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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 PERMIT UNDER THE CLEAN WATER ACT

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 taken and sold in interstate or foreign commerce; or
> (3) Which are used or could be used for indus-

> trial 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 history, 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 "Interpretive 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 NDPES 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 the Agency 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 permit-

ting 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.

EASTERN WATER NEWS

TRUMP ADMINISTRATION ALTERS THE METRICS FOR MEASURING GLOBAL WARMING

Due to changes in metrics allowed to be utilized in climate models, portions of the federal government will no longer meet scientific metrics of accuracy when reporting on the future effects of a rapidly warming planet and predicting what Earth may look like by 2100 if major changes to the global economy do not occur. While changes are occurring throughout the government, the most recent example involves the United States Geological Survey, whose director, James Reilly, has ordered that the office use only computer-generated climate models that project the impact of climate change through 2040, rather than through the end of the century, which was previously the required timeline for modeling.

Background

President Trump has rolled back environmental regulations put in place by the Obama administration, including pulling out of the Paris climate accord, in an effort to alter the United States' approach to a changing climate. In the coming months, the White House will complete the rollback of the broadest federal effort to curb greenhouse-gas emissions, expand efforts to impose President Trump's environmental views on the global community, and decline to sign a communique to protect the Arctic region unless it is stripped of any references to climate change. This pattern of deregulation and denial extends further throughout the federal government as Trump's first term continues.

For the last several decades, the federal government has taken a central role in what scientists consider an urgent need in climate science studies—reporting on the future effects of current emissions and the rapidly warming planet in order to determine what Earth might look like at the end of the century if changes are not made. Yet alterations to how the federal government approaches its ongoing environmental studies can have wide-ranging effects on how informative those studies may be as society attempts to grapple with global warming.

The United States Geological Survey

In May, James Reilly, the president's appointed director of the United States Geological Survey, ordered that scientific assessments produced by that office use only climate models projecting the effects of climate change through 2040. This significantly curtails the models previously in effect, which predicted the likely effects by the end of the century. Scientists indicate that will create a misleading picture because the most dramatic effects of current emissions will be felt after 2040. Current models predict the planet will most likely warm at about the same rate through about 2050, which has made that a popular date for efforts to reduce carbon emissions and get global warming under control. From 2050 through 2100, the rate of warming is expected to differ significantly depending on an increase or decrease in carbon emissions in the interim.

The main focus of this change is the National Climate Assessment, produced by a federal interagency task force roughly every four years since 2000. Government scientists used computer-generated models in the most recent report to project that if fossil fuel emissions continue at current levels, the atmosphere could warm by up to eight degrees Fahrenheit by the end of the century. That level of increase would lead to drastically higher sea levels, more devastating storms and droughts, crop failures, food losses, and severe health consequences.

The next National Climate Assessment is expected to be released in 2021 or 2022, and work has already commenced to create the report. Yet following Reilly's order, predictions that take into account warming trends over the longer term will not automatically be included in the National Climate Assessment or other reports produced by the federal government.

Trump's Proposed Climate Review Panel

The Trump administration's goals extend beyond altering the methodology used for climate models

in the National Climate Assessment through the creation of a new climate review panel. That effort, led by former Princeton physicist William Happer, is backed by National Security Adviser John Bolton, remains divisive even within the administration. Yet President Trump has indicated he is inclined to allow the panel to move forward.

Conclusion and Implications

Changes to the National Climate Assessment are a small but significant portion of a trend to roll back prior climate initiatives. The previous Assessment, which the Trump Administration released on the Friday after Thanksgiving in 2018, has the potential to create legal problems for Trump's agenda of abolishing regulations. This summer, the EPA is expected to finalize the rollback of President Obama's regulations to curb pollution from vehicle tailpipes and power plant smokestacks, and opponents to the rollbacks have stated they intend to use the 2018 National Climate Assessment to argue that the government cannot justify the reversals when it has concluded the effects of removing these regulations could be so harmful.

In light of these statements, the proposed changes to the National Climate Assessment fit into a broader pattern of creating the legal framework for environmental deregulation. However, taken alone, the changed methodology of the National Climate Assessment risks perhaps, set the stage for a false optimism for the future effects of pollutants and carbon emissions, and risks the loss of the federal government as a source for reliable climate research. (Jordan Ferguson)

U.S. DROUGHT MONITOR BRIEFLY REPORTS NO SIGNIFICANT DROUGHT CONDITIONS NATIONWIDE, FIRST TIME IN TWENTY YEARS

For the first time in over 20 years, the U.S. Drought Monitor recently reported finding no significant drought conditions at any location in the contiguous United States. Crediting a wet winter and sustained wet spring conditions, the report was welcome news, particularly coming on the heels of all-too-recent memories of exceptional drought conditions that gripped California and other Western States.

Background

Since approximately the year 2000, the Drought Monitor has released weekly maps depicting areas of the United States, and areas of individual States, experiencing drought conditions. The Drought Monitor is produced jointly by the National Drought Mitigation Center (NDMC) at the University of Nebraska-Lincoln, the National Oceanic and Atmospheric Administration (NOAA), and the U.S. Department of Agriculture (USDA). The Drought Monitor is not a forecast; rather, it provides a weekly assessment of drought conditions based on current data.

The Drought Monitor utilizes five classifications, namely:

D0 – Abnormally Dry, showing areas that may be going into or are coming out of drought. The Drought Monitor describes examples of possible impacts of D0 to include short-term dryness that slows planting or growth of crops, and when coming out of drought, crops that do not fully recover.

D1 – Moderate Drought, with examples of possible impacts including some damage to crops, lowered stream, reservoir and well levels, developing or imminent water shortages and voluntary water-use restrictions.

D2 – Severe Drought, with examples of possible impacts including likely crop losses, water shortages and the imposition of water use restrictions.

D3 – Extreme Drought, typically resulting in major crop losses and widespread water shortages or restrictions.

D4 – Exceptional Drought, typically resulting in exceptional and widespread crop losses and shortages of water in reservoirs, streams and wells creating water supply emergencies.

The Drought Monitor defines drought primarily on the basis of lack of precipitation. As summarized on the Drought Monitor website:

> It is not a statistical model, although numeric inputs are many: the Palmer Drought Severity Index, the Standardized Precipitation Index, and other climatological inputs; the Keech-Byram Drought Index for fire, satellite-based assessments of vegetation health, and various indicators of soil moisture; and hydrologic data, particularly in the West, such as the Surface Water Supply Index and snowpack. The [Drought Monitor] relies on experts to synthesize the best available data from these and other sources and work with local observers to interpret the information. The USDM also incorporates ground truthing and information about how drought is affecting people, via a network of more than 450 observers across the country, including state climatologists, National Weather Service staff, Extension agents, and hydrologists.

Regulatory Responses to Drought

The NMDC correctly acknowledges that:

> No single federal agency is in charge of water or drought policy; response and mitigation fall to an assortment of federal authorities. . . .The National Drought Resilience Partnership, launched in the aftermath of widespread drought in 2012, is an effort to unify federal drought response and policy. Drought response efforts, planning, and water law vary from state to state.

The NMDC recommends that state, local, tribal and basin-level water managers adopt an operational definition of drought for their own circumstances and incorporate local data to inform drought response measures.

California and Drought

Since the year 2000 when the Drought Monitor began, the longest duration of drought conditions in California, ranging from D1 to D4 at any location in the State, lasted 376 weeks from December 2011 until March 2019. At peak intensity in late 2014, the Drought Monitor reported D4 Exceptional Drought conditions affecting geographically nearly 60 percent of California. The record-breaking California Drought prompted then-Governor Jerry Brown's historic drought emergency declarations, first-ever statewide emergency water use regulations, first-ever statewide groundwater management legislation and a host of other first-ever water law and policy changes. Drought conditions also prompted Colorado River managers and stakeholders to negotiate and reach historic drought contingency agreements.

Conclusion and Implications

The recent Drought Monitor map observing an absence of drought conditions nationwide punctuates the whiplash experienced by California and other Western States going from sustained drought to intense bursts of precipitation. Though a helpful and informative tool, the Drought Monitor acknowledges that drought conditions are more accurately defined and felt at a local level and can change quickly. Furthermore, while sporadic bursts of precipitation may boost short-term and seasonal water supplies, groundwater basin conditions generally require much more time and active management to recover from increased pumping during sustained drought conditions. For more information, *see:* https://droughtmonitor.unl.edu

(Derek Hoffman, Michael Duane Davis)

COLORADO RIVER BASIN STATES AGREE TO ACTION PLAN TO PROTECT DWINDLING WATER SUPPLY IN DROUGHT

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)

NEWS FROM THE WEST

Drought and water supply shortages seem to be a part of the landscape of the West. In this month's News from the West, first we report on actions planned by the U.S. Bureau of Reclamation to capture and store more precious water during times of drought, by raising Shasta Dam—one of California's most important water storage projects. We also report on Senate Bill 12—passed by the New Mexico Legislature and signed into law by the Governor—which changes notice requirements for water use/water right change applications filed with the State Engineer.

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 significant" 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 4) Westlands is acting is 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)

New Mexico Legislation Amending Notice Requirements for State Engineer Applications to Change Water Use Take Effect July 1, 2019

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 protestants 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 applications. 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)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

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

Civil Enforcement Actions and Settlements—Water Quality

•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 cor-

rective actions to address discharges of certain pollutants 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 - Princess Cruise Lines Ltd. (Princess) and its parent, Carnival Cruise Lines & plc (together "Carnival") were ordered to pay a $20 million criminal penalty and will be subject to enhanced supervision after admitting to violations of probation attributable to senior Carnival management in a case in which Princess had already paid $40 million. Princess was convicted and sentenced in April 2017, after pleading guilty to felony charges stemming from its deliberate dumping of oil-contaminated waste from one of its vessels and intentional acts to cover it up. While serving five years of probation, all Carnival related cruise lines vessels eligible to trade in U.S. ports were required to comply with a court approved and supervised environmental compliance plan (ECP), including audits by an independent company and oversight by a Court Appointed Monitor. Numerous violations have been identified by the company, the outside auditor, and the court's monitor during the first two years of probation, including "major non-conformities" as defined by the ECP. Carnival admitted it was guilty of committing six violations of probation. Two of the violations involved interfering with the court's supervision of probation by sending undisclosed teams to ships to prepare them for the independent inspections required during probation. When this was first discovered in December 2017, U.S. District Court Judge Patricia Seitz directed that the practice cease and ordered additional inspections as a consequence. However, without seeking court approval, a second undisclosed program was started shortly thereafter. Documents filed in court showed that a purpose of the vessel visit programs was to avoid adverse findings during the inspections. Carnival's Chairman of the Board, Chief Executive Officer and Chief Financial Officer attended the hearing pursuant to court's order and were asked to personally pledge their commitment to correcting the company's compliance issues and corporate culture. In addition, senior management of each operating cruise line of Carnival Corporation & plc were present for the court proceedings. The company admitted to other violations of probation including:

Failing to establish a senior corporate officer as a corporate compliance manager with responsibility and sufficient authority for implementing new environmental measures required during probation;

Contacting the Coast Guard seeking to re-define the definition of what constitutes a major nonconformity under the ECP without going through the required process and after the government had rejected the proposal and told the company to file a motion with the court if it wanted to pursue the issue;

Deliberately falsifying environmental training records aboard two cruise ships; and

Deliberately discharging plastic in Bahamian waters from the Carnival Elation and failing to accurately record the illegal discharges. Prosecutors advised the Court that this particular instance was an example of a more widespread problem, identified by the external audits, in failing to segregate plastic and non-food garbage from waste thrown overboard from numerous cruise ships.

Under the terms of the settlement, Carnival will do the following:

Pay a $20 million criminal penalty;

Issue a statement to all employees in which Carnival's CEO accepts management's responsibility for the probation violations;

Restructure the company's corporate compliance efforts, including appointing a new chief Corporate Compliance Officer, creating an Executive Compliance Committee across all cruise lines, adding a new member to the Board of Directors with corporate compliance expertise, and train its Board of Directors;

Pay up to $10 million per day if it does not meet deadlines for submitting and implementing needed changes to its corporate structure;

Pay for 15 additional independent audits per year conducted by the third-party auditor and Court Appointed Monitor (on top of approximately 31 ship audits and 6 shore-side audits currently performed annually);

Comply with new reporting requirements, including notifying the government and court of all future violations, and specifically identifying foreign violations and the country impacted; and

Make major changes in how the company uses and disposes of plastic and other non-food waste to urgently address a problem on multiple vessels concerning illegal discharges of plastic mixed with other garbage.

The revised sentence imposed by Judge Seitz also requires that Princess remain on probation for a period of three years.

•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 totaling 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.

•May 16, 2019 - A federal grand jury in Wilmington, Delaware, returned a four-count indictment

charging Evridiki Navigation Inc., Liquimar Tankers Management Services Inc., and Nikolaos Vastardis with failing to keep accurate pollution control records, falsifying records, and obstruction of justice, the Justice Department announced. According to the indictment, the charges stem from the falsification of records and other acts designed to conceal from the Coast Guard inspectors impermissible overboard discharges of oily bilge water from the Nigerian-flagged oil tanker, M/T Evridiki. According to the indictment, on or about March 11, 2019, Vastardis, who was the chief engineer for the ship, failed to maintain an accurate oil record book which fully recorded both the discharge overboard of bilge water that had accumulated in machinery spaces, and any failure of the ship's oil filtering equipment. Additionally, when the ship's pollution control equipment was inspected by the Coast Guard, Vastardis made false statements concerning how the equipment was operated at sea, and demonstrated how the equipment was operated at sea in a manner designed to trick the equipment into reporting the discharge of oily bilge water at permissible levels. The vessel's management company, Liquimar Tankers Management Services; the vessel's owner, Evridiki Navigation; and Vastardis are all charged with failing to maintain an accurate oil record book as required by the Act to Prevent Pollution from Ships, a U.S. law which implements the International Convention for the Prevention of Pollution from Ships, commonly known as MARPOL. The defendants are also charged with falsification of records, obstruction of justice, and making false statements. An indictment is merely an accusation and defendants are presumed innocent unless and until proven guilty in a court of law.
(Andre Monette)

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 declined 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 his 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)

WATER SUPPLY OFFICIALS IN THE UNITED STATES FACE INCREASED SCRUTINY AND EXPOSURE TO LIABILITY

Burgess v. United States, ___F.Supp.3d___, Case No. 2:17-cv-10291-LVP-RSW (E.D. Mich. Apr. 18, 2019); *Berry v City of Chicago*, 2019 IL App 180871(1st District May 22, 2019).

The national challenge of dealing with lead and copper piping for public drinking water supplies is becoming the source of tort litigation and class actions in ways few legal experts expected. The central event triggering the phenomenon was the drinking water crisis in Flint, Michigan a very few years ago. There, a decision by local officials to switch the source of the Flint drinking water from the City of Detroit water system to the Flint River proved disastrous. The previously idled Flint water treatment plant was reactivated to deal with the new water source, and the calamity ensued because the system operators were unable or unwilling to make sure the water was safe to drink. Also, state and federal officials failed to step in until months passed in which people consumed excessive amounts of lead.

This article reports briefly on two recent cases, and also notes the apparent plan of the U.S. Environmental Protection Agency (EPA) proposed promulgation, sometime this year, of changes to the federal "Lead and Copper Rule" (40 CFR §141.80 et seq, especially §141.84).

Burgess v. United States, ___F.Supp.3d___, Case No. 2:17-cv-10291-LVP-RSW (E.D. Mich. Apr. 18, 2019).

In one recent case, Judge Linda V. Parker of the U.S. District Court for the Eastern District of Michigan found that the actions of the EPA were properly the subject of tort claims under the Federal Tort Claims Act (FTCA). In the Michigan case the United States argued that the court did not have subject matter jurisdiction over the plaintiffs' complaint, which had invoked the FTCA. In such a situation, the court was guided by established precedent to examine the facts carefully:

> A plaintiff suing under the FTCA must invoke jurisdiction by alleging facts not accepted under the statute. … This includes facts establishing that the complaint is facially outside the exceptions of the FTCA's discretionary function exception. … If the plaintiff succeeds, the burden falls on the government to prove the FTCA's inapplicability, including that the plaintiff's claims fall within any of the statute's exceptions.

The court examined the language of the Safe Drinking Water Act (SDWA) in terms of the federal relationship to the state and local water treatment programs, because it is under the SDWA that the official failures allegedly occurred. The court also carefully parsed the complaint's allegations about EPA acts and failures to act. The court noted that the FTCA would allow a federal employee or official to be subject to tort if a private person would be subject to tort claims under state law, unless the federal official was exercising discretion allowed by law.

The court concluded that EPA's failure to act could be found negligent. Also, there could be liability in negligence on the basis of EPA asserting safety of water despite clear contrary evidence. The District Court held Michigan tort law would provide a proper basis for liability based on the "good Samaritan" principle that a volunteer who tries to help someone is held to a standard of care.

Berry v City of Chicago, 2019 IL App 180871(1st District May 22, 2019).

In the second decision covered by this article, a panel of the Illinois Appellate Court, First District, held that a claim for damages founded on negligence of the City of Chicago in replacing lead piping or water meters was properly pleaded, as was an inverse "taking", and that the local government tort immunity law did not shield the City on the facts pleaded.

In the Illinois case the plaintiffs claimed negligent infliction of damages by reason of the City of Chicago's negligently performing repairs. They also claimed to have suffered a "taking," or damage to their property, from the work that the City performed. The City had moved for dismissal on the grounds that there was no real injury, since all plaintiffs sought was medical monitoring. The City also contended there

was no different damage to the plaintiffs' residences than that to the public generally, and therefore no inverse taking occurred. The trial court agreed and dismissed the claims.

Two of the three appellate court judges held that there was sufficient injury in fact alleged by reason of compelling facts, such as high levels of lead in the paintiffs' drinking water and the concomitant finding the child at one home had a very elevated lead level in her blood. They interpreted Supreme Court case law in Illinois to consider those and similar facts sufficient injury to have a "justiciable claim," even where medical monitoring is the relief sought. The negligence of the City was demonstrated by the history of their dealings with the public and with the plaintiffs in particular. At first the City gave no advance warning of possible adverse health effects due to lead pipes, despite such warnings being deemed "standard" in the industry. Also, the City later advised only a five-minute flushing, while industry standard recommendations were to flush for at least 30 minutes. Additionally, there continued to be excess lead in the plaintiffs' water supply long after the work was done.

While the dissenting judge complained that the majority was overly generous with inferences in favor of plaintiff, it does seem pretty clear that physical invasion of the body by excess lead carried by public water supply is an injury in fact. The key ruling of the majority is that the tort immunity of cities under Illinois law could not be applied here. While the decision to upgrade or repair the water delivery system may have been discretionary, the court's majority was convinced that the City's failure to issue standard warnings was a non-discretionary aspect of doing the work.

U.S. Environmental Protection Agency Contemplating a Change in the Nation's Lead and Copper Rule

The issue of lead in water systems is very much front and center at public water supply offices of EPA. The EPA is reported to be weighing what changes should be made in the Lead and Copper rule, including mandates to state and municipal systems. Given the tens of millions of lead service lines still in use nationwide, the rule's substance and safety procedures are almost certainly going to be "toughened up". Some sources predict an EPA announcement of a draft rule change later this summer.

Conclusion and Implications

The cases discussed above show that there are serious prospects of tort liability under the existing rules regime. Past and current practices are now giving rise to a new source of cost and personal liability concern for officials at every level of government whose duties include assurance of a safe drinking water supply to the public. And it is anticipated that EPA will modify its Lead and Copper Rule in drinking water. The court's decision in *Burgess v. United* States is available online at: https://www.courthousenews.com/wp-content/uploads/2019/04/burgess-flint.pdf

The court's decision in *Berry v. City of Chicago*, is available online at: http://www.illinoiscourts.gov/Opinions/AppellateCourt/2019/1stDistrict/1180871.pdf

(Harvey M. Sheldon)

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

City of Seattle v. Monsanto Co., ___F.Supp.3d___, Case No. 2:16-CV-107-RSL (W.D. Wash. May 3, 2019).

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. [

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 for Costs

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 re-

medial 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. Monsanto 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)

GEORGIA SUPREME COURT CLARIFIES CLEAN WATER ACT ANTIDEGRADATION POLICY FOR NONPOINT SOURCES

City of Guyton v. Barrow, Case No. S18G0944 (Ga. May 20, 2019).

In a recent federal Clean Water Act (CWA) case, the Supreme Court of Georgia determined Georgia's antidegradation rule does not apply to nonpoint sources. CWA antidegradation rules ensure bodies of waters that meet minimum water quality standards do not drop below those standards. The Court determined the scope of the federal antidegradation rule also governed the scope of Georgia's rule and, therefore, nonpoint sources do not require an antidegradation analysis before receiving a permit from the state.

Factual and Procedural Background

The Clean Water Act requires states to designate a use for each water body, specify water quality criteria that support a particular designated use, and develop an antidegradation policy to protect existing uses and high-quality waters. The State of Georgia's antidegradation policy is codified as part of the Georgia Water Quality Control Act (GWQCA). The CWA's National Pollutant Discharge Elimination System (NPDES) does not generally require nonpoint source

discharges to obtain an NPDES permit. Similarly, the GWQCA, while requiring a state-issued permit, does not regulate nonpoint source discharges the same as point source dischargers. Because a water quality standard must be maintained, however, pollution caused by nonpoint source discharges that affects water quality might require more stringent limitations upon point source discharges than would otherwise be required under the NPDES program.

The GWQCA provides regulations for nonpoint source discharges, including a permit required for land application systems (LAS). LASs serve as wastewater reclamation and reuse systems, which can then be used for supplying water for domestic and industrial agriculture. Under the CWA, an LAS is considered to be a nonpoint source. EPD requires treatment of pollutants that are harmful to humans, animals or plant life in addition to regulating the hydraulic loading rate or a pollutant, and ensuring that groundwater runoff does not exceed the maximum contaminant level for drinking water.

In October 2013, EPD issued the City of Guyton (City) a permit to build and operate a wastewater treatment facility. The facility would treat wastewater and apply the treated effluent to a 260-acre tract of land. Plaintiff, Barrow, owned property across the road from the City's proposed LAS. Barrow argued before an administrative law judge (ALJ) that the City's operations would harm aquatic species in the wetlands on his property. Barrow challenged the permit on the basis that EPD failed to conduct an antidegradation analysis prior to issuing the permit.

The ALJ determined the City's LAS was a nonpoint source discharge, that the LAS required a permit, and that the antidegradation rule required EPD to conduct an antidegradation analysis before issuing any permit that lowers water quality. The appellate court affirmed the ALJ's decision, ruling that the antidegradation rule applies to nonpoint sources because: 1) EPD must issue a permit for such discharges, 2) the antidegradation rule mentions nonpoint sources, and 3) the rule does not specifically exclude nonpoint sources from the antidegradation-analysis requirement.

The City appealed the case to the Supreme Court of Georgia through a petition for writ of certiorari.

The Supreme Court's Decision

The Georgia Supreme Court reversed the judgment of the appellate court. It held that Georgia's antidegradation rule does not apply to nonpoint sources, based on the text and legal context of the regulation. The Court reasoned that because Georgia's antidegradation rule mirrors the EPA's rule, federal law serves as the legal context for the state's rule and guides it in the interpretation of the rule.

EPA's antidegradation rule does not require states to conduct antidegradation analysis for nonpoint sources. Instead, it requires states to achieve "best management practices for nonpoint source control." Thus, although the EPA and Georgia's antidegradation rules both mention point and nonpoint sources, the Court concluded that a requirement for states to ensure best management practices:

> . . .is hardly textual support requiring states to conduct a rigid and thorough antidegradation analysis for nonpoint sources.

Without evidence that the state antidegradation rule was intended to exceed the requirements of the federal antidegradation rule, the Court refused to extend the antidegradation analysis requirement to permits issued to nonpoint sources. The Court reasoned that if EPA interpreted the federal antidegradation rule as applying to nonpoint sources, the EPA would exceed its authority. As a result, the Supreme Court found the appellate court interpreted the state's antidegradation rule too broadly.

Conclusion and Implications

This case reaffirms the long-standing principle that the EPA cannot force states to regulate conduct through indirect means when it cannot do so itself. The Court's analysis also reminds readers that an authorized state's water quality laws may be governed by the interpretation of federal law if the state law mirrors the minimum requirements of the federal CWA. Unless it is clear a state law intends to exceed the scope of federal law, its water quality laws may be limited to the scope of the federal CWA. The Court's decision is available online at: https://www.gasupreme.us/wp-content/uploads/2019/05/s18g0944.pdf (Kara Coronado, Rebecca Andrews)

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