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WWL

REGULATORY DEVELOPMENTS

U.S. BUREAU OF RECLAMATION AND DWR REACH AGREEMENTS FOR COORDINATED OPERATIONS OF CALIFORNIA'S CENTRAL VALLEY AND STATE WATER PROJECTS

The California Department of Water Resources (DWR) and the U.S. Department of the Interior, Bureau of Reclamation (Bureau) recently executed agreements updating the respective agencies' coordinated operation of the federal Central Valley Project (CVP) and California State Water Project (SWP) (collectively: Projects). Specifically, the parties executed an Addendum amending the 1986 "*Agreement Between the United States of America and the State of California for Coordinated Operation of the Central Valley Project and the State Water Project*" generally referred to as the "Coordinated Operation Agreement, or, "COA." The parties also executed a "*Memorandum of Agreement for the Implementation of the 2008 and 2009 Biological Opinions for the Coordinated Long-Term Operation of the Central Valley Project and State Water Project*" (BiOps MOA). The agreements were deemed necessary to maintain the Projects' coordinated and operational viability in response to significant restricting regulatory changes and operating conditions that have developed over several decades.

Background

The Projects comprise two of the largest water storage, conveyance and delivery systems in the world. Following severe late-1920s drought conditions, California voters approved constructing the CVP as part of the State Water Plan. However, as the Great Depression took hold in the 1930s, the state was unable to fund the bonds required for the CVP. The United States assumed responsibility for construction of the CVP in 1937, and the state consequently assigned many of its water rights filings to the United States. The CVP Friant Dam was completed in 1944, followed by many other large CVP facilities. Today, the CVP diverts, stores, conveys and distributes waters of the Sacramento River, the American River, the Trinity River and the San Joaquin River and their tributaries for a wide variety of purposes including irrigation, municipal, domestic, industrial, environmental, flood control, hydroelectricity, salinity control, navigation and other beneficial purposes.

During improved economic conditions following World War II, California began constructing its own massive water system, the SWP. Though the SWP generally developed larger pumping capacities than the CVP, the surface water diversion rights for the SWP were generally subsequent-in-time, and therefore junior, to the CVP water rights. Today, the SWP is composed of twenty-one reservoirs and lakes and eleven other storage facilities with a combined storage capacity of over 4 million acre-feet, five hydroelectric power plants and four pumping-generating plants, and over 700 miles of major canals and aqueducts.

Tensions arose over water rights priorities and operating issues as the CVP and SWP facilities were proposed, planned and constructed. The parties also share responsibility and operation over certain facilities that serve both Projects. In order to mitigate the litigation risks potentially deleterious to both Projects, DWR and the Bureau undertook to coordinate the Projects' operations.

The COA, which was originally signed in 1986, primarily establishes how the Projects share water quality and environmental flow obligations imposed by regulatory agencies. The COA also recognizes the need for, and requires, periodic review in order to determine whether updates are required in light of changed conditions.

Addendum to COA

In fact, conditions have changes significantly since the COA was executed in 1986.

As described in the Addendum, both the United States and California have added extensive facilities to the CVP and SWP. The U.S. Fish & Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) issued highly-impactful Biological Opinions (BiOps) pursuant to the federal Endangered

Species Act (ESA) in 2008 and 2009, respectively, which restrict the Projects' abilities to achieve their intended water supply objectives. The California State Water Resources Control Board (SWRCB) established new Bay Delta standards restricting water exportation in order to protect aquatic Delta species. These and other complex regulatory processes continue to evolve, with intense controversy. Recent historic drought conditions also revealed certain shortcomings in the COA.

The Addendum acknowledges that the United States and California have thus far shared responsibility for meeting the requirements of these regulatory constraints, but that changed conditions warranted a review and update to the COA. The Addendum amends or expands upon several aspects of COA, primarily including:

Establishing new allocation percentages and storage withdrawal obligations in order to meet Sacramento Valley in-basin demands based on specific water-year (wet/dry) designations. Establishing allocations and responsibilities for sharing export capacity during balanced and excess water conditions.

Setting forth new terms regarding the timing, amount, transportation and utilization of water supplies reliant upon certain shared facilities. Requiring an update to COA Exhibit "A" to conform to Delta flow standards established by the SWRCB.

Requiring COA Exhibit "B", which sets forth CVP and SWP water supply figures and responsibilities, to be updated based on a joint operations study of the amendments imposed by the Addendum.

Establishing new timeframes and triggering events requiring joint review of the Projects' operations, as well as procedures for resolving disputes and implementing agreed-upon recommended changes.

Cost Sharing Agreement

The BiOps Agreement summarizes the key requirements imposed by the 2008 and 2009 BiOps. It further memorializes the August 2016 joint requests of DWR and the Bureau for Reinitiation of ESA Consultation on the Coordinated Long-Term Operation of the CVP and SWP. It also seeks to implement the mandate of President Trump's October 2018 Memorandum directing the Bureau to issue a Biological Assessment by January 31, 2019 and directing FWS and NMFS to issue final BiOps within 135 days thereafter.

Key aspects of the BiOps Agreement include:

- Identifies funding obligations for the joint and individual DWR and Bureau requirements set forth by the current FWS BiOps and NMFS BiOps, and the subsequent and/or superseding BiOps to be issued in mid-2019.

- Establishing procedures for cooperation and collaboration.

- Establishing procedures for tracking and reporting expenditures.

Conclusion and Implications

Many stakeholders, including the CVP and SWP contractors, have long expressed the need to update the COA in response to the increased regulatory burdens imposed on those Projects that have resulted in reduced water supply deliveries. Regarding these agreements, DWR Director Karla Nemeth said, "The state and federal projects are intertwined, and we have a joint interest and responsibility to ensure our water system meets California's needs, especially as conditions change." Perhaps the most robust aspect of these new agreements is the recognition that conditions continue to change and require greater coordination efforts to manage operation of these massive—and aging—water systems.

(Derek R. Hoffman, Michael Duane Davis)

NEVADA STATE ENGINEER APPROVES FIRST-OF-ITS-KIND GROUNDWATER MANAGEMENT PLAN

During his last day on the job, Nevada State Engineer Jason King approved a new-to-Nevada groundwater management plan (GMP) that seeks to address over-pumping in the Diamond Valley Hydrographic Basin and avoid curtailment by priority. *Order #1302 Granting Petition To Adopt A Groundwater Management Plan For The Diamond Valley Hydrographic Basin (07-153), Eureka County, State Of Nevada* (January 11, 2018).]

Background

Diamond Valley has about 26,000 acres of irrigated land, which primarily produce premium-quality alfalfa and grass hay. Groundwater pumping is approximately 76,000 acre-feet, while the perennial yield recognized by the State Engineer is 30,000 acre-feet per year. Although irrigation constitutes the primary water use in the basin, the aquifer also supports mining and other commercial and industrial uses. Additionally, nearly two thirds of Eureka County's residents rely on Diamond Valley groundwater to meet their domestic needs.

Since 1960, groundwater levels have declined at an average rate of approximately two feet per year. The State Engineer has periodically met with water users but, historically, those conversations had not yielded concrete solutions to the overdraft problem.

Statutory Authority for GMP

In 2011, the Nevada Legislature passed AB 419, which sought to address groundwater overdraft in basins such as Diamond Valley. That legislation gave the State Engineer discretion to:

> . . .designate as a critical management area any basin in which withdrawals of groundwater consistently exceed the perennial yield of the basin. NRS 534.110(7).

Once a basin is so designated, groundwater users may develop a GMP. But if no such plan is approved within ten years of the critical management area designation, the State Engineer must then curtail water withdrawals according to seniority.

The Legislature required the State Engineer to consider the following factors "without limitation" when determining whether to approve a GMP:

- The hydrology of the basin;
- The physical characteristics of the basin;
- The geographic spacing and location of the withdrawals of groundwater in the basin;
- The quality of the water in the basin;
- The wells located in the basin, including, without limitation, domestic wells;
- Whether a groundwater management plan already exists for the basin; and
- Any other factor deemed relevant by the State Engineer.

Pursuant to this legislative authority, in 2015, the State Engineer designated Diamond Valley as the first critical management area in Nevada.

The GMP Process

Before and after the Critical Management Area (CMA) designation, various irrigators in Diamond Valley started meeting to develop a GMP. They enlisted the help of third-party facilitators, who reached out to stakeholders to identify issues, obstacles and potential solutions. Invitations were sent to every groundwater right holder and domestic well owner in the basin to participate in the GMP process. Notice was also given in the local newspaper encouraging interested parties to get involved.

Multiple facilitated workshops and meetings were held in which to flesh out various aspects of the GMP. Stakeholders elected an advisory board, which met in more than twenty formal meetings to develop the GMP specifics. Ultimately, a majority of permit and certificate holders signed the petition to approve the GMP, as required by NRS 534.037(1), and submitted it to the State Engineer.

Key Components of the GMP

The GMP uses a market-based structure to increase water fungibility and efficiencies and decrease overall use. Water rights are converted into shares based on a priority factor so that more senior water rights equate to a greater number of shares than more junior rights. Each year, the percentage of a share that can be exercised (*i.e.* the annual allocation) gets reduced according to a benchmark reduction schedule until groundwater levels in the basin stabilize. After ten years, the State Engineer may mandate a more aggressive reduction schedule of no more than 2 percent per year.

The State Engineer, through a new water manager position, will administer the GMP in consultation with an advisory board made up of shareholders. A share register that is managed by the Division of Water Resources and is accessible to all shareholders will be used to monitor water use, transfers and banking of annual allocations. Any part of an annual allocation that is banked for use in a subsequent year will be subject to a depreciation factor to account for natural losses through evapotranspiration. Shares will continue to be tied to the specific land and well(s) described in the respective permits at the time of GMP approval and are not severable from the base permit to which they are attached.

The scope of the GMP is limited to irrigation rights and mining rights that have an irrigation base right (meaning the original appropriation was for irrigation but the manner of use subsequently changed to mining). No out-of-basin transfers of groundwater subject to the GMP is allowed.

By taking such steps to reduce consumptive use below the basin's perennial yield, the GMP seeks removal of the CMA designation within 35 years.

Objections to the GMP

The State Engineer's review of the proposed GMP involved public comment and a hearing, and the State Engineer's order approving the GMP addressed the objections that were raised in this process. A major challenge to the GMP was that it violates the rule of prior appropriation because reduction in annual allocations are borne by both senior and junior rights. While "acknowledge[ing] that the GMP does deviate from the strict application of the prior appropriation doctrine with respect to 'first in time, first in right,'" the State Engineer concluded that NRS 534.037, which contemplates that a GMP will be adopted to avoid curtailment by priority, "demonstrates legislative intent to permit action in the alternative to strict priority regulation."

The State Engineer cited to a shortage sharing plan affirmed by a 2006 decision of the New Mexico Supreme Court to support his approval of the GMP and interpreted NRS 534.037 "as intending to create a solution other than a priority call as the first and only response." Moreover, the State Engineer noted that the priority factor used in the GMP to convert water rights to shares "honors" the doctrine of prior appropriation.

Commenters also claimed that the provision of the GMP that allowed transfers of water from one well to another for less than a one-year period violated Nevada statute. The State Engineer responded that this provision was consistent with NRS 533.345(2), which allows for temporary changes to water rights. Ultimately, the State Engineer concluded that the GMP is:

> . . .not a significant departure from existing law because temporary change applications do not undergo publication or hearing unless required by the State Engineer.

Other concerns addressed by the State Engineer included well plugging, water banking, and the argument that currently unused water rights should be subject to abandonment or forfeiture proceedings prior to being converted to shares. The State Engineer expressed that the time required to prove abandonment would needlessly delay implementation of the GMP and that initiating forfeiture proceedings would have the perverse effect of prompting resumed pumping to protect existing rights, rather than decrease pumping as sought by the GMP.

Some comments contended that the GMP improperly elevated irrigation uses over environmental concerns. However, the State Engineer focused on the public interest being served, noting the community's efforts to develop the GMP and preserve the agricultural way of life in Eureka County.

Conclusion and Implications

When enacting AB 419 in 2011, the Nevada Legislature paved the way for stakeholders to address groundwater overdraft through a mechanism other than curtailment by priority. The Diamond Valley

GMP represents the type of consensus-built approach contemplated by the statute. It remains to be seen how the GMP will withstand likely court challenges, but in the meantime, it represents a first-of-its-kind approach to bringing groundwater consumption in line with a basin's perennial yield.
(Debbie Leonard)

LAWSUITS FILED OR PENDING

STATE OF WYOMING FILES APPEAL TO THE NINTH CIRCUIT SEEKING TO OVERTURN THE DISTRICT COURT'S DECISION REGARDING THE ESA LISTING OF THE GREATER YELLOWSTONE GRIZZLY BEAR

On December 5, 2018, the State of Wyoming, shortly followed by several co-defendants, filed an appeal to the Ninth Circuit Court of Appeals of the U.S. District Court for the District of Montana's (District Court) decision to vacate the delisting of the Greater Yellowstone Ecosystem grizzly bear (Yellowstone Grizzly) from the federal Endangered Species Act (ESA). Wyoming's appeal of the District Court's ruling continues the ongoing battle between conservationists and the hunting community regarding a well-beloved species. [*Crow Indian Tribe v. United States*, ___ F.Supp.3d ___ (D. Mt. 2018).]

Grizzly Bear Population in the United States

Before European settlement began, upwards of 50,000 grizzlies roamed the lands of the United States. As settlement moved westward in the 19th Century, the government began "bounty programs aimed at eradication, [and] grizzly bears were shot, poisoned, and trapped wherever they were found.": (Final Rule: Endangered and Threatened Wildlife & Plants; Removing the Greater Yellowstone Ecosystem Population of Grizzly Bears from the Federal List of Endangered & Threatened Wildlife, 82 Fed. Reg. 30,502, 30,508 (June 30, 2017)) (2017 Final Rule). Most recently, only six ecosystems of grizzly bears remain in the United States: 1) the Greater Yellowstone Ecosystem (GYE), covering portions of Wyoming, Montana, and Idaho; 2) the Northern Continental Divide Ecosystem (NCDE) of north-central Montana; 3) the Cabinet-Yaak area extending from northwest Montana to northern Idaho; 4) the Selkirk Mountains in northern Idaho, northeast Washington, and southeast British Columbia; 5) north-central Washington's North Cascasdes area; and 6) the Bitterroot Mountains of western Montana and central Idaho. 82 Fed. Reg. 30,508-09. The GYE and NCDE maintain the largest grizzly bear populations with an estimated 700 to 900 bears. *Id*. Fewer than 100 bears occupy each of the remaining four ecosystems. *Id*.

First Attempts to Delist the Yellowstone Grizzly

In 2007, the Fish and Wildlife Service (Service) published its final rule (2007 Final Rule), which identified the Yellowstone Grizzly as a "distinct population segment" and delisted the Yellowstone Grizzly from the endangered and threatened species list. A "distinct population segment" of a larger species may be listed once the Service finds that, in addition to being endangered or threatened, the population segment is discrete—that is, "markedly separated from other populations of the same taxon"—and significant. Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4,722, 4725 (Feb. 7, 1996).

As litigation ensued challenging the 2007 Final Rule, the Ninth Circuit Court of Appeals affirmed the lower court's ruling to vacate and remand the 2007 Rule to the Service to determine the listing status of the Yellowstone Grizzly. The Ninth Circuit affirmed the District Court's ruling because the Service failed to rationally take into account the emerging threat of whitebark pine tree (a prominent food source to the Yellowstone Grizzlies) loss when delisting the Yellowstone Grizzly from the ESA.

The *Humane Society v. Zinke* Decision

In August 2017, as the Service continued to analyze the listing status of the Yellowstone Grizzly, the United States District Court for the District of Columbia (D.D.C. Cir.) decided *Humane Society of the United States v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017) (*Humane Society*). The court in *Humane Society* invalidated a similar final rule published by the Service relating to the designation of the Western Great Lakes population of the gray wolf as a distinct population segment and the Service's decision to delist the Western Great Lakes gray wolves.

Importantly, the D.C. Circuit provided that the Service must review the status of the entire listed

species from which the distinct population segment was carved, which had been ignored entirely in its delisting determination of the Western Great Lakes population. Thus, the Service was compelled to analyze the effects of delisting the Western Great Lakes gray wolves on the larger gray wolf species as a whole.

2017 Final Rule Delisting Yellowstone Grizzly

Approximately ten years after the Ninth Circuit remanded the 2007 Final Rule, the Service again published a final rule delisting the Yellowstone Grizzly on June 30, 2017 (2017 Final Rule). *See*, Final Rule, 82 Fed. Reg. at 30,505. Recognizing that the holding in *Humane Society* may have some relevance in its analysis, the Service reopened public comments on the impacts of the *Humane Society* decision on its determination to delist the Yellowstone Grizzly.See, Request for Comments: Endangered and Threatened Wildlife & Pants; Removing the Greater Yellowstone Ecosystem Population of Grizzly Bears from the Federal List of Endangered & Threatened Wildlife, 82 Fed. Reg. 57,698 (Dec. 7, 2017) (Request for Comments). Ultimately, after the Request for Comments period, the Service determined that the 2017 Final Rule did not require modification. The Service found that despite the D.C. Circuit's decision in *Humane Society*, the "consideration and analyses of grizzly bear populations elsewhere in the lower 48 States is outside the scope of [the 2017 Final Rule]. *See*, 2017 Final Rule, 82 Fed. Reg. at 30,546.

Shortly after the publication of the 2017 Final Rule, the Crow Tribe (Tribe), along with several co-plaintiffs (plaintiffs), commenced a lawsuit objecting to the Service's actions relating to the Yellowstone Grizzly as arbitrary and capricious under the ESA and Administrative Procedure Act (APA).

The District Court's Decision

Arbitrary and Capricious Standard of Review under the APA

Pursuant to § 706(2)(A) of the APA, a court is required to:

> . . .hold unlawful and set aside agency action, findings, and conclusions found … to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

Of the four factors to be considered under the arbitrary and capricious standard, Plaintiffs alleged that the Service "entirely failed to consider an important aspect of the problem.": *See, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Specifically, the District Court analyzed if the Service acted arbitrarily and capriciously when: 1) delisting the Yellowstone Grizzly and analyzing its impacts of such action on the remaining endangered and threatened grizzly bear population not located in the GYE; 2) failing to include a recalibration methodology utilizing the best available science in its 2017 Final Rule; and 3) analyzing the need for translocation or natural connectivity of other grizzly bear populations in other regions.

The Services' Piecemeal Approach to Grizzly Bear Protections

The thrust of the plaintiffs' argument rests with the fact that the Service blatantly excluded any analysis or consideration of the effect of delisting the Yellowstone Grizzly on other members within the grizzly bear species, which remain protected under the ESA. Specifically, plaintiffs relied heavily upon the similar fact pattern and analysis by the D.C. Circuit in *Human Society* to argue that the Service acted in violation of the APA and ESA. The Service maintained that *Humane Society* was wrongly decided, and that the facts in *Humane Society* were distinguishable because the remaining grizzly bear populations outside of the GYE remained protected, unlike the remaining population of the gray wolves in *Humane Society*. The District Court was unconvinced by the Service's arguments:

> The Service does not have unbridled discretion to draw boundaries around every potential healthy population of a listed species without considering how that boundary will affect the members of the species on either side of it.

The District Court further held that the Services' "piecemeal approach" in segmenting off a healthy portion of an endangered species population contravenes the ESA's "policy of institutionalized caution.":See, *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1167 (9th Cir. 2011).

Removal of Recalibration Methodology

A recalibration method is used to calculate new estimates for a species population in any given year and then utilized in making listing and delisting determinations. Additionally, the ESA requires that the Service make listing and delisting determinations "solely on the basis of the best mandates and commercial data.": 16 U.S.C. § 1533(b)(1)(A). The Service conceded that the current recalibration model may not remain the best available science but that the methodology will remain in place until another population estimator was approved. The Service ignored concerns about the existing recalibration methodology and removed the requirement to utilize the "best available science" for changing the estimator in the 2017 Final Rule mostly due to political pressures from the states. The District Court ruled that there was clear evidence that the Service made its decision on recalibration in the 2017 Final Rule not based on the best available science or law, but rather, a concession to the states' hardline position in utilizing old recalibration methods.

Lack of Natural Connectivity Provisions

The ESA provides that the Service consider the "natural or manmade factors affecting [the Yellowstone Grizzly's] continued existence," including the population's genetic health while under the threat of endangerment. 16 U.S.C. § 1533(b)(1)(A). In its 2017 Final Rule, the Service recognized that "[t]he isolated nature of the [Yellowstone Grizzly] was identified as a potential threat when listing occurred in 1975.": 82 Fed. Reg. at 30,535. Without an adequate gene pool, the Yellowstone Grizzly will be at an increased risk of endangerment than currently exists. 82 Fed. Reg. at 30,535-36.

The District Court held that the Service failed to logically support its conclusion that the Yellowstone Grizzly population was not threatened by its isolation. Specifically, in the 2007 Final Rule, the Service:

> . . .recommended that if no movement or successful genetic interchange was detected by 2020, grizzly bears from the [NCDE] would be translocated into the [GYE] grizzly bear population to achieve the goal of two effective migrants every 10 years (i.e., one generation) to maintain current levels of genetic diversity. 82 Fed. Reg. at 30,536.

The 2017 Final Rule did not maintain the same commitment to translocation in order to create a genetically diverse grizzly bear population. The lack of commitment to translocation was based on the Services' reliance on two distinct studies that were "illogically cobbled together" to conclude the Yellowstone Grizzly population is currently sufficiently diverse.

Conclusion and Implications

The holding in *Crow Indian Tribe v. United States* stayed the first grizzly hunt in 44 years in Wyoming. As Wyoming and its co-defendants appeal the District Court's decision to the Ninth Circuit, the current conservation strategy to protect the Yellowstone Grizzly and remaining grizzly bear population remains in place. As the public sentiment shifts toward environmental concerns and conservation efforts, Wyoming faces an uphill battle in its appeal to argue that the 2017 Final Rule should not be vacated but reaffirmed. The District Court's decision is available online at: https://www.mtd.uscourts.gov/sites/mtd/files/Order%20in%20Crow%20Indian%20Tribe%2C%20et%20al%20vs.%20U.S.A.%2C%20et%20al%20and%20State%20of%20Wyoming%2C%20et%20al.pdf

Wyoming's December 2018 appeal to the Ninth Circuit is available online at: https://www.courtlistener.com/recap/gov.uscourts.mtd.55114/gov.uscourts.mtd.55114.280.0.pdf

(Nicolle Falcis, David Boyer)

SEVERAL LAWSUITS FILED CHALLENGING CALIFORNIA'S BAY-DELTA PLAN UPDATE

As expected, a state plan to require higher flows for salmon in the Tuolumne, Stanislaus and Merced rivers has spawned a flurry of lawsuits from irrigation districts in the northern San Joaquin Valley, the City and County of San Francisco, and the Santa Clara Valley Water District, charging that the plan will not help fish but will cause extensive economic harm. While for some of the challengers the lawsuit is an attempt to buy time while agencies work together to create an alternative plan, other challengers look to maintain the status quo.

Background

Protecting the San Francisco Bay- San Joaquin-Sacramento Delta watershed and its many beneficial uses is one of the State Water Resources Control Board's (SWRCB) primary responsibilities and top priorities. The SWRCB is responsible for developing and modifying the Bay-Delta Plan which establishes water quality control measures and flow requirements needed to provide reasonable protection of beneficial uses in the watershed.

The Bay Delta Plan is being updated through two separate processes. The first plan amendment (Phase 1) is focused on San Joaquin River flows and southern Delta salinity. The second plan amendment (Phase 2) is focused on the Sacramento River and its tributaries, Delta eastside tributaries, delta outflows, and interior Delta flows.

Phase 1 is intended to stem the decline in native fish species, including the Chinook salmon. Populations of salmon returning to the San Joaquin basin have declined from 70,000 in 1984 to 10,000 in 2017. Phase 1 is designed to restore water flows on the San Joaquin River and its main tributaries—the Stanislaus, Tuolumne, and Merced Rivers.

Following an unprecedented request jointly made by the Governor and the Governor-Elect, efforts were made by state negotiators and many of the impacted irrigation districts to reach voluntary agreements on flow requirements. In 30 days, the Turlock and Modesto irrigation districts and the San Francisco Public Utilities Commission reached a tentative deal. The water districts would agree to send an additional 110,000 acre-feet of water—35 billion gallons—down the river, spend nearly $40 million for riverbed restoration and create of 80 acres of new flood plain. Districts on the Stanislaus and Merced rivers signaled they would accept similar deals.

On December 12, 2018, however, the California State Water Resources Control Board adopted Phase 1. The SWRCB concluded that Phase 1 established water quality control measures and flow requirements needed to provide protection of beneficial uses in the watershed. As part of this process, the SWRCB approve and adopted a Substitute Environmental Document (SED) for Phase 1.

Phase 1 sets a benchmark of 40 percent of unimpaired flow during the critical February to June migratory period. It allows for reduced river flows on tributaries where stakeholders reach agreements on flow and "non-flow" measures, such as habitat restoration projects.

The Lawsuits

The first in a series of Bay-Delta Plan lawsuits came from the Merced Irrigation District shortly after the SWRCB's decision in December. The lawsuit claims that the plan will end up costing the local economy more than $230 million and nearly 1,000 jobs without providing the intended benefits to fish populations.

The San Joaquin Tributaries Authority (SJTA), which includes the Modesto Irrigation District, Oakdale Irrigation District, South San Joaquin Irrigation District, Turlock Irrigation District, as well as the City and County of San Francisco, filed another suit in Tuolumne County on January 10, 2019. The lawsuit contends that the SWRCB's plan to require 40 percent in unimpaired flows, with a range of 30 percent to 50 percent between February and June, "directly and irreparably" harms the SJTA members and in violation of the Porter-Cologne Water Quality Control Act. The plan, plaintiffs said:

> . . .will cause substantial losses to the surface water supply relied upon by the SJTA member agencies for agricultural production, municipal supply, recreational use, hydropower generation, among other things. Implementation will also

cause direct impacts to groundwater resources relied upon by the SJTA member agencies.

The group contends that the SWRCB violated state and federal due process laws.

The Modesto Irrigation District (MID) and City of Modesto (City) each filed lawsuits in the Sacramento Superior Court challenging the sufficiency of the SED for Phase 1 and putting forth the argument that Phase 1 violates the California Environmental Quality Act (CEQA). The City receives drinking water from MID. It is estimated that MID diverts an average of over 315,000 acre-feet of water from the Tuolumne River each year for consumptive use. According to the SED, surface diversions by MID from the Tuolumne under Phase 1 will be reduced by 14 percent or approximately 44,000 acre-feet, per year. This is enough water to supply 88,000 average households for one year and is equivalent to the amount of water MID supplies to the City each year.

The latest lawsuit was filed in the Santa Clara County Superior Court by the Santa Clara Valley Water District. The District asserts that the proposed plan could significantly reduce local water supplies, potentially costing the water district millions of dollars in the acquisition of alternate water supplies and increased reliance on groundwater.

In the meantime, several of the plaintiffs continue to negotiate with the State in an effort to work towards a compromise with the SWRCB.

Conclusion and Implications

The lawsuits, the result of unnecessarily precipitous action by SWRCB, appear to have undermined the grand compromise plan brokered by Governor Brown's administration in December in an effort to calm the state's longstanding water wars. This leaves Brown's successor, Governor Newsom with a mess on his hands. The series of lawsuits are expected to take years to make it through the courts. It remains unclear whether, in the face of the lawsuits, SWRCB will proceed with implementing Phase 1 and adopting Phase II, leaving the state of water in California as unsettled as ever.

In the meantime, several districts have noted intentions of continuing to work toward a compromise with the SWRCB. At the same time, newly elected California Governor Newsom says he plans to scrutinize the compromise plans as well as conduct a reassessment of the membership of the SWRCB. The five members of the board are all gubernatorial appointees.

(Wesley Miliband)

JUDICIAL DEVELOPMENTS

INDUSTRIAL ACTIVITIES AND THE CLEAN WATER ACT: SECOND CIRCUIT DECISION HELPS CLARIFY WHAT ACTIVITIES MAY REQUIRE A CLEAN WATER ACT PERMIT

Sierra Club v. Con-Strux, LLC, ___F.3d___, Case No. 18-257 (2nd Cir. Dec. 17, 2018).

The federal Clean Water Act (CWA) regulates the discharge of pollutants into the waters of the United States by requiring certain activities that lead to stormwater runoff to obtain a permit. 33 USC 1251(a). Specifically, the CWA lists several activities that require a National Pollutant Discharge Eliminations System (NDPES) permit which generally limits what can be discharged, establishes specific monitoring and reporting requirements, and implements requirements specific to the action to protect water quality and people's health. Thus, challenges often occur over whether a specific activity is covered by CWA and therefore, requires a NDPES permit. In *Sierra Club v. Con-Strux, LLC*, the U.S. Court of Appeals for the Second Circuit provided guidance to help determine what activities may require a NDPES permit as well as how the CWA provisions should be interpreted.

Background

The activities at issue in the *Sierra Club* case were conducted by a New York company Con-Strux, LLC, which, according to the court, operated a facility that:

> . . .recycles demolished concrete, asphalt, and other construction products that it then processes and resells on the wholesale market for use by the construction industry.

Thus, Con-Strux's operations involved two separate and distinct processes: 1) recycling construction waste and 2) selling the materials it created from the recycling to the construction industry.

The Sierra Club brought an action against Con-Strux claiming its activities required a NDPES permit which it did not have. Thus, the court was charged with assessing the requirements of CWA to determine if Con-Strux's failure to obtain a NDPES permit constituted a violation of the CWA.

The NDPES Permit Process

The CWA requires NDPES permits for facilities that "are considered to be engaged in 'industrial activity.'" 40 CFR 122.26(b)(14)(i)-(xi). To define the phrase "industrial activity," the CWA provides several "Standard Industrial Classifications" (SIC) which generally describe the types of activities that either require or do not require a NDPES permit. In the *Sierra Club* case, the court reviewed two of these categories.

The Second Circuit's Decision

First, the court reviewed SIC 5093, which is entitled "Scrap and Waste Materials" and applies to any facility engaged in "assembling, breaking up, sorting, and wholesale distribution of scrap and waste materials." To fit within this SIC, the activity must involve the use of certain materials listed within the SIC, including what the court identified as a "catch-all" category of "scrap and waste materials—wholesale." Sierra Club alleged that Con-Strux's activities involved scrap waste, and therefore required a NDPES permit pursuant to SIC 5093.

Con-Strux argued that its work instead fit under SIC 5032 which does not require a NDPES permit. SIC 5032 covers facilities:

> . . .primarily engaged in the wholesale distribution of stone, cement, lime, construction sand, and gravel; brick (except refractory); asphalt and concrete mixtures; and concrete, stone , and structural clay products (other than refractories).

After the lower court granted Con-Strux's motion to dismiss, finding that Con-Strux's activites best

fit under SIC 5032 and therefore did not require a permit, the Second Circuit took up the issue. Thus, the court was tasked with deciding how to properly classify Con-strux's activities.

First, the court acknowledged that Con-strux's operations were multi-faceted and therefore, the court addressed how to classify facilities that conduct multiple and distinct activities. The lower court, in ruling in favor of Con-strux, approached the analysis by deciding that Con-strux's activities on the whole best fit into the description of SIC 5032 and, therefore, found that Con-strux did not need a permit. The court rejected this analysis, finding nothing in the CWA indicating that the CWA created an "either or" process where the activities of a facility must be placed into one category. Instead, the court found that one facility could fit into multiple SIC if it engaged in distinct activities. Importantly, the court noted that this "either or" analysis would allow businesses to avoid the NDPES permit requirements by dedicating a portion of its facilities to clean activities, while the remainder creates pollution without consequence. Thus, the court establishes that one facility could fit into multiple SIC but be required to obtain a NDPES permit if any of the activities fit into a SIC that requires a permit.

The court went on to separately analyze the portion of Con-strux's operations dedicated to the processing of construction debris for recycling to determine if it required a NDPES permit. The court explicitly dismissed the theory argued by Con-strux that its operations had to be reviewed collectively and fit into one SIC that best fit its facilities as a whole. In this analysis, the court found that Con-strux's recycling of "demolished concrete, asphalt, and other construction products" fit within SIC 5093 and therefore, required Con-strux to obtain a NDPES permit. Even though the specific materials used by Con-Strux were not explicitly mentioned in SIC 5093, the court found that the "catch all" category in SIC 5093 covering "scrap and waste materials" applied to materials not listed in SIC 5093 that were treated as construction waste. The court reasoned that a strict interpretation of SIC 5093, which would require the material at issue to be listed in the language of SIC 5093, would make the catch-all provision in SIC 5093 superfluous.

Conclusion and Implications

Although the Second Circuit Court of Appeals ended its analysis by noting that its conclusion was limited to concluding that the lower court improperly dismissed Sierra Club's complaint and did not address the merits of the issue, there are a couple lessons that can be gleamed from the court's analysis. First, an NDPES permit can be required for a facility even if some of its activities do not fit into a SIC requiring the permit. In other words, facilities cannot shield polluting activities from the NDPES permit requirement by conducting non-polluting activities at the same site. Secondly, the language SIC 5093 can be interpreted broadly to cover recycling of construction waste and is not limited to the specific materials identified in the language of SIC 5093. Taken together, the court's analysis suggests that the NDPES permit requirements should be interpreted broadly to address any type of polluting activity, even if such activity is combined with other, non-polluting activities and the specifics of the polluting activity is not explicitly identified in the CWA. The court's opinion is available online at: http://www.ca2.uscourts.gov/decisions/isysquery/27928a3e-3711-44ac-ad0a-4403cb6117a6/1/doc/18-257_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/27928a3e-3711-44ac-ad0a-4403cb6117a6/1/hilite/
(Stephen McLoughlin, David Boyer)

FOURTH CIRCUIT FINDS ARMY CORPS LACKED STATUTORY AUTHORITY TO NULLIFY STATE-IMPOSED SPECIAL CONDITIONS ON CWA NATIONWIDE PERMIT

Sierra Club v. U.S. Army Corps of Engineers, 909 F.3d 635 (4th Cir. 2018).

A pipeline developer sought to rely on a nationwide permit under the federal Clean Water Act (CWA) for various stream crossings. However, the pipeline's Federal Energy Regulatory Commission (FERC) approval allowed stream-crossing construction techniques at odds with the applicable state conditions on the nationwide permit at issue. The Fourth Circuit held that the U.S. Army Corps of Engineers (Corps) has no statutory authority to impose a "special" condition that, in effect, nullifies a state-imposed condition.

Background

Mountain Valley Pipeline, LLC, seeks to build a 304-mile, 42-inch diameter natural gas pipeline through Virginia and West Virginia along a path that crosses:

> . . .591 federal water bodies, including four major rivers (the Elk, Gauley, Greenbrier, and Meadow), three of which are navigable-in-fact rivers regulated by Section 10 of the Rivers and Harbors Act of 1899 (the Elk, Gauley, and Greenbrier). 33 U.S.C. § 403.

Mountain Valley obtained certification to build and operate the pipeline from FERC, and then sought clearance from the Corps to discharge fill into water of the United States, pursuant to the Clean Water Act. 33 U.S.C. § 1344(a).

Rather than seek an individual permit, Mountain Valley sough coverage under nationwide permit 12 (NWP 12):

> . . .which acts as a standing authorization for developers to undertake an entire category of activities deemed to create only minimal environmental impact. *Chrutchfield v. Cty. of Hanover, Va.*, 325 F.3d 211, 214 (4th Cir. 2003).

Potential permittees "must satisfy *all* terms and conditions of an NWP for a valid authorization to occur." Citing 33 C.F.R. § 330.4(a) (emphasis original):

> NWP 12. . .authorizes the discharge of dredged or fill material into federal waters attributable to 'the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States.'

The applicant for a § 1334 permit, including coverage under NWP 12:

> . . .'shall provide the [Corps] a certification from the State in which the discharge originates or will originate,' unless the state waives, either explicitly or by inaction, its right to independently certify the project. 33 U.S.C. § 1341(a)(1).

When the state's certification imposes additional conditions, the Corps must incorporate those as conditions on the permit. 33 C.F.R. § 330.4(c)(2). "West Virginia imposed, after providing public notice and receiving public comment, several additional 'Special Conditions' as part of its certification of NWP 12," including Special Condition C limiting "construction of stream crossings to a 72-hour window, except for certain rivers not at issue in the instant case."

In early 2017, West Virginia issued certification of the project; environmental groups challenged that certification. The state ultimately requested that the Fourth Circuit vacate the certification and remand it to the state for further evaluation. Once that request was granted, the state:

> . . .purported to waive its requirement that Mountain Valley obtain an Individual 401 Water Quality Certification. Accordingly, Mountain Valley does not have an individual state water quality certification under Section 401 of the Clean Water Act.

The Corps issued a:

> . . .the Verification concluding that the Pipeline project meets the criteria of NWP 12, provided Mountain Valley 'compl[ies] with all terms and conditions of the enclosed material and the enclosed special conditions.'

But the Verification allowed for Mountain Valley to use:

> . . .plans to use a 'dry open cut' method to construct the Pipeline through four major, Corps-managed rivers (the Elk, Gauley, Greenbrier, and Meadow), which requires installing cofferdams directing water away from a riverbed construction area to minimize sedimentation and erosion. This 'dry' open-cut method takes longer than 'wet' open-cut construction, which involves constructing a pipeline while water continues to flow over the riverbed.

The environmental groups sought a stay of the Verification on grounds that contrary to the 72-hour limit set forth in Special Condition C, Mountain Valley expected to take four-to-six weeks to construct river crossings for the Pipeline through the Elk, Gauley, Greenbrier, and Meadow Rivers. The Corps then "suspended" the Verification to consider "the extent of [Mountain Valley's] compliance with Special Condition C's 72-hour limit on construction of stream crossings.

The Corps and the state then corresponded to establish that the state believed the use of the 'dry' cut construction method ... is more protective of water quality at each of the crossings' and 'provides more stringent water quality protection that the time requirement of Special Condition C. However, the state "did not notify or solicit feedback from the public in any manner before responding to the Corps' letter." Reinstating the Verification, the Corps relied on its authority to modify a "case specific activity's authorization under an NWP" pursuant to 33 C.F.R. § 330.5(d)(1), imposing a new Special Condition 6 providing for use of the dry-cut construction method at specific crossings and stating that Special Condition 6 "shall apply in lieu of Special Condition C."

Various environmental groups brought suit, challenging the Corps' actions under the Administrative Procedures Act. 5 U.S.C. § 706(2)(A).

The Fourth Circuit's Decision

Standard of Review and Agency Deference

The Fourth Circuit first rejected both *Chevron* and *Skidmore* deference as applied to the Corps' actions. *Chevron* deference did not apply because the Corps' interpretation of the CWA and its regulations did not "derive[] from notice-and-comment rulemaking." *Knox Creek Coal Corp. v. Sec'y of Labor, Mine Safety & Health Admin.*, 811 F.3d 148, 159 (4th Cir. 2016). *Chevron* deference may yet apply if the agency decision at issue nonetheless bears the "procedural hallmarks of legislative decision-making," including "[a]t minimum ... future application to claim rulemaking power." *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 287 (4th Cir. 2018). However, the court pointed out that:

> . . .the imposition of Special Condition 6 is highly specific to the four river crossings across the Greenbrier, Gauley, Elk, and Meadow Rivers, and makes no mention of the Condition even applying to all future crossings across those rivers. . . .Nor does the Reinstatement indicate any 'adversarial or deliberative process where opposing views were presented or considered' with respect to whether the Corps has the statutory authority to substitute its own conditions in place of state-imposed conditions. *Sierra Club*, 899 F.3d at 288.

Rather, the Corps' decisions here resulted from "a one-off, independent, and case-specific determination."

As for *Skidmore* deference—which may be warranted depending on "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control," *Skidmore v. Swift & Co.*, 323 U.S. 124, 140 (1944)—none was due as the Corps' decision "is completely devoid of any statutory analysis—Special Condition 6 does not even reference the Clean Water Act":

> There is no effort made to explain or justify how the statutory text affords the Corps the authority to issue one special condition. . .in lieu of" a

state-imposed condition, as it did in replacing Special Condition C with Special Condition 6.

The Clean Water Act Claim

Turning to the text of the CWA itself, the Fourth Circuit concluded:

> . . .[t]he plain language of Section 1341(d) of the Clean Water Act provides that any state certification '*shall* become a condition on any Federal license or permit.' (Emphasis original.) The court cited *Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d 1207, 1218 (9th Cir. 2008), as collecting cases to establish that:
>
> . . .[e]very Circuit to address this provision has concluded that 'a federal licensing agency lacks authority to reject [state Section 401 certification] conditions in a federal permit.'

As Special Condition 6 is inimical to Special Condition C, the Corps lacked any statutory authority to impose it, and therefore in reinstating the Verification the agency acted without authority of law.

Conclusion and Implications

Agency deference is not always deference. When squaring the circle of competing conditions on permits from various cooperative, supportive agencies, as the Fourth Circuit demonstrated, it is vitally important to guard against agency actions that overreach statutory authority. The court's opinion is available online at: http://www.ca4.uscourts.gov/Opinions/181173R1.P.pdf
(Deborah Quick)

DISTRICT COURT ADDRESSES CLEAN WATER ACT MOTIONS TO DISMISS IN INTERNATIONAL BOUNDARY WATER POLLUTION DISPUTE

City of Imperial Beach v. International Boundary & Water Commission, ___F.Supp.3d___, Case No. 18CV457 JM (S.D. Cal. Dec. 11, 2018).

The U.S. District Court for the Southern District of California recently denied the government's motion to dismiss a claim for a violation of the federal Clean Water Act (CWA) on sovereign immunity grounds, and granted in part and denied in part defendants' motions to dismiss for lack of subject matter jurisdiction and failure to state a claim under the federal Resource Conservation and Recovery Act (RCRA).

Factual and Procedural Background

This case arises of out the management and operation of facilities in the Tijuana River Valley in San Diego intended to direct and treat water flowing from Mexico into the U.S. The International Boundary and Water Commission (Commission), a bi-national organization comprised of the International Boundary and Water Commission—United States Section (USIBWC) and the Comisión Internacional de Limites y Aguas in Mexico. The Commission entered into a treaty in 1944 related to the use of water in the Tijuana River.

In 1990, the Commission entered into an agreement to address the border sanitation problems in San Diego and Tijuana. As a result, the South Bay Plant (Plant) was constructed in the Tijuana River Valley in San Diego and designed to treat 25 million gallons of sewage flowing from Mexico each day. USIBWC owns the plant and Veolia Water North America—West, LLC (Veolia) operates the Plant's wastewater systems. The Plant is subject to a National Pollutant Discharge Elimination System (NPDES) Permit that authorizes the discharge of pollutants at the South Bay Ocean Outfall only after the water has been treated.

Six canyon collectors are designed to capture polluted wastewater in shallow detention basins and convey the water via pipes to the Plant for treatment and eventual discharge at the South Bay Ocean Outfall. When water cannot drain into the pipes for treatment, it overflows the basins and travels into the downstream drainages.

In 1978, USIBWC constructed a flood control conveyance that directs water, sewage, and waste

flowing from Mexico into an area of the Tijuana River Valley in which the Tijuana River had not previously flowed. Unlike canyon collectors, the flood control conveyance is not subject to an NPDES Permit and Veolia is not involved in its operation. USIBWC constructed temporary sediment berms at the border to reduce the volume of flow entering the flood control conveyance via the Tijuana River from Mexico. However, the berm also temporarily detains and causes water to pool in the flood control conveyance.

On September 27, 2017, City of Imperial Beach, San Diego Unified Port District, and the City of Chula Vista sent defendants the U.S. and Veolia a notice of intent (NOI) to sue. On March 2, 2018, plaintiffs brought suit against defendants for violations of the federal Clean Water Act (CWA) and RCRA. On September 12, 2018, plaintiffs filed a Second Amended Complaint (SAC) alleging three causes of action: 1) against USIBWC, for discharges of pollutants from the flood control conveyance without an NDPES permit, 2) against both defendants, for discharges of pollutants from the canyon collectors in violation of the CWA, and 3) against both defendants, for contribution to an imminent and substantial endangerment in violation of RCRA.

Defendants filed separate motions to dismiss.

The District Court's Decision

The Clean Water Act Claims

USIBWC argued the CWA was barred by sovereign immunity because the application of the CWA to the flood control conveyance would affect or impair the 1944 treaty. Section 501(a)(1) of the CWA provides a partial waiver of sovereign immunity and allows suits against the U for violations of effluent standards or limitations. At issue was whether § 511(a)(3) of the CWA limited this partial waiver on the grounds that the CWA cannot be construed as "affecting or impairing the provisions of any treaty of the U.S." Following the Eighth Circuit Court of Appeals the court here determined the U.S. consented to suit under the CWA, but only to the extent that it does not affect or impair a treaty. The court then denied USIBWC's motion to dismiss on the grounds that impairment of the 1944 treaty is a factual question, and USIBWC failed to present sufficient evidence that compliance with the CWA would affect or impair the treaty.

The court next considered defendants' two arguments that the RCRA claims failed for 1) lack of subject matter jurisdiction, and 2) failure to state a claim upon which relief could be granted.

The RCRA Claims

Defendants argued they did not receive proper notice for suit under RCRA and the court lacked subject matter jurisdiction. Defendants alleged that the NOI Plaintiffs sent defendants focused on "the mere passage of wastewater through USIBWC's facilities." The court disagreed and determined that the NOI contained sufficient information to allow defendants to identify the alleged violations, and that the court had subject matter jurisdiction. However, the court also determined the NOI failed to place defendants on notice of plaintiffs' claim relating to waste dispersed by wind, and the court lacked subject matter jurisdiction over those claims.

Defendants next argued plaintiffs failed to state a RCRA claim because plaintiffs did not allege defendants "contributed" to the:

> . . .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.

The court disagreed, citing to the Ninth Circuit Court of Appeals' definition of "contribution," which requires active involvement or control over waste disposal. Plaintiffs' SAC adequately alleged defendants' active role in connection to the waste, alleging the design of the canyon collector detention basins and flood control conveyance changed the character of the waste to make it more harmful. The SAC also described the wastewater in the flood control conveyance and canyon collectors as "open toxic waste pits" plagued with "mosquitoes and flies" and more likely to contain carcinogenic compounds, heavy metals and pollutants. Thus, the court granted in part and denied in part defendants' motion to dismiss for failure to state a RCRA claim.

In two related cases, the court denied defendant USIBWC's motion to dismiss a CWA claim brought by Surfrider Foundation on sovereign immunity grounds for the same reasons expressed in this case,

see, *Surfrider Found. v. Int'l Boundary and Water Comm'n*, (2018), and granted the California State Lands Commission's motion to intervene under § 505(b)(1)(b) of the CWA, *see*, *California ex. Rel. Regional Water Quality Control Board*, (2018).

Conclusion and Implications

This case highlights how a partial waiver of sovereign immunity under the Clean Water Act can be limited and still provide the U.S. with immunity protection. This case also provides an example of how insufficient notice to bring suit under the Resource Conservation and Recovery Act can result in dismissal of that claim.
(Joanna Gin, Rebecca Andrews)

RULE DELAYING APPLICABILITY OF REVISED DEFINITION OF 'WATERS OF THE UNITED STATES' VACATED BY THE DISTRICT COURT, IN ITS ENTIRETY, DUE TO SERIOUS PROCEDURAL ERRORS

Puget Soundkeeper Alliance v. Wheeler, ___F.Supp.3d___, Case No. C15-1342 (W.D. Wash. Nov. 26, 2018).

The much-contested revised definition of "waters of the United States" was adopted in 2015, which essentially defines the scope of the federal Clean Water Act. A 2018 rule delayed its effective date to 2020, and provided that the pre-2015 definition would be applied in the interim. During the 2018 rulemaking process, no comments were accepted or responded to regarding the substance of the pre-2015 definition or 2015 Rule. The U.S. District Court for the Western District of Washington, applying a Fourth Circuit opinion, held that the re-imposition, even on a temporary basis, of a previously superseded rule required compliance with the Administrative Procedure Act's notice and comment period provisions. Refusing to accept or respond to comments on the substance of the pre-2015 definition violated the act.

Background

In 2015 the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) issued a final rule (2015 Rule) defining "waters of the United States" (WOTUS), as used to define the jurisdiction of those agencies under the Clean Water Act (CWA: 33 U.S.C. § 1251 *et seq.*). The 2015 Rule "sought to make 'the process of identifying waters protected under the CWA easier to understand, more predictable, and consistent with the law and peer-reviewed science. . . .'" 80 Fed. Reg. 37,054 (June 29, 2015). The 2015 Rule became effective on August 28, 2015; multiple lawsuits were filed contesting the 2015 Rule. The Sixth Circuit Court of Appeals issued a nationwide stay of the 2015 Rule, and then in early 2016 asserted original jurisdiction over challenges to the 2015 Rule. *In re U.S. Dep't of Def., U.S. EPA Final Rule: Clean Water Rule: Definition of Water of U.S.*, 817 F.3d 216, 274 (6th Cir. 2016). Overturning the Sixth Circuit, in:

> January 2018, the United States Supreme Court reversed the Sixth Circuit and held that challenges to the WOTUS Rule must be brought in federal District Courts. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 634 (2018).

The nationwide stay was vacated. *In re United States Dep't of Def.*, 713 F. App'x 489, 490 (6th Cir. 2018).

Meanwhile back at the agencies, a new rule was proposed to add an "applicability date" to the 2015 Rule, *i.e.*, that:

> . . .would delay the effect of the WOTUS Rule for two years from the date that final action was taken on the proposed rule, in order to maintain the status quo and provide regulatory certainty in case the Sixth Circuit's nationwide stay was vacated. 82 Fed. Reg. 55,542, 55,542 (Nov. 22, 2017).

A 21-day comment period was noticed, and comments were solicited "only the issue of whether adding an applicability date would be desirable and appropriate"; comments were "expressly" not solicited:

> . . .on the merits of the pre-2015 definition of 'waters of the United States,' or on the scope of the definition that the Agencies should adopt if they repealed and revised the WOTUS [2015] Rule. *Id.* at 55,544–45.

The final rule adopting the applicability date (2018 Rule) was promulgated in February 2018 "suspend[ing] the effectiveness of the WOTUS Rule until February 2020." 83 Fed. Reg. 5,200, 5,200, 5,205 (Feb. 6, 2018). Until that time, "the Agencies would apply the pre-2015 definition of 'waters of the United States.'" *Id.* at 5,200. The plaintiff environmental group filed suit challenging, *inter alia*, the agencies' compliance with the Administrative Procedure Act (APA: 5 U.S.C. § 500 *et seq.*) in adopting the 2018 Rule.

The District Court's Decision

Analysis under the *North Carolina Growers* Decision

The District Court relied on the Fourth Circuit's analysis in *North Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755 (4th Cir. 2012) (*NC Growers Ass'n*), in concluding that the agencies acted "arbitrarily and capriciously" in limiting the scope of the public comments to the desirability and appropriateness of delaying the effective date of the 2015 Rule.

NC Growers Ass'n addressed whether the Secretary of Labor ran afoul the APA in issuing a notice of proposed rulemaking that would temporarily suspend regulations adopted in 2008 "for further review and consideration"; during the reconsideration period, the prior regulations—dating from 1987—would be reinstated. *Id.* at 760. The proposed rulemaking provided a ten-day comment period, and stated that the Department of Labor:

> . . .'would consider comments concerning the suspension action itself, and not regarding the merits of either set of regulations (the content restriction).' *Id.* at 761.

The Fourth Circuit "rejected the defendants' argument that the reinstatement of the 1987 regulations did not constitute rule making under the APA," noting that:

> When the 2008 regulations took effect on January 17, 2009, they superseded the 1987 regulations for all purposes relevant to this appeal. As a result, the 1987 regulations ceased to have any legal effect, and their reinstatement would have put in place a set of regulations that were new and different "formulations" from the 2008 regulations. 702 F.3d at 765.

Having concluded that the temporary reinstatement of superseded regulations constituted rulemaking, the Fourth Circuit held that:

> . . .because the Department did not provide a meaningful opportunity for comment, and did not solicit or receive relevant comments regarding the substance or merits of either set of regulations. . .the Department's reinstatement of the 1987 regulations was arbitrary and capricious in that the Department's action did not follow procedures required by law. *Id.* at 770.

The District Court concluded that the agencies' rule suspending the 2015 Rule's effectiveness until 2020, and resurrecting the pre-2015 definition of WOTUS during the interim was "substantively indistinguishable" from the facts examined in *NC Growers Ass'n*. Promulgation of the 2015 Rule and "rendered the pre-2015 legally void" as of the 2015 Rule's effective date. Reinstatement, even temporary, of the pre-2015 Rule constitutes rulemaking under the APA:

> Although the Agencies held a 21-day comment period, they expressly excluded substantive comments on either the pre-2015 definition of "waters of the United States" or the scope of the definition that the Agencies should adopt if they repealed and revised the WOTUS Rule. 82 Fed. Reg. 55,542 at 55,545. Instead, the Agencies limited the content of the comments considered to the issue of "whether it is desirable and appropriate to add an applicability date to the [WOTUS Rule]." *Id.* at 55,544. By restricting the content of the comments solicited and considered, the Agencies deprived the public of a meaningful opportunity to comment on relevant and significant issues in violation of the APA's notice and comment requirements. *BASF Wyandotte Corp.* [*v. Costle*], 598 F.2d [637,] 641

[(1st Cir. 1979). Therefore, the Agencies acted arbitrarily and capriciously when they promulgated the Applicability Date Rule.

The District Court remanded with *vacatur*, finding the agencies' "serious procedural error" warranted setting "aside the entirety of the unlawful agency action, as opposed to a more limited remedy particular to the plaintiffs in a given case," citing 5 U.S.C. § 706(2)(A).

Conclusion and Implications

The convoluted ins-and-outs regarding the scope of the Clean Water Act jurisdiction have undoubtedly engendered confusion and uncertainty in the regulated community. However, this attempt to provide a pause prior to implementation of the 2015 Rule was derailed by an ill-considered attempt to truncate the process for public involvement. Once again, attention to the niceties of the APA goes a long way towards reducing uncertainty and confusion.
(Deborah Quick)

ENVIRONMENTAL GROUP WIELDS CEQA IN THE CALIFORNIA COURT OF APPEAL TO STRIKE DOWN IRRIGATION DISTRICT'S APPROVAL OF WATER CONSERVATION PROJECT

Oakdale Groundwater Alliance v. Oakdale Irrigation District, *Unpub.*, Case No. F076288 (5th Dist. Nov. 27, 2018).

Another project approval has fallen victim to noncompliance with the California Environmental Quality Act (CEQA). In *Oakdale Groundwater Alliance v. Oakdale Irrigation District*, California's Fifth District Court of Appeal, in an *unpublished* decision, upheld a decision that required the Oakdale Irrigation District (District) to vacate and set aside its approval of a water conservation project based on the District's failure to comply with CEQA.

In particular, the Court of Appeal held that the District violated CEQA by adopting a Negative Declaration—rather than an Environmental Impact Report (EIR)—despite substantial evidence that the project could have a significant impact on biological resources and air quality. The court additionally held that the District violated CEQA by failing to properly describe the entirety of the project and the project area's physical baseline conditions.

Background

The District sought to help landowners comply with the Water Conservation Act of 2009—which requires California to reduce urban water consumption by 20 percent by 2020—by proposing a project under which participating landowners within the District's service area would fallow up to 3,000 acres of farmland during the 2016 irrigation season, potentially conserving up to 9,000 acre-feet of water. The conserved water would then be transferred to San Luis & Delta-Mendota Water Authority and State Water Contractors in exchange for funds that the landowners would use to finance the implementation of water conservation measures on their fallowed land—*e.g.*, new pipelines, laser land leveling, tail-water recovery or pump-back systems, land conversions from high water use crops to lower water use crops, and conversion to higher efficiency irrigation systems (collectively: the Project).

In an effort to comply with CEQA, the District prepared an Initial Study/Negative Declaration (IS/ND) to examine the Project's potential environmental impacts. The District circulated the IS/ND for public comment pursuant to CEQA, and received a series of letters challenging the District's environmental conclusions and requesting that an Environmental Impact Report be prepared for the Project.

For example, a letter from the California Department of Fish and Wildlife (DFW) noted that the District had no basis for its conclusion that the Project would not adversely impact biological resources because the District did not prepare or rely upon any biological surveys for the project site. The District admitted that it had not relied on biological surveys, but responded that the burden should be on each landowner to conduct a biological survey on his or her land.

Certain members of Oakdale Groundwater Alliance (Alliance) further submitted a letter noting various violations of CEQA. Their letter explained that the IS/ND did not analyze the whole of the Project as it analyzed only the water transfer aspect of the Project, not the landowners' use of funds from conserved water to implement conservation measures. This letter also contended that the IS/ND's four-sentence analysis of air quality impacts was inadequate.

Unfazed, the District approved the Project and adopted the IS/ND. In response, the Alliance filed a petition for a writ of mandate directing the District to vacate and set aside its approval of the Project and to prepare an EIR. The trial court granted the petition and entered judgment in favor of the Alliance. The District appealed.

The Court of Appeal's Decision

The Court of Appeal held that the District violated CEQA because: 1) the District should have prepared an EIR for the Project; 2) the District's IS/ND did not sufficiently describe the Project as a whole; and 3) the IS/ND did not sufficiently describe baseline physical conditions.

Project Significant Environmental Impacts

CEQA requires a public agency to prepare and certify an EIR—rather than adopt a Negative Decla-

ration—when substantial evidence exists to support a "fair argument" that the project may have a significant effect on the environment. The Court of Appeal here held that the District abused its discretion when it adopted the IS/ND because there was substantial evidence supporting a fair argument that the Project could have a significant effect on biological resources and air quality. The District thus violated CEQA by failing to prepare an EIR for the Project.

With respect to biological resources, the Court of Appeal explained that the Department's letter detailing how various endangered species could be adversely impacted by the Project constituted substantial evidence sufficient to trigger an EIR. The court rejected the District's argument that each landowner should bear the burden of preparing biological surveys for his or her own property before implementing water conservation measures. The court explained that CEQA requires *the lead agency* to investigate potential environmental impacts and that an agency may not hide behind its own failure to gather relevant data. The court further explained that a fair argument that the project may have a significant impact may be based on the limited facts in the record where the lead agency fails to study an area of possible environmental impact.

The Court of Appeal similarly held that substantial evidence existed to support a fair argument that the Project could have significant air quality impacts, and refused to allow the District to hide behind its own failure to gather relevant data.

Analysis of the Entirety of the Project

An environmental document prepared under CEQA must describe "the entirety of the project, and not some smaller portion of it." This is because the adequacy of a project description is closely linked to the adequacy of the analysis of the project's environmental effects; if the description is deficient because it fails to discuss the entire project, the environmental analysis will likely reflect the same mistake.

The Court of Appeal here held that the District violated CEQA because the IS/ND's project description only described the water transfer component of the Project; it failed to discuss the water conservation measures to be carried out as part of the Project. The IS/ND's environmental analysis reflected this mistake, as the document's analysis of these conservation measures' environmental impacts was minimal—a fatal mistake under CEQA.

Description of Baseline Physical Conditions

CEQA requires a public agency to describe a project area's existing physical conditions—i.e., the environmental baseline—before determining a project's potential environmental effects. The environmental baseline is then compared to the anticipated physical conditions that would exist upon the project's completion to determine the nature and degree of a project's environmental impact.

The Court of Appeal held that the District's IS/ND was additionally fatally defective because it failed to sufficiently describe baseline physical conditions. For example, the IS/ND did not identify any of the endangered species documented to have been found within the District's service area. Similarly, while the IS/ND concluded that the Project would not change the baseline air quality conditions, the IS/ND failed to disclose exactly what constituted those baseline conditions. The Court of Appeal concluded that the IS/ND's inadequate description of the environmental baseline rendered a proper analysis of the Project's impacts impossible.

CEQA Claim Was Not Moot Even Though Project Approval Expired

On appeal, the District argued that this matter was moot because the one-year term of the Project had expired well before the appeal was heard. The Court of Appeal rejected this argument and held that the matter fell under certain discretionary exceptions to mootness. In particular, the court allowed appellate review to proceed because the case concerned important issues of broad public interest (*i.e.*, preservation of biological resources and air quality) that were likely to recur.

Conclusion and Implications

This case illustrates the paramount importance of properly defining a project under CEQA. The project definition will dictate the scope of an environmental document's analysis. Here, the District failed to include the Project's water conservation measures as part of its project description, and the District's environmental analysis proved fatally defective as a result. The court's *unpublished* opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/F076288.PDF

(Ali Tehrani, Steve Anderson)

OREGON COURT OF APPEALS RULES DEPARTMENT OF STATE LANDS MUST FIND PUBLIC NEED BEFORE ISSUING WETLAND REMOVAL FILL PERMIT

Citizens for Responsible Development in The Dalles v. Wal-Mart Stores, Inc., 295 Or.App. 310 (Or. App. 2018).

In *Citizens for Responsible Development in The Dalles*, the Oregon Court of Appeals reversed and remanded the decision of the Oregon Department of State Lands (DSL or the Department) to issue a wetland removal fill permit to Walmart®. Walmart sought to build a store on a 66-acre site in The Dalles, which required a removal fill permit because the site included just over two acres of wetlands.

Statutory Framework

The governing statute, ORS 196.825, provides in part:

> (1) The Director of the Department of State Lands shall issue a permit applied for under ORS 196.815 if the director determines that the project described in the application:
>
> Is consistent with the protection, conservation and best use of the water resources of this state as specified in ORS 196.600 to 196.905; and
>
> (b)Would not unreasonably interfere with the paramount policy of this state to preserve the use of its waters *for navigation, fishing and public recreation*. . . .
>
> (3) In determining whether to issue a permit, the director shall consider all of the following:
>
> The public need for the proposed fill or removal and the social, economic or other public benefits likely to result from the proposed fill or removal. When the applicant for a permit is a public body, the director may accept and rely upon the public body's findings as to local public need and local public benefit.

Permit Issuance and Departmental Appeal

Upon Walmart's application, DSL issued a removal fill permit with required mitigation. DSL's findings included that:

> . . the record is inconclusive with regard to whether the project, for which the fill or removal is proposed, will address a public need . . .[l]ikewise, the record is inconclusive regarding the social, economic or other public benefits that may result from the proposed project.

Petitioner Citizens for Responsible Development in The Dalles challenged the issuance of the permit and requested a contested case hearing. Petitioner argued DSL lacked the authority to issue the permit because the record was inconclusive as to whether the proposed project addressed a public need. The Administrative Law Judge issued a proposed order granting the permit, and the Department issued the final order granting it. Petitioner appealed.

The Court of Appeals Decision

The appellate court's analysis centered on the Oregon Supreme Court's decision in *Morse v. Oregon Division of State Lands*, 285 Or. 197 (1979). In that case, the court interpreted a prior version of the removal fill statute, ruling that "[i]n the absence of a finding that the public need predominates, there is no basis for the issuance of the permit." DSL argued *Morse* no longer controls because the text of ORS 196.825 requires only that DSL *consider* the public need for a proposed project. Petitioner countered that, although the statute has been amended since *Morse*, the legislature did not intend to alter the conclusion in *Morse* that the statute requires DSL to find a public need for a proposed project in order to grant a removal fill permit.

The court agreed with petitioner, citing a number of statements in the legislative history of the post-*Morse* statutory revisions indicating that the revisions were intended to codify the court's ruling in *Morse*. The court also found support in *1000 Friends of Oregon v. Division of State Lands*, 46 Or.App. 425 (1980).

In that case:

> . . .[r]elying on *Morse*'s construction of the statute, [the *1000 Friends* court] noted the agency had not found that the project satisfied a public need. . .[and]. . .reversed the order granting the permit.

As the *Citizens for Responsible Development* court explained:

> . . .[t]he fill and removal permit statute has been amended a number of times since 1979, but the operative language of the 1979 version of the statute and the current version is substantively equivalent. Implicit in the *1000 Friends* holding is the conclusion that the 1979 amendments codified the core holding in *Morse*.

DSL also argued the *Morse* holding was limited to estuarine fills, the type of fill at issue in that case. The court rejected that argument, as it did not see:

> . . .a persuasive reason that ORS 196.825 would treat wetland and estuarine fills differently when they are both treated the same in the statutory scheme as 'waters of the state.'

Finally, the court added, the Oregon Supreme Court's recent decision in *Coos Waterkeeper v. Port of Coos Bay*, 363 Or. 354 (2018), "does not undercut our conclusion about the import of *Morse* on the construction of ORS 196.825." Although the *Coos Waterkeeper* court concluded "that *Morse* does not bear on the construction of the term 'project' in ORS 196.825" that:

> . . .does not affect the core principle recognized in *Morse* and codified by the legislature in 1979, which requires DSL to find that the public need for a proposed project predominates before DSL has the authority to issue a wetland fill and removal permit for the project.

Conclusion and Implications

The court's ruling reiterates that DSL must make a finding of public need before issuing a wetland removal fill permit. Applicants should be sure to provide sufficient information in their permit application to enable DSL to make such a finding.
(Alexa Shasteen)

UTAH COURT OF APPEALS AFFIRMS THAT A MUNICIPALITY IS NOT CONSTITUTIONALLY OBLIGATED TO SERVE RESIDENTS OUTSIDE OF ITS BOUNDARIES

Salt Lake City Corp. v Haik, 2019 UT App 4 (Ut.App. Jan 10, 2018).

The Utah Court of Appeals has held that consistent with Article XI, § 6 of the Utah Constitution, a municipality is not obligated to provide service to those outside of its service district and has not deprived a resident of any rights in refusing to make sure deliveries. Additionally, the Court of Appeals held that use by another water user is not a defense to forfeiture in the absence of a lease or other agreement.

Factual and Procedural Background

The waters of Little Cottonwood Creek have a long and storied history. The facts in the present case stem from an attempt by several water users with rights in the South Despain Ditch (the Ditch) to move their water rights significantly upstream. Two of these users (Haik and Raty) filed change applications in an effort to obtain water service to lots they owned in the Albion Basin near Alta Ski Resort. The contemplated changes would convert these irrigation rights to year-round domestic rights.

Salt Lake City and Metropolitan Water District of Salt Lake and Sandy (collectively: the City) opposed these change applications as they felt they would interfere with the City's rights to the overwhelming majority of the flows of Little Cottonwood Creek. Particularly, the City contended that pursuant to an

agreement signed in 1934, the Ditch had granted the use of the majority of the non-irrigation and winter water to the City. In light of this agreement, the Utah Division of Water Rights declined to act on those change applications, as it could not interpret the agreement. These change applications remain unapproved.

Subsequently, the City filed a motion for partial summary judgment seeking a declaratory judgment that the subject water rights were forfeited due to non-use. Haik and Raty opposed this motion asserting, among other things, that the water had been used by other parties and that they had no opportunity to use the water at the point of diversion. However, neither Haik nor Raty provided evidence of an agreement or lease allowing some other party to use their allocations.

At the District Court

The District Court granted the City's motion declaring that "any portion of the [water right] acquired by [Haik and Raty] has been forfeited by nonuse." ¶ 16. Further, the court concluded that evidence of "diversion does not equal use, and does not support an inference of use." ¶ 17. Therefore, absent a lease or agreement, use by others was legally insufficient. *Id.* Haik and Raty have appealed this ruling.

Additionally, Raty filed several counterclaims asserting that the City had a constitutional obligation to provide her Albion Basin lot with water service. These claims were based upon Article XI, § 6 of the Utah Constitution, which requires municipalities to operate the water it controls for "supplying its inhabitants with water at reasonable charges." Utah Const. Art XI, § 6. Additionally, she asserted violations of due process and equal protection. *See id.* Art I, §§ 7 and 24. Finally, she asserted that the City's provision of water outside of its city limits should be regulated by the Public Service Commission.

The City moved to dismiss these claims asserting that they failed to state a claim upon which relief could be granted. The District Court granted this motion to dismiss. The District Court held that Raty was not an "inhabitant" of Salt Lake City as required to receive protection under Article XI, § 6. Further, the court concluded that Raty had not been unequally treated and did not have a protectable property interest. Finally, the court rejected the theory that the City was subject to public regulation. Raty appealed these decisions.

The Court of Appeals' Decision

The Utah Court of Appeals reviewed each of the issues on appeal and ultimately affirmed the decision of the District Court. Of particular interest, is the court's analysis of both the question of forfeiture and also that of the constitutional protections. These decisions have broad implications for water users and also those seeking to obtain water outside of municipal city limits.

The Forfeiture Claim

In Utah, a water right is subject to forfeiture:

> . . .[w]hen an appropriator or the appropriator's successor in interest … ceases to use all or a portion of a water right for a period of seven years…. Utah Code Ann. § 73-1-4-(2)(a).

In the present case, the District Court held that "straightforward facts" showed a complete lack of use from 2003 to the present time. Raty and Haik provided no evidence of their use, but rather relied upon evidence showing that the water right was diverted to the Ditch, and testimony that the diverted water was used by others. ¶ 46.

The Court of Appeals noted that this evidence is "legally insufficient," because the forfeiture statute states that a right is subject to forfeiture when the unused water is "permitted to run to waste" or "beneficially used by others without right with the knowledge of the water right holder." Utah Code Ann. § 73-1-4(2)(d)(i)-(ii). Accordingly, the court concluded that use by others will save a water right holder from forfeiture only when such use is:

> . . .according to a lease or other agreement with the appropriator or the appropriators' successor in interest. Id. at § 73-1-4(2)(e)(i).

Consequently, the lack of actual use or an agreement for use by another water user was fatal to Haik and Raty's defense. Notwithstanding the foregoing, the court left open the question of whether a water right held by multiple owners may be insulated from forfeiture if one of the parties uses the other's water

without agreement. This is of particular relevance to mutual water companies and/or other associations that hold water for multiple shareholders or owners.

The Constitution Claim

Further, the Court of Appeals ruled that Article XI, § 6 of the Utah Constitution does not create a "legal duty to provide water service to all members of the public." *Thompson v. Salt Lake City Corp.*, 724 P.2d 958, 959 (Utah 1986). Rather, because that provision mentions only "inhabitants", the duty does not extend to "others beyond the limits of the city." *Platt v. Town of Torrey*, 949 P.2d 325, 329 (Utah 1997) (quotation simplified). Raty asserted that she was an "inhabitant" of Salt Lake City, citing to the fact that her lot was "part of [the City's] established municipal service area."

In rejecting this argument, the court noted approved change applications near the Raty lot "empowered," but did not obligate the City to deliver water in that area. Further, in Utah, a municipality's decision not supply water to non-residents is permissive. Utah Code Ann. § 10-8-14(1)(d). Accordingly, the Court of Appeals held that the City's decision to supply water to people beyond its city limits does not create a constitutional obligation to serve all those within the approved service area. *See, Platt*, 949 P.2d at 328 - 330. Ultimately, the court noted that such an obligation would cut against the purpose of Art XI, § 6, which is designed to ensure sufficient water is available for the continued growth of a municipality.

Due Process and Equal Protection Claims

Finally, the court analyzed Raty's due process, equal protection and Public Service Commission claims. The Court of Appeals denied the due process claim as Raty did not have a protectable interest in receiving water (based upon the Article XI, § 6 analysis). As such, she could not have been deprived of that property without due process. Similarly, the court dismissed the equal protection claim because Raty, as a class of one, did not establish that the City had a, requisite, "totally illegitimate animus" towards her. *See, Brian Head Dev., LC v. Brian Head Town*, 2015 Utah App 100, ¶ 9.

Conclusion and Implications

This case addresses two interesting points for water users and water practitioners. First, the Court of Appeals held that in order to protect a water right from forfeiture, an appropriator must take an affirmative step to lease or enter into some other agreement to allow another person the use of her water. Thus, the simple fact that water is diverted and used by a downstream party is insufficient to protect a water right from forfeiture arising from nonuse.

Second, this decision clarifies the obligations of municipalities with regard to the delivery of water outside of its municipal boundaries. This allows municipalities to regulate and limit growth in certain areas, such as critical watersheds. Additionally, it relieves the municipality of the obligation to construct expensive infrastructure necessary to serve individuals outside of its municipal boundaries.

The Utah Court of Appeals Decision may be found at: https://www.utcourts.gov/opinions/appopin/Salt%20Lake%20City%20Corp.%20v.%20Haik20190110_20170238_4.pdf
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