintiff States' motion on the basis that Plaintiff States have not shown they will suffer irreparable harm and that Defendant Agencies are in the process of repealing the Clean Water Rule. Amici States argued that Plaintiff States had not demonstrated irreparable harm, were not likely to succeed on the merits of their challenge, and that the balance of harms weighs against granting the requested injunction.

The court agreed with Defendant Agencies and Amici States that Plaintiff States had failed to demonstrate they would suffer irreparable injury in the absence of an injunction. The court recognized Plaintiff States' concern that the Clean Water Rule is in effect due to the South Carolina district court's injunction against the Suspension Rule, but explained that Plaintiff States had not articulated "any particularized harm they will suffer while this matter remains pending." The court also agreed with Plaintiff States that their allegations regarding the Clean Water Rule's usurpation of state rights and violation of the constitution were serious; however, the court noted that Defendant Agencies had rescinded the challenged government action, and that Plaintiff States' claims that would suffer monetary losses was unpersuasive. Accordingly, because Plaintiff States did not carry their burden to show they would suffer imminent and irreparable injury without an injunction, the court denied the motion.

Conclusion and Implications

This case adds another layer to the complex web of challenges to the Clean Water Act, Clean Water Rule. Despite the controversy surrounding the South Carolina District's enjoining of the Suspension Rule, the District court for Ohio found that Plaintiff States' protestations are more or less 'much ado about nothing' considering that Defendant Agencies are in the process of repealing the Clean Water Rule.
(Dakotah Benjamin, Rebecca Andrews)

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