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EASTERN WATER LAW™

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EWL

EASTERN WATER NEWS

FLORIDA MAKES SCIENCE PARAMOUNT IN WATER RESOURCES, WATER QUALITY AND SEA LEVEL RISE CONCERNS

Florida's Governor Ron DeSantis, on the campaign trail, has been pushing for improvements to water resources and water quality improvements throughout the state. The Governor has now, via Executive Order, created a "Science Officer" who will be charged with these tasks. He also will soon create the position of Chief Resilience Officer to address other related issues like sea level rise from climate change.

Background

In the six months since he took office Florida's Governor, Ron DeSantis, has surprised many Floridians by backing his campaign expressions of concern about the importance of environmental protection with pledges to expend upwards of $2.5 billion on projects to preserve Lake Okeechobee and improve the state's water quality and water resources.

The Office of Environmental Accountability

The Governor had spoken of putting science as the basis on which program decisions would be made. In April he appointed the first-ever Science Officer for the state. The man he chose for the role is Dr. Thomas K. Frazer. Dr. Frazer will lead the newly established Office of Environmental Accountability and Transparency within the State's Department of Environmental Protection.

According to the DeSantis administration:

> Dr. Frazer will guide funding and strategies to address priority environmental issues, as well as, but not limited to, making recommendations for increased enforcement of environmental laws necessary to improve water quality within key waterbodies.

Dr. Frazer, a water ecologist, formerly was the Director of the University of Florida's School of Natural Resources and Environment. And formerly served as Acting Director of the UF Water Institute. Before this position, he served as Associate Director of the School of Forest Resources and Conservation and the Leader of the Fisheries and Aquatic Sciences Program. At UF, his research focused on the effects of anthropogenic activities on the ecology of both freshwater and marine ecosystems.

On May 17, the DEP invited Florida journalists to a press briefing in order to ask questions of Dr. Frazer. Together with Noah Valenstein, the Director of Department of Environmental Protection, Frazer indicated that one of the most important priorities for him is mitigating the problem of algae in Florida's waters. He noted the Governor's program establishes a Blue-Green Algae Task Force, charged with focusing on expediting reduction of the adverse impacts of blue-green algae blooms. This task force of a half dozen or so experts will identify priority projects for funding that are based on scientific-data. There will be a push to acquire more data immediately through existing restoration programs in order to facilitate informed decision-making by the Task Force in formulating an effective plan.

Clean Air, and Climate Change-Related Sea Level Rise

When asked whether greenhouse gases are a priority, both Dr. Frazer and Director Valenstein responded that sea level rise is a priority, but that the main focus of the Department of Environmental Protection is on nitty-gritty clean air and clean water issues. Valenstein noted that a separate position, "Chief Resilience Officer," will be filled soon by the Governor once applications for it are fully reviewed. That position, through a beefed-up Division of Coastal Protection will focus on improving coastal resilience.

Small Strategic Projects

Dr. Frazer indicated that the $680 million available this year from the legislative session just ended will help jump-start a number of small but strategically important projects around the state, to begin the restoration process for water bodies affected by the blue-

green algae. The Task Force is expected to convene in June. It will formulate longer term strategy recommendations. It will be meeting in a venue where the public is able to attend.

Conclusion and Implications

Dr. Frazer and the DeSantis administration will have to deal with resistance from Florida's water management districts. These regional districts throughout the state have the direct authority to manage the flow of water and its availability. The Governor has already clashed with some district officials regarding the need to immediately build additional reservoir capacity near Lake Okeechobee to assure freshwater availability for future drinking water needs of the population. The administration wishes to see two new reservoirs constructed, but actions of the South Florida Water Management District have, so far, been contrary to that vision. The Governor has asked for resignations of some commissioners, including a number appointed by his predecessor, Rick Scott. His Executive Order urged better transparency and accountability from the Water Districts. A copy of the DeSantis Executive Order on the priority of water quality efforts can be found at https://www.flgov.com/wp-content/uploads/orders/2019/EO_19-12.pdf
(Harvey M. Sheldon)

NEWS FROM THE WEST

In this month's News from the West we cover ongoing efforts by the State of California to catalog and characterize its many groundwater basins. The process allows the worst the basins—those deemed critically overdrafted—to have a priority status with the goal of establishing a reasonable, workable sustainability plan as required by the states' Sustainable Groundwater Management Act.

We also cover a decision out of the Supreme Court of Colorado clarifying Water Court jurisdiction for change applications. In Colorado, the Water Courts are the first judicial step in determining and adjudicating water rights.

California Department of Water Resources Announces Phase 2 Draft Basin Prioritization

In April, the California Department of Water Resources (DWR) released its second phase of groundwater basin prioritizations. The new prioritizations implicate the applicability of the Sustainable Groundwater Management Act to local agencies within certain priority basins, including the need to develop Groundwater Sustainability Plans or alternative plans to sustainably manage groundwater within certain groundwater basins in the state. The Department of Water Resources has provided a 30-day public comment period for interested parties to submit comments on the second phase of basin prioritizations. [*See:* DWR Announces Draft Basin Prioritization under SGMA for 57 Modified Basins, available at https://water.ca.gov/News/News-Releases/2019/April/DWR-Announces-Draft-Basin-Prioritization--under-SGMA-for-57-Modified-Basins]

Background

The California Sustainable Groundwater Management Act (SGMA), which went into effect in January 2015, requires that the Department of Water Resources (DWR) prioritize all groundwater basins by Jan. 31, 2015, and every time Bulletin 118 basin boundaries are updated or modified. Basins are prioritized as either high-, medium-, low-, or very low-priority, based on the components listed in the California Water Code § 10933(b).

A basin's priority informs which provisions of SGMA and the California Statewide Groundwater Elevation Monitoring (CASGEM) apply to that particular basin. CASGEM is a groundwater monitoring tool developed in 2009 to track seasonal and long-term groundwater elevation trends statewide. When SGMA went into effect in 2015, DWR used the 2014 CASGEM Basin Prioritization as the initial SGMA basin prioritization. Shortly after the passage of SGMA, 54 requests for groundwater basin boundary modification were submitted to the DWR. In 2016, DWR completed and released groundwater basin boundary modifications (Bulletin 118 – Interim Update 2016), and in 2018, DWR released the draft basin prioritization results for all 515 California groundwater basins (2018 Draft Boundary Modifications).

Phase 1 and Phase 2 Basin Prioritization Process

After the DWR released the Bulletin 118 – Interim Update 2016, several other requests for groundwater basin boundary modification were submitted for DWR review, which prompted DWR to initiate a two-phase basin prioritization process to reassess the priority of groundwater basins in accordance with SGMA requirements.

DWR finalized and released the "SGMA 2019 Basin Prioritization Phase 1" in January 2019. The SGMA 2019 Basin Prioritization Phase 1 focused on the 458 basins that were not affected by the 2018 Draft Boundary Modifications. Under the SGMA 2019 Basin Prioritization Phase 1, 25 basins were assigned as high priority, 31 as medium priority, nine as low priority and 393 basins as very low priority.

The final version of the 2018 Draft Boundary Modifications was released in February 2019 (2018 Final Boundary Modifications), affecting 57 basins, including 53 that were previously modified and approved, as well as two that were not approved by DWR as part of the 2018 Draft Boundary Modifications.

In April 2019, DWR released a draft version of the second basin prioritization phase (SGMA 2019 Basin Prioritization Phase 2). This draft covers the remaining 57 basins, which includes the subdivision of the San Luis Rey Valley Groundwater Basin into an upper and lower sub-basin when Assembly Bill 1944 was approved by then Governor Jerry Brown in September 2018. Under the draft SGMA 2019 Basin Prioritization Phase 2, 22 basins were designated as high priority, 16 as medium, two as low priority and 17 basins as very low priority. According to DWR, the priority designation for 75 percent of the basins prioritized in SGMA 2019 Basin Prioritization Phase 2 remains the same as the 2015 designation.

The prioritization affects which SGMA requirements apply to a basin, including the deadline by which a Groundwater Sustainability Plan (GSP) must be submitted to the DWR. Under SGMA, previously identified critically overdrafted high and medium priority basins in Bulletin 118 – Interim Update 2016 are required to submit a GSP by January 31, 2020. The remaining high and medium priority basins are required to submit a GSP by January 31, 2022. In light of SGMA 2019 Basin Prioritization Phase 2, 38 basins are required to develop GSPs, while 12 will not.

Following release of the prioritizations, DWR opened a 30-day comment period ending May 30 to receive input from the public, and held a public meeting on May 13 for that same purpose. The basin prioritization results under this second phase are expected to be finalized in early summer 2019.

Groundwater basins that were previously categorized as low- or very-low priority and that are *newly* identified as high or medium priority are required to form a Groundwater Sustainability Agency (or submit an alternative to GSP) within two years from the date the SGMA 2019 Basin Prioritization Phase 2 prioritization is finalized, and are required to submit a GSP five years from that date. GSPs are optional for basins prioritized as low or very low priority.

Conclusion and Implications

Because basin prioritizations affect the applicability of SGMA to any given basin, DWR's newly released prioritizations could have a significant impact on basins that are designated as high or medium priority. It is unclear whether the public comment period ending May 30 will affect basin prioritizations, but it is likely that interested parties for high or medium priority basins will submit commentary. Once basin prioritizations are finalized, local agencies will begin developing applicable GSPs or alternative plans to ensure compliance with SGMA within the coming years. (Maya Mouawad, Steve Anderson)

Colorado Supreme Court Clarifies Stance on Resume Notice, Water Court Jurisdiction

Sheek v. Brooks, 2019 CO 32 (Colo. 2019).

The Colorado Supreme Court recently upheld a Water Court's decision in a case that clarified the required resume notice for Colorado Water Court cases. The High Court's decision also addressed the subject-matter jurisdiction of district-level Water Courts.

Background

Roger Brooks filed a change application in Water Court in 2008. In that application, he requested to change the point of diversion for his water from the Giles Ditch to the Davenport Ditch because the location of the property made him unable to use water diverted at the Giles Ditch. In Colorado, all Water Court applications are required to be published—

called "resumes"—in a local paper. C.R.S. § 37-92-302(3). The resume must contain pertinent information such as to:

> . . put interested parties 'to the extent reasonably possible on inquiry notice of the nature, scope, and impact of the proposed diversion.' *Monaghan Farms, Inc. v. City & Cty. of Denver By & Through Bd. Of Water Comm'rs*, 807 P.2d 9, 15 (Colo. 1991) (quoting *Closed Basin Landowners Ass'n v. Rio Grande Water Conservation Dist.*, 734 P.2d 627, 633 (Colo. 1987)).

Typically, this information includes the legal description for the point of diversion, the source (traced to the principal basin river), the appropriation date, and use of the water, among other things. Brooks's resume included all of the necessary information, however the legal description of the headgate for the Davenport Ditch, where the water would be changed to, listed in the incorrect section and range. The mistake was realized four months later, and Brooks moved to amend the application to change the description from "NE ¼ of the SE ¼ of Section 13, Township 36N, Range 13W" to "NW ¼ of the SW ¼ of Section 18, Township 36S, Range 12W." The motion noted that the headgate was essentially on the section line (the east line of Section 13 and the west line of Section 18) and therefore the actual change in the legal description was only 100 feet.

The Water Court granted the motion, finding that "no person [would] be injured by the amendment." The only objector to the application was the Colorado Water Conservation Board (CWCB). Stipulation was later reached with the CWCB and the court entered a decree granting the change in point of diversion on December 23, 2009.

Fast forward to 2016 and Gary Sheek, the Sheek Family Limited Partnership, and Pamsey I. Sheek (Sheek) filed a complaint in the Water Court seeking: 1) declaratory judgment that Brooks's change decree was void; 2) quiet title to an access easement for the Davenport Ditch; 3) trespass; 4) theft and interference with a water right; and 5) injunctive relief. Although Sheek did not own the land underlying the Davenport Ditch headgate (that land was owned by the James Fenberg Revocable Trust, to which Brooks had provided notice in 2008) but rather Sheek claimed sole ownership of all Davenport Ditch water rights. He also claimed to have "exclusively operated, maintained, and repaired the headgate and the ditch."

In response, Brooks filed a motion for summary judgment on the first claim and a motion to dismiss the other four claims. The Water Court for Division No. 7 granted both motions, stating that Brooks's resume was sufficient to meet the standards of C.R.S. § 37-92-302(3) and therefore the decree was valid. The order granting the motion to dismiss noted that, because of the decree, Brooks had a right to use the Davenport Ditch and therefore claims for trespass and injunctive relief were moot. The court then held that it lacked ancillary jurisdiction over the other two claims. Sheek then appealed—in Colorado Water Court appeals skip the Court of Appeals and go straight to the Colorado Supreme Court.

The Supreme Court's Decision

The Colorado Supreme Court affirmed the Water Court's ruling that Brooks's resume notice was sufficient. The court also upheld the dismissal of the remaining four claims; However the Supreme Court ruled that those claims should have been dismissed by the Water Court for lack of subject matter jurisdiction.

Resume Notice

Turning first to the resume notice, the court recited that:

> To meet the standard, a resume notice must include "fact sufficient to attract the attention of interested persons and prompt a reasonable person to inquire further." *Monaghan Farms*, 807 P.2d at 15; *see also City of Black Hawk v. City of Central*, 97 P.3d 951, 959-61 (Colo. 2004). Thus, a resume notice is defective only if, "taken as a whole [, it] is insufficient to inform or put the reader on inquiry of the nature, scope [,] and impact of the proposed diversion." *Monaghan Farms*, 807 P.2d at 15. We have explained that "[i]n cases where notice was inadequate, the applicants' filings were 'characterized by the complete absence of material information concerning the dispute water rights.'" *City of Black Hawk*, 97 P.3d at 959 (quoting *City of Thornton v. Bijou Irrigation*, 926 P.2d 1, 26 (Colo. 1996)).

As mentioned above, Brooks's resume included all pertinent information, with the exception of the erroneous legal description for the Davenport Ditch headgate. However, the resume did mention the Davenport Ditch by name five times, including once in bold font. As the court noted, sufficiency of resume notice is fact-specific inquiry particular to each specific case. Here, Sheek claimed to be the only user of the Davenport Ditch and the application specifically stated that the change was to be from the Giles Ditch to the Davenport Ditch. Therefore, the court ruled, Sheek couldn't possibly argue that he did not have adequate notice of Brooks's proposed change.

Erroneous Legal Description

Regarding the erroneous legal description, Colorado Water Rule 4 generally requires republication of a resume if the correction results in a change to a different quarter section. But subsection (c) of Rule 4 provides that the water judge may determine that republication is not necessary if no injury will result—as mentioned above the Water Court made that finding in 2008. This resulted in a rather clear decision, the Supreme Court ruled, that Brooks's resume was sufficient and therefore the granting of the motion for summary judgment was proper.

Subject Matter Jurisdiction

The Supreme Court then took an interesting angle on dismissing the remaining four claims, finding that the Water Court in 2016 should have dismissed the claims for lack of subject matter jurisdiction. The Colorado Water Courts have jurisdiction over "water matters" under C.R.S. § 37-92-203, and also over "issues ancillary to water matters." *Crystal Lakes Water & Sewer Ass'n v. Backlund*, 908 P.2d 534, 543 (Colo. 1996). That being said, property issues, such as the claims for trespass or theft, are not considered ancillary to water matters and instead are in issue more proper for a regular District Court. *FWS Land & Cattle Co. v. Colo. Div. of Wildlife*, 795 P.2d 837, 841 (Colo. 1990). Therefore, instead of dismissing the claims for mootness, the Supreme Court affirmed the dismissal, but on the grounds of lack of subject matter jurisdiction.

Conclusion and Implications

It is surprising that this case was appealed to the Colorado Supreme Court, as the factual circumstances, statutory standards, and accompanying case law were relatively straightforward. The court affirmed the leniency of the resume notice standard—it does not have to be perfect so long as any interested party would be placed on sufficient notice. Finally, the court, for the second time in 2019, further clarified "water matters" and the jurisdiction of Water Courts. The Supreme Court's decision is available online at: https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Opinions/2018/18SA110.pdf (John Sittler, Paul Noto)

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

•April 15, 2019—The U.S. Environmental Protection Agency (EPA) announced that StarKist Co. and its subsidiary, Starkist Samoa Co., will be assessed $84,500 in penalties for violating the terms of a 2018 settlement designed to remedy deficiencies at their tuna processing facility in American Samoa to achieve environmental compliance. StarKist violated the 2018 settlement on multiple occasions when it made unauthorized discharges from the facility to Pago Pago Harbor, including one incident where StarKist discharged 80,000 gallons of wastewater to the inner harbor. The company also violated the consent decree terms on 27 days when wastewater was routed around one of the required treatment measures to bypass a step in the wastewater treatment process. Under the 2018 settlement, StarKist paid a $6.5 million penalty to resolve violations of federal environmental laws. The company was also required to make upgrades to reduce water pollution and the risk of releases of hazardous substances. In addition, StarKist agreed to provide American Samoa with $88,000 in emergency equipment for responding to chemical releases. Starkist Samoa Co. owns and operates the tuna processing facility, located on Route 1 on the Island of Tutuila in American Samoa. Starkist Samoa Co. is a subsidiary of StarKist Co., which is owned by Korean company Dongwon Industries. StarKist Co. is the world's largest supplier of canned tuna. Its American Samoa facility processes and cans tuna for human consumption and processes fish byproducts into fishmeal and fish oil.

•April 29, 2019—The U.S. Environmental Protection Agency (EPA) has reached an agreement with Asanuma Kokuba Joint Venture and Nippo USA Inc. to resolve stormwater violations from their Hotel Nikko expansion—the Tsubaki Tower project—which lacked controls to prevent discharge of pollutants into Tumon Bay and the Pacific Ocean in Guam. An EPA inspection found the project's construction companies were operating without the required Clean Water Act Stormwater Construction General Permit and had an unauthorized non-stormwater discharge from the construction site at the time of inspection. EPA also found that the best management practices that were in place to control the discharge of stormwater were not properly implemented. The companies will pay a settlement of $129,048 and have already obtained the proper permit and corrected the site's stormwater controls. Many construction sites have operations that disturb soil and include areas for maintenance and cleaning of equipment. Rainfall runoff flowing through such sites can pick up pollutants, such as sediment, metals from exposed steel, and other chemicals found in construction products, and transport them directly to nearby waterways, degrading water quality and damaging coral reefs. Federal regulations require construction sites to obtain coverage under EPA's Stormwater Construction General Permit by implementing best management practices to keep pollutants out of stormwater, preventing non-stormwater discharges from the site, and following a site-specific stormwater pollution control plan. The settlement is subject to a 30-day comment period before becoming final.

•April 25, 2019—The U.S. Environmental Protection Agency (EPA) reached a settlement agreement with Denbury Onshore, LLC to resolve federal Clean Water Act (CWA) and Oil Pollution Act (OPA) violations in Alabama and Mississippi. The State of Mississippi is a co-plaintiff under the consent decree in which Denbury has agreed to implement an extensive injunctive relief package, including a risk-based program designed to prevent

future oil spills, and pay a civil penalty of $3.5 million. Denbury is the owner and operator of onshore oil production facilities located in the Gulf Coast and Rocky Mountain regions of the United States. Denbury's facilities in Region 4 are in Alabama and Mississippi. The company's business model involves acquiring older oil fields and extending the life of the fields using advanced engineering extraction techniques. EPA is pursuing penalties for 26 CWA discharges that occurred between August 8, 2008 and November 11, 2015 and resulted in approximately 7,000 barrels of oil and produced water discharged to the environment. The 26 violations took place at ten different Denbury facilities in Region 4—one facility in Alabama and nine facilities in Mississippi. Most of the discharges were the result of internal corrosion of pipes and flow lines, breaks in old lines, and failed equipment.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•April 18, 2019— The U.S. Environmental Protection Agency (EPA) and the Department of Justice announced a settlement with Honeywell International Inc. and International Paper Co. for cleanup of contaminated soils and sediments at the LCP-Holtrachem plant in Riegelwood, Columbus County, North Carolina. The United States brought its action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as the Superfund Law, and the Resource Conservation and Recovery Act (RCRA). The LCP-Holtrachem Superfund Site is about 24 acres adjacent to the Cape Fear River at 636 John Riegel Road. From 1963 to 2000, the LCP-Holtrachem plant made chemicals such as sodium hydroxide, liquid chlorine, hydrogen gas, liquid bleach and hydrochloric acid using a mercury cell process. According to the complaint filed simultaneously with the settlement today in the Eastern District of North Carolina, the Honeywell and International Paper are liable for historic industrial discharges of metals, including mercury, and polychlorinated biphenyls (PCBs) at the site. Under the proposed settlement, Honeywell and International Paper will address contaminated soils and sediments through a combination of in-situ treatment, on-site storage, and off-site treatment and disposal. The two companies will also reimburse the United States for all past and future costs associated with the cleanup. In exchange, the two companies will receive a covenant not to sue and protection from suit by third parties. The two companies previously performed investigations and preliminary cleanup work under prior agreements with EPA. EPA uses the Superfund Alternative Approach (SAA) for the site, so it has not been proposed for addition to the National Priorities List (NPL). Under the SAA, EPA uses the same investigation and cleanup process and standards it uses for NPL sites, and saves the time and resources associated with NPL listing. Honeywell is the current owner of the site, which is contiguous to about 1,300 acres of land owned by International Paper. Since 1951, International Paper has operated a bleached kraft paper mill there, which manufactures paperboard from wood fiber. International Paper used many of the chemicals manufactured at the LCP-Holtrachem plant. Hazardous substances from the LCP-Holtrachem plant were disposed of at the International Paper property and are being addressed under the settlement. The consent decree is subject to a 30-day public comment period and final approval by the court.

•May 15, 2019—the U.S. Environmental Protection Agency (EPA) announced an agreement with TFL, Inc., also known as Mega Saver and Tobacco and Phones 4 Less, to pay a civil penalty and upgrade spill monitoring and alarm systems at its gas stations in the Omaha, Nebraska, and Council Bluffs, Iowa, area for violations of the Underground Storage Tank provisions of the Resource Conservation and Recovery Act. TFL, Inc., will pay a penalty of $16,448. In addition to the penalty, the company also agreed to spend $133,000 to upgrade the monitoring and alarm systems at each of its 23 gas stations in the greater Omaha and Council Bluffs area. The new systems will enable fuel leaks at any of these facilities to be reported directly to a central location so an immediate response to the release can be directed. Inspections conducted in 2016 by EPA revealed that at nine gas stations owned by TFL, Inc., the company failed to conduct required inspections or keep records concerning equipment designed to detect leaks from underground storage tanks (USTs) containing gasoline and other petroleum products. The inspections also revealed that TFL, Inc., failed to properly maintain overfill protection at two facilities. Overfill protection is designed to prevent gasoline spills

when being pumped into USTs at a gas station. This enforcement action is the result of repeated violations over several years. TFL, Inc., has until March 21, 2020, to complete the upgrade to the monitoring and alarm systems.

Indictments, Convictions and Sentencing

• April 15, 2019— A judgement was entered holding 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. 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 U.S. Environmental Protection Agency (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 clean-up 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. Cohen and LAI were ordered to pay restitution to the EPA of $105,816.

• April 23, 2019—A federal grand jury in Wilmington, Delaware, returned a six-count indictment today charging Chartworld Shipping Corporation, Nederland Shipping Corporation, and Chief Engineer Vasileios Mazarakis with failing to keep accurate pollution control records, falsifying records, obstruction of justice, and witness tampering, the Justice Department announced. The charges stem from the falsification of records and other acts designed to cover up from the Coast Guard the overboard discharges of oily mixtures and machinery space bilge water from the Bahamian-flagged cargo vessel, M/V Nederland Reefer. According to the indictment, on Feb. 21, 2019, the M/V Nederland Reefer entered the Port of Delaware Bay with a false and misleading Oil Record Book available for inspection by the U.S. Coast Guard. The Oil Record Book failed to accurately record transfers and discharges of oily wastewater on the vessel. The vessel's management company, Chartworld Shipping Corporation, the vessel's owner, Nederland Shipping Corporation, and the Chief Engineer of the vessel, Greek national Vasileios Mazarakis, are all charged with failing to maintain an accurate oil record book as required by the Act to Prevent Pollution from Ships, a U.S. law which implements the International Convention for the Prevention of Pollution from Ships, commonly known as MARPOL. The defendants were also charged with falsification of records, obstruction of justice, and witness tampering for destroying evidence of the illegal discharges and directing lower level crew members to withhold evidence from the Coast Guard. Finally, the corporate defendants are charged with the failure to report a hazardous condition to the Coast Guard, namely a breach in the hull of the vessel and resulting incursion of seawater into tanks on board the vessel that occurred before the vessel came to port in Delaware.

•May 3, 2019— Two Greek shipping companies, Avin International LTD and Nicos I.V. Special Maritime Enterprises, were sentenced in the Eastern District of Texas on charges stemming from several discharges of oil into the waters of Texas ports by the oil into the waters of Texas ports by the oil tanker *M/T Nicos I.V.* Avis International was the operator and Nicos I.V. Special Maritime Enterprises was the owner of the *Nicos I.V.*, Which is a Greek-flagged vessel. The Master of the *Nicos I.V.*, Rafail-Thomas Tsoumakos, and the vessel's Chief Officer Alexios Thompopoulos, also pleaded guilty to making material false statements to members of the United States Coast Guard during the investigation into the discharges. Both companies pleaded guilty to one count of obstruction of an agency proceeding, one count of failure to report discharge of oil under the Clean Water Act, and three counts of negligent discharge of oil under the Clean Water Act on November 26, 2018. Under the plea agreement, the companies will pay a $4 million criminal fine and serve a four-year term probation, during which vessels operated by the companies will be required to implement an environmental compliance plan, including inspections by an independent auditor. The Master and Chief Officer both pleaded guilty to one county of making a material false statement and were sentenced to pay fines of $10,000 each. According to documents filed in court, the Nicos I.V. was equipped with a segregated ballast system, a connected series of tanks used to control the trim and list of the vessel by taking on or discharging water, the latter involving an operation called deballasting. At some point prior to July 6, 2017, the ballast system of the Nicos I.V. became contaminated with oil and that oil was discharged twice from the vessel into the Port of Houston on July 6 and July 7, 2017, during deballasting operations. Both Tsoumakos and Thomopoulos were informed of the discharges of oil in the Port of Houston. Tsoumakos failed to report the discharges, which, as the person in charge of the vessel, he was required to do under the Clean Water Act. Neither discharge was recorded in the vessel's oil record book, as required under MARPOL and the Act to Prevent Pollution from Ships. After leaving the Port of Houston, en route to Port Arthur, Texas, oil was observed in several of the ballast tanks. After arriving in Port Arthur, additional oil began bubbling up next to the vessel, which was then reported to the U.S. Coast Guard. During the ensuing investigation, both Tsoumakos and Thomopoulos lied to the Coast Guard, stating, among other things, that they had not been aware of the oil in the ballast system until after the discharge in Port Arthur, and that they believed that the oil in the ballast tanks had entered them when the vessel took on ballast water in Port Arthur. (Andre Monette)

REGULATORY DEVELOPMENTS

EPA ISSUES INTERPRETIVE STATEMENT ON APPLICATION OF THE CLEAN WATER ACT TO POINT SOURCE DISCHARGES TO GROUNDWATER

The U.S. Environmental Protection Agency (EPA) issued a statement (Statement) interpreting the application of the federal Clean Water Act's (CWA) National Pollutant Discharge Elimination System (NPDES) permit requirements to point sources that discharge through hydrologically connected groundwater. The Statement repudiates the "direct hydrologic connection" theory EPA advanced fewer than three years earlier in the Ninth Circuit in *County of Maui v. Hawaii Wildlife Fund et al.*, 886 F.3d 737 (9th Cir. 2018), petition granted Case No. 18-260 (Feb. 19, 2019) (*Maui*). [84 Fed. Reg. 16,810 (Apr. 23, 2019).]

Background

Relevant to EPA's Interpretive Statement, § 301 of the CWA prohibits the discharge of any pollutant by any person except pursuant to an NPDES permit. "Discharge of a pollutant" means:

> (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft . . . [and] . . .navigable waters. . .[as]. . .the waters of the United States, including the territorial seas. *Id.* § 1362(7), (12).

Historically, NPDES permit programs have not applied to most discharges to groundwater. In *Maui*, however, the Ninth Circuit determined the County of Maui was required to obtain an NPDES permit for injection wells that discharged to groundwater where the groundwater had a direct hydrologic connection to the Pacific Ocean and the pollutants were "fairly traceable" from the wells to the ocean "such that the discharge [was] the functional equivalent of a discharge into the navigable water." In its *amicus* brief in *Maui*, EPA urged the Ninth Circuit to reach this ruling, reiterating its "longstanding position" that a discharge from a point source to jurisdictional surface waters that moves through groundwater with a direct hydrological connection comes under the purview of the CWA's permitting requirements.

In February 2018, only 20 days after the Ninth Circuit issued its opinion in *Maui*, EPA solicited comments on whether it should consider clarifying or revising its position on the direct hydrologic connection theory of liability. Later in 2018, the Fourth Circuit Court of Appeals issued a decision aligned with *Maui*, and the Sixth Circuit issued two decisions rejecting the Fourth and Ninth circuits' analysis.

On February 19, 2019, the U.S. Supreme Court granted the County's petition for *certiorari* in *Maui* on the question of:

> . . .[w]hether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.

EPA's Interpretative Statement

On April 23, 2019, the EPA released its Interpretive Statement concluding that the CWA does not regulate the discharge of pollutants to groundwater. In explaining this conclusion, EPA reviewed the CWA's structure, text, legislative history, case law, and public policy, finding that each supports its interpretation.

On structure, EPA noted that:

> . . .[t]he CWA approaches restoration and protection of the Nation's waters as a partnership between states and the federal government, assigning certain functions to each in striking the balance of the statute's overall regulatory scheme.

Specifically, the CWA governs discharges from a

point source, defined as "any discernible, confined and discrete conveyance," while Congress reserved the regulation of nonpoint source pollution exclusively to the states.

Holistic Approach in Reading Section 301

As to text, EPA explained that a "holistic approach" is necessary, and § 301's broad prohibition against the discharge of pollutants to jurisdictional waters must be read in the context of the specific provisions dealing with groundwater. The CWA generally describes four categories of waters: navigable waters, waters of the contiguous zone, the ocean, and groundwater, and that the CWA's operative NPDES regulatory provisions only apply to the first three. In contrast, the CWA's provisions related to groundwater pertain to EPA providing information, guidance, and funding to states in order to enable states to regulate groundwater pollution. EPA also relied on the fact that Congress left groundwater out of the definition of "effluent limitations," and the important role effluent limitations occupy in NPDES permit programs.

In discussing the CWA's legislative history, EPA focused on the numerous instances in which Congressmen and Senators acknowledged the hydrological connection between surface water and groundwater, but nonetheless rejected amendments that would have explicitly brought discharges to groundwater under the NPDES program.

Case Law

Regarding relevant case law, EPA acknowledged the view expressed in the Interpretive Statement is difficult, if not impossible, to reconcile with its previous positions. Addressing its earlier support for the direct hydrologic connection theory in *Maui*, EPA explained that its amicus brief failed to take into account Congress' unique treatment of groundwater in the CWA when interpreting the definition of discharge of a pollutant and improperly equated releases of pollutants to groundwater with releases of pollutants from a point source to surface water that occur above ground. EPA further reasoned that the CWA and its legislative history indicate Congress intended all discharges to groundwater to be left to state regulation and control, regardless of any future contribution of pollutants to jurisdictional surface waters.

EPA also relied on cases from the Fifth and Seventh circuits that, in its view, took the necessary "holistic" approach in interpreting the statute and legislative history to hold that the CWA's coverage does not include groundwater pollution.

A 'Mosaic of Laws and Regulations'

Finally, responding to comments and criticism that its interpretation creates a massive enforcement loophole that could eviscerate the CWA's explicit purpose to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," EPA explained that its position "does not preclude states from regulating these releases under state law," and that other federal environmental protection laws govern discharges to groundwater omitted from the CWA, including the Safe Drinking Water Act, Resource Conservation and Recovery Act, Comprehensive Environmental Response, Compensation, and Liability Act. Thus, EPA concluded these statutes and state programs "form a mosaic of laws and regulations that provide mechanisms and tools for EPA, states, and the public to ensure the protection of groundwater quality, and to minimize related impacts to surface waters."

Conclusion and Implications

EPA's course reversal reflected in the Interpretive Statement comes as the U.S. Supreme Court considers a Circuit split on the issue of point source discharges through groundwater. It remains to be seen whether the Supreme Court adopts one of the EPA's positions. For more information, *see*, https://www.govinfo.gov/content/pkg/FR-2019-04-23/pdf/2019-08063.pdf

(Dakotah Benjamin, Rebecca Andrews)

JUDICIAL DEVELOPMENTS

D.C. CIRCUIT ADDRESSES IDENTIFYING AND MITIGATING ENVIRONMENTAL IMPACTS, UNDER NEPA, OF JAMES RIVER PROJECT ON HISTORICAL PROPERTIES

National Parks Conservation Association v. Semonite, 916 F.3d 1075 (D.C. Cir. 2019).

The National Environmental Policy Act (NEPA) establishes the process that federal agencies must use to assess the potential environmental effects of any project that requires their permission. (42 USC 4332.) These environmental effects include any impact "on our national heritage." (42 USC 4331(b).) In sum, federal agencies must first conduct a preliminary "environmental assessment" to determine if the proposed project may have any "significant impact" on the environment. (40 CFR 1508.9.) If this initial assessment identifies any potential environmental effect, the federal agency must prepare an Environmental Impact Statement (EIS) that discusses the environmental impact of the proposed action in detail, assesses potential alternatives to the action, and summaries other environmental considerations. 42 U.S.C. § 4332(C). Thus, developers often seek a finding that their proposed project will not pose any impact to the environment through the preliminary environmental assessment, thereby avoiding the more stringent EIS process. Although NEPA provides some guidance as to what specific factors must be considered when making this preliminary environmental assessment to determine if an EIS is necessary guidance on the details of this analysis has been provided by several courts throughout NEPA's lifespan. A March 2019 decision by the U.S. Court of Appeals for the District of Columbia Circuit provides further guidance as to how federal agencies must conduct these preliminary environmental assessments to determine if an EIS is needed for a specific project.

Background

The U.S. Army Corps of Engineers (Corps) granted permission to the Virginia Electric and Power Company to build a new electrical switching station across the historic James River (Project). The Project involved constructing 17 transmission towers on property surrounding the James River to support two transmission lines which "would cross the James River and cut through the middle of the historic district encompassing Jamestown and other historic resources." (Id. at 1078.) The Corps conducted a preliminary environmental assessment and concluded the Project did not require an EIS because the effect on the historical value of the surrounding property was minimal. The National Parks Conservation Association (NPCA) challenged the Corps' decision, claiming the NEPA required an EIS based on the specifics of the Project.

The D.C. Circuit's Decision

To address this issue, the court outlined the specific factors that the NEPA requires federal agencies to review when conducting their preliminary environmental assessments. Generally, the NEPA requires a review of both the "context" of the proposed project, meaning whether the project will have an impact on the local environment, and the "intensity" of the project, meaning the severity of the impact. According to the court, the parties conceded that the Project met the environmental context requirement, since it is located near historical property and sites. Thus, the court focused its inquiry on the intensity element, which NEPA further breaks down into ten factors, any of which may be significant enough to require an EIS. (40 CFR 1507.27(b).) The NPCA alleged that three specific factors applied to the Project and required an EIS, all of which were reviewed by the Court.

'Highly Controversial' Factor

First, the Court reviewed the factor that requires an EIS if the project is deemed "highly controversial." Based on prior case law, the court defined this factor to exist when a "substantial dispute exists as to the

size, nature, or effect of the major federal action." (*Nat'l Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075, 1083 (D.C. Cir. 2019) citing *Town of Cave Creek, Arizona v. F.A.A.*, 325 F.3d 320, 330 (D.C. Cir. 2003).) While the court recognized that a controversy is not created simply because some people are "highly agitated" and "willing to go to court," it noted that two federal agencies disputed the Corp's decision to forgo an EIS based on its analysis of the size, nature and effect of the project. Specifically, the Advisory Council on Historic Preservation and the National Park Service challenged the Corp's method for assessing the overall impact of the Project on the historical significance of the surrounding property. While the court acknowledged that the Corps was not required to defer to these agencies, the fact that they constituted highly specialized governmental organizations that provided detailed objection to the Corps' analysis was enough to establish a legitimate controversy about the Project and warrant an EIS, according to the Court.

'Intensity Factor'

The second factor considered by the court is deemed the "intensity factor" and requires a review of the "unique characteristics of the geographic area such as proximity to historic and cultural resources." (*Id.* at 1083.) While the parties did not dispute the historical significance of the property involved with the Project, they debated the extent to which the Project intruded on this significance. The Corps found that the Project amounted to "modern visual intrusions" that represent "a successful mix of progress and history." (Id. at 1086.) The Corps also cited to case law suggesting that aesthetic judgments are "inherently subjective" and therefore, do not required a full EIS to assess. In its analysis, the court focused on the intent of Congress when designating historical sites, which is to preserve "an unencumbered view of an attractive scenic expanse." (*Id.* at 1087 quoting *River Road Alliance, Inc. v. Corps of Engineers of U.S. Army, 764 F.2d 445, 451 (7th Cir. 1985))*. The court agreed with NPCA in that the Project would not simply blend into the scenery but constituted a "massive project" that would intrude through the historical nature of the James River because it will "be the only overhead crossing of the James River in a fifty one-mile stretch." (*Id.* at 1089.)

Adverse Impacts to Sites Listed in National Register of Historic Places

The final factor analyzed by the court focused on the "degree to which the action may adversely affect districts or sites listed in or eligible for listing in the National Register of Historic Places." (40 CFR 1508.27(b)(8).) The court cited to the Corp's record to conclude that the Project may affect fifty seven separate sites that are either on the National Register or eligible for inclusion. While the Corp's cited to other examples of projects located next to historical sites, the Court found that the scope and size of the Project made its effect on numerous historical sites impossible to dismiss as minor.

The Need for an EIS

Based on these three factors, the court found that the Project perfectly fit the intent of the EIS requirement, which is to provide "robust information" for projects that may have uncertain and controversial environmental impacts. (*Id.* at 1087.) Thus, the court required the Corps to complete an EIS to assess the Project's potential historical affects and explore ways to mitigate the impact of the Project on the historical significance of the surrounding property and James River.

Because the Corps is required to provide an EIS, the court noted that the Corps will also have to reevaluate its analysis of the Project under the federal Clean Water Act and the National Historic Preservation Act. Specifically, the court noted that the National Historic Preservation Act requires federal agencies to take concrete actions to minimize harm to any landmark if the Project "directly and adversely affects any National Historical Landmark." (*Id.* at 1088 citing 54 USC 306107.) The Project's towers are visible from Carter's Grove, a National Historic Landmark. The Corp's concluded that the Project did not "directly" affect Carter's Grove because the Project towers are not physically located in Carter's Grove. The court rejected this argument, finding that "directly" means "free from extraneous influence" or immediate." (Id.) Thus, the court directed the Corps to reconsider its Preservation Act analysis based on the proper definition of directly.

Conclusion and Implications

As noted by the Circuit Court of Appeals through-

out its decision, several cases have addressed how NEPA should be interpreted and applied when assessing a project that may affect historic sites. Although the Corps noted that the Project would have some effect on the historic James River and surrounding historic properties, it concluded that the effect was similar to other projects that modernized areas without adversely affecting their historic value. Thus, the Corps found that the Project represented a reasonable balance between allowing modernization without physically intruding on historic sites. While the court did not necessarily disagree with the Corps' conclusion, it found that the Project warranted further and more detailed analysis through an EIS. In doing so, the court gave strong consideration to the scenic value of the surrounding sites and rejected the idea that adverse impact is limited to physical intrusions or projects that fully block or dominate the scenic view. Instead, when part of the historical value of property relates to providing a glimpse into what historical figures originally saw, federal agencies must at least conduct a thorough analysis before permitting anything that may affect this historical value. The court's decision is available online at: https://www.cadc.uscourts.gov/internet/opinions.nsf/87FABC162438AE4B852583B000549984/$file/18-5179.pdf

(Stephen M. McLoughlin, David D. Boyer)

SIXTH CIRCUIT HOLDS PUBLIC COMMENTS IN ADMINISTRATIVE PROCEEDINGS ARE INSUFFICIENT TO ESTABLISH 'INJURY' FOR STANDING IN CHALLENGING AGENCY ACTION

Protecting Air for Waterville v. Ohio Environmental Protection Agency, ___F.3d___, Case No. 18-3025 (6th Cir. Feb. 21, 2019).

Citizen groups brought a petition directly in the Sixth Circuit Court of Appeals challenging the issuance of air quality permits by the Ohio Environmental Protection Agency pursuant to delegated federal Clean Air Act the authority. To establish standing, the groups cited in sworn statements regarding individual harms submitted in the Ohio administrative proceedings. The Circuit Court rejected these as sufficient to support Article III standing, requiring, at a minimum, affidavits attesting to feared or actual harms. While being an air quality case, the decision is relevant to water practices as well.

Background

Three citizens groups representing owners of property along a "257-mile natural gas pipeline system originating in Ohio and running into Michigan" challenged issuance of air quality permits issued for two natural gas compressor stations proposed in Ohio as part of the pipeline system.

In August 2017 the Federal Energy Regulatory Commission (FERC) granted a certificate of public convenience and necessity for the pipeline pursuant to the Natural Gas Act, 15 U.S.C. § 717f(c), conditioned "on the pipeline proponent obtaining air pollution-control permits required by the federal Clean Air Act." As it happened:

> . . .[t]he Ohio EPA Director had issued the permits in September 2016 pursuant to chapter 3745-31 of the Ohio Administrative Code, part of Ohio's implementation of the federal Clean Air Act. See 40 C.F.R. § 52.1870.

Prior to issuing the permits, the Ohio EPA had held public hearings, publicized in local papers, and provided the public with an opportunity to submit written comments, which were in turn responded to in writing by the agency. The three citizen groups challenged the Ohio EPA's issuance of the permits including by appeal to the Ohio Environmental Review Appeals Commission (ERAC):

> In August 2017, while discovery was ongoing, NEXUS filed motions to dismiss the ERAC proceedings for lack of subject-matter jurisdiction, claiming that the Natural Gas Act, 15 U.S.C. § 717r(d)(1), vests jurisdiction over such appeals exclusively with the United States Courts of Appeal. ERAC agreed and dismissed the appeals.

The citizens groups filed a petition for review of

the ERAC dismissal directly in the Sixth Circuit, arguing that ERAC had jurisdiction to hear their challenge and the dismissal violated their due process rights, and that the Ohio EPA issued the permits in violation of its own *de minimis* exemption.

The Sixth Circuit's Decision

As an initial matter, the Sixth Circuit declined to resolve the jurisdictional issue because the citizens groups had failed to name ERAC as a respondent to their petition, did not serve ERAC, and the record of the proceedings before ERAC was not before the Circuit Court. The groups failed to timely address these deficiencies once they were pointed out by the pipeline proponent and Ohio EPA, and therefore the Circuit Court declined to reach their jurisdictional and due process claims.

Standing

Turning to the claim that the Ohio EPA improperly relied on its *de minimis* exception in issuing the air quality permits for the compressors, the Sixth Circuit again identified a preliminary impediment to reaching the merits: whether the citizens groups had established standing to bring their petition, *i.e.*, that they:

> . . .(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016).

The Sixth Circuit requires in seeking direct appellate review of agency decisions, that petitioners must establish standing by presenting:

> . . .specific facts supporting standing through citations to the administrative record or 'affidavits or other evidence' attached to its opening brief, unless standing is self-evident. *Tenn. Republican Party v. SEC*, 863 F.3d 507, 517 (6th Cir. 2017).

Here, the citizens groups failed to address standing in their opening brief, so that "[e]ven the first element of standing—injury in fact—was far from self-evident in this case." The groups failed to identify any harms they themselves, or their members, would suffer:

> We cannot simply assume that petitioners have members who would be affected by the compressor stations' emissions; petitioners were required to 'present specific facts ... through citations to the administrative record or 'affidavits or other evidence' attached to its opening brief,' *Tenn. Republican Party*, 863 F.3d at 517, demonstrating that identified members of their organizations had, or would imminently, suffer a sufficiently concrete injury.

The court rejected the argument that the dismissal of the groups' administrative appeal by ERAC had deprived them of the opportunity to, in an adversarial setting, develop a record supporting standing:

> But petitioners did not need to utilize an intensive fact-finding process to establish an injury sufficient for Article III purposes. There were many ways petitioners could have established injury without resort to the factfinding proceedings available in ERAC. While we will not decide the hypothetical question of precisely what would have sufficed, we note that courts have accepted, for example, affidavits from individual members attesting to fear of health concerns in combination with expert reports detailing the injuries that could follow from exposure.

Here, however, the groups did not file any affidavits of their members attesting to any concrete or feared health-related harms, and the Court rejected reliance on unsworn statements submitted as public comments in the Ohio EPA public review proceedings. Accordingly, the petition was dismissed.

Conclusion and Implications

The seemingly low bar to establish Article III standing does nonetheless require sworn affidavits. Even had these petitioners lodged a complete administrative record of the state agency proceedings with the Circuit Court, they would nonetheless have had to supplement that record with separate, attested statements regarding individual, particularized harms. The court's opinion, which was *partially published*, appears online at: http://www.opn.ca6.uscourts.gov/opinions.pdf/19a0088n-06.pdf
(Deborah Quick)

EIGHTH CIRCUIT AFFIRMS JOINT AND SEVERAL LIABILITY FOR PUNITIVE DAMAGES UNDER CERCLA FOR 'ARRANGERS' FOR PCB CONTAMINATION

U.S. v. Dico, Inc., ___F.3d___, Case No. 17-3462, (8th Cir. Apr. 11, 2019).

The U.S. Court of Appeals for the Eighth Circuit found that corporate defendants intentionally sold buildings contaminated with polychlorinated bipehnyls (PCBs) to a third party in order to dispose of a hazardous substance and were liable as arrangers to the government for punitive damages.

Factual and Procedural Background

In 1984, Dico, Inc. owned property in Des Moines, Iowa (Dico site) designated a Superfund Site based on volatile organic compounds that had polluted the water supply and PCBs in the insulation of several buildings. Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), the U.S. Environmental Protection Agency (EPA) initiated a removal action and issued a unilateral administrative order (1994 Order) that required Dico to address the contamination and repair and seal the exposed insulation to prevent further release of PCBs. Dico completed the remediation work. In 1997, the EPA issued a Notice of Completion and expressly stated that Dico had continuing obligations under the 1994 Order, including post-removal activities and annual reporting in an operation and maintenance plan. In 2003, the EPA approved a revised work plan that reduced Dico's inspection and testing requirements and required Dico to coordinate any plans for demolition of the buildings with the EPA.

In May 2007, Dico sold the contaminated buildings to Southern Iowa Mechanical, L.L.C. (SIM). SIM intended to dismantle the buildings, dispose of the materials except the steel beams, and relocate the beams for reuse to its property (SIM Site). Dico signed a bid proposal from SIM to "demo and remove" the buildings, but did not disclose to SIM that the buildings were contaminated. In addition, Dico did not inform the EPA of the building sale or proposed demolition. At a Dico site visit in September 2007, the EPA learned for the first time that buildings subject to the 1994 Order had been or were being dismantled. The EPA tested the steel beams and determined the levels of PCBs posed a direct threat to SIM workers, visitors and trespassers. In December 2008, the EPA issued a unilateral administrative order requiring Dico and its affiliate, Titan Tire Corporation (collectively: defendants) to perform a removal action at the SIM Site. The EPA sued to recover damages for its cleanup costs.

The U.S. District Court granted summary judgment to the government on its arranger liability claim, found Dico had violated the 1994 Order, and awarded civil penalties and punitive damages.

The Eighth Circuit Court of Appeals affirmed in part and reversed in part. It affirmed summary judgment on Dico's violation of the 1994 Order and civil penalties, but vacated summary judgment on arranger liability and punitive damages because there were questions of fact.

On remand, the District Court found that defendants violated CERCLA by arranging to dispose of hazardous substances, and were jointly and severally liable for $5.45 million in past response costs, all future costs, all enforcement costs and attorney's fees. The District Court also held Dico liable for punitive damages.

On this appeal, defendants argued the District Court erred in finding defendants liable as arrangers. Dico argued that the District Court erred in awarding punitive damages against Dico.

The Eighth Circuit's Decision

The issue on remand was whether the District Court erred in finding defendants liable as arrangers for the disposal of a hazardous substance when they sold the contaminated buildings to SIM. When the requisite intent for arranger liability exists, a defendant is liable for all response costs of removal or remedial action incurred by the government resulting from the release of a hazardous substance.

Arranger Liability

The Court of Appeals upheld the District Court's determination that defendants had arranged for the disposal of a hazardous substance in violation of

CERCLA when the buildings were sold. The District Court concluded Dico avoided paying costs to remove and dispose of the contaminated insulation when it sold the property. Removal and disposal costs were $988,567, which exceeded the value of $117,000 Dico received from SIM for the sale of the buildings. The difference in value constituted strong evidence that defendants intended to avoid environmental liability through the sale of the contaminated buildings. The District Court also found that the buildings were no longer commercially useful and represented ongoing liabilities to defendants. In addition, defendants failed to disclose that the buildings were contaminated to SIM and had reason to believe that SIM would not discover the contamination prior to purchase. Thus, the District Court's findings were sufficient to conclude to that defendants had arranged for the disposal of a hazardous substance in violation of CERCLA.

Award of Punitive Damages

The Court of Appeals also affirmed the award of punitive damages against Dico. CERCLA authorizes punitive damages against a person who is liable for a release of a hazardous substance and the EPA incurred cleanup costs at the SIM site as a result of Dico's failure to take proper action. The Court of Appeals previously reversed the punitive damages award because it "could not say as a matter of law" that the sale of contaminated buildings caused the cleanup costs. In affirming the District Court's finding on remand that the sale violated CERCLA, the Court of Appeals also affirmed the punitive damages award.

The Court of Appeals also determined that the arranger liability award included enforcement costs. Defendants were jointly and severally liable for enforcement costs because they failed to satisfy their burden of proving that a reasonable apportionment exists.

Conclusion and Implications

This case demonstrates that a lower court's findings regarding arranger liability will not be disturbed unless there is clear error. Financial benefit from failure to disclose may establish a causal connection between response costs and the CERCLA violation. Once a causal connection established, punitive damages can follow under CERCLA's strict liability regime. In addition, arranger liability includes past and future response costs, enforcement costs, and attorney's fees. The Eighth Circuit's decision is available online at: https://ecf.ca8.uscourts.gov/opndir/19/04/173462P.pdf (Joanna Gin, Rebecca Andrews)

NINTH CIRCUIT REVIVES ENVIRONMENTAL GROUPS' NEPA CHALLENGE TO DEPARTMENT OF AGRICULTURE'S GRAY WOLF KILLING POLICY

Western Watersheds Project et al. v. Todd Grimm et al., ___F.3d___, Case No. 18-35075 (9th Cir. Apr. 23, 2019).

On April 23, 2019, the Ninth Circuit Court of Appeals overturned a U.S. District Judge's January 2018 dismissal of an action brought by plaintiffs Western Watersheds Project, Center for Biological Diversity, Friends of the Clearwater, WildEarth Guardians, and Predator Defense (plaintiffs) to enjoin the federal government's participation in the elimination of gray wolves in Idaho, pending additional National Environmental Policy Act (NEPA) analysis. The U.S. District Court originally dismissed the suit based on the plaintiffs' lack of Article III standing.

Factual Background

In 1973, the U.S. Fish and Wildlife Service (FWS) listed the Northern Rocky Mountain gray wolf (*Canis lupus irremotus*) as endangered under the federal Endangered Species Act (ESA). This subspecies of gray wolf is native to the northern Rocky Mountains and preys on bison, elk, the Rocky Mountain mule deer, and the beaver. However, the gray wolves are known to prey upon many other species of animals given the opportunity. In 1994, FWS' goal was to assist the gray wolf reach a population of thirty breeding pairs by reintroducing them into central Ohio. In anticipation of conflict between the wolves, and humans and their livestock and animals, the FWS authorized the killing of those wolves that preyed on livestock, domestic animals, and ungulates in the area. FWS reached its

wolf breeding goal and in 2011, the gray wolf was successfully delisted.

Back in 2002, the Idaho Department of Fish and Game (IDFG) prepared a plan to be executed upon the gray wolves' delisting under the ESA. IDFG would maintain responsibility for managing the wolves in Idaho with the goal of addressing these issues of predation by way of sport hunting as its primary method. Ever since its delisting, FWS supported IDFG's wolf management activities through both legal and non-legal methods, including aerial hunting.

In June 2017, plaintiffs sued the USDA alleging that the agency violated NEPA for its wolf killing policy. The USDA said that NEPA's law did not constitute a major federal action significantly affecting, individually or cumulatively, the quality of the human and natural environment."

Procedural History

In June 2016, plaintiffs brought the following NEPA-based claims against the U.S. Department of Agriculture, Wildlife Services (Wildlife Services) in District Court: 1) Failure to prepare an Environmental Impact Statement (EIS); 2) Failure to take a hard look at the effects of actions and alternatives; 3) Violations under 5 U.S.C. §706 (2)(A) for decisions not to supplement NEPA analysis as arbitrary and capricious; and 4) Violations under U.S.C. §706 (1) for failure to supplement the 2011 Environmental Assessment as an action unlawfully withheld or reasonably delayed.

Specifically, plaintiffs alleged that NEPA requires Wildlife Services to prepare an EIS and supplement the Environmental Assessment for the agency's killing of the gray wolf. The District Court held that plaintiffs failed to show that Article III standing because plaintiffs failed to show redressability. The District Court explained that plaintiffs failed to show that eliminating the USDA's rule would actually result in fewer wolf killings therefore, making their injury not redressable.

The Ninth Circuit's Decision

NEPA violations constitute procedural injuries. To prevail on a cause of action involving procedural injuries, plaintiffs are required to:

> . . .show that the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.

Further, to establish injury in fact, the plaintiffs may demonstrate that they:

> . . .use the affected area and are persons or who the aesthetic and recreational values of the area will be lessened by the challenged activity.

Standing: Injury in Fact

In order to prevail, plaintiffs needed to establish injury in fact:

> Environmental plaintiffs may establish injury-in-fact by demonstrating that "they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 183 (2000)).

In this case, plaintiffs submitted declarations from their members stating that the wolf-killing threatened the aesthetic and recreational interests in tracking and observing wolves in the wild, often in specific regions. The Court of Appeals deemed those interests to fall under the scope of NEPA's protections. Thus, plaintiffs successfully established injury-in-fact.

Standing: Redressability

Next, the Ninth Circuit reviewed the District Court's ruling that the plaintiffs' injuries were not redressable:

> To establish redressability, '[p]laintiffs alleging procedural injury 'must show only that they have a procedural right that, if exercised, *could* protect their concrete interests.' *Salmon Spawning*, 545 F.3d at 1226 (quoting *Defs. of Wildlife v. EPA*, 420 F.3d 946, 957 (9th Cir. 2005), *overruled on other grounds by Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007)). Thus, the proper inquiry here is whether Plaintiffs have shown that halting Wildlife Services' wolf-killing activities pending additional NEPA analysis could protect their aesthetic and recreational interests in gray wolves in Idaho. We hold that they have.

The Ninth Circuit overturned the District Court's conclusion and emphasized that the court erred because it relied on an incorrect standard by relying on an unpublished case that lacks precedential effect. Additionally, to properly establish redressability, plaintiffs must show that they have a procedural right and if exercised, *could* protect their concrete interests—a more relaxed standard applied to procedural injury cases. Under this standard of redressability, plaintiffs need only show that merely halting Wildlife Services' wolf-killing activities pending additional NEPA analysis would have the potential to protect their aesthetic and recreational interests in gray wolves in Idaho. This differs from the District Court's heightened standard which ruled the plaintiffs must show that fewer wolves would be killed.

Wildlife also argued that based on its current wolf-maintenance responsibilities, IDFG would exercise its independent authority and continue wolf-hunting to address the predation issues thus, defeating redressability. The Ninth Circuit quickly held that IDFG has not expressed an intent or ability to replace Wildlife Services' lethal wolf-management operations. Therefore, whether IDGF would implement an identical program as such is a matter of speculation.

Conclusion and Implications

In a win for the conservation groups, the Ninth Circuit Court of Appeals reversed the U.S. District Court's ruling and held that the plaintiffs' procedural injuries were indeed redressable. Though courts generally grant a high level of deference to oversight agencies such as the Fish and Wildlife Service, a win on a procedural challenge, like Article III standing, may be a new avenue for conservation groups to challenge controversial laws to better protect endangered species. Interestingly the court pointed out in a footnote why it did not directly address the additional issue of demonstrating causation: "Causation is not at issue here. However, because standing is a constitutional requirement, we note that Plaintiffs' injury—reduced aesthetic and recreational enjoyment of wolves in Idaho—is 'not too tenuously connected' to Wildlife Services' alleged NEPA violation, thus establishing causation under the relaxed standard for procedural injuries. *Salmon Spawning*, 545 F.3d at 1229." The Ninth Circuit's decision is available online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2019/04/23/18-35075.pdf
(Rachel S. Cheong; David D. Boyer)

DISTRICT COURT FINDS FEDERAL GOVERNMENT WAIVED SOVEREIGN IMMUNITY FOR NEGLIGENT RESPONSES TO FLINT WATER CRISIS

Burgess v. United States, ___F.Supp.3d___, Case Nos. 17-11218, 18-10243 (E.D. Mich. Apr. 18, 2019).

The U.S. District Court for the Eastern District of Michigan denied the federal government's motions to dismiss residents' suit against the United States under the Federal Tort Claims Act (FTCA) for the U.S. Environmental Protection Agency's (EPA) role in the Flint water crisis. A group of Flint residents alleged that EPA officials were negligent in carrying out the agency's oversight authority under the federal Safe Drinking Water Act (SDWA). The federal government moved to dismiss plaintiffs' action for lack of subject matter jurisdiction, contending sovereign immunity had not been waived because: 1) state law would not impose liability in similar circumstances (the premise for waiving immunity under the FTCA), and 2) the discretionary function exception to liability would apply. The District Court rejected both contentions.

Factual and Procedural Background

Plaintiffs' suit against the United States, arising from what is now known as the Flint Water Crisis, follows earlier actions brought against the City of Flint, the State of Michigan, and related officials.

The Safe Drinking Water Act

Section 1414 of the SDWA requires the EPA to notify a state and provide technical assistance when a public water system does not comply with the act. If the state fails to take timely enforcement action, the EPA is required to issue an administrative order requiring compliance or commence a civil action.

Section 1431 of the SDWA further grants the EPA emergency powers when it has information that (i) a contaminant has entered or is likely to enter a public water system, (ii) which may present "an imminent and substantial endangerment to the health of persons," and (iii) state or local authorities have not acted to protect the public health.

The Flint Water Crisis

In April 2014, the City of Flint (City), Michigan changed the source of its water supply, suspending the purchase of finished drinking water from Detroit to draw on raw water from the Flint River processed through Flint's outdated water treatment plant.

Within weeks after the switch, EPA received a record number of resident complaints about skin rashes, hair loss, and foul smelling and tasting water. After some investigation, EPA determined that: (1) the water service lines in Flint were galvanized iron, (2) water drawn from the Flint River was highly corrosive and lead-based service lines posed a significant danger of lead leaching out of pipes, (3) Michigan was not requiring corrosion control treatment in Flint (despite communications from EPA staff urging otherwise), (4) the City was distorting its water samples to give residents false assurances about water lead levels, and (5) water samples from residents' homes showed noncompliant lead levels. The EPA was also aware of the health risks posed by lead exposure, particularly to children and pregnant women.

Internal reports established that EPA had the authority and sufficient information to issue an SDWA § 1431 emergency order to protect Flint residents from lead-contaminated water as early as June 2015. The EPA did not issue an emergency order until January 2016. In at least some of its communications with Flint residents, EPA also indicated that the City's drinking water met applicable health standards.

The District Court's Decision

The United States must waive its sovereign immunity in order for a court to have jurisdiction over a claim against the federal government. Through the FTCA, Congress waived the federal government's immunity from claims of injury arising from an act or omission of an employee, if state law imposes liability on a private person under similar circumstances. The FTCA excludes from its waiver of immunity any claim based on a discretionary function.

Liability under State Law

Rejecting the federal government's contention that Michigan law would not impose liability on private individuals in similar circumstances, the court found plaintiffs stated a cause of action under Michigan's Good Samaritan doctrine. The doctrine provides that undertaking services to protect another person creates a duty of care and liability for negligent performance, if the negligence increases the risk of harm. The court found that EPA had undertaken to render services to plaintiffs by engaging in the oversight of state and local actors under the SDWA. By alleging EPA's negligent oversight increased the risk of harm to Flint's residents, plaintiffs' stated a claim for liability under state law sufficient to proceed under the FTCA.

The Discretionary Function Exception

To determine whether plaintiffs' suit was barred by the discretionary function exception, the District Court applied a two-step analysis. The court first determined whether the challenged act or omission was discretionary in nature, and second, if so, whether the challenged discretionary conduct was susceptible to policy analysis. The discretionary function exception applies only to judgments based on policy.

Plaintiffs alleged that EPA was negligent in failing to timely respond to the crisis as mandated by §§ 1414 and 1431 of the SDWA, including failing to warn residents of the health risks posed by Flint water. Plaintiffs also alleged the EPA was negligent when responding to residents' complaints by misleading them about the safety of the water and the character of state and local management.

On plaintiffs' first claim, the District Court found that EPA had discretion to issue warnings under the SDWA, but that the agency's failure to warn residents could not be justified by any permissible exercise of policy judgment. While regulatory decisions are generally presumed to be based in policy, the court found that the SDWA authorized EPA to exercise discretion in oversight based only on objective scientific and professional standards. Moreover, the facts of the crisis presented:

> . . .a safety hazard so blatant that [officials'] failure to warn the public could not reasonably be said to involve policy considerations.

Given the "obvious danger" to the community and EPA's knowledge of the facts, the court concluded "this is an instance where decisions by government actors, even if discretionary, may pass a threshold of objective unreasonableness" that bars exemption from liability.

On plaintiffs' second claim, the court again found EPA's decision regarding whether and how to respond to residents' complaints was discretionary, but that once the government decided to act, "it was required to do so without negligence." Exemption from liability was thus denied.

Conclusion and Implications

The exercise of administrative discretion is presumed to be grounded in considerations of public policy, and thus beyond the reach of tort liability. This case provides a rare example of discretionary conduct that falls outside the presumption of regulatory immunity. The court's decision is available online at: https://www.courthousenews.com/wp-content/uploads/2019/04/burgess-flint.pdf
(Kathy Shin, Rebecca Andrews)

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