

# WESTERN WATER LAW<sup>TM</sup>

## & POLICY REPORTER

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**FEATURE ARTICLE**

**U.S. SUPREME COURT TO DECIDE WHETHER DISCHARGES OF POLLUTANTS TO GROUNDWATER HYDROLOGICALLY CONNECTED TO SURFACE WATERS REQUIRE A CLEAN WATER ACT PERMIT**

*By Nicole E. Granquist and Meghan Quinn*

For decades, the debate whether discharges of pollutants to ground water that is hydrologically connected to federally jurisdictional surface waters requires a federal Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permit has been raging in federal courts throughout California and the nation. To state that “splits” in authority have occurred would be an underwhelming description of the battles being waged on this topic in both the judicial and administrative arenas.

However, on February 19, 2019, the U.S. Supreme Court simultaneously served hope and struck fear within those in the trenches of the debate when it granted *certiorari* and agreed to hear the *Hawaii Wildlife Fund v. County of Maui* case emanating from the Ninth Circuit Court of Appeals, 881 F.3d 774; <http://cdn.ca9.uscourts.gov/datastore/opinions/2018/02/01/15-17447.pdf>

The Supreme Court’s determination in the *County of Maui* case has the potential to definitively answer this long-standing thorny permitting question and provide regulatory certainty to a variety of water storage and supply, recycled water, agricultural, and land disposal projects here in California.

**Background of NPDES Permitting Program**

Per the Clean Water Act, in the absence of an NPDES permit, “the discharge of any pollutant by any person shall be unlawful.” 33 U.S.C. §1311(a). The term “discharge of a pollutant” is defined as:

...any addition of any pollutant to *navigable waters* from any point source [or] any addition

of any pollutant to the waters of the *contiguous zone* or the *ocean* from any point source. . . . 33 U.S.C. §1362(12) (emphasis added).

“Navigable waters” is defined as “waters of the United States, including the territorial sea.” 33 U.S.C. §1362(7).

The term “waters of the United States” another oft-litigated area of CWA jurisprudence, is currently defined by regulation, and includes:

(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(b) All interstate waters, including interstate “wetlands;”

(c) All other waters, such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, “wetlands,” sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such water:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be

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taken and sold in interstate or foreign commerce;  
or

- (3) Which are used or could be used for industrial purposes by industries in interstate commerce;
- (d) All impoundments of waters otherwise defined as waters of the United States under this definition; and
- (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition. See 40 C.F.R. § 122.2; see also 33 C.F.R. §328.3(a)).

While groundwater has not been included in the definition of “waters of the United States” or amongst the waters to which the “discharge of a pollutant” is prohibited without an NPDES permit, in 2006, on the heels of the separate “significant nexus” test proffered in the U.S. Supreme Court’s decision in *Rapanos v. United States*, 547 U.S. 715, 126 S. Ct. 2208, 165 L.Ed.2d 159 (2006); <https://www.supremecourt.gov/opinions/05pdf/04-1034.pdf> (to establish whether a surface water is a “waters of the U.S.”), the Ninth Circuit Court of Appeals utilized the theory to find for the first time in California that an NPDES permit was required for the discharge of a pollutant to groundwater which was hydrologically connected to the Russian River. See, *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993, 1000 – 03 (9th Cir. 2006).

### Statutory Language of the Clean Water Act and Congressional Legislative History

Though the facts of the *Northern California River Watch* case created a particularly susceptible environment for such a finding, some observed that the determination by the Ninth Circuit seemingly fell out of step with the plain language of the CWA and Congressional legislative history on the topic. Within the four corners of the CWA, Congress identified four different and distinct types of water bodies addressed by various provisions of the CWA: 1) navigable waters, 2) groundwater, 3) the contiguous zone, and 4) oceans. See, e.g., 33 U.S.C. §§ 1251(a), 1254(a), 1256(e), 1288(b), 1314(a), and 1314(e). However, when establishing the NPDES permit program, only “navigable waters,” the “contiguous zone,” and the “oceans” were included within the definition of “discharge of a pollutant,” and thereby require

an NPDES permit to discharge to these waters. 33 U.S.C. §1362(12). Those advocating that the NPDES permit program is inapplicable to discharges of pollutants to hydrologically connected groundwater assert that the omission of “groundwater” from the definition of “discharge of a pollutant” or “waters of the United States” indicates that Congress did not conclude discharges to groundwater trigger the need for an NPDES permit. Those advocating for application of the NPDES permit program assert that any “discharge of any pollutant” (to waters of the United States) from “any point source” must secure an NPDES permit irrespective of whether the pollutant first migrates through groundwater. 33 U.S.C. §§ 1342(a), 1362(12).

Legislative history of the CWA was, and continues to be, a flash point for those who disagree with the outcome of the *Northern California River Watch* case, and other cases that have made similar conclusions. While the CWA was being drafted, attempts were made by various members of the House of Representatives and the Senate to expressly include groundwater within the NPDES permitting requirements of CWA § 402 (33 U.S.C. §1342); all failed. For example, the report accompanying the Senate’s version of the CWA stated:

Several bills pending before the Committee provided authority to establish Federally approved standards for groundwaters which permeate rock, soil and other surface formations. Because the jurisdiction regarding groundwaters is so complex and varied from state to state, the Committee did not adopt this recommendation. S. Rep. No. 414, 92d Cong., 1st Sess. 73 (1971), U.S. Code Cong. & Admin. News 1972, pp. 3739 (emphasis added). Instead, the Senate Committee recognized the role of state pollution prevention programs to regulate discharges to groundwater. *Id.*

Additionally, in 1972, the House of Representatives specifically rejected an amendment that would have brought groundwater within the jurisdiction of the NPDES permitting requirements of the CWA. When the amendment was introduced, Representative Aspin stated:

Groundwater is that water which lies below the surface of the earth. It is in reservoirs and pools,

it is well water, it is drinking water. In other words, it is subsurface water.

The amendment does two things, two very simple things. First, the amendment brings groundwater into the subject of the bill, into the enforcement of the bill. Groundwater appears in this bill in every section, in every title except title IV. It is under the title which provides EPA can study groundwater. It is under the title dealing with definitions. But when it comes to enforcement, title IV, the section on permits and licenses, then groundwater is suddenly missing. That is a glaring inconsistency which has no point. If we do not stop pollution of ground waters through seepage and other means, groundwater gets into navigable waters, and to control only the navigable water and not the groundwater makes no sense at all. 118 Cong. Rec. 10666-10667, 1 Leg. Hist. 589 (1972). After considerable debate, the amendment was rejected. *Id.*

### **Splits in U.S. District Courts and Circuit Courts of Appeals**

Prior to the *Northern California River Watch* case (and now the *County of Maui* case as discussed below), U.S. District Courts within the Ninth Circuit disagreed on whether discharges to groundwater that is hydrologically connected to a navigable surface water falls within the purview of the CWA. Some District Courts held that the CWA's jurisdiction extends to discharges into ground water that is hydrologically connected to surface waters, as the "discharge of a pollutant" to ground water from a "point source" ultimately reaches a navigable surface water. *See, e.g., Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F.Supp. 983, 989-90 (E.D. Wash. 1994); *Idaho Rural Council v. Bosma*, 143 F.Supp.2d 1169, 1180 (D. Idaho 2001); *McClellan Ecological Seepage Situation v. Weinberger*, 707 F.Supp. 1182, 1196 (E.D. Cal. 1988). Other District Courts within the Ninth Circuit Court of Appeals held that even hydrologically connected ground water is not subject to the NPDES permitting requirements of the CWA. *See, Umatilla Waterquality Protective Association, Inc. v. Smith Frozen Foods, Inc.*, 962 F.Supp. 1312 (D. Or. 1997); *Woodward v. Goodwin*, 2000 U.S. Dist. LEXIS 7642, \*43 (N.D. Cal. 2000). The District Courts that determined such discharges are not within the purview of the CWA found a strong indication in the legislative his-

tory, partially cited above, that Congress considered ground water to be entirely distinct from navigable waters for purposes of the NPDES permit program, notwithstanding some site-specific connectivity.

This same split of authority has occurred at the national level. For example, the Fourth Circuit Court of Appeals recently concluded in *Upstate Forever, et al. v. Kinder Morgan Energy Partners, L.P., et al.*, 887 F.3d 637 (4th Cir. 2018); <http://www.ca4.uscourts.gov/opinions/171640.P.pdf>, that the federal court possessed jurisdiction to preside over a third-party citizen suit alleging violation of the CWA for an underground gasoline pipeline spill that, via subsurface transit, allegedly entered two nearby tributaries of the Savannah River, Browns Creek, and Cupboard Creek, and their adjacent wetlands. *Id.* at 649. The Fourth Circuit held that an indirect discharge of a pollutant through ground water, which has a direct hydrological connection to navigable waters, can support a theory of liability under the CWA. *Id.* at 647 – 48. Defendants in that case requested review by the U.S. Supreme Court, and the Solicitor General responded seeking a stay of any action pending resolution of the *County of Maui* case. *Id.* Other Circuit Courts of Appeals have disagreed, concluding that discharges to hydrologically connected groundwater are not subject to the permitting requirements of the CWA for the reasons noted above. *See, e.g., Town of Norfolk v. U.S. Army Corps of Engineers*, 968 F.2d 1438, 1451 (1st Cir. 1992); *Rice v. Harkin Exploration Co.*, 250 F.3d 264, 272 (5th Cir. 2001); *Oconomowoc Lake v. Dayton Hudson Co.*, 24 F.3d 962, 965 (7th Cir. 1994); *Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925 (6th Cir. 2018); *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436 (6th Cir. 2018), *reh'g denied*, 913 F.3d 592 (6th Cir. 2019).

### **The Ninth Circuit Court of Appeals' Decision in County of Maui Case**

The County of Maui (County) operates the Lahaina Wastewater Reclamation Facility (Facility). The Facility receives approximately 4 million gallons of municipal sewage each day. After treatment, the facility releases three to 5 million gallons of effluent into four on-site injection wells. *Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 742 (9th Cir. 2018). The discharge then travels into a shallow groundwater aquifer and ultimately to the Pacific Ocean through the seafloor at points known as "submarine

springs.” *Id.* The U.S. Environmental Protection Agency (EPA), the Hawaii Department of Health, and others conducted a tracer-dye study that confirmed this pathway for at least two of the injection wells. According to the study, it took the leading edge of the dye 84 days to go from the two wells to the Pacific Ocean. The parties did not dispute that the dye’s appearance in the ocean “conclusively demonstrated that a hydrogeologic connection exists.” *Id.* at 742 – 43.

Upholding the District Court’s decision, and in accord with an EPA *amicus* brief, the Ninth Circuit Court of Appeals concluded that the County’s four discrete wells were “point sources” from which the County discharged “pollutants” in the form of treated effluent into groundwater, through which the pollutants then entered a “navigable water,” the Pacific Ocean. The wells, therefore, were subject to NPDES permit regulation.

Focusing its analysis on supporting predecessor cases, while avoiding entirely the issue of the CWA’s legislative history, the panel held that the CWA does not require that the point source itself convey the pollutants directly into the navigable water, concurring with the “indirect discharge” theory espoused by the Second Circuit Court of Appeals in *Concerned Area Residents for Environment v. Southview Farm*, 34 F.3d 113, 119 (2d Cir. 1994). Ultimately, the Ninth Circuit found the County liable under the CWA because: 1) it discharged pollutants from a point source, 2) the pollutants were fairly traceable from the point source to a navigable water such that the discharge was the functional equivalent of a discharge into the navigable water, and 3) the pollutant levels reaching navigable water were more than *de minimis*. The court also rejected the argument that because the County’s injections were disposals of pollutants into wells, they were exempt from the NPDES permitting program and, instead, only subject to state law requirements. *Id.* at 750 – 51.

### **Proposed ‘Interpretative Statement’ by EPA Contradicts Position Taken by the Agency in Earlier Permitting Actions and Brief Submitted in County of Maui Case**

One of the most fascinating developments during the ongoing deliberation of the *County of Maui* case is EPA’s recently-issued “Interpretative Statement on Application of the Clean Water Act National Pollutant

Discharge Elimination System Program to Releases of Pollutants From a Point Source to Groundwater” (Interpretative Statement), which departs significantly in several respects from the *amicus curiae* brief the EPA submitted to the Ninth Circuit in May 2016 (Amicus Brief). 78 Fed. Reg. 16810 (February 20, 2018). In its Amicus Brief, EPA supported the position that an NPDES permit was required for the County of Maui’s discharges to groundwater due to the direct hydrological connection that exists between the groundwater to which the County of Maui discharges and the Pacific Ocean. *See*, Brief for the EPA as Amicus Curiae, pp. 11 - 12, *Hawai’i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737 (9th Cir. 2018).

In the Interpretative Statement, EPA now concludes that:

...the CWA is best read as excluding all releases of pollutants from a point source to groundwater from NPDES program coverage and liability under [§] 301 of the CWA, regardless of a hydrologic connection between the groundwater and a jurisdictional surface water. 78 Fed. Reg. 16810 at 16811.

Notably, the EPA states that the Interpretative Statement does not apply in the Ninth or Fourth Circuits, *i.e.*, those circuits that have held that an NPDES permit is required for discharges to groundwater. Thus, the Interpretative Statement provides guidance to the rest of the nation until the U.S. Supreme Court determines the appropriate scope of the NPDES permit program.

The Interpretative Statement’s conclusion appears to be a significant deviation from the “longstanding position” EPA expressed in its Amicus Brief (“It has been EPA’s longstanding position that discharges moving through groundwater to a jurisdictional surface water are subject to CWA permitting requirements if there is a “direct hydrological connection” between the groundwater and the surface water.”). Brief for the EPA as Amicus Curiae, p. 12, *Hawai’i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737 (9th Cir. 2018). However, as the Interpretative Statement points out, the opinion expressed in the Amicus Brief is anything but “longstanding.” Rather:

...there have in fact been a range of prior statements by the Agency, some of which align with th[e]

Interpretive Statement, that EPA has now considered in its analysis for the first time. 78 Fed. Reg. at 16820.

Regardless of the EPA's expressions of the steadfastness of its position on discharges to groundwater, the discrepancy between the positions in the Interpretative Statement and the Amicus Brief (along with a list of permitting actions described more fully in the Interpretative Statement) will likely be viewed by many practitioners as a significant deviation in EPA's interpretation of the NPDES program's scope.

In most instances, regulatory agencies are afforded deference in their interpretation of an ambiguous provision of law where Congress has delegated authority to administer the law to the agency. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 - 43 (1984). However, the deference afforded an agency is not limitless. Changes in regulatory interpretation require a more searching analysis. Consequently, while agencies have the latitude to alter their regulations and interpretations of the law as a result of an administration's policy changes, agencies must meet additional requirements in order to do so.

An agency can only significantly depart from a settled interpretation of a law or one of its regulations, where the agency provides a reasoned analysis of the departure. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ("an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance"). While the level of analysis required for a changed interpretation to survive judicial challenge is determined on a case-by-case basis (*Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993)), something more than a conclusory statement about changing priorities is required. See, e.g., *Int'l Union, United Mine Workers of Am. v. U.S. Dep't of Labor*, 358 F.3d 40, 43- 44 (D.C. Cir. 2004).

In some instances, an explanation of how a new policy or interpretation would be a more proper interpretation of a statute is a sufficient rationale for a change in direction. See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991). EPA seems to be striving to meet this specific criterion in the preamble to its Interpretative Statement.

The Interpretative Statement acknowledges that the EPA is departing from the interpretation of the

NPDES permitting program expressed in its Amicus Brief. According to EPA, the position expressed in the Amicus Brief:

. . .improperly rel[ies] on the broad goals of the Act to justify applying the definition of 'discharge of a pollutant'- which exclusively addresses point source discharges to navigable, ocean, and contiguous zone waters—to releases of pollutants to groundwater. 78 Fed. Reg. at 16820.

To justify its changed interpretation, EPA indicates that:

. . .views about the general purpose of the Act should not override Congress's evident intent not to regulate discharges to groundwater of any kind. *Id.*

Protecting the validity of the Interpretative Statement under the Administrative Procedures Act, EPA indicates that:

. . .[w]hile [it] disagrees with the reasoning of the Ninth Circuit's decision in *County of Maui*, as well as the reasoning of the Fourth Circuit in its *Kinder Morgan* decision, for reasons discussed [in the Interpretative Statement], it will nonetheless apply the decisions of those courts in their respective circuits until further clarification from the Supreme Court. 78 Fed. Reg. at 16812.

This manner of proceeding may allow EPA to avoid a challenge to the Interpretative Statement while providing guidance outside the Fourth and Ninth Circuits until the U.S. Supreme Court's decision.

### Conclusion and Implications

In California, the state has effectively implemented Congress' intent by adopting a robust regulatory program for discharges to waters of the state, which includes groundwater. See, California's Porter-Cologne Water Quality Control Act, Cal. Water Code §§ 13000, *et seq.* Projects that must secure permitting under state law include groundwater recharge, water storage and supply, recycled water, agricultural,

and land disposal projects. Until now, these projects, which often involve direct or indirect discharges to groundwater, have been regulated pursuant to state law, via the issuance of state only, non-federal, Waste Discharge Requirements and/or Water Reclamation Requirements.

If the *County of Maui* decision is upheld, the scope of the CWA's NPDES permitting program will greatly expand in California (and the nation), which might overwhelm EPA and state permitting agencies. While many water quality standards are shared between

the CWA and the state's water quality program, the CWA's focus on protecting the most sensitive aquatic species (that do not exist in groundwater) can result in CWA discharge standards being more stringent than state standards adopted to protect municipal drinking supplies. As such, some projects will certainly feel the effects of such a regulatory change. The shift to NPDES permits also introduces third party citizen enforcement, where none exists under California's state regulatory program.

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Opinions expressed in this article are those of Ms. Granquist and Ms. Quinn alone and do not represent the views of Downey Brand, LLP or any of its clients.



## WESTERN WATER NEWS

SEVEN COLORADO RIVER BASIN STATES AGREE  
TO NEW ACTION PLAN TO PROTECT VITAL RIVER WATER

In May, state and federal stakeholders in the Colorado River's water supply reached an agreement designed to reduce risks from ongoing and anticipated droughts in the Upper and Lower Colorado River Basins. The Colorado River drought contingency plans for the Upper and Lower Basins reflect years of collaborative effort by state, federal, tribal, and international stakeholders, and are trumpeted as significant cooperative efforts to fortify the Colorado River's water supply against the effects of drought in the basins.

### Background

The Colorado River provides a water supply for more than 40 million people and irrigates roughly 5.5 million acres of farmland. The Colorado River Basin, which is divided into an Upper and Lower Basin, spans seven states and extends into Mexico. The Colorado River's water supply is governed by the "Law of the River," which is comprised of numerous federal laws, regulatory guidelines, judicial decisions, agreements, and compacts developed over the course of nearly a century. An important function of this body of law has been federal-state and interstate cooperation in the dam and reservoir operation of the Colorado River, which has become increasingly important as drought conditions impact the river's supply.

In particular, in 2007, the U.S. Department of the Interior (Interior) and seven Colorado River Basin states established a set of temporary guidelines (2007 Guidelines) to address the historic drought plaguing the basin. For the Lower Basin, the guidelines provided for coordinated operations of two major reservoirs—Lake Powell and Lake Mead—and for water allocations among the Lower Basin states in the event of water shortages. Specifically, when Lake Powell's elevation is higher than Lake Mead's, water must be released from Lake Powell. Additionally, the guidelines provided that a shortage would be declared if Lake Mead's elevation dropped to 1,075 feet, at which point Arizona's apportionment

of water would decrease from 2.8 million acre-feet to 2.48 million acre-feet. Nevada would also receive less water—287,000 acre-feet compared to 300,000 acre-feet. The guidelines did not establish a scenario in which California would receive less than its 4.4 million acre-feet allotment, but California would not be able to receive deliveries of intentionally created surplus water if a shortage was declared in the Lower Basin.

Also, in 2007, the seven Basin States entered into an Agreement Concerning Colorado River Management and Operations (2007 Agreement). That agreement was designed to improve cooperation and communication among the states, provide additional security and certainty around the Colorado River's supply, and avoid situations giving rise to disputes under the Law of the River. Both the 2007 Agreement and 2007 Guidelines form an important backdrop to the newly signed drought contingency plans for the Upper and Lower Basins (collectively: Plans), which Congress authorized in April and which are governed by a single "companion" agreement.

### Drought and the Colorado River

Generally, drought response actions under the Plans will be triggered by projected reservoir levels according to 24-month studies by the U.S. Bureau of Reclamation incorporated into the Plans. The Plans, which expire December 31, 2025, do not override existing guidelines or agreements. Instead, the Plans allow for the development and testing of "tools" designed to provide security and certainty in the Colorado River's water supply. The Upper Basin drought contingency plan (Upper Basin DCP) is aimed at minimizing the risk of Lake Powell falling below a target elevation of 3,525 feet (mean sea level). To do this, the Upper Basin DCP provides for adjustments at the Glen Canyon Dam (*i.e.* Lake Powell), Flaming Gorge Dam, Curecanti, and Navajo Dam in the event of a drought operations response. Volumetric adjustments at Lake Powell will be considered first as part of a drought operation response. At the same time, Glen

Canyon Dam operations will be conducted so as to maintain its ability to generate hydropower for other Colorado River system projects and electrical service customers.

For its part, the Lower Basin drought contingency plan (Lower Basin DCP) provides that Lower Basin states will make reductions per the 2007 Guidelines based on projected Lake Mead levels. Additionally, the Lower Basin DCP provides that Lower Basin States will contribute certain water supplies to Lake Mead, again depending on its level. These supplies include intentionally created surpluses, which allow entities in California, Nevada, and Arizona to store water in Lake Mead if they are able to produce an equal amount of water within their state. This results in a water credit, and the credited volume is then delivered from Lake Mead when a surplus is declared. Under the Lower Basin DCP, some of this water may need to be contributed to Lake Mead if levels fall within certain tiered water levels. For instance, if the elevation of Lake Mead drops below 1,045 feet, Arizona, Nevada, and California must contribute 240,000 acre-feet, 10,000 acre-feet, and 200,000 acre-feet, respectively. If projected Lake Mead levels are between 1,045 and 1,090 feet, Arizona would need to contribute 192,000 acre-feet, with Nevada contributing 8,000 acre-feet. California would only need to contribute to Lake Mead levels if they do not exceed 1,045 acre-feet. However, if lake levels fall

below 1,030 feet, California would need to contribute 350,000 acre-feet, with Arizona and Nevada contributions set at less than 1,045 foot levels. This arrangement generally appears to reflect the priorities each state has to Colorado River water based on the Law of the River and reflected further in the 2007 Guidelines.

### **Conclusion and Implications**

The drought contingency plan has been widely considered a positive development in the management of the Colorado River water supply. The Plans also reflect a more precise understanding of the hydrological conditions of the Colorado River Basin developed through prior cooperative efforts, such as the 2007 Agreement and 2007 Guidelines. While it is unclear whether the interim drought response tools developed under the Plans will provide long-term solutions to drought conditions along the Colorado River, it is likely that these efforts will advance the parties' understanding of the river, its basin, and their ability to plan for and respond to anticipated drought conditions in the future. For more information, see: Interior and States Sign Drought Agreements to Protect Colorado River, available at <https://www.acwa.com/news/interior-and-states-sign-historic-drought-agreements-to-protect-colorado-river/> (Steve Anderson, Miles Krieger)

## **COLORADO WEST SLOPE RIVER BASIN ROUNDTABLES PRESENTS NEW STUDY PHASE OF COLORADO RIVER WATER, DROUGHT AND IMPACTS TO THE STATE**

The West Slope Basin Roundtables held a joint meeting on June 20 to hear a presentation on Phase III of an ongoing study examining risks associated with drought and future use in Colorado. The four West Slope Basin Roundtables (Colorado, Gunnison, Southwest, and Yampa-White-Green) originally commissioned the study to begin in December 2014. The study consists of three major phases. Phase I primarily focused on demand management programs, Phase II utilized the U.S. Bureau of Reclamation's Colorado River Simulation System (CRSS) to further study Phase I results, particularly how water banking could be used in conjunction with demand manage-

ment programs. Most recently, Phase III examined Colorado water use in the scenario of a compact call, studying where the most post-Compact diversions take place, and how that would be administered in a state-wide curtailment. As all phases of the project have consistently noted, the study is for discussion and informational purposes only, and no outcomes or ideas have been officially put forth by any of the involved Basin Roundtables.

### **Basin Roundtables**

The Basin Roundtables were created on the heels of extreme drought, after the Colorado General

Assembly passed the Colorado Water for the 21st Century Act in 2005. The roundtables, one each for Colorado's nine sub-basins, allow water districts, citizens, and any other stakeholders to have a process through which to plan water uses and needs for the future. Each roundtable has since created a Basin Implementation Plan (BIP) that highlights the specific challenges and needs of that basin. The Colorado Water Plan, finalized in 2015, contains nine chapters outlining issues, challenges, and goals for each of the basins. Although water issues of course affect the state as a whole, these Basin Roundtables allow specific areas of the state to plan for and combat the specific challenges in their areas.

### Phase I

Phase I specifically looked at demand management programs and how they could be utilized to better serve Colorado water needs in the future. Demand management programs are typically government or quasi-government funded programs that pay water users to not use their water in a specific year. That water can then be sent downstream to be stored in Lake Powell, or sent through to the Lower Basin States. Phase I determined, importantly, that there does not appear to be any hydrology and demand scenarios (meaning water supply v. water use) in which storage levels in Lake Powell can be maintained *without* implanting demand management programs. The study found that, absent demand management programs or implementation of the Drought Contingency Plan, there is a 10-20 percent chance that Lake Powell will be lowered below critical levels.

Of course, drought and demand are intertwined, and higher demand combined with severe drought is the worst-case scenario. Phase I testing found that a mere 10 percent increase in Upper Basin depletions doubles the frequency that demand management would be needed to sustain Lake Powell. The final step of Phase I looked at severe drought, such as 2000-2004, and determined that the amount of water needed in those years is far more than demand management can save in another year. Therefore, demand management should be done in conjunction with water banking, so as to be able to preserve that saved water for the driest years.

### Phase II

Phase II was more technical in that, compared to

the ideas and programs of Phase I, it was primarily tasked with using advanced computer modeling to study various Phase I ideas. The first step used the CRSS model to look at small-scale demand management combined with water banking. Under this scenario, 100,000 acre-feet per year would be banked in reservoirs by the Upper Basin states. The models confirmed the Phase I conclusions that this plan would work, provided: 1) there is dedicated reservoir space available and 2) there is sufficient water in the bank when the drought begins.

The second task under Phase II combined the CRSS model with Colorado's State-Mod model to examine basin-specific impacts (the CRSS model doesn't allow specific, water-rights based study within individual states). Phase II was able to combine the models, allowing inquiry into basin-specific questions involving demand management and its effects. Those questions were the focus of Phase III.

### Phase III

Phase III was conducted by John Carron of Hydros Consulting, under contract with the four Basin Roundtables. The study results were sobering—an increase in Upper Colorado River Basin water use by just 11.5 percent doubles the risk that the Upper Basin will fail to meet its Compact obligations. Further, even assuming no increase in use—but accounting for climate change affected hydrology—there is still a 46 percent chance of failing to meet Compact obligations over the next 25 years. This is based on the assumption that the Upper Basin must deliver a running ten-year average of 82.5maf (based on 7.5maf/year to the Lower Basin + 750,000af to Mexico). However, some have argued that the Upper Basin doesn't actually owe that much, but rather only owes 75maf on the running ten-year average. Under that assumption, no models found a risk of failure to meet Compact obligations. The models were based on "stress test hydrology," meaning that the models are realistically pessimistic about climate change impacts on water volumes in the Upper Basin. And, Carron noted in his presentation, "all models are wrong, some are useful."

The Phase III study first noted that the state of Colorado uses about 2.5maf/ year, but only 932,000af of that is post-Compact water rights. Any pre-Compact water rights would not be curtailed in a potential call scenario. Of that 932,000 more than half of that

water is transmountain diversions (TMDs) from the Colorado River Basin to the Front Range. This is important, particularly depending on how any curtailment would be administered. Phase III examined two potential call models:

The first would be a pure priority call, by curtailing rights going back by priority date until the volumetric call limit was reached. Under a 100,000af call, the oldest rights to be curtailed would be July 1957. Under a 300,000af or 600,000af call, the oldest rights would be September 1940 and August 1935, respectively. TMDs play such a large part in this because large TMDs often end up being the “swing” call when trying to make those specific volumetric reductions. For example, the July 1957 call would include the Fryingpan-Arkansas Project, while the September 1940 call would include water brought through the Roberts Tunnel to Denver.

The second potential method of administering a call would be through each sub-basin’s post-compact water usage as a percentage of state-wide post-compact use (essentially the age of water rights is not as important here). Although no one has specifically advocated for this plan, it was included in the Phase

III report as a means of furthering discussion. Under this plan some sub-basins, such as the Gunnison, would be responsible for less curtailment. Other sub-basins, like Southwest Colorado, would be responsible for 17,000 *more* acre-feet of curtailment than it would have based upon a pure priority call.

### **Conclusion and Implications**

How the state would administer a Compact call is yet unclear. The only thing that is certain is that TMDs especially would be hit hard. Therefore, Front Range water suppliers are left with two options: 1) buy and dry pre-compact water rights (probably western slope) and use more TMDs; or 2) convince the state to use a curtailment system not strictly based on priority (for example, like the program based on sub-basin usage). Either plan would require cooperation with western slope water users, which in reality was the main point behind the Basin Roundtables and the study. It is likely that water shortage issues are coming to Colorado, but through this three phase study, the water managers are hoping to be able to develop plans to allow the state, as well as the Upper Basin and even the entire Colorado River Basin as a whole, to develop and implement solutions to serve western water users throughout the 21st century.  
(John Sittler, Paul Noto)

## **EDUCATIONAL GRACE PERIOD NEARING END FOR IRRIGATION AND DRAINAGE ENTITIES UNDER THE NATIONAL FLOOD INSURANCE PROGRAM IN IDAHO**

After disagreement between the State of Idaho and the Federal Emergency Management Agency (FEMA), and the spring 2018 gubernatorial directive for the Idaho Department of Water Resources (IDWR) to partner with FEMA to preserve Idaho access to the National Flood Insurance Program (NFIP), the floodplain permit and training grace period is in full swing if not nearing its close. Whether and how the irrigation and drainage community, and local municipalities charged with floodplain administration and enforcement, react remains to be seen.

### **The Conflict**

Continuing eligibility for NFIP assistance hinges upon the regulation and oversight of “development”

within floodplains (which include the larger 100-year floodplain and the narrower floodway within it). While FEMA administers and enforces the NFIP from the national level, state participation requires local communities to adopt and enforce floodplain management ordinances through “local floodplain administrators” who are assisted and audited by the IDWR State Floodplain Coordinator. The local communities map local floodplains consistent with NFIP regulations, and then issue permits governing floodplain development activities consistent with the NFIP.

Though this regulatory hierarchy has been in place in Idaho, routine irrigation operation and maintenance activities taking place within mapped flood-

plains have not been regulated. This is because Idaho Code §§ 46-1021 and 46-1022 expressly exempt the operation, cleaning, maintenance or repair of irrigation facilities from the broader definition of the term “development” as used in 40 CFR § 60.3 under the NFIP. To assuage any federal preemption concerns at the time, FEMA participated in, and approved, the 2010 Idaho statutory amendment process that exempted routine irrigation operation and maintenance activities from typical floodplain “development” regulatory requirements. Times have, apparently, changed.

In early 2018, and despite prior participation in and agreement with Idaho Code §§ 46-1021 and 46-1022 irrigation activities exemption language, FEMA contacted Idaho officials asserting conflict between Idaho Code and 40 CFR § 60.3. FEMA essentially threatened to suspend Idaho eligibility under the NFIP unless the state worked with FEMA correct the conflict. Under gubernatorial mandate, IDWR and FEMA officials drafted and released a regulatory guidance document setting forth a stepped permitting regime outlining those irrigation facility-related operation and maintenance activities exempt from NFIP permitting requirements; those qualifying for a general permit (General Irrigation Floodplain Development Permit or GIFD); and those requiring an individual permit. IDWR and FEMA further entered into Memorandum of Agreement in April 2019 concerning the implementation of local floodplain regulation with respect to irrigation-related activities consistent with the June 2018 joint guidance document.

In May 2019, IDWR sent letters enclosing the 2018 guidance document to local communities and irrigation and drainage entities. The letters also included a schedule of informational/training sessions occurring throughout the state.

### Regulatory Regime

Under the NFIP in Idaho, local floodplain administrators are being required to (and irrigation and drainage entities must accede to) regulate “development” activities occurring in the “special flood hazard area” which includes both the floodway and the larger/broader 100-year floodplain. Not surprisingly, numerous portions of irrigation facilities (both diversion and drainage) are located in special flood hazard areas given the need to divert water from rivers and streams and the need to convey drainage back to the same.

The 2018 guidance document provides examples of irrigation and drainage “operation, cleaning, maintenance and repair” (OCMR) activities that are exempt from permitting requirements as that term (OCMR) is defined in the guidance. OCMR activities that are exempt from permitting include headgate adjustment, removal of aquatic weeds, channel vegetation growth, and removal of other debris provided that the materials removed are picked up and hauled out of the special flood hazard area.

Activities requiring a GIFD include facility grading, shaping and dredging activities, facility replacement of like kind (*e.g.*, headgates, check structures, wing walls, *etc.*), and channel or facility armoring or stabilization (provided that the same does not involve channel alteration). The GIFD process is comparatively streamlined and coverage lasts for up to five years with annual coordination meetings to review entity work plans.

An activity that may or causes an increase in base flood level elevation, all new (as opposed to like-kind replacement) construction and the enlargement of facilities, and fill activities require an individual permit.

### Conclusion and Implications

Irrigation and drainage entities are reluctant to participate in more permit programs than absolutely necessary. Additional paperwork and coordination meetings can overtax smaller entities that simply do not have the staff to keep up with program requirements.

Idaho irrigation and drainage entities are also irked by the fact that the public safety goals of the NFIP (minimizing flood risk and resulting flood damage) is already required of them under state law (*see, e.g.*, Idaho Code §§ 42-1202 through 42-1204) absent the need of an additional permitting program. Moreover, irrigation and drainage facility operations and maintenance promote the flow of water rather than the opposite which could cause flooding.

One of the most troublesome aspects of the NFIP guidance is the requirement that irrigation and drainage entities haul off canal and drain-dredged spoils within ten days of depositing the same on the facility banks. This may be counterintuitive because building up the banks of irrigation and drainage facilities provides additional capacity making them less susceptible to flooding/overtopping. It is further unrealistic and problematic to haul spoils off be-

cause: (a) dredged materials are difficult to handle and remove until dry—a process taking much longer than ten days; and (b) few, if any, irrigation entities possess the fleet of dump trucks and personnel needed to haul dredged materials away contemporaneous with the dredging. Then, an entity is left to find a destination for the spoils. The budgetary implications of this requirement (whether in terms of equipment

rentals and temporary personnel, or permanent staff and equipment) are staggering, especially for larger entities overseeing hundreds of miles of facilities.

All stakeholders are sitting back for the moment observing how this all progresses. Whether legal challenges result remains to be seen.  
(Andrew J. Waldera)

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**LEGISLATIVE DEVELOPMENTS**

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**CALIFORNIA LEGISLATORS REJECT WATER TAX BUT APPROVE FUNDING FOR SAFE AND AFFORDABLE DRINKING WATER**

California lawmakers recently approved and presented to Governor Gavin Newsom a \$214.8 billion California budget with new spending for safe and affordable drinking water. Lawmakers rejected Governor Newsom's initial proposal to impose a water tax, pursuing instead a compromise to appropriate over \$130 million of existing tax revenue for improvements to the drinking water systems and supplies.

**Background**

Several funding proposals were introduced earlier this year to support safe and affordable drinking water supplies particularly for disadvantaged communities in California. Governor Newsom's January and May budget proposals included a controversial water tax ranging from 95 cents to \$10 a month on water customer bills in order to raise approximately \$140 million annually for a proposed "Safe and Affordable Drinking Water Fund (SADWF)."

The California Assembly and Senate simultaneously juggled many other bills aimed to fund and support clean and reliable drinking water in areas of high need throughout the state. Examples included Assembly Bill 217 (Garcia) and Assembly Bill 134 (Bloom), which proposed creating a safe drinking water fund to be financed through taxes on various agricultural interests, livestock, fertilizers, and local water systems. Examples of Senate proposals included Senate Bill 669 (Caballero) to create a water trust fund using General Fund appropriations, and Senate Bill 200 (Monning) to create and implement a safe drinking water fund but without specifying a funding source.

**A Compromise Result**

On May 22, 2019, the California Senate Budget Subcommittee voted 37-1 to reject Governor Newsom's proposed water tax. Both Republican and Democratic lawmakers were hesitant to implement a new tax in light of the state's projected surplus of \$21.5 billion. The Senate instead recommended

an alternative proposal to appropriate money from existing tax dollars to finance the Safe and Affordable Drinking Water Fund. The proposal included funding from other bills and laws including Proposition 1 and Proposition 68 to fund various projects to strengthen water delivery systems.

Following extensive negotiations, the legislature approved in early June and sent to Governor Newsom a \$214.8 billion state budget including more than \$130 million for clean water projects funded primarily from the Greenhouse Gas Reduction Fund which derives proceeds from the sale of greenhouse gas emission credits.

In the 201920 budget plan, the administration proposes to establish the SADW program to increase access to safe drinking water for Californians. Similar to last year's proposal, the program would provide certain local water agencies—particularly ones in disadvantaged communities—with grants, loans, contracts, or services to help support their O&M costs. This funding would be supported by new charges proposed by the Governor on water system ratepayers, fertilizer sales, and certain agricultural entities. For 201920, the administration requests \$4.9 million General Fund in onetime funding for state administration costs at the SWRCB and CDFA to begin implementation of the program. Below, we provide additional details about key aspects of the administration's proposal. (LAO Office Analysis of the 2019-2020 California Budget).

The breakdown of funding sources, are summarized as follows:

In total, the administration estimates that the various proposed charges would generate roughly \$110 million to \$140 million annually when fully implemented. Charges on fertilizer and agricultural entities would sunset 15 years

after they go into effect. Specifically the administration proposes budget trailer legislation to implement the following charges:

**Charge on Water System Customers (\$100 Million to \$110 Million).** Beginning July 2020, the administration proposes imposing monthly charges on most water system customers ranging from \$0.95 to \$10 per month based on the size of the customers' water meter. According to a recent report by a private consulting firm, the average monthly residential water bill across the state typically falls between \$40 to \$80. SWRCB estimates these charges would generate between \$100 million and \$110 million annually when fully implemented. Beginning July 2022, SWRCB could reduce the amount consumers are charged. Customers would be exempted from the charges if (1) they self-certify that their household income is equal to or less than 200 percent of the federal poverty level (\$25,100 for a family of four in 2019) or (2) receive service from a water system with fewer than 200 connections. Local water systems would be authorized to retain 4 percent of the revenue to cover costs associated with the collection of the charges until July 2022 when the amount the water systems could retain would decline to 2 percent.

**Fertilizer Mill Fee (\$14 Million to \$17 Million).** The administration proposes a mill fee of six "mills" (equal to sixtenths of a cent) per dollar on the sale of fertilizer. This would be in addition to the current mill fee of three mills. This fee would go into effect upon enactment of the budget trailer legislation. According to CDFA, this charge is estimated to generate \$14 million to \$17 million per year when fully implemented.

**Charges on Milk Producers (\$5 Million).** The administration proposes to impose charges on milk producers beginning January 2022. In total these charges are estimated to generate \$5 million per year when fully implemented. We note that the

dairy industry in California generated \$6.6 billion in cash receipts in 2017.

**Charge on Confined Animal Facilities (Amount Not Estimated).** Beginning January 2022, the administration proposes to impose a charge on confined animal facilities—excluding dairies—such as poultry and other livestock operations. A workgroup would be convened by the administration to establish a charge commensurate with the risk to groundwater confined animal facilities create by discharging nitrates. The charges are capped at \$1,000 per facility. (Ibid)

Some environmental advocates have described the comprise budget bill's use of the Greenhouse Gas Reduction Fund as asking Californians to choose between clean water and clean air. In response, Governor Newsom has asserted that while money from the cap-and-trade programs are legally required to be spent on projects to reduce the greenhouse gases responsible for global warming, the lack of clean drinking water in various locations throughout the state results in increased carbon emissions from transporting bottled water to those communities.

### Conclusion and Implications

The legislature finds that each year, more than one million Californians lack access to clean drinking water. As of the time of this writing, lawmakers were finalizing details of the Fiscal Year 2019-2020 budget legislation, including through developing trailer bills. The compromise proposal avoids the controversial imposition of a water tax, which may be among its most compelling qualities from the perspective of the many urban water suppliers that would have been burdened with collecting such a tax. An analysis by the California Legislative Analyst's Office of the water related portions of Governor Newsom's 2019 budget is available online at: <https://lao.ca.gov/Publications/Report/3933#Water> (Paula Hernandez, Michael Duane Davis)



## NEW MEXICO LEGISLATION AMENDING NOTICE REQUIREMENTS FOR STATE ENGINEER APPLICATIONS TO CHANGE WATER USE TAKE EFFECT

On March 28, 2019, New Mexico Governor Michelle Lujan Grisham signed into law Senate Bill 12 (SB 12), which results in significant changes in how notice must be provided for an Application with the New Mexico State Engineer's Office (OSE) to appropriate ground and surface water. The effective date of these changes is July 1, 2019. *See*, 2019 N.M. Laws, ch. 88, § 8.

### Background

Prior to SB 12, a water rights applicant was required to publish the details of an application in a local newspaper designated as a newspaper of public record once a week for three weeks. Potential protesters could submit their objections to the State Engineer at any time after first publication and up to ten days after the date of last publication of the Public Notice. If done correctly, this process took 31 days to complete from the start of the first publication to the end of the protest period.

Now, in addition to publishing notice as previously required, the OSE will be required to publish information about the application on its website. This shall include: 1) the essential facts of the application; 2) the name of the newspaper where the application is being published; 3) the contact information for the State Engineer District Office where the application is located; and 4) the date by which objections may be filed. *See*, 2019 N.M. Laws, Ch. 88, § 1(A). This online publication must be posted for 70 days. Potential protestors may object anytime within this 70-day period. *Id.* These online water notifications, which apply to new appropriations and water transfers, contributes to due process protections for stakeholders whose water rights holders may be affected by a decision of the State Engineer.

### Senate Bill 12

SB 12 creates a new section of Chapter 72, Article 2, NMSA 1978, which requires a new procedure for notice of an application filed pursuant to §§ 72-5-4 (notice for appropriation of surface water), 72-5A-5 (groundwater storage and recovery), 72-6-6 (water use leasing), 72-12-3 (appropriation of groundwater),

or 72-12B-1 (export of water outside the State). *See*, 2019 N.M. Laws, ch. 88, §§ 1-8.

Put simply, if there is an application to appropriate, lease, begin a groundwater storage project, or export water outside the state, notice must be provided as required by the new law. Although SB 12 does not explicitly amend the notice requirements for a transfer of water rights, NMSA 1978, §§ 72-5-23 (Surface Water-Change in Place of Use) and 72-5-24 (Surface Water-Change in Purpose of Use and/or Point of Diversion), notice requirements for water transfers shall be the same as those for new appropriations "as required by Sections 72-5-4 . . ." NMSA 1978, § 72-5-3. Also, § 72-12-7 (Groundwater-Change in Place of Use or Location of Well) provides that notice shall be "prescribed in the case of original applications." Therefore, the impact of SB12 will likely be broader than just new appropriations and leases. SB 12 does not revoke or alter the State Engineer's ability to approve temporary water use while a lease application is pending. *See*, NMSA 1978, § 72-6-3 (B) ("The lease may be effective for immediate use of water or may be effective for future use of the water covered by the lease . . .").

Procedurally, when SB 12 takes effect on July 1, 2019, an applicant must file an application with the OSE, wait for the OSE to put together a description of the application along with any other required information, and then the OSE must post the application details for 70 days. Meanwhile, within five days of posting the electronic notice, the OSE is required to issue instructions to the Applicant to publish notice in the newspaper as previously required and as described above. *See*, 2019 N.M. Laws, Ch. 88, § 1(B). And, the last of the three newspaper publication dates must occur within 60 days of the posting of the notice online by the State Engineer's Office, or the applicant is required to request that the State Engineer prepare a new notice and begin the entire process over. *See*, 2019 N.M. Laws, Ch. 88, § 1(D). Proof of publication will still be required within 20 days of the last publication. *See*, 2019 N.M. Laws, Ch. 88, § 1(C).

Finally, SB 12 also amends § 72-5-4, 72-5-5 (Objections to Applications), and §§ 72-5A-5, 72-6-6,

72-12-3, and 72-12B-1 NMSA 1978 to ensure uniformity in posting, publication, objection, and timeline instructions for all applications that require publication. *See*, 2019 N.M. Laws, Ch. 88, §§ 1-7.

### **Conclusion and Implications**

This new law creates major procedural changes for providing due process notice for water rights ap-

plications. The State Engineer's District Offices are preparing to implement its provisions. The updated legislation includes important due process protections for water rights holders with the implementation of online water notifications. Going forward, it may be wise for law firm to develop methods for the preparation of applications to ensure compliance with the new statutory directives.

(Christina J. Bruff)

**REGULATORY DEVELOPMENTS****U.S. BUREAU OF RECLAMATION REVIVES PLAN  
TO RAISE SHASTA DAM**

Since the 1980s, Shasta Dam has been a focal point in debates for increasing the state's water storage capacity. In 2014, such a proposal initially led nowhere when the U.S. Bureau of Reclamation (Bureau) studied the potential impacts of raising the dam by 18.5 feet, finding that such a project could have adverse effects on the McCloud River, violating the state's Wild and Scenic Rivers Act (WSRA). With newfound wind in its sails under the current federal administration, however, the Bureau has revived its interest in raising Shasta Dam by teaming up with Westlands Water District (Westlands). Welcomed by a storm of opponents seeking to prevent the project from going forward, the Bureau and Westlands now find themselves in a legal battle to keep the project from sinking.

**Background**

Decades in the making, the Bureau's Shasta Dam and Reservoir Enlargement Project (Project) began to take off in 2014 when the Final Environmental Impact Statement for the Shasta Lake Water Resources Investigation (FEIS) was completed. The FEIS analyzed the benefits and environmental impacts of raising the Shasta Dam by varying heights, ranging from 6.5 to 18.5 feet, and acted as an important step for the Bureau in fulfilling its obligations under the National Environmental Policy Act (NEPA).

The Bureau considered the potential impacts of the Project on the McCloud River, specifically looking at the transition reach of the McCloud Arm of Lake Shasta into the Lower McCloud River. In this analysis, the Bureau determined that if the Project were to be implemented, the transition reach would be increased by about 3,550 feet, extending 39 percent further up the McCloud than the current transition reach and absorbing 3 percent of the river from the McCloud Dam to Lake Shasta.

Based on these findings, the Bureau concluded that the Project would have a "potentially signifi-

cant" impact on the wild trout fishery located on the McCloud River and a "significant and unavoidable" impact on the free-flowing condition of the McCloud. Additionally, the FEIS acknowledged that these impacts would conflict with the WSRA.

Despite the extensiveness of the FEIS and its accompanying Final Feasibility Report for the Project, no Record of Decision was made and there was no official recommendation.

No further major action was taken until March of 2018 when Congress granted \$20.5 million to the Bureau for design and pre-construction activities for the Project, at which point The Bureau began negotiations with Westlands for a cost-share agreement.

In November of 2018, Westlands issued its Initial Study and Notice of Preparation for the Project and announced that it would be serving as the Lead Agency for review under the California Environmental Quality Act (CEQA) in preparing an Environmental Impact Report (EIR). In December, Westlands held a public scoping hearing in Redding and in January accepted written comments regarding the Initial Study.

**The Complaint against Westlands in California Superior Court**

On May 13, 2019, several environmental groups (collectively: plaintiffs) filed suit in California Superior Court in Shasta County, alleging that Westlands' cooperation and assistance in the Project violates the WSRA and seeking declaratory and injunctive relief on the matter.

Created in 1972 to protect listed rivers in California by preserving their free-flowing state and their immediate environments, the WSRA established a list of rivers throughout California, chosen for their "extraordinary scenic, recreational, fishery, or wildlife values." In 1989, the WSRA was amended to add § 5093.542, which gave the McCloud River a protected status.

Although not specifically listed among the other

rivers protected by the WSRA, § 5093.542 declares that:

. . .the McCloud River possesses extraordinary resources in that it supports one of the finest wild trout fisheries in the state. . .[and that].  
. . .maintaining the McCloud River in its free-flowing condition to protect its fishery is the highest and most beneficial use of the waters of the McCloud River.

Additionally, § 5093.542(c) prohibits state agencies from assisting or cooperating with any government agency:

. . .in the planning or construction of any dam, reservoir, diversion, or other water impoundment facility that could have an adverse effect on the free-flowing condition of the McCloud River, or on its wild trout fishery.

Using the WSRA as the spearhead for their suit, plaintiffs' cause of action alleges that:

- 1) Westlands is a state agency,
- 2) Westlands is assisting and cooperating with a

federal agency (the Bureau) in the Project,

3) the Project could have an adverse effect on the free-flowing condition of the McCloud River and its wild trout fishery, and ultimately, and

4) Westlands is acting in violation of the WSRA.

### **Conclusion and Implications**

The Bureau of Reclamation does have to comply with the federal Water Infrastructure Improvements for the Nations Act, which requires that the Bureau secure a non-federal cost-share partner to cover at least 50 percent of the Project funding. Accordingly, the Bureau would still need a local partner to split the costs of the Project, whether Westlands or a different agency.

In the event plaintiffs' challenge is successful, the Bureau of Reclamation will need to find a new, non-state agency cost-share partner, slowing the progress of the Project significantly. Until and unless that happens, however, Westlands and the Bureau have set their schedule to begin construction for the Project by December, 2019.

(Wesley A. Miliband, Kristopher T. Strouse)

## **NEVADA STATE ENGINEER APPROVES LONG-SOUGHT WATER PERMITS FOR MOLYBDENUM MINE BY ALLOWING MITIGATION OF CONFLICTS WITH EXISTING RIGHTS**

On June 6, 2019, the Nevada State Engineer issued Ruling 6464, which approved over 11,000 acre-feet of groundwater applications for a proposed molybdenum mine in Eureka County, Nevada known as the Mt. Hope project. This ruling ended years of litigation that made three trips to the Nevada Supreme Court and resulted in two published opinions. Ultimately, the applicant entered into settlement agreements with the protestants, paving the way for the State Engineer's approval, notwithstanding his acknowledgment that the permits will cause nearby springs to dry up.

### **Background**

Starting in 2006, General Moly, Inc., through a subsidiary Kobeh Valley Ranch, LLC (collectively:

KVR) filed applications for new water appropriations and to change the point of diversion, place of use and manner of use of existing water appropriations to develop the Mt. Hope open-pit mine. The project will be constructed on public lands managed by the U.S. Bureau of Land Management (BLM) at a total cost of nearly \$1.3 billion. The 36-square-mile mine footprint will straddle two hydrographic basins, Kobeh Valley and Diamond Valley.

To provide water for the project, KVR proposed a well field in Kobeh Valley. Over the anticipated 44-year life of the project, KVR predicted a sizeable draw down of groundwater in the vicinity of the well field. KVR's hydrogeology and groundwater modeling experts anticipated that KVR's pumping would completely dry nearby springs and stock watering

wells. Although these sources produce relatively small amounts of water (some springs estimated to discharge less than one gallon per minute), the water was already appropriated by others.

### Litigation History

The Applications were protested by Eureka County, the U.S. Bureau of Land Management (BLM), and certain affected senior appropriators. A primary protest ground was that the appropriations would conflict with existing rights, in violation of Nev. Rev. Stat. (NRS) 533.370(2). The statute provides in pertinent part:

[W]here there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights or with protectable interests in existing domestic wells . . . , or threatens to prove detrimental to the public interest, the State Engineer shall reject the application and refuse to issue the requested permit.

After two hearings in 2008 and 2010 (the latter occurring after remand from the district court), the State Engineer issued Ruling 6127 in 2011 approving the applications.

In Ruling 6127, the Nevada State Engineer recognized that certain springs located on the Kobeh Valley floor that are hydrologically connected to the underlying water table would be “impacted” by KVR’s pumping. The State Engineer further recognized that those springs were the source of existing, senior water rights. Nevertheless, the State Engineer concluded that the drying up of springs was not a “conflict with existing rights” prohibited by NRS 533.370(2) because KVR could fully mitigate any impact. To that end, the State Engineer required KVR to prepare, with the assistance of Eureka County, a monitoring, management, and mitigation plan (3M Plan) for approval by the State Engineer before KVR could divert any water.

Certain protestants sought judicial review of Ruling 6127, which the district court denied, concluding that substantial evidence supported the State Engineer’s decision that KVR would be able to mitigate any adverse impacts to existing water rights. The district court further held that NRS 533.370(2):

. . . does not prevent the State Engineer from granting applications that may impact existing rights if the existing right can be protected through mitigation, thus avoiding a conflict with existing rights.

While Ruling 6127 was before the district court, KVR developed a 3M Plan in coordination with Eureka County, which the State Engineer approved. Nevertheless, the State Engineer retained ultimate authority over the 3M Plan, approving it with the:

. . . understanding that components of the Plan are subject to modification based on need, prior monitoring results, or changes in the approved water rights.

Certain protestants petitioned for judicial review of the State Engineer’s approval of the 3M Plan, which the district court denied.

The protestants then appealed both decisions to the Nevada Supreme Court, which consolidated the cases for review.

### The Nevada Supreme Court Decisions

#### *Eureka I*

On appeal, the Supreme Court decided it did not need to reach the question of whether NRS 533.370(2) allows the State Engineer to conditionally grant applications on the basis of future successful mitigation in order to avoid a “conflict with existing rights.” Rather, the Court concluded that because the 3M Plan was prepared after Ruling 6127 issued, there was not substantial evidence before the State Engineer to support the decision:

Nowhere in the ruling . . . does the State Engineer articulate what mitigation will encompass, even in the most general sense. And evidence of what that mitigation would entail and whether it would indeed fully restore the senior water rights at issue is lacking: there was no mitigation plan in the record before the district court or in existence when KVR’s applications were granted. . . . [T]he State Engineer’s decision to grant an application, which requires a determination that the proposed use or change would not

conflict with existing rights, NRS 533.370(2), must be made upon presently known substantial evidence, rather than information to be determined in the future. . . .*Eureka County, et al. v. State Engineer, et al.*, 131 Nev.Adv.Op. 84, 359 P.3d 1114, 1119-20 (2015) (*Eureka I*).

Although asserting it was not addressing the question of whether Ruling 6127 violated NRS 533.370(2), the Supreme Court questioned the characterization of KVR's proposed use as "impacting" rather than "conflicting with" existing rights:

[C]ontrary to the State Engineer's, KVR's, and amici's assertions, KVR's pumping would not merely impact existing water rights; the very evidence upon which the State Engineer relied demonstrates that KVR's appropriation would cause the complete depletion of the source of existing water rights. The Legislature did not define exactly what it meant by the phrase "conflicts with" as used in NRS 533.370(2), but if an appropriation that would completely deplete the source of existing water rights does not "conflict with" those existing rights, then it is unclear what appropriation ever could... To the extent that KVR's proposed appropriations would deplete the water available to satisfy existing rights at issue, they are undeniably "in opposition" thereto, and thus "conflict with" the existing rights under NRS 533.370(2). *Eureka I*, 359 P.3d at 1118.

The Court reversed and remanded to the District Court.

### ***Eureka II***

On remand, the parties disputed whether the Supreme Court's remand instructions allowed KVR to submit additional mitigation evidence. The District Court concluded no, and granted the protestants' petitions for judicial review, vacated the State Engineer's approval of the 3M Plan, denied the water right applications and vacated the permits. KVR appealed, and the Supreme Court affirmed. *State Engineer v. Eureka County*, 133 Nev. Adv. Op. 71, 402 P.3d 1249 (2017) (*Eureka II*).

### **State Engineer Ruling 6464**

Because *Eureka I* and *Eureka II* terminated all proceedings concerning KVR's initial applications, KVR filed another set of applications with a completed 3M Plan. Some of KVR's applications sought new appropriations and some sought to change existing rights. Eureka County, certain senior water rights holders and an organization that represented groundwater users called Diamond Natural Resources Protection & Conservation Association (DNRPCA) protested. At the outset of the administrative hearing, KVR and most of the protestants reached a settlement under which the settling protestants withdrew their protests in exchange for KVR withdrawing its applications for new water appropriations and other concessions.

The hearing proceeded on KVR's change applications with just one protestant remaining. Months after the hearing, that remaining protestant also reached a settlement with KVR and withdrew its protest. At the hearing, KVR submitted evidence that monitoring indicated potential adverse impacts to certain springs. KVR submitted an augmentation plan to augment the senior rights that would be impacted by KVR's pumping.

The State Engineer then issued Ruling 6464, which approved KVR's change applications. Appearing to address the Nevada Supreme Court's admonitions in *Eureka I*, the State Engineer concluded:

While the State Engineer finds that an approval of KVR's applications would result in a conflict with existing rights, that potential conflict has been resolved through an independent agreement between [the protestant] and KVR resulting in the withdrawal of the remaining protests to KVR's applications. Because [the protestant] has withdrawn its protests concerning the conflicts with existing rights, as well as other grounds, despite any impairment of the rights on Mud Spring, the State Engineer will acknowledge the contractual resolution to the conflict as being sufficient to avoid the conflict and not mandate the State Engineer's denial due to conflicts with existing rights. The State Engineer acknowledges the augmentation plan presented by KVR as contained in [its expert's] report and adopts the augmentation plan as a condition that it be implemented prior to the diversion of any water for beneficial use by KVR.

The State Engineer's disposition of the "conflict"

in this manner was surprising in light of a footnote in the Supreme Court's *Eureka I* decision, which stated:

The State Engineer's ruling states that though the BLM originally protested KVR's appropriations, it withdrew its protests "after reaching a stipulation on monitoring, management and mitigation" with KVR. It seems the State Engineer assumed this was sufficient to dispense with the conflict under NRS 533.370(2), but this is a less than clear conclusion. *Eureka I*, 359 P.3d at 1118 n.3 (emphasis added).

### Conclusion and Implications

Although Nevada law allows "any person feeling aggrieved by any order or decision of the State Engineer" to seek judicial review, it is unlikely that the State Engineer's interpretation of NRS 533.370(2)

and analysis of conflicts with existing rights will be challenged in the courts. In settling with KVR, the protestants withdrew their protests and waived their rights to appeal. The judicial review statute could be interpreted to allow someone who was not a protestant to challenge Ruling 6464. But in light of the long history of litigation, any interested parties likely got involved long ago and have settled with KVR.

For that reason, the Mt. Hope mine litigation will likely not give the Supreme Court the opportunity to address the full extent of the State Engineer's authority to approve applications even when acknowledged conflicts with senior rights exist. Nevertheless, the question of whether conflicts with existing rights can be overcome through mitigation and augmentation will likely be the subject of a future Nevada Supreme Court decision.

(Debbie Leonard)

## OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY DENIES LIQUIFIED NATURAL GAS EXPORT PROJECT'S APPLICATION FOR WATER QUALITY CERTIFICATION

On May 6, 2019 the Oregon Department of Environmental Quality (DEQ) denied Jordan Cove LNG, LLC and Pacific Connector Gas Pipeline, LP's (collectively: applicants) application for water quality certification for their proposed Jordan Cove Liquefied Natural Gas (LNG) Export Terminal and Pacific Connector Pipeline (Project). DEQ determined the applicants had not provided reasonable assurance that the Project would comply with water quality standards. Federal regulations require such "reasonable assurance." The certification was denied "without prejudice," meaning the applicants may reapply with new information responsive to DEQ's concerns.

DEQ's denial represents the latest in a series of permit challenges the Project has faced. For example, in late 2018 we covered *Coos Waterkeeper v. Port of Coos Bay Oregon*, 363 Or. 354 (2018), in which the Oregon Supreme Court upheld the Oregon Department of State Lands' issuance of a removal fill permit to the Port of Coos Bay for the construction of the marine terminal.

### Project Overview

The proposed export terminal would be located on

the North Spit of Coos Bay in Coos County, Oregon. Facilities would include a slip and access channel, modifications to the federal navigational channel, a marine terminal, a natural gas conditioning and liquefaction facility, operations buildings, and wetland mitigation sites. The terminal would be served by the proposed 229-mile Pacific Connector pipeline that would connect Jordan Cove to existing interconnections in Klamath County, Oregon. The pipeline could transport up to 1.2 billion cubic feet of natural gas per day. The proposed pipeline route involves more than 300 water crossings.

### Legal Framework

Section 401 of the federal Clean Water Act (CWA) requires that:

. . . [a]ny applicant for a Federal license or permit to conduct any activity. . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate. . . that any such

discharge will comply with. . . [applicable water quality standards].

The Project requires a CWA § 404 Dredge and Fill Permit from the U.S. Army Corps of Engineers (Corps), which triggered the requirement to obtain water quality certification from DEQ. Without a water quality certification from DEQ, the Corps cannot grant the dredge and fill permit the applicants need to begin the Project.

### The DEQ's Decision

After reviewing the Applicants' initial submission and responses to DEQ's supplemental information requests, DEQ determined that it

. . . [id] not have a reasonable assurance that the construction and operation of the Project will comply with applicable Oregon water quality standards.

The "reasonable assurance" standard comes from CWA regulations concerning 401 certification. *See*, 40 C.F.R. § 121.2(1)(3). However, the term "reasonable assurance" is not defined in the CWA, its regulations, or Oregon's water quality certification regulations. Nationwide, there is limited caselaw interpreting the meaning of this term, but multiple courts have agreed that the reasonable assurance standard "does not require absolute certainty" that the activity will comply with water quality standards.

DEQ's report about the Project indicates that DEQ lacks reasonable assurance of compliance with multiple water quality criteria. With respect to temperature, DEQ observed that the Project would involve vegetation removal and:

. . . there would be a time lag between the removal of vegetation providing shade to water-

bodies, and the reestablishment of that shade cover.

DEQ noted that several potentially impacted waterbodies are limited for temperature and are under an approved temperature Total Maximum Daily Load (TMDL). DEQ explained that it requested the applicants:

. . . evaluate compliance with Total Maximum Daily Load allocations and with Designated Management Agencies' Total Maximum Daily Implementation Plans. . . [but did not]. . . receive[] information on [the Project's] compliance with TMDL allocations for temperature.

The applicants also failed to provide detailed temperature mitigation plans. In addition to its concerns about temperature, DEQ also highlighted the risk of release of drilling materials into waterbodies due to the construction of the proposed Coos Bay estuary crossing.

### Conclusion and Implications

The certification was denied "without prejudice," which means the applicants can reapply for certification and submit additional information that could result in a different decision. DEQ's decision highlights the importance of responding to DEQ's requests for additional information quickly and comprehensively. DEQ sent the applicants four requests for additional information after they filed their application for certification. DEQ commented that one response was "incomplete or inadequate" and, with respect to another, stated that "the late date of Jordan Cove's filing prevented any significant review of the material for this decision." This is a pitfall that prospective applicants should take care to avoid.  
(Alexa Shasteen)



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**PENALTIES & SANCTIONS**

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**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**

• May 30, 2019 - The EPA announced a series of enforcement actions that will reduce pollution and improve compliance with critical clean water laws at marina and boat yard facilities in Massachusetts. EPA will continue to actively inspect marinas and boat yards as the boating season soon starts in New England to ensure marinas and boat yards are fully complying with their obligations under the Clean Water Act. Industrial marine activity has the potential to contain significant quantities of pollutants in its stormwater, and polluted stormwater can have a detrimental impact on the surrounding water quality and aquatic life. Marinas also often store quantities of oil that require a facility to have a current oil spill prevention plan. The recent enforcement actions include:

Martha's Vineyard Shipyard, Inc. (Vineyard Haven, Massachusetts): The company could not produce documentation to EPA showing it had conducted routine facility inspections, assessments, or monitoring and had not submitted annual reports, as required under the federal Clean Water Act. Failure to perform these actions left the facility without information needed to minimize the mixing of stormwater with pollutants and discharging to the nearby waters. MV Shipyard also did not have an oil spill prevention plan. While EPA is not aware that a spill has occurred, the failure to prepare a current plan created an increased risk of environmental harm should a spill occur. MV Shipyard agreed to pay a \$26,526 penalty to resolve the violations.

Ryan Marine Services, Inc. (Marblehead): EPA issued a formal order to Ryan Marine Services to

stop discharging wastewater from its facility without a permit and to fully comply with the terms of its Clean Water Act stormwater permit. Within one year of EPA's order, the company is required to send EPA a progress report summarizing whether RMS has fulfilled its obligations under its permit. RMS also agreed to pay a \$20,000 penalty to resolve these wastewater and stormwater violations.

Prime Marina Vineyard Haven (Vineyard Haven): During an EPA inspection, the company could not produce documentation showing it had been conducting routine facility inspections, assessments or monitoring or producing the annual reports required under the Clean Water Act. Prime Marina also did not have a current oil spill prevent plan in place, only one from 2004 when the facility was owned and operated by a different company. Prime Marina agreed to pay a \$15,721 penalty to resolve these violations.

Marblehead Trading Company (Marblehead): MTC operates three sites in Marblehead and could not produce documentation of required routine facility inspections, quarterly visual assessments, water quality monitoring results or annual reports required under the Clean Water Act for most of the quarters since 2015. The company agreed to pay a \$15,000 penalty to resolve the violations.

Beverly Port Marina (Beverly): EPA found that the marina was not performing and documenting certain types of mandatory Clean Water Act facility inspections and water quality monitoring efforts and lacked an oil spill prevention plan. EPA also observed evidence of a failure to prevent wastewater from boat pressure washing operations from reaching the Danvers River. Under agreements with EPA, the marina agreed to improve compliance with the clean water permitting requirements, develop stormwater and oil spill management plans, perform and document regular facility inspections and pay a \$3,500 penalty.

Liberty Marina (Danvers): Based on EPA's inspection and evaluation of additional related information, the agency determined that Liberty Marina failed to submit all of its required annual reports and take corrective actions to address discharges of certain pollut-

ants of concern above certain benchmark standards, as required by the Clean Water Act. EPA issued a formal order to Liberty Marina requiring it to come into compliance with its Clean Water Act permit, reevaluate its water sampling locations and provide EPA with a report on its actions to comply with its permit after one year.

•May 20, 2019—The EPA announced a settlement with Manke Lumber, Inc., that resolves alleged violations of the Clean Water Act. This settlement is the latest in a series of enforcement actions taken by EPA Region 10 to address stormwater violations from industrial facilities and construction sites throughout the Pacific Northwest and Alaska. During inspections in July and September of 2014 of Manke's Hylebos Waterway facility, EPA found process water discharges which are prohibited under the Washington Department of Ecology's Industrial Stormwater General Permit, and violations of EPA's Spill Prevention, Control and Countermeasures (SPCC) regulations. The Hylebos Waterway is a former Superfund clean-up site in Puget Sound, and is on the Clean Water Act § 303(d) impaired waters list. Wastewater from lumber yards typically contains high pH, wood debris, oils, and high levels of solids. When these solids settle they can form sediment deposits that destroy plant life and spawning grounds of fish. In the face of allegations that Manke Lumber failed to fully comply with Clean Water Act stormwater management regulations, the company agreed to pay a \$320,000 penalty, build a treatment system to address ongoing water quality violations, and invest in a Supplementary Environmental Project that will allow for approximately 38 acres of undeveloped land to be permanently set aside for conservation and recreational purposes, including 1,500 feet of Goldsborough Creek, 580 feet of a tributary, and a riparian corridor covering approximately 20 acres. The main habitat functions provided by the Supplementary Environmental Project site are: abundant, good quality spawning habitat for coho and chum salmon, and steelhead; shade, food and nutrient input from vegetation overhanging the creek; creek flow maintenance and regulation provided by an undeveloped floodplain; and the prevention of pollution in the form of runoff, lawn chemicals and septic effluent from residential development, from entering Goldsborough Creek and ending up in Oakland Bay and

Puget Sound. Once the agreement is lodged in federal court, there is a 30-day Public Notice and Comment period.

### **Civil Enforcement Actions and Settlements— Chemical Regulation and Hazardous Waste**

•June 6, 2019—The EPA has reached an agreement with the Territory of American Samoa and the American Samoa Shipyard Services Authority to improve conditions at the Satala Shipyard and an inland facility in Tafuna. At the Satala Shipyard, EPA inspectors observed unauthorized industrial runoff into the Pago Pago Harbor, a violation of the facility's National Pollutant Discharge Elimination System permit, required under the Clean Water Act. EPA inspections also found the Satala Shipyard and an inland facility in Tafuna were improperly storing and managing hazardous waste. The Resource Conservation and Recovery Act requires hazardous wastes must be stored, handled and disposed of using measures that safeguard public health and the environment. Under the settlement agreements, the American Samoa Shipyard Services Authority will improve wastewater and stormwater controls and properly manage hazardous materials. These corrective actions include: Repairing a 3,000-ton dry dock to prevent discharges; Proper monitoring and sampling of stormwater discharges; Implementing best management practices to prevent hazardous materials and other pollutants from entering water; Removing and properly disposing 80 drums of hazardous waste stored at the Tafuna facility; Developing plans to properly store, handle and dispose of hazardous waste. Activities conducted at Satala Shipyard include welding, fabrication, sandblasting, painting, and fitting valves and pipes. These activities generate hazardous waste and sources of pollutants that can discharge to Pago Pago Harbor and degrade water quality.

•May 29, 2019—The EPA has announced that a Rhode Island developer who owns a multi-use complex in Rumford that was once an industrial facility has come into compliance with federal laws regulating toxic chemicals. Bourne Holdings LLC of Pawtucket, Rhode Island agreed to pay a penalty of \$82,000 to settle EPA allegations of six counts of violating regulations for the safe handling and management of polychlorinated biphenyls (PCBs) under the Toxic Substances Control Act at their

Phillipsdale Landing Industrial Center facility in Rumford. The case stems from an April 2018 inspection in which EPA documented the improper storage of PCBs and items that came in contact with PCBs. EPA also confirmed that one PCB transformer had been dismantled, and some of the parts associated with the transformer had been sold as scrap without being decontaminated. Federal PCB regulations include prohibitions of and requirements for the use, disposal, storage and marking of PCBs and items that have come in contact with PCBs. The regulations are meant to reduce the potential for harm and to track PCBs from use to disposal. The violations at Phillipsdale Landing were significant given the quantity and concentrations of PCBs involved. EPA recommends that developers considering purchasing an industrial site or former industrial site obtain an environmental assessment so they can prepare for the financial and regulatory obligations they could face.

### **Indictments Convictions and Sentencing**

• June 3, 2019 - the U.S. Department of Justice, the Department of the Interior (DOI), the National Oceanic and Atmospheric Administration (NOAA), the State of Washington, the Suquamish Tribe, and the Tulalip Tribes (collectively: the Port Gardner Bay Trustees aka the Trustees), announced that they have reached a settlement with the Port of Everett (the Port) related to contamination of the Port Gardner Bay Area in Everett, Washington. The settlement is intended to resolve claims brought under the Clean Water Act (CWA), the Oil Pollution Act (OPA), and the Washington Model Toxics Control Act (MTCA), for damages to natural resources stemming from the release of oil and other hazardous substances in Port Gardner Bay. The settlement will also address potential liability of the U.S. Navy for natural resource damages. In April 2018, three other identified potentially responsible parties (PRPs) entered into a consent decree to resolve the full amount of their liability for natural resource damages in the Port Gardner Bay Area, through cash-out payments total-

ing over \$3.9 million. Today's settlement, if approved by the court, will resolve the liability of the remaining identified PRPs—the Port and the Navy. As part of the proposed settlement, the Port is required to construct the Blue Heron Slough Restoration Project (the BHS Project), in accordance with a final design plan approved by the Trustees, and maintain the project in perpetuity. The BHS Project will restore 338 acres of intertidal estuarine and upland habitats along Interstate I-5 in the lower Snohomish River estuary, reconnecting these habitats to the Snohomish River watershed and Puget Sound, and preserving open space. The restoration of this habitat will be beneficial to a multitude of native fish, wildlife, and other natural resources. The Port will operate the Project as a “bank” for conservation credits, and will resolve its liability by “retiring,” or setting aside, credits equivalent to approximately 35 acres of the Project. The proposed settlement also states that the United States, on behalf of the Navy, will make a payment of \$789,840 to be used towards construction of the BHS Project. In exchange for the payments from the Navy and the other three PRPs, the Port will set aside credits equivalent to approximately 36 additional acres of the project. As part of the proposed settlement, the Port and the Navy will also pay a proportionate share of the costs incurred by the Trustees in assessing natural resource damages in the Port Gardner Bay Area. According to documents filed with the court, the violations for which the Port is allegedly liable involved the unauthorized discharge of oil and other harmful compounds on properties now owned or operated by the Port. Investigations have detected hazardous substances in soils, groundwater and sediments on or in the Port's properties. Alleged liability of the Navy is the result of past releases of harmful substances on land now owned or operated by the Navy. The claims against the Port were brought under § 311 of the CWA, § 1002(b) of the OPA, and the MTCA. The proposed settlement, which is subject to a 30-day public comment period.  
(Andre Monette)

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## LAWSUITS FILED OR PENDING

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### DISTRICT COURT DISMISSES CLEAN WATER ACT CLAIMS AGAINST CITY OF SEATTLE—ALLOWS OTHER COUNTERCLAIMS TO MOVE FORWARD IN PCB CONTAMINATION CASE

The U.S. District Court for the Western District of Washington recently dismissed Monsanto Company's federal Clean Water Act (CWA), unjust enrichment, and contribution counterclaims against the City of Seattle. Monsanto's federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and negligence counterclaims are allowed to move forward. [*City of Seattle v. Monsanto Co.*, \_\_\_F.Supp.3d\_\_\_, Case No. 2:16-CV-107-RSL (W.D. Wash. May 3, 2019).]

#### Factual and Procedural Background

From 1946 to 1986, Monsanto owned and operated a plant that manufactured adhesives and vanillin on a site adjacent to the Lower Duwamish River. Monsanto manufactured polychlorinated biphenyls (PCBs) in the United States, including at this plant, until the 1970s. The PCBs contaminated Seattle, Washington's drainage systems, storm water, and other bodies of water. In 1979 Congress banned the manufacture of PCBs by enacting the Toxic Substances Control Act.

Seattle has various types of drainage systems that collect storm water and sewage. During heavy rains the system overflows and discharges into surrounding waterways. In 2013, the United States and the State of Washington (Washington) jointly sued Seattle for violating the CWA and the Washington Water Pollution Control Act. The consent decree at the end of the suit required Seattle to reduce its overflows and pay a civil penalty of \$350,000.

In 2016 the City of Seattle filed a complaint against Monsanto. Seattle alleged that Monsanto, as the sole manufacturer of PCBs in the United States, was responsible for the presence of PCBs in city waters. Seattle brought five claims against Monsanto, and Monsanto filed a motion to dismiss. The court dismissed Seattle's defective design, failure to warn, and equitable indemnity claims, but Seattle's public nuisance and negligence claims went forward.

Monsanto then brought six counterclaims and

asserted 90 affirmative defenses. Monsanto's counterclaims included two CERCLA claims, a CWA claim, a negligence claim, an unjust enrichment claim, and a contribution claim. Seattle moved to dismiss all six counterclaims under Federal Rule of Civil Procedure 12(b)(6), and moved to strike fifteen of the affirmative defenses.

#### The District Court's Decision

##### Clean Water Act Counterclaims

Seattle first argued that Monsanto lacked standing because it "lumped" together approximately 31 CWA counterclaims. The court set aside this argument and deemed Monsanto's generalized allegations sufficient for the pleading stage. Seattle then argued that Monsanto lacked standing for its CWA counterclaims, focusing primarily on causation and redressability. Seattle succeeded in both of these arguments and the court dismissed Monsanto's CWA counterclaims.

On the causation front, Seattle argued the injuries alleged by Monsanto were due to actions by the U.S. Environmental Protection Agency (EPA) and Washington: the EPA determined Monsanto was a "Potentially Responsible Party" under CERCLA, and Washington decided to sue Monsanto. Monsanto argued that Seattle's activities in violation of the CWA resulted in the discharge of pollutants into the "Affected Water Bodies," which in turn caused the EPA and Washington to take actions against Monsanto. The court opined it was "speculative to hold that Seattle's compliance with the CWA would have prevented the EPA from issuing its Notice or Washington from suing Monsanto." The independent decisions of the EPA and Washington were sufficiently uncertain to break the chain of causation.

On the redressability front, Seattle convinced the court that this counterclaim would not redress Monsanto's past costs because the CWA only allows payment of civil penalties to the United States Treasury.

Further, the court opined that even if an injunction or civil penalties were granted in this lawsuit, Monsanto's future defense costs and liabilities would not be redressed because they would have no bearing on Seattle's prosecution of this lawsuit or Washington's prosecution of its lawsuit. Lastly, the court opined that Monsanto could recover its future response costs through its CERCLA counterclaims.

### **CERCLA Counterclaims**

Monsanto argued it was entitled to recover costs from Seattle under CERCLA. Seattle challenged this CERCLA counterclaim by arguing Monsanto's response costs were not "necessary." The court determined Monsanto made out a plausible CERCLA claim.

First, the court explained that the touchstone for determining the necessity of response costs is whether there is an actual threat to human health or the environment. The court then opined that, accepting Monsanto's allegations as true, Seattle's activities generated such a threat. Second, even though the EPA had already been cleaning up the Lower Duwamish Waterway Superfund site, the court refused to declare Monsanto's extra efforts duplicative and unnecessary at this stage. "The question whether a response action is necessary ... is a factual one to be determined at the damages stage."

Seattle also argued that § 122(e)(6) of CERCLA bars Monsanto from recovering its costs because remedial actions are barred at facilities where a remedial investigation and feasibility study take place. Monsanto responded that even though this section may bar it from recovering costs at the Lower Duwamish Waterway Site, where a remedial investigation and feasibility study have taken place, it still incurred costs outside the geographic boundary of that site that are recoverable. The court concluded it is plausible that Monsanto had some recoverable costs outside the Lower Duwamish Waterway Site, therefore it would be premature to dismiss the counterclaim.

### **Negligence Counterclaim**

Seattle challenged Monsanto's negligence claim by arguing Seattle had no duty to Monsanto. Mon-

santo alleged Seattle had duties with regard to the operation of wastewater treatment system and sewer systems, construction activities, and the operation and maintenance of its own properties.

The question of whether a municipality owes a duty rests on whether or not the incident was foreseeable. The court held that, at this stage, Monsanto plausibly alleged it was foreseeable to Seattle that a person or entity would eventually need to address its contamination of the water bodies at issue. Seattle failed to eliminate Monsanto's negligence claim at this time.

### **Unjust Enrichment Counterclaim**

The court dismissed Monsanto's unjust enrichment claim because it was contingent on Seattle prevailing in this action. The court stated that other mechanisms, like contributory fault, are better suited to allocate fault, and that Monsanto cannot assume that a court judgment on damages would be unjust and inequitable.

### **Contribution Counterclaim**

The court dismissed Monsanto's contribution claim because a defendant cannot bring a claim for contribution against a single plaintiff that may secure a judgment against it. The court stated that "the right of contribution is limited to parties who have been held jointly and severally liable for the plaintiff's injury."

### **Conclusion and Implications**

The court's decision to dismiss some, but not all, of Monsanto's counterclaims means Monsanto will be allowed to pursue superfund and negligence claims related to PCBs that Monsanto manufactured and discharged to Seattle's sewer systems. This case also shows that such counterclaims cannot proceed under the CWA where the claim is only causally attenuated to the injury. <https://cases.justia.com/federal/district-courts/washington/wawdce/2:2016cv00107/226478/116/0.pdf?ts=1556961701> (William Shepherd, IV, Rebecca Andrews)

## JUDICIAL DEVELOPMENTS

### NINTH CIRCUIT HOLDS RCRA'S CITIZEN SUIT PROVISIONS VEST DISTRICT COURTS WITH BROAD JURISDICTIONAL AUTHORITY TO ISSUE INJUNCTIVE RELIEF AGAINST FEDERAL AGENCIES

*Center for Biological Diversity v. U.S. Forest Service*, 925 F.3d 1041 (9th Cir. 2019).

When can a U.S. District Court decline to exercise its jurisdiction over a case seeking injunctive relief against a federal agency? Here, environmental groups sought an injunction under the federal Resource Conservation and Recovery Act (RCRA) to require the U.S. Forest Service (Forest Service) to regulate the use of lead ammunition allegedly endangering California condors and other scavengers. The Ninth Circuit Court of Appeals concluded, in a decision on May 30, 2019, that the District Court improperly dismissed the suit as non-justiciable.

#### Background

Arizona's Kaibab National Forest has home to endangered California condors and other scavenger wildlife species. It is also a popular site for big-game hunting. The Forest Service only narrowly regulates hunting, and "does not regulate the use of lead ammunition in the Kaibab at all."

Some hunters in the Kaibab use lead ammunition, and some of them leave behind the remains of their kill, either because they prefer not to "pack out" the remains or because the hunted animal runs away after it is shot and then dies elsewhere. Other animals feed on those remains and ingest fragments of spent lead ammunition. Lead ingestion, even in small amounts, can cause significant adverse effects on animals' health, including death.

Since 1991, the federal government has banned the use of lead bullets for waterfowl hunting, but no such restrictions apply to big-game hunting.

Several environmental advocacy groups sued the Forest Service under the Resource Conservation and Recovery Act, 42 U.S.C. § 6972, on the theory that the Forest Service is a "contributor" "to the past or present ... disposal" of a solid waste, 42 U.S.C. § 6972(a)(1)(B). Plaintiffs sought declaratory and injunctive relief to require the Forest Service to "abate

the endangerment" from lead ammunition in the Kaibab.

The District Court initially dismissed the suit on standing grounds, and the Ninth Circuit reversed. *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 640 F. App'x 617, 620 (9th Cir. 2016). On remand, the District Court once again dismissed, this time concluding that the plaintiffs were "requesting an improper advisory opinion."

#### The Ninth Circuit's Decision

##### Justiciability

A justiciable case exists when:

... case must satisfy two requirements: First, the case must present 'an honest and actual antagonistic assertion of rights by one [party] against another.' Second, the court must be empowered to issue a decision that serves as more than an advisement or recommendation. (Internal citations omitted.)

The rule against advisory opinions is "the oldest and most consistent thread in the federal law of justiciability," reflecting the same core considerations that underlie the justiciability doctrine more generally. *Flast v. Cohen*, 392 U.S. 83, 96, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968) (quoting Charles Alan Wright, *Federal Courts* 34 (1963)). The advisory opinion prohibition ensures that:

... [f]ederal judicial power is limited to those disputes which confine federal courts to a rule consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process. *Id.* at 97, 88 S.Ct. 1942.

The Ninth Circuit first noted that in its prior reversal on standing, it had necessarily concluded that the case “concerns a ‘genuine adversary issue between the parties.’” *United States v. Johnson*, 319 U.S. 302, 304, 63 S.Ct. 1075, 87 L.Ed. 1413 (1943).

### **Injunctive Relief**

In its second consideration of this case, the court focused on *Flasts’s* second prong—whether the District Court is empowered to grant relief that the Forest Service must obey.

The Ninth Circuit rejected the argument that in the face of an injunction requiring the Forest Service:

. . .to mitigate in some manner—not necessarily by banning use of lead ammunition in the Kaibab—the harm caused by spent lead ammunition. . .[the Service]. . .would retain discretion over whether to regulate lead ammunition.

To the contrary, the Ninth Circuit found that “RCRA specifically provides otherwise.” The United States is included within RCRA’s definition of a “person.” 42 U.S.C. §6972(a). “And it is incontrovertible that ‘a person subject to an injunction must ordinarily obey it.’” *Irwin v. Mascott*, 370 F.3d 924, 931 (9th Cir. 2004).

The court went on to conclude that:

So, whatever discretion [the Forest Service] otherwise has regarding regulating — or not regulating — hunting in the Kaibab, the agency would have to comply with an order from the court regarding the disposal of lead bullets in the Kaibab.

The court also disagreed with the proposition that the Forest Service’s retained “discretion over how to implement” an injunction necessarily would mean that the order would lack “clear terms for attainment,” distinguishing the District Court’s reliance on *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 68 S.Ct. 431, 92 L.Ed. 568 (1948), where there could be no judicial review of an order

regarding overseas air routes within the President’s “unreviewable discretion.”

The Forest Service argued that an injunction issued under RCRA would necessarily intrude into the domain of the Service.

The Ninth Circuit found that justification would preclude courts from issuing injunctions against expert administrative agencies, which, of course, they regularly do:

We have done so against the USFS with regard to such matters within its ‘knowledge and expertise’ such as riparian reserves, *Or. Nat. Res. Council Fund v. Goodman*, 505 F.3d 884, 898 (9th Cir. 2007), and hiking access on public lands, *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 649 (9th Cir. 2004).

In conclusion, the Ninth Circuit found that Congress made the Forest Service and other agencies subject to judicial orders resulting from citizen suits and:

. . .[t]o the extent the exercise of that authority ‘intrudes’—to use the District Court’s term—on the exercise of USFS’s discretion, it does so because that discretion is subject to the limits enunciated by Congress, and because Congress has sanctioned judicial ‘intrusion’ if those limits are exceeded. Typically, . . .we call that ‘intrusion’ judicial review.’

### **Conclusion and Implications**

With the Ninth Circuit’s rejection of the notion that the District Court’s lack the authority to enjoin agencies, it found that RCRA’s specific statutory authorization for judicial review over federal agencies, including the power to issue injunctions—has the effect of severely constraining the ability of U.S. District Courts to disclaim jurisdiction over properly pled citizen suits. The case has implications far beyond the facts of this case. The court’s decision is available online at: <http://cdn.ca9.uscourts.gov/datastore/opinions/2019/05/30/17-15790.pdf> (Deborah Quick)

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