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CONTENTS

Continued on next page

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EASTERN WATER NEWS

TRUMP ADMINISTRATION UNDERTAKES HISTORIC ROLLBACK OF ENVIRONMENTAL PROTECTIONS FOR NATIONAL PARKS

Since January 2017, the Trump administration has undertaken over 100 actions that have the potential to threaten America's National Parks. From rollbacks of the federal Clean Air Act and Clean Water Act to exemptions allowing drilling and mining within previously protected lands. As of July 2019, the Trump administration has opened more than 18.3 million acres of public land up for drilling and mining activities. Even the Fourth of July celebration on the National Mall resulted in reducing the budget for National Park repairs and may result in lower staffing at several National Parks going forward.

Background

The history of preservation in the United States is a constant pattern of one step forward and two steps back. In 1892, less than two years after Yosemite was established, Congress authorized wagon road and turnpike construction in Sequoia National Park. A little over a decade later, in 1905, Congress decreased the acreage of Yosemite by nearly a third to permit forestry and mining. The competing goals of preservation and industry have traded blows for well over a century. Yet the issue of natural resources has taken increasing prominence as researchers warn of the dangers of climate change.

The Trump administration reduced the 1.35 million-acre Bears Ears National Monument by 85 percent roughly a year after it was established, in order to allow drilling on much of the previously protected land. The administration also opened Arctic National Wildlife Refuge to oil and gas development in 2017. Such rollbacks appear to be increasing, according to a study published in *Science* in May. For the study, a group of international researchers gathered and examined roughly 3,700 cases in 73 countries over the past 150 years in which legal protections for natural areas such as parks and preserves were downgraded, downsized, or removed entirely. Perhaps more surprisingly, the study found that roughly two-thirds of those rollbacks have occurred since 2000, and that a majority of them were used to permit industrial-scale resource extraction or infrastructure projects, including roads, dams, and pipelines.

Trump Administration Rollbacks

Three actions undertaken by the Executive Branch in July 2019 alone offer a good glimpse of the systemic rollbacks occurring across the federal government. On July 30, 2019, the U.S. Environmental Protection Agency (EPA) withdrew proposed protections for Alaska's Bristol Bay in order to allow the Pebble Mine project to move forward. Earlier that week, the Bureau of Land Management released a final plan to manage the remaining acreage of Bear Ears National Monument (after the removal of over 1 million acres from protection), pushing out the final implementation of a Recreation Area Management Plan for at least five years, during which period inevitable damage and degradation to the monument will occur. And the Department of the Interior diverted nearly $2.5 million in National park fee revenue to pay for President Trump's Fourth of July celebration on the National Mall. That funding, collected from park visitor fees, is a significant funding source for national park maintenance and service projects.

All of that occurred within just one month. Yet in June, the EPA released its final replacement for the Clean power Plan, the Affordable Clean Energy Rule, which no longer requires power plants to reduce carbon dioxide emissions. The Clean Power Plan, unveiled by the Obama administration in 2015, established national limits on carbon dioxide pollution, yet the Trump administration's replacement rule strips domestic efforts to limit carbon dioxide emissions from the power plant sector. The EPA's own analysis indicates that Americans will face more premature deaths, asthma attacks, and respiratory diseases as a result of the Affordable Clean Energy Rule. Any one of these actions, in isolation, would have negative effects on National Parks and on the environment more broadly. Collectively, they reveal a pattern and practice of ignoring environmental protections in order to assist the energy industry.

Conclusion and Implications

The push and pull of environmental protections and industry deregulation is not a new story in America. But the breadth of the rollback under the current administration is especially worrisome, given how crucial this period is in the global effort to combat climate change. National Parks not only preserve scenic vistas and natural resources, they also protect endangered species and sustain at-risk ecosystems. Efforts to undermine existing protections are frequently opposed individually, but only through a look at the collective toll the Trump administration's environmental policies are taking on protected lands can the full scope of the issue come to light.
(Jordan Ferguson)

MILITARY WASTE AND WATER QUALITY: NEW MEXICO AQUIFER THREATENED BY KIRTLAND AIR FORCE BASE JET FUEL SPILL

Kirtland Air Force Base (KAFB) has continued to move forward with remediation efforts regarding the jet fuel spill discovered almost 20 years ago. The most recent correspondence on the matter came in the form of a letter from the Albuquerque Bernalillo County Water Utility Authority (ABCWUA) to Assistant Air Force Secretary John Henderson which discussed the future of the clean-up process as well as certain concerns the ABCWUA has going forward. Currently, extensive testing and monitoring is not only occurring, but is imperative to coming up with a remedy. Analyses of soil cores is ongoing as well as the construction of additional data-gap wells and has been determined to be necessary before a permanent solution can be reached; this data will be included in a quintessential report that will be sent to the New Mexico Environmental Department (NMED) in November. The current interim solution is a pump-and-treat system, which began operation in June 2015 as well as a soil vapor extraction system. As of June 30, 2019, 668 million gallons of water have been treated resulting in 118 grams of ethylene dibromide (EDB) being removed. KAFB also touts an 86% reduction of the EBD plume north of Ridgecrest Drive.

Background

In 1999, jet fuel was discovered 500 feet below the ground in the Albuquerque Aquifer, which is a partial source of the City of Albuquerque's municipal water supply. The spill was initially estimated to be around 8 million gallons, however, most recent information estimates the spill to be as large as 24 million gallons, which would put it at two times the size of the 1989 Exxon Valdez oil spill in Alaska's Prince William Sound as well as make it the largest toxic spill into a public water system in U.S. history. In 2007, it was concluded that the spill had in fact reached the water table. The consensus regarding the plume's direction of travel is that it has and is currently moving north of KAFB and into the vicinity of southeast Albuquerque near the Ridgecrest neighborhood. This area contains two of the largest drinking water wells maintained by the ABCWUA. Negotiations have remained a regular occurrence between ABCWUA and KAFB as they discuss specific contingency plans should the spill reach drinking water wells.

The Rio Grande bisects Albuquerque's Aquifer, which is located in the Middle Rio Grande Basin. The Aquifer is approximately 100 miles long and 25-40 miles wide. It is bounded on the west by the Rio Puerco, Tijeras Canyon on the east, Cochiti Pueblo to the north and San Acacia on the south. The Aquifer's porous composition, comprised of sand and gravel, allows for the easy flow and percolation of water. Recharge to the Aquifer comes from snowmelt in the northern mountains and approximately eight inches of annual rainfall. Factors affecting the Aquifer's recharge rate include soil permeability, topography, evapotranspiration rates, soil—moisture content, depth to the Aquifer, and irrigation return flows. The Albuquerque Aquifer is part of the 450-mile long Rio Grande Rift, which has been called one of the most impressive rifts on earth. The rift provides a porous foundation, or reservoir, where water is stored in huge quantities.

The jet fuel leak is believed to have originated from corroded, underground pipes that supplied fuel to KAFB's Bulk Fuel Facility (BFF) which was constructed in 1953. The leaks are estimated to have

originated and continuously occurred for a period of 40 years prior to their discovery. The spill site is located in the western part of KAFB where the BFF fuel processing and storage occurred. The spill site includes the former fuel offloading rack and the underground, light non-aqueous phase liquid plume, both of which fall under the "BFF Spill." Since the spill began, and in the following decades, the fuel seeped an estimated 400-500 feet downward into the Albuquerque Aquifer. The Air Force is continuing to work with the NMED's Hazardous Waste Bureau on remediation efforts in accordance with, *inter alia*, the federal Resource Conservation and Recovery Act and the New Mexico Hazardous Waste Act.

The Latest on the Remediation

Current feelings of both the NMED and the ABCWUA are that KAFB has seemingly become less transparent in their release of data and concern has risen as to the timetable set for the permanent remedy to the spill. Specific attention is being focused on the plume still located south of Ridgecrest Drive where a considerable amount of contamination still exists. Statements made by Assistant Air Force Secretary John Henderson indicate that the remedy will not be able to take place until 2023. Several steps must be taken before a remediation can commence, namely, KAFB must wait for the NMED to approve their investigative report that will be submitted in November, approval of which is not expected until 2021. Once this report is approved, a corrective measures evaluation by KAFB is set to begin but cannot do so until soil cores are collected, and additional data-gap wells can be installed to better evaluate the sources of the EBD. This evaluation must also obtain the approval of the NMED before any remedial action can take place, pushing the remediation date into 2023. The Air Force has expressed interest in working with NMED to shorten the timeline.

Further disagreement between KAFB and NMED has arisen due to NMED's concern that the Air Force is committed to protecting drinking water, but seems less inclined to treat all groundwater, regardless of its use. KAFB argues that special attention must be paid to the City of Albuquerque's drinking water supply and that it will remain the priority, however overall remediation is still the goal once a permanent remedy can begin.

Monitoring Wells

KAFB has drilled more than 130 monitoring wells in its efforts to assess the jet fuel's plume, however more are still needed. Of these wells, 24 are sentinel wells strategically positioned between the plume and the ABCWUA drinking water wells. These wells monitor any potential threat to the water supply. These wells are monitored quarterly while the remaining KAFB wells, along with VA hospital wells and City of Albuquerque wells, are monitored monthly. As of July 2019, none of the sentinel wells have reported any EBD. It is KAFB's monitoring wells that provided the data for the increase in the estimated size of the spill from 8 million gallons to as much as 24 million gallons. The data and calculations continue to be reviewed and the actual size of the spill will remain unknown until it is fully remediated.

Soil Vapor Extractors

Current interim remediation is being conducted by KAFB via soil vapor extractors which are used to vacuum out and then burn off gases from the spill's plume. It is important to note, however, that not all of the EBD will be able to volatize and be vacuumed out. NMED has stated that it is anxious to see the results of the vapor extraction, but data on its effectiveness has yet to be released. Between pump-and-treat methods and soil vapor extraction, $1.3 million has been reserved as funding for remediation in 2019, down from the $2.5 million in 2018. A total of $125 million has been spent on the clean-up project so far.

KAFB acknowledged early on that it "owns" the BFF Spill and is committed to leading the containment and remediation efforts and has seemingly followed through on those commitments, regardless of concerns regarding the timetable. In its March 2011 Assessment Report to Congressional Committees, KAFB concludes:

> . . .[t]he Air Force accepts responsibility for the spill and its remediation and is leading the effort to ensure it is completed as quickly as possible . . . . To be effective the effort will require the close cooperation and communication of all stakeholders to include the public, NMED, the Air Force, the City of Albuquerque and the Albuquerque Bernalillo County Water Utility Authority.

Conclusion and Implications

The NMED and KAFB will need to solve some of their disagreements in order to further the remediation process and are both under increasing public pressure to do so. However, with the involvement of stakeholders, federal and state agencies, and active negotiations regarding monitoring and permanent remediation, the logistics of the clean-up are moving forward. The Air Force states that in the interim, pump-and-treat systems and soil vapor extraction will continue "until the final remedy or remedies are in place, or cleanup standards in the [Resource Conservation and Recovery Act] Permit are achieved." (Christina J. Bruff)

REPORT ANALYZES EXTREME HEAT SCENARIOS LIKELY TO BECOME THE NORM IN THE UNITED STATES

Many of the studies and reports on the dangers of climate change focus on large-scale environmental impacts like floods, wildfires, sea-level rise and hurricanes. A July 2019 report from the Union of Concerned Scientists focuses on an area that is likely familiar to all of us: heat.

The report, entitled "Killer Heat in the United States: Climate Choices and the Future of Dangerously Hot Days" (Report) analyzes the extreme-heat scenarios that are likely to occur in the United States by the middle and end of this century if the United States does not reduce "heat-trapping emissions."

The National Weather Service's Heat Index

According to the National Weather Service (NWS), its "heat index" is "a measure of how hot it really feels when relative humidity is factored in with the actual air temperature." Generally, the heat index is used to determine the "Likelihood of Heat Disorders with Prolonged Exposure or Strenuous Activity" and the NWS breaks heat indexes into four categories: "Caution", "Extreme Caution," "Danger" and "Extreme Danger." For example, a day with a heat index of 100°F falls in the "Danger" category and a day with a heat index of 105°F falls in the "Extreme Danger" category.

Significant Increase in Number of Dangerous Heat Index Days

According to the Report, if no actions are taken to reduce heat-trapping emissions, the following is likely to occur in the United States:

- By midcentury (2036-2065), the average number of days per year with a heat index above 100°F would more than double when compared to historical averages (1971-2000) while average numbers of days per year with a heat index above 105°F would quadruple.

- By midcentury, "[m]ore than one-third of the area of the United States will experience heat conditions once per year, on average, that are so extreme they exceed the current NWS heat index range—that is, they are literally off the charts."

- By midcentury, "[a]ssuming no changes in population, the number of people experiencing 30 or more days with a heat index above 105°F in an average year will increase from just under 900,000 to more than 90 million—nearly one-third of the US population."

- By late century (2070-2099), the average number of days per year with a heat index above 100°F would quadruple when compared to historical averages and the average number of days with a heat index above 105°F would be eight times as much when compared to historical averages.

- By late century, "[a]t least once per year, on average, more than 60 percent of the United States by area will experience off-the charts conditions that exceed the NWS heat index range and present mortal danger to people."

- By late century, assuming no population change, more than 180 million people would experience 30 or more days with a heat index above 105°F.

One of the highlights associated with the Report is a website with an interactive United States map

that shows potential future heat index scenarios by county: (https://ucsusa.maps.arcgis.com/apps/MapSeries/index.html?appid=e4e9082a1ec343c794d27f3e12dd006d)

An example of the data that can be gleaned from the interactive map is provided in Table 1:

Report Recommends Suite of Federal and State Policies for Deep Cuts to Heat-Trapping Emissions

The Report recommends "deep cuts" in United States heat-trapping emissions and continued United States implementation and strengthening of the Paris climate agreement. The Report also recommends a suite of federal and state policies, including:

- An economywide price on carbon to help ensure that the costs of climate change are incorporated into our production and consumption decisions and encourage a shift away from fossil fuels to low-carbon energy options.

- A low-carbon electricity standard that helps drive more renewable and zero-carbon electricity generation and helps deliver significant public health and economic benefits.

- Policies to cut transportation sector emissions, including increasing fuel economy and heat-trapping emissions standards for vehicles…

- Policies to cut emissions from the buildings and industrial sectors, including efficiency standards and electrification of heating, cooling, and industrial processes.

- Policies to increase carbon storage in vegetation and soils, including through climate-friendly agricultural and forest management practices.

- Investments in research, development, and deployment of new low-carbon energy technologies and practices.

- Measures to cut emissions of methane, nitrous oxide, and other major non-CO_2 heat-trapping emissions.

- Policies to help least developed nations make a rapid transition to low-carbon economies and cope with the impacts of climate change.

Conclusion and Implications

Taking action often requires awareness and the Report (and the website) effectively highlight the dangerous conditions that likely await us if the status quo prevails. Most certainly, the extreme heat will impact water supply. It will be interesting to see if the information provided moves the action needle and if any of the Report's recommendations are implemented.

(Kathryn Casey)

Table 1: Average number of days per year with a heat index above 100°F

County	Historical	Midcentury	Late Century
Cook (Chicago)	3	24	47
Los Angeles	1	12	32
Miami-Dade	41	134	166
Philadelphia	5	32	58
Riverside	33	69	91
Travis (Austin)	29	96	130

NEW FROM THE WEST

In the month's News from the West, we report on two state Supreme Court decisions impacting water rights in the West. First, we report on a decision out of the Colorado Supreme Court addressing water exchanges—a legal concept that is neither codified in the state nor part and parcel of the state's common law. Lastly, we report on a decision out of the Supreme Court of Utah defining a necessary party at administrative hearings in regarding water rights impairments.

Colorado Supreme Court Declines to Embrace 'Character of Exchange Rule'

The Colorado Supreme Court recently declined to fully embrace the "character of exchange rule," an unofficial concept declaring that water diverted by exchange takes on the "character" of the substitute supply. By refusing to entirely embrace this concept, the Court has instead elected to "cultivate flexibility [and] optimize the beneficial use of the state's waters." *City & County of Denver v. Consolidated Ditches of Water District*, Case No. 2, 2019 CO 68 (Col. July 1, 2019).]

Background

The physical and legal background of this case is quite expansive, and the opinion itself took 33 pages including three maps to fully explain the history. While such in-depth review may have been necessary for the Supreme Court, this article will instead provide a more cursory overview of the relevant Colorado water systems and laws, and the procedural history of this case.

The present dispute centers on a 1940 Agreement between Denver and Consolidated Ditches of Water District No. 2, an amalgam of various ditch and irrigation companies. The 1940 Agreement attempted to resolve disputes regarding seepage and evaporation losses from Denver's in-channel reservoirs on the South Platte River. [The Water Court in the present case later reasoned that the 1940 Agreement, at the time it was executed, assumed that the water saved by prohibiting reuse was roughly equivalent to the amount lost from evaporation.] Instead of making additional releases from the reservoir to offset these losses, the typical practice, Denver instead agreed not to reuse or successively use return flows from water imported from Colorado's western slope. [In Colorado, "imported water" (*i.e.*, water diverted from a different basin) may be reused and successively used to extinction. This is different from normal diversions whose return flows must be allowed to return to the stream.]

Several decades later, a decision in Case No. 81CW405 clarified that the 1940 Agreement only applies to return flows from "decreed water rights from Colorado River sources with appropriation dates before May 1, 1940," the day Denver signed the Agreement. Therefore, Denver is fully able to reuse and successively use return flows from sources acquired or appropriated after that date. That distinction led to the singular question in the present case: whether the 1940 Agreement prohibits Denver from using return flows from water imported from the Blue River system under exchange and substitution operations that use water stored in the Williams Fork Reservoir under a 1935 priority date as a substitute supply. To understand that question, a brief overview of the relevant reservoirs and systems is required.

In brief, the Blue River Diversion Project collects water at the confluence of the Snake River, Blue River, and Tenmile Creek. That water can be stored in Dillion Reservoir, or piped directly into the Roberts Tunnel where it is pumped across the mountains and into the North Fork of the South Platte River. Denver owns water rights in the Blue River that were adjudicated in 1955, with a 1946 appropriation date—clearly post-May 1, 1940.

The Williams Fork River is tributary to the Colorado on the western slope of the continental divide. Denver owns water rights in the Williams Fork Reservoir. Particularly relevant to this case, those water rights were decreed in 1937 with an appropriation date of 1921.

Importantly, Denver can release water stored in the Williams Fork Reservoir to make replacements under Blue River exchange and substitution operations. Water stored in the Williams Fork Reservoir physically cannot be transported to the Front Range because the reservoir lies below the collection systems and relevant tunnels. Therefore, Denver operates a

simple exchange and substitution that releases water from Williams Fork Reservoir to compensate for water it diverts out-of-priority from its Blue River water rights.

Water Exchanges in Colorado

Water exchanges are a central tool used by Colorado appropriators to allow flexibility of use. Essentially, a junior water right is allowed to divert out-of-priority by acquiring an exchange and substitution plan that reintroduces water to the river above the senior calling rights. C.R.S. §§ 37-38-104, -80-120(2)-(4). Because the substitute supply is provided in lieu of the water that is diverted out-of-priority upstream, it must mimic the diverted water in quality, quantity, and continuity, and must not injure any downstream users. *Id.* [Briefly the four required parts of an exchange are: 1) the source of substitute supply must be above the senior calling water right; 2) the substitute supply must be equivalent in amount and of suitable quality to the downstream appropriator; 3) there must be available natural flow at the point of natural upstream diversions; and 4) the rights of others cannot be injured when implementing the exchange. *See generally*, C.R.S. § 37-80-120(4).] Necessarily, an exchange reduced the amount of water available between the upstream out-of-priority diversion, and the downstream releases—but the physical supply of water in the river, as measured below the substitute supply, is unchanged.

Denver's Exchange and Substitution Plan for Augmentation

In practice, Denver wanted to continue to divert its Blue River water (and pump it across the divide) even when that relatively junior 1946 water right was called out. To accomplish this, Denver appropriated an exchange and substitution plan for augmentation that allowed it to pump that Blue River water, even when not in priority, and replace those diversions by making extra releases from Williams Fork Reservoir, which was still above the senior calling water right. That exchange and substitution is the subject of this case.

The Water Court found in favor of Denver, ruling that the Blue River water imported by Denver has a priority date of 1946, regardless of whether it is imported after diversion in-priority, or by substitution and exchange via Williams Fork Reservoir releases. The Supreme Court used much of the same analysis and reasoning in affirming the Water Court's decision.

The Supreme Court's Decision

For a myriad of complex reasons not necessary to understand this ruling, Denver and the Consolidated Ditches were engaged in litigation when the parties filed competing Rule 56 motions asking the Court to determine, as a matter of law, whether Denver was entitled, in light of the 1940 Agreement, to reuse return flows from water imported from the Blue River system via exchange from the Williams Fork Reservoir substitute supply. Denver's argument was that by its plain language, and the decision in 81CW405, the 1940 Agreement only prohibited Denver from reusing water that was acquired or appropriated before 1940. Because the Blue River water rights have a priority date of 1946, Denver reasoned, it should have no restrictions on its use.

The Consolidated Ditches countered these claims by relying on the "character of exchange rule." This so-called rule provides that water diverted by exchange takes on the "character" of the substitute supply—in this case the water diverted out-of-priority in the Blue River was therefore no longer Blue River water, but rather it was Williams Fork Reservoir water that had been "moved" upstream via the legal fiction of substitution and exchanges. If this were the case, then the water being diverted under that exchange would have a pre-1940 priority date and therefore Denver would be prohibited from reusing and successively using those return flows.

Character of Exchange Rule Not Legally Defined

The Court noted that the character of exchange rule is not codified, nor has it ever been expressly defined in case law. Instead, it is an "unofficial, permissive practice recognized by the State Engineer." [*See*, Ans. Br. Appellees State Engineer and Division Engineer, Water Division 1 at 29 ("As the administrators of exchanges, the Engineers know of no mandatory character-of-exchange rule, but have regularly permitted the water diverted upstream to take on the character of the substitute supply as necessary to accomplish an appropriator's non-speculative purposes,

consistent with Water Court decrees, and without impairment to the rights of others.").] Nothing in the various exchange statutes, cited above, mentions such a rule, or provides for its operation. Although the substitute supply must mimic the out-of-priority diversions and therefore could be view as the "same" water, "this court has never formally endorsed this legal fiction." In declining to exercise this view, the Court identified several problems.

First, it is unclear what is meant by "character" of the substitute supply. For example, does character mean type of source, priority date, decretal restrictions (*e.g.*, type of use), contractual limitations, or even "all legal characteristics"? Various briefs from the parties as well as amici revealed disagreement about even this basic point.

Second, as mentioned above, the Colorado Supreme Court has never expressly defined or embraced the character of exchange rule in its decisions. In the present decision, the Court noted that the "rule" has been mentioned twice previously but "in neither case did [the court] expressly apply the principal or hold that it functions as a mandatory 'rule.'" That being said, the Supreme Court did include a discussion of two cases that it believed "implicitly relied on the character of exchange concept." After examining those cases, the Court allowed that:

> . . .at a minimum, the character of exchange concept reflects the statutory requirements applicable to a substitute supply.

The rule, then, is not a rigid set of restrictions but rather:

> . . .a flexible tool to preserve the fully reusable character of transmountain water used as a substitute supply in exchanges.

Turning to the dispute between Denver and the Consolidated Ditches, the Colorado Supreme Court agreed with the Water Court that the Blue River water, no matter how diverted, is a source acquired after May 1, 1940 and therefore Denver may reuse or successively use all return flows from that water.

Conclusion and Implications

This case represents the first time the Colorado Supreme Court has conclusively spoken on the character of exchange rule. By refusing to fully embrace the rule, the Court has chosen to side with Colorado's "longstanding water management policy of maximizing the beneficial use of waters of the state." Exchange and substitution operations are a critical part of Colorado's water infrastructure, allowing users to divert at different times of the year, and from different locations than they otherwise would be allowed to under a strict priority approach. The Court noted that applying a strict character of exchange rule to all exchanges would "neither cultivate flexibility nor optimize the beneficial use of the state's waters." Therefore, this ruling can be seen as a victory for flexible water use in Colorado. Provided that an exchange comports with the four main statutory provisions, it will not be held to the strict standards of the character of exchange rule. That being said, the Court did hedge its opinion on the specific facts presented here. So, although the character of exchange rule is clearly not going to present a strict standard, the Court has left the door open for it to be applied in a smaller function in future cases. The Supreme Court's slip opinion in this matter is available online at; https://www.courts.state.co.us/Courts/Supreme_Court/Case_Announcements/Files/2019/E2714207-01-19.pdf
(John Sittler, Paul Noto)

Utah Court Supreme Court Requires Water User Participation in Administrative Proceedings Regarding Impairment of Water Rights

The Utah Supreme Court has held that a water user must participate in the administrative proceedings in order to assert impairment of its water rights. In so holding the Court rejected the concept of a hybrid priority date system related to change applications. Rather the Court concluded that a water right retains its priority date and the only avenue to assert impairment arising from a change application is during the administrative process to approve or reject the same. This decision places renewed emphasis on protesting and disputing change applications that may potentially impact water rights. [*Rocky Ford Irrigation Company v. Kents Lake Reservoir Company and Beaver City*, 2019 UT 31 (Ut. 2019).]

Factual and Procedural Background

This case is the latest episode in a long running dispute between two water users' groups. Kents Lake Reservoir Company (Kents Lake) and Rocky Ford

Irrigation Company (Rocky Ford) divert and store water from the Beaver River in Central Utah. Each company owns direct-flow and storage water rights that were recognized in the 1931 Beaver River Decree. The Beaver River Decree held that all upper users were entitled to obtain their water rights prior to the lower users, irrespective of their relative priority dates. Kents Lake is located upstream of Rocky Ford and is considered to be in the upper basin, while Rocky Ford is in the lower basin.

Kents Lake filed change applications in 1938 and 1940 to store additional water in its reservoir. These change applications were both approved by the Utah Division of Water Rights over the protests of Rocky Ford. Subsequently, the two companies entered into an agreement to:

> . . .provide for the practical administration of storage … and to prevent future controversy concerning the diversion for storage. *Rocky Ford v. Kents Lake*, 2019 UT 31, ¶ 9.

This agreement provided that: 1) Rocky Ford would not protest Kents Lake's planned change application seeking an option storage right in Three Creeks Reservoir, 2) Kents Lake would not oppose Rocky Ford's enlargement of its reservoir, and 3) Rocky Ford has an exclusive right to store all water available to it from November 1 to the following April 1 each year.

As agreed, Kents Lake submitted a change application to the State Engineer seeking to create an option storage right in Three Creeks Reservoir. Rocky Ford, as promised, did not protest the application. The State Engineer approved the application and granted Kents Lake's request for these "direct-storage changes." Kents Lake now had a direct-storage right, allowing it to either use the water directly or store it in Three Creeks Reservoir. Kents Lake subsequently perfected this change and received a certificate of beneficial use for the direct-storage right.

Beginning in the 1970s Beaver River water users gradually shifted to sprinkler irrigation, which requires less diversion of water and produces less return flows. Entities such as Kents Lake began to store these efficiency gains and this reduced the flow available to lower users, such as Rocky Ford. The reduction of return flows can adversely impact lower users as insufficient water is made available.

In 2010, after requesting assistance from the Division of Water Rights, Rocky Ford brought suit in District Court against Kents Lake. The suit alleged water right interference, conversion of water rights, and negligence, and seeking declaratory relief, injunctive relief, and rescission of the 1953 Agreement. Rocky Ford contends that its water rights have been impaired by the approved changes to the direct-storage and other actions taken by Kents Lake. Essentially, Rocky Ford asserted that its water rights had priority over the direct-storage rights approved in Kents Lake's change application when the issue of localized impairment arises.

At the District Court

Following discovery, Rocky Ford moved for partial summary judgment. It asserted that: 1) the direct-storage changes maintain an 1890 priority date only to the extent they don't impair Rocky Ford's direct flow rights, and 2) Rocky Ford's direct flow rights are not subordinated or waived under a plain language reading of the Agreement. The state District Court denied the motion holding that Rocky Ford had "intentionally waived its direct flow rights against [Kents Lake] through its entrance into the 1953 agreement" and that Kents Lake could continue to store its water as it has "even to the detriment of [Rocky Ford]'s direct flow rights." *Id.* at ¶ 15.

Following a bench trial, the District Court issued its written Memorandum Decision. The court first denied Rocky Ford's request for injunctive and declarative relief regarding Kents Lake's measurement obligations. Because Kents Lake had followed the instructions of the State Engineer with regard to measurement, the District Court concluded that Rocky Ford was not entitled to declarative or injunctive relief. The District Court also declined to rescind the 1953 Agreement. It concluded that Rocky Ford had not proved material breach, impracticability, frustration of purpose, or mutual mistake. Lastly, the District Court awarded attorney fees to Kents Lake and Beaver City *sua sponte* under Utah Code § 78B-5-825.

Issues on Appeal

Rocky Ford appealed the decision and asserted five principal questions for review. First, did the trial court commit legal error when it denied Rocky Ford's motion for summary judgment? Second, did the

trial court err in refusing to declare that Kents Lake could not store the water it saved through improved efficiency? Third, did the trial court err in refusing to declare that Kents Lake must measure its usage consistent with the requirements of the Beaver River Decree? Fourth, did the trial court err in refusing to rescind the 1953 Agreement? And fifth, did the trial court err in awarding attorney fees to Kents Lake and Beaver City?

The Utah Supreme Court's Decision

The Utah Supreme Court affirmed the denial of Rocky Ford's motion for partial summary judgment on alternative grounds. It also affirmed the trial court's holdings that Rocky Ford had no claim on Kents Lake's efficiency gains and that the 1953 Agreement should not be rescinded. However, the Court reversed and remanded the District Court's refusal to enter a declaratory judgment regarding Kents Lake's measurement obligations and also the denial of the rule 59 motion and hold that Kents Lake and Beaver City are not entitled to attorney fees. *Id.* at ¶ 20.

The Court addressed each of the five principal issues on appeal, however the question of whether the District Court erred in denying Rocky Ford's motion for summary judgment is of particular interest. The Court affirmed the decision of the District Court, but did so on alternative grounds. The District Court ruled that the 1953 Agreement was clear and unambiguous and that Rocky Ford had intentionally subordinated its direct flow rights, allowing Kents Lake to use the water to Rocky Ford's detriment. *Id.* at ¶ 21. This holding relied upon the plain text of the 1953 Agreement. The Supreme Court disagreed with this holding. Rather the Court held that Rocky Ford had "agreed it was not impaired" under doctrines of "waiver, release, ratification, or … estoppel." *Id.* at ¶ 25. Rocky Ford consented not to protest Kents Lake's change application, in doing so it also waived any right to subsequently assert impairment.

Utah law provides that a water user may change the use of their water right. Utah Code § 73-3-3 (1953). However, a changed use is not permitted "if it impairs any vested right." *Id.* Likewise, other water users are entitled to file a protest with the State Engineer, claiming that the change would impair vested rights in the water source. *Id.* § 73-3-7 (1953). Finally, "no such change of approved application shall affect the priority of the original application." *Id.* § 73-3-3 (1953).

How a Change Application Affects Priority?

Rocky Ford asserted that the change in use by Kents Lake's is junior to Rocky Ford's direct flow rights. Accordingly, the Court was charged with resolving the question of how a change application affects priority. If a change application retains the original priority date, Rocky Ford's rights are junior to Kents Lake's, and Kents Lake can use its water to the detriment of Rocky Ford. But if a change application receives the priority date of the approved change, Rocky Ford's rights would be senior to Kents Lake's direct-storage right. The Court applied the plain text of the statute; holding that a change application does not affect the priority date of a water right. In reaching this conclusion, the Court expressly rejected a hybrid priority system that would utilize the priority date of a change application to resolve issues of localized impairment.

A Party Must Utilize the Administrative Process to Assert a Water Right Impairment

Importantly, the Supreme Court held that a party must utilize the administrative process in order to assert impairment of a water right. The Utah Code provides a process for asserting impairment and that requires a party to protest a change application and participate in the administrative process. Further, the Utah Code provides for judicial review within 60 days of a final Division of Water Rights order. *Id.* at § 73-3-14. However, once a certificate of beneficial use is issued for the change in question, it is "*prima facie* evidence of the owner's right to the use of the water in the quantity, for the purpose, at the place, and during the specified time therein, subject to prior rights." *Id.* at § 73-3-17. Consequently, Rocky Ford's failure to participate in the administrative process, by choice or in accordance with a contract, effectively barred its assertion of impairment.

Conclusion and Implications

This decision represents a change in how many have perceived changed water rights to be administered. Change Applications are typically assigned a priority date by the Division of Water Rights. This decision renders that priority date obsolete and confirms that the priority date of the underlying water right remains unchanged. Further, it places additional emphasis on the administrative process, by holding

that failure to participate in that process can result in an absolute bar on the ability to subsequently assert impairment arising from a change.

The Utah Supreme Court Decision may be found at: https://www.utcourts.gov/opinions/supopin/Rocky%20Ford%20v.%20Kents%20Lake20190711_20170290_31.pdf
(Jonathan Clyde)

REGULATORY DEVELOPMENTS

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY PROPOSES WATER QUALITY CERTIFICATION REGULATIONS

The U.S. Environmental Quality Act (EPA) has proposed new formal regulations to govern the procedures and the scope of state reviews of water quality impacts pursuant to § 401 of the federal Clean Water Act (CWA. Under § 401, a federal agency may not issue a license or permit to conduct any activity that may result in any discharge into waters of the United States, unless the state or authorized tribe where the discharge would originate either issues a § 401 water quality certification finding compliance with existing water quality requirements or waives the certification requirement.

Clean Water Act Water Quality Certifications

Typically, state certifications of compliance with state water quality standards are necessary for applications for National Pollutant Discharge Eliminations System (NPDES) permits to discharge pollutants or to dredge or fill waters regulated by the United States under §§ 401 and 404 of the CWA. EPA Administrator Andrew Wheeler stated on August 9 EPA's intent is to assist states to act within the scope of authority allowed to them under the CWA. In recent decades, the process of obtaining state certification has been a common focus of environmental advocacy groups and others opposed to industrial discharges and commercial developments in federally regulated waters. A notice of public hearing on the proposal was published in the August 16, 2019 Federal Register, 84 FR 41948. The hearing is to be held on September 5, 2019 in Salt Lake City, Utah. The proposed rule itself is published in the August 22, 2019 Federal Register at 84 FR 44080. Public comments on the rule proposed will be accepted through October 21, 2019 (sixty days following the date the proposal publication date). The regulatory docket number is Docket ID No. EPA-HQ-OW-2019-0405.

Rivers and Harbors Act

In addition to the typical discharge permits under the Clean Water Act, permits under §§ 9 and 10 of the Rivers and Harbors Act, and hydropower and pipeline certifications issued by FERC are also subject to state water quality review under these proposed rules.

Events and discussions of policy differences preceding the promulgation make it clear that the EPA wishes to limit state review to the actual water quality impacts of a proposed discharge. Under the rules proposed, EPA has authority not to honor conditions to certification based on environmental or policy questions about a given project that do not involve water quality. In EPA's view, its rule proposal honors and reflects the language and scope of the CWA itself. EPA's preface to the proposed rules gives an extensive discussion of case law history that has impacted the certification process in recent decades.

Executive Order No. 13868

The immediate impetus for the rule proposal was the President's issuance of Executive Order No. 13868. The order deals with the need to facilitate major energy supply and other projects of national security and economic significance. The EPA indicates in its discussion of the proposed rule that one purpose of the proposal is to eliminate confusion and uncertainties that have come to complicate and delay the water quality certification process under the CWA. EPA has basically been governing the process with pre-CWA rules (*e.g.* 40 CFR, Part 421) and through "guidance" rather than formal rulemaking during the years since the CWA was adopted into modern form in 1972. EPA wishes to replace the existing rules (40 CFR Part 421) with the rules in its new proposal. The formal proposal was preceded by a series of meetings and conferrals with states, tribes and interested parties. The Executive Order requires that the proposed rule must be finalized by May 2020.

The Proposed Rule

Some of the highlights of the Proposed Rule include an express limitation on the amount of time that is "reasonable" for the state review process; that review is limited to a maximum of one year from the

date of application. (Congress itself included a one-year limitation in § 401.) The federal agency granting federal permission is given leeway to set a time frame shorter than one year considering the potential need for additional study, the complexity of the project, and potential for discharge being harmful. Requests from a state to an applicant for agreed tolling or abeyance of the time frame clock are generally not allowed.

The Clean Water Act contains a provision that describes situations where a state will be deemed to have waived its review opportunity. In addition to obvious failure to act or an express written statement that the state will not act on certification, the new rules would result in a state risking commission of a "constructive" waiver if and when its actions go beyond the scope of Section 401 certification.

Another section of the proposed rules provides a procedure for the EPA to process objections from states other than the certifying authority which contend the proposed discharge would violate such other states' water quality standards. A hearing is proposed to be held by the federal permitting authority on the merit of any such "neighboring state" contention that its own water quality will be adversely affected by the discharge.

EPA indicates in its regulatory preamble that it is interested in comments on whether it should play any specific oversight role in the course of a 401 certification proceeding undertaken by a state. In addition, the EPA rules proposed would permit the concerned federal agency (such as EPA, the U.S. Army Corps of Engineers, or the Federal Energy Regulatory Commission (FERC) to review and disallow conditions a given state may impose, if the federal agency finds that the state has gone beyond the scope of water quality regulations that are pertinent. In its preamble discussion, EPA also seeks comment on whether its proposed regulations appropriately balance the scope of state authority under section 401 with Congress' goal of facilitating commerce on interstate navigable waters, and whether they define the scope in a manner that would limit the potential for states to withhold or condition certifications such that it would place undue burdens on interstate commerce. The proposed rules place a burden of proof on the state certifying authority to show why any conditions imposed on an applicant's discharge are needed for water quality compliance assurance.

Conclusion and Implications

It can be expected that some states and environmental action groups may contend the proposed rules go too far in limiting the scope of state review authority under Section 401 of the CWA. The EPA seems to anticipate such contentions in the extensive legal justification published in its preface to the proposed rule. If this proposed rule is finalized, in all likelihood, it would be subject to challenges from several states and tribes. In fact, Attorneys General of 16 states previously filed a comment letter with the EPA on May 24, 2019, stating that the proposal undermines the broad statutory authority of the states to vet projects for impacts on water quality under CWA § 401, (*see generally*, *PUD No. 1 of Jefferson County and City of Tacoma v. Washington Department of Ecology*, 511 U.S. 700 (1994)), and the long standing principles of cooperative federalism.
(Harvey M. Sheldon)

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.

Nationwide Actions

•July 11, 2019—The U.S. Environmental Protection Agency (EPA) announced a final policy to enhance effective partnerships with states in civil enforcement and compliance assurance work. Articulated in a memorandum from EPA's Assistant Administrator for Enforcement and Compliance Assurance Susan Bodine, the final policy describes procedures and practices for effective coordination between EPA and states when carrying out shared responsibilities under environmental laws. The final policy memorandum is divided into three sections. The first section details requirements for joint planning and regular communication between EPA and states to promote enhanced, shared accountability. The second section of the policy provides greater detail on EPA and state roles and responsibilities in implementing authorized programs. The third and last section of the policy provides a process for the elevation and resolution of issues. The issuance of today's final policy replaces the interim guidance memorandum on enhanced planning and communication between EPA regional offices and states issued by Susan Bodine on January 22, 2018. EPA indicated that it would update and finalize that guidance based on input from EPA regional offices, states, and a workgroup on compliance assurance that EPA and the Environmental Council of States convened. On May 13, 2019, EPA published a federal register notice soliciting public comment. EPA released policy on Enhancing Effective Partnerships Between the EPA and the States in Civil Enforcement and Compliance Assurance Work. To read EPA's policy on Enhancing Effective Partnerships Between the EPA and the States in Civil Enforcement and Compliance Assurance Work: https://www.epa.gov/compliance/enhancing-effective-partnerships-between-epa-and-states-civil-enforcement-and-compliance

•August 9, 2019—The U.S. Environmental Protection Agency (EPA) issued a proposed rule to implement Section 401 of the federal Clean Water Act (CWA). EPA Administrator Andrew Wheeler made the announcement at the Council of Manufacturing Associations Summer Leadership Conference in Charleston. The proposed rule seeks to increase the transparency and efficiency of the 401 certification process and to promote the timely review of infrastructure projects while continuing to ensure that Americans have clean water for drinking and recreation. "Under President Trump, the United States has become the number one oil and gas energy producer in the world, while at the same time continuing to improve our air quality," said EPA Administrator Andrew Wheeler. "Our proposal is intended to help ensure that states adhere to the statutory language and intent of Clean Water Act. When implemented, this proposal will streamline the process for constructing new energy infrastructure projects that are good for American families, American workers, and the American economy." In April, President Trump issued an executive order and directed the administration to take appropriate action to accelerate and promote the construction of pipelines and other important energy infrastructure. The president's executive order directs EPA to consult with states and tribes on reviewing and updating guidance and regulations related to § 401 of the CWA. Section 401 of the CWA gives states and authorized tribes the authority to assess potential water quality impacts of discharges from federally permitted or licensed infrastructure projects that may affect navigable waters within their borders. The EPA's existing certification rules have not been updated in nearly 50 years and are inconsistent with the text of CWA § 401, leading to confusion and unnecessary delays for infrastructure projects. With today's action, EPA is proposing to modernize and clarify the timeline and scope of CWA § 401 certi-

fication review and action to be consistent with the plain language of the CWA.

EPA will accept public comment on the proposed rule for 60 days following publication in the Federal Register. To review the proposed rule and learn more about the CWA Section 401 certification process, see: https://www.epa.gov/cwa-401

Civil Enforcement Actions and Settlements—Water Quality

•July 8, 2019—The U.S. Environmental Protection Agency has ordered the Grindstone Indian Rancheria near Elk Creek, California, to provide alternative drinking water to rancheria water system costumers, disinfect the system's water and monitor the water for contamination. The Grindstone Indian Rancheria Public Water System serves approximately 150 residents. The system uses water from Stony Creek, which has numerous potential contaminants from agricultural, municipal and industrial operations. EPA found the system was not complying with a 2017 drinking water order by not properly disinfecting the system's water and not employing a certified drinking water operator. The order requires Grindstone Indian Rancheria Public Water System to:

- Provide at least one gallon of water per person per day for every individual served by the system.
- Immediately procure and continuously use National Sanitation Foundation International certified and Federal Insecticide, Fungicide, and Rodenticide Act registered approved chlorine disinfectant.
- Employ a qualified drinking water operator.
- Adequately fund the system's operations.
- Issue a boil water notice to all customers.
- Properly monitor the system's water and report findings to the EPA.

Failure to comply with the EPA's order could result in penalties levied against the Grindstone Indian Rancheria Public Water System of up to $23,963 per day.

•July 16, 2019—The U.S. Environmental Protection Agency announced an agreement with the U.S. Department of Agriculture (USDA) Forest Service to close 15 campground pit toilets, considered to be large capacity cesspools, at four Arizona national forests. The Forest Service will have until December 2024 to comply with the federal Safe Drinking Water Act's ban on large capacity cesspools (LCCs). The Forest Service's Southwestern Region disclosed that it continued to use LCCs despite a 2005 ban under the Safe Drinking Water Act's Underground Injection Control program. The four Arizona forests that will remove the noncompliant systems are Apache-Sitgreaves, Tonto, Coconino and Kaibab. The agreement also includes specific reporting requirements and allows for penalties should the Forest Service fail to meet deadlines. Cesspools collect and discharge waterborne pollutants like untreated raw sewage into the ground, where disease-causing pathogens can contaminate groundwater, streams and the ocean. The settlement is subject to a 30-day comment period before becoming final. For more information and to submit comments, please visit: https://www.epa.gov/uic/usda-forest-service-southwestern-region-proposed-safe-drinking-water-act-underground-injection

•July 17, 2019—The U.S. Environmental Protection Agency reached a settlement for civil penalties with U.S. Lubricants Inc. for Clean Water Act violations. Under the agreement, U.S. Lubricants will pay a $196,314 penalty. EPA recently entered into a separate agreement with the company to take steps to reduce the risk of oil spills from their petroleum storage facility in Commerce, California, to the Los Angeles River. "It is essential that companies operating near our waterways develop and follow a spill prevention plan," said EPA Pacific Southwest Regional Administrator Mike Stoker. "Our action will help prevent oil spills to the Los Angeles River." The facility is located near the Los Angeles River, which flows to Long Beach Harbor and the Pacific Ocean. An EPA inspection in May 2017 found that the company had violated the Clean Water Act›s oil pollution prevention regulations by failing to:

Inspect tanks and perform tank integrity testing; Provide adequate secondary containment around tanks to keep potential spills from leaving the site and entering waterways; Develop and implement a Facility Response Plan (FRP) to respond to major oil spills; Develop a Spill Prevention, Control and Countermeasure Plan (SPCC) certified by a professional engineer.

The requirement to develop an FRP Plan applies to facilities that store more than 1 million gallons of oil. The plan helps staff prevent and respond to an oil spill on-site. FRPs also help local and regional re-

sponse authorities better understand potential hazards and response capabilities in their area. EPA's oil pollution prevention regulations aim to prevent oil from reaching navigable waters and adjoining shorelines and to ensure containment of oil discharges in the event of a spill. Specific prevention measures include developing and implementing spill prevention plans, training staff, and installing physical controls to contain and clean up oil spills. EPA's proposed settlement with U.S. Lubricants, which is subject to a 30-day comment period, can be found at: https://www.epa.gov/ca/us-lubricants-inc-commerce-ca-proposed-settlement-clean-water-act-class-ii-administrative-penalty

• July 30, 2019—The U.S. Environmental Protection Agency recently reached a settlement with Sutter County Water Works District No. 1 (SCWWD), located in Robbins, California, over arsenic violations of the Safe Drinking Water Act. SCWWD will provide residents with alternative water until the system is in compliance with federal and state drinking water laws. "We are pleased this system will make critical investments to secure and serve safe drinking water," said EPA Pacific Southwest Regional Administrator Mike Stoker. "EPA will ensure all requirements of this agreement will be met for the long-term protection of the community." As part of the agreement, the Sutter County Water Works District will design and build a new drinking water treatment facility that reduces arsenic in the drinking water. The system will also procure land to drill a new groundwater well. SCWWD is required to provide EPA with quarterly progress reports and participate in quarterly meetings with EPA and the California State Water Resources Control Board on its progress towards compliance. The Sutter County Water Works District system serves approximately 350 residents, including over 100 households, a school and businesses with 93 connections located in Robbins, California. The system's current source of drinking water is groundwater from one primary and one backup well that serves its customers. Arsenic occurs naturally in the environment and as a by-product of some agricultural and industrial activities. It can enter drinking water through the ground or as runoff into surface water sources. Drinking water containing excess arsenic is linked to skin damage, circulatory problems and an increased risk of cancer.

• August 2, 2019—A Massachusetts developer agreed this month to resolve allegations by the U.S. Environmental Protection Agency (EPA) that the company failed to follow the terms of its permits for discharging stormwater from three construction sites. EPA alleged that Fafard Real Estate and Development Corporation, based in Milford, Massachusetts, did not follow its Clean Water Act permit at the Ledgemere Country Residential Development in Uxbridge as well as at Maplebrook Commons Condominiums and Lakeview Estates, both in Bellingham. Under a settlement with EPA, Fafard will pay a $48,000 civil penalty. After EPA issued a notice to inform Fafard of the potential violations, Fafard promptly worked to correct erosion control issues at the three construction sites. Fafard failed to adequately put in place and maintain erosion controls at each of the sites, in violation of its permit under the Clean Water Act, EPA claimed. Inadequate erosion controls can lead to sediment washing into waterways, affecting the ecosystem and human uses. The case stems from 2018 inspections at all three sites by EPA New England and Fafard's subsequent responses to EPA's request for information. In 2010, Fafard paid a $150,000 penalty and performed other environmental projects to settle charges by EPA that it had not fully complied with federal stormwater permits at about a dozen construction sites. This settlement is the latest in a series of enforcement actions taken by EPA New England to address stormwater violations from industrial facilities and construction sites around New England. More information is available on stormwater permits in New England at: https://www.epa.gov/npdes-permits/npdes-stormwater-permit-program-new-england.

• August 5, 2019—The U.S. Environmental Protection Agency announced an agreement with Whitaker Aggregates, Inc. of Humboldt, Kansas, to pay a civil penalty for failing to respond to an information request in violation of the Clean Water Act § 308. Whitaker Aggregates will pay a penalty of $7,500. "EPA relies on information requests to successfully ensure regulated facilities are in compliance with applicable regulations," said EPA Region 7 Administrator Jim Gulliford. "Failing to respond to information requests reduces EPA's ability to protect human health and the environment, while potentially increasing risk to the communities surrounding these facilities." In December 2017, Whitaker Aggregates agreed to provide to EPA several reports and other documents demonstrating the company's

compliance with the Clean Water Act. Whitaker Aggregates failed to adequately and fully respond to the information request, as required by the Clean Water Act. Whitaker Aggregates has until late September 2019 to pay the civil penalty. The settlement is subject to a 30-day public comment period before finalization. Individuals may submit written comments to the EPA Regional Hearing Clerk at 11201 Renner Blvd., Lenexa, KS 66219. Please reference Docket No. CWA-07-2019-0187 when submitting written comments.

• August 13, 2019— Librandi's Plating of Middletown, Pennsylvania, has agreed to settle Clean Water Act violations involving the discharge of pollutants to a collection system for a municipal wastewater treatment facility, the U.S. Environmental Protection Agency (EPA) announced today. Librandi's Plating will pay a $30,000 penalty and take corrective actions as part of the settlement. According to EPA, the company violated regulations for facilities that discharge industrial waste to publicly-owned treatment plants. These facilities must comply with "pretreatment" limits and monitoring requirements before discharging industrial waste to municipal treatment facilities. Excessive industrial discharges may pass through or interfere with the operation of the treatment plants, which are generally designed to handle sewage and domestic waste. Librandi's Plating, an industrial metal finishing facility, has Clean Water Act discharge limitations and monitoring requirements allowing the facility to discharge treated industrial wastewater to a wastewater treatment facility near the Harrisburg Airport, which further treats the wastewater and eventually discharges to a tributary of the Susquehanna River. According to EPA, the company's discharge exceeded applicable limits for nickel, zinc, chromium and cyanide. EPA also alleged that the company failed to notify EPA after becoming aware of the violations, and did not repeat sampling as required by Clean Water Act regulations. As part of the settlement, the company did not admit liability for the alleged violations, but has stated that it is now in compliance with applicable Clean Water Act requirements. For more information about EPA's Pretreatment Program, visit https://www.epa.gov/npdes/national-pretreatment-program

Indictments Convictions and Sentencing

• July 11, 2019—A Japanese fishing company, Fukuichi Gyogyo Kabushiki Kaisha (Fukuichi), was convicted and sentenced today in the District of Guam for two violations of the Act to Prevent Pollution from Ships and one count of obstruction of an agency proceeding. The charges stemmed from discharges of waste oil and oily bilge water from the *F/V Fukuichi Maru No. 112* (the vessel) into international waters and the attempt to cover up those discharges when the vessel was inspected by the U.S. Coast Guard in Apra Harbor, Guam. The charges also included failing to properly document the discharge of fishing gear and plastics from the vessel, and obstructing a Coast Guard Port State Control inspection. Fukuichi pleaded guilty to one count of obstruction of an agency proceeding, and two counts of violating the Act to Prevent Pollution from Ships. The company was ordered to pay a $1.5 million criminal fine and serve a five-year term of probation, during which vessels owned and/or operated by the company will be banned from entering the Exclusive Economic Zone, Territorial Sea, or a port or terminal belonging to the United States without prior approval. Fukuichi will also be required to implement a comprehensive Environmental Compliance Plan (ECP) that includes vessel audits. The ECP and associated audits must be sent to the nearest U.S. Coast Guard Captain of the Port prior to any of the company's vessels entering U.S. waters or a U.S. port. The COTP will have the discretion whether to allow such entry based upon the company's compliance with international and domestic laws governing pollution and safety. Fukuichi was the owner and operator of the vessel, which conducted fishing operations throughout the Pacific Ocean. The vessel entered Apra Harbor, Guam, on April 1, 2019, for repairs to its cargo refrigeration system. According to court documents, members of the U.S. Coast Guard boarded the vessel and discovered fifteen pollution and safety deficiencies and detained the vessel. The inspectors discovered numerous leaks of water and oil into the bilges and the Chief Engineer confessed that the practice on the vessel was to discharge waste oil and oily bilge water directly into the ocean using an emergency bilge pump system and buckets. The inspectors discovered these systems coated with heavy oil. The inspectors examined the vessel's Oil Record Book and discovered 233 incorrect or false entries.
(Andre Monette)

JUDICIAL DEVELOPMENTS

U.S. SUPREME COURT DELIVERS MAJOR CONSTITUTIONAL 'TAKINGS' DECISION APPLICABLE TO ALL FEDERAL, STATE OR LOCAL ORDINANCES THROUGHOUT THE NATION

Knick v. Township of Scott, Pennsylvania, ___U.S.___, 139 S.Ct. 2162 (U.S. June 21, 2019).

On June 21, 2019, the United States Supreme Court delivered a major property rights victory by giving property owners a direct path to federal court that had been closed since 1985. In a 5-4 decision in *Knick v. Township of Scott, Pennsylvania*, the Supreme Court held that a property owner has an actionable federal claim under the Takings Clause of the Fifth Amendment, "when the government takes his property without paying for it" and may "bring his claim in federal court under [42 U.S.C] § 1983 at that time."

This decision overrules *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, (1985) (*Williamson County*) where the Supreme Court held that a property owner had not suffered a Fifth Amendment violation unless his claim for just compensation was first denied by a state court under state law. The decision also eliminates its 2005 decision in *San Remo Hotel, L. P. v. City and County of San Francisco*, 545 U.S. 323 (2005) (*San Remo*), which caused the most difficulties in takings jurisprudence.

The majority opinion and the minority opinion both paint different pictures of the impact of this decision. The majority minimizes the impact of its holding, stating that it:

> . . .will not expose governments to new liability [and] will simply allow into federal court takings claims that otherwise would have been brought as inverse condemnation suits in state court.

While the dissent states:

> Today's decision sends a flood of complex state-law issues to federal courts. It makes federal courts a principal player in local and state land-use disputes.
>
> Both are, in part, correct.

Background

In *Knick v. Township*, Scott Township in Pennsylvania (Township) passed an ordinance in 2012 requiring all cemeteries to be kept open and accessible to the public during daylight hours. In 2013, a Township officer notified Rose Mary Knick (Knick) that "several grave markers" were on her property and that she was violating the Township's ordinance by failing to open her land to the public during the day. Knick sought declaratory and injunctive relief in state court claiming a "taking." The state court did not rule on Knick's request because "she could not demonstrate the irreparable harm necessary for equitable relief" as a result of the Township's withdrawal of its violation notice pending the court proceedings.

Knick then filed an action in the U.S. District Court for the Middle District of Pennsylvania under 42 U.S.C. § 1983. Knick alleged that the ordinance violated the Fifth Amendment's Takings Clause. The District Court, following *Williamson County*, dismissed Knick's claim and the Third Circuit Court of Appeals affirmed (also following *Williamson County*). The U.S. Supreme Court granted review to:

> . . .reconsider the holding of *Williamson County* that property owners must seek just compensation under state law in state court before bringing a federal takings claim under Section 1983.

The Supreme Court's Decision

The Majority Identifies a 'Catch-22' and Overrules *Williamson County*

The majority's decision to overrule *Williamson County* was based in part on the widely accepted premise that takings plaintiffs were faced with a "Catch-22" as a result of *Williamson County* and the

Supreme Court›s 2005 decision in *San Remo*. In *San Remo*, the Supreme Court held that "a state court's resolution of a claim for just compensation under state law generally has preclusive effect in any subsequent federal suit." Thus, a takings plaintiff:

> . . .cannot go to federal court without going to state court first; but if he goes to state court and loses, his claim will be barred in federal court.

The majority and dissent also had opposing interpretations on the text of the Takings Clause: "nor shall private property be taken for public use, without just compensation." Specifically, they disagreed on what action gives rise to a federal claim. According to the majority, it is the taking itself that gives rise to a federal claim. The dissent, however, opined that a Fifth Amendment violation only occurs if: 1) there is a taking *and* 2) there is a failure to provide just compensation, with the second condition only satisfied "when the property owner comes away from the government's compensatory procedure empty-handed." The disagreement between the majority and dissent is highlighted by the following exchange.

The majority decision stated:

> . . .[the Takings Clause] does not say: 'Nor shall private property be taken for public use, without available procedure that will result in compensation.'

Meanwhile, the minority position was as follows:

> [H]ere's another thing the [Takings Clause] does not say: 'Nor shall private property be taken for public use, without advance or contemporaneous payment of just compensation, notwithstanding ordinary procedures'

The majority ultimately opined that *Williamson County* was wrong and that its "reasoning was exceptionally ill founded and conflicted with much of our takings jurisprudence." As a result, the majority held that *Williamson County's*:

> . . .state-litigation requirement imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled.

The majority clarified that a government need not provide compensation in advance in order to protect its activities from injunctive relief as "long as the property owner has some way to obtain compensation after the fact." But even with such a procedure in place, "the property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation" and may file his claim in federal court at that time.

Conclusion and Implications

What about the potential impacts of the decision in California? Only time will tell how California plaintiffs and California federal courts will apply inverse condemnation claims. For example, will plaintiffs first seek to adjudicate ancillary claims for invalidation of land use regulations before seeking federal court relief? How will the federal courts apply the California courts' requirements that to avoid the chilling effect of inverse condemnation claims on planning, plaintiffs must first seek to invalidate challenged land use regulations? While invalidation of the challenged land use regulations is not a prerequisite to an inverse condemnation claim in federal courts, it is possible that lack of an attempt at invalidation might have an impact on the claim.

Plaintiffs suing in state court first, will have to reserve their federal claims to have a "second bite" at the apple if they lose in California. Thus, due to the many state court claims a plaintiff can bring, will federal courts stay the federal claims and remand the state law claims to state court? There are a number of procedural issues that now have to be addressed.

Furthermore, the removal of the *Williamson County* procedural hurdle may not be a panacea for all takings claims. For example, California court precedent under rent control laws as to what is meant by a constitutional "fair return" may significantly impact whether there is a taking of property rights. As another example, California court precedent under the Coastal Act may limit whether mistaken assertion of Coastal Commission jurisdiction under the Coastal Act constitutes a taking. The substantive aspects of each particular inverse condemnation claim should be considered before filing in federal court.
(Boyd Hill, Nedda Mahrou)

NINTH CIRCUIT REVERSES OIL INDUSTRY CLASS CERTIFICATION DUE TO LACK OF COMMON ISSUES IN CASE WHERE OIL CRUDE SPILL REACHED THE PACIFIC OCEAN

Andrews v. Plains All American Pipeline, Ltd. Partnership, Unpub., Case No. 18-55850, (9th Cir. July 3, 2019).

The Ninth Circuit determined that a U.S. District Court abused its discretion by certifying an "Oil Industry subclass" under Federal Rule of Civil Procedure 23(b). The Oil Industry subclass sought recovery from Plains All American Pipeline and Plains Pipeline L.P. (Plains) for the closure of the Plains' crude oil pipeline after a May 2015 Santa Barbara oil spill.

Factual and Procedural Background

On May 19, 2015, the Plains' onshore pipeline ruptured, resulting in a release of at least 140,000 gallons of crude oil that reached the Pacific Ocean. In the aftermath of the oil spill, the pipeline was shutdown. Plaintiffs suing Plains moved for four subclass certifications, including one for the Oil Industry subclass. The proposed Oil Industry subclass included oil workers and oil supply businesses that had a contractual relationship with facilities reliant on the Plains' pipeline, such as entities who provided core services and entities who provided incidental services such as pest control and telecommunications services. The District Court certified the Oil Industry subclass, concluding that class members had a contractual relationship with the Plains' facilities and were exposed to the pipeline shutdown. Plains appealed the subclass certification.

The Ninth Circuit's Decision

To certify a class under Federal Rule of Civil Procedure 23(b), plaintiffs must establish that common questions of law or fact predominate over uncommon questions. The Ninth Circuit Court of Appeals reversed the District Court's class certification after concluding that common issues did not predominate. Instead, the Ninth Circuit reasoned, individualized inquiries were required to determine necessary elements of the class's claims, including causation, injury, and the applicability of the economic loss doctrine.

Causation and Injury

As to causation and injury, the Ninth Circuit noted that class members were subject to varying economic factors that could have caused their economic injury, to the extent the proposed class members suffered any injury at all:

> Here, causation and injury are necessary elements of the class's claims, *see Baptist v. Robinson*, 49 Cal. Rptr. 3d 153, 167 (Ct. App. 2006); *Redfearn v. Trader Joe's Co.*, 230 Cal. Rptr. 3d 98, 111 (Ct. App. 2018), and, as the district court acknowledged, class members were subject to varying economic factors that could have caused their economic injury, to the extent they suffered an injury at all.

The class included a "myriad businesses," including employees and contractors, each impacted differently by the shutdown of the pipeline. The court reasoned that mere exposure of the proposed class members to the pipeline shutdown was insufficient to establish that Plains' alleged misconduct similarly impacted the class.

Economic Loss Model

Similarly, plaintiff's reliance on an economic loss model did not provide common proof of injury:

> The same individualized inquiries that predominate regarding causation and injury will predominate as to whether the economic loss doctrine bars the class's negligence claims. To prevail on their claims for economic injury, class members will be required to establish that they have a "special relationship" with Plains that gives rise to a duty of care to prevent economic harm. *See J'Aire Corp. v. Gregory*, 598 P.2d 60, 63 (Cal. 1979).

The model, set forth by a University of California Professor of Economics, showed a general impact

from the pipeline's shutdown as a 34 percent decrease in employment in the local oil and gas industry. The court reasoned that this economic model also indicated many employees in the within the class likely were not injured. Because plaintiff's own economic loss model would require individual class members to demonstrate injury and to demonstrate that the injury was caused by the pipeline shutdown, issues of common fact did not predominate the proposed class.

The Ninth Circuit also concluded that the same individualized inquiry governing class certification would also govern the class's substantive negligence claims. To prevail on the substantive negligence claims, class members would be required to establish that they had a special relationship with Plains that gave rise to a duty of care to prevent economic harm. The existence of a special relationship depends on multiple factors, such as degree of connection between the defendant and each individual class member and the alleged economic harm. Because the proposed class members had varying relationships with Plains and some of the members likely had no injury, individualized consideration and individualized proof would be required to determine whether a special relationship existed. The fact that class members had "contractual relationships to the oil industry" was not common proof of injury or of a special relationship with Plains.

Conclusion and Implication

This case affirms that class certification and negligence claims in environmental litigation cannot be established based solely on allegations that a defendant's misconduct affected multiple plaintiffs' contracts with third parties. The court's unpublished decision is available online at: http://cdn.ca9.uscourts.gov/datastore/memoranda/2019/07/03/18-55850.pdf (Gina Herrera, Rebecca Andrews)

EIGHTH CIRCUIT DENIES PRIVATE RIGHT OF ACTION UNDER NEPA AGAINST STATE AGENCY REGARDING PROPOSED LIGHT RAIL TRANSIT PROJECT

Lakes & Parks Alliance of Minneapolis v. Federal Transit Administration, 928 F.3d 759 (8th Cir. 2019).

The Eighth Circuit Court of Appeals reversed a U.S. District Court's decision to *imply* a private right of action against a state agency under the National Environmental Policy Act (NEPA). This decision affirmed the sole remedy for alleged NEPA violations in the Eighth Circuit to be judicial review under the Administrative Procedure Act (APA).

Factual and Procedural Background

The Metropolitan Council (Council) is a regional transportation agency in Minnesota tasked with planning and constructing the proposed Southwestern Light Rail Transit Project (Transit Project). The Transit Project proposed a transit line connecting downtown Minneapolis to the southwestern Twin Cities suburbs. The Lakes Park and Alliance of Minneapolis (LPA) is a not-for-profit group of residents who live in or frequently use the area near the proposed construction site, including the Kenilworth Corridor. Minnesota state law requires the Council to seek approval of each city and county along the Transit Project's route before commencing construction. Further, because the SWLRT is partially funded by the Federal Transit Administration (FTA), NEPA requires the Council to prepare an Environmental Impact Statement (EIS) of the project before it is completed.

The Council first took actions to prepare an EIS for the Transit Project in 2008. In early 2014, the Council began seeking municipal consent for a plan that routed the Transit Project through the Kenilworth Corridor. While the environmental review was ongoing, the LPA sued the Council and the FTA alleging violations under NEPA, the Minnesota Environmental Policy Act, and Minnesota municipal consent statutes.

The LPA filed a motion for summary judgment, which was denied by the District Court. Then after, both the FTA and the Council filed motions to dismiss. The District Court granted the FTA's motion based on sovereign immunity, and dismissed most claims against the Council but preserved a

narrow cause of action against it under NEPA. The LPA's narrow claim alleges that the Council pursued a single politically expedient course for the Transit Project in violation of NEPA's environmental review requirements.

In 2016, the Council released the final EIS and the FTA issued a record of decision (ROD), determining that the EIS satisfied the requirements under NEPA. The parties then filed competing motions for summary judgment. The LPA re-asserted the same narrow claim. The Council's argument was two-fold: 1) it complied with NEPA; and 2) and the issuance of the ROD mooted the LPA's claim. The District Court denied the LPA's motion and granted the Council's motion on the merits.

The LPA appealed the District Court's decision on the merits, and requested the appeals court to affirm the District Court's recognition of an implied cause of action under *Limehouse*, 549 F.3d 324 (4th Cir. 2008), but reverse the court's analysis, and instead find that the Council violated NEPA. The Council asserted that the District Court erred in implying a private right of action under NEPA.

The Eighth Circuit's Decision

The Eighth Circuit determined that NEPA alone does not provide a right of action. Rather, a court's jurisdiction is limited to judicial review under the Administrative Procedure Act (APA), which provides for review of final agency action for which there is no other adequate remedy in court:

> Because "private rights of action to enforce federal law must be created by Congress," we must "interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). . . ."the Eighth Circuit, along with other circuits, has repeatedly held that NEPA's statutory text provides no right of action." *Lakes & Parks*, 91 F.Supp.3d at 1120; see, e.g., *Sierra Club v. Kimbell*, 623 F.3d 549, 558-59 (8th Cir. 2010). . . .

The Circuit Court also determined the District Court circumnavigated Eight Circuit Court precedent by relying on the Fourth Circuit's decision in *Limehouse* to *imply* a right of action under NEPA. In *Limehouse*, there was still a federal agency party to the suit, the final EIS and ROD had been issued, and Fourth Circuit precedent supported a NEPA claim against a state defendant to preserve environmental status quo pending federal review. The Eighth Circuit reasoned that *Limehouse* was inapposite to the present case. Unlike in *Limehouse*, the Council was the sole defendant, LPA filed suit prior to any final agency action, and Eighth Circuit precedent expressly rejected the viability of a NEPA cause of action outside the APA framework, especially when the only defendant is a state agency. Finally, the Circuit Court reasoned that even if a *Limehouse*-like action had been appropriate, such action was moot. Without the FTA in the present action, the Council cannot invalidate the ROD and conduct the environmental review again. The Eighth Circuit reversed and remanded the lower court's decision with instructions to dismiss the case.

Conclusion and Implications

This case affirms the Eighth Circuit's position that the National Environmental Policy Act does not recognize an implied private right of action. In so doing, the court affirmed that the sole remedy for alleged NEPA violations in the Eighth Circuit to be judicial review under the Administrative Procedure Act. https://ecf.ca8.uscourts.gov/opndir/19/07/181686P.pdf (Nathalie Camarena, Rebecca Andrews)

IT'S ALL IN THE NAME—D.C. DISTRICT COURT FINDS TMDL FAILED THE CLEAN WATER ACT AS IT DIDN'T SPECIFY DAILY LIMITS ON *E. COLI*

Anacostia Riverkeeper, Inc. v. Wheeler, ___F.Supp.3d___, Case No. 16-cv-1651 (D. D.C. Aug. 12, 2019).

Applying precedent, the D.C. District Court held that the U.S. Environmental Protection Agency (EPA) acted outside its authority under the federal Clean Water Act (CWA) in approving Total Maximum Daily Loads (TMDLs) for the discharge of *E. coli* from a Washington, D.C. sewage treatment plant, where the approved maximum values for single samples were described as variable daily limits that would fluctuate so as to allow an average "geometric mean" for the presence of fecal matter in surface water bodies used for recreational purposes.

Background

The Clean Water Act (33 U.S.C. § 1251 *et seq.*):

> . . .requires each State to develop water quality standards for any interstate water body in its boundaries, and to submit these standards to [the Environmental Protection Agency] for review and approval. 33 U.S.C. § 1313(a).

EPA's regulations specify that state water quality standards must include "designated uses" for each covered water body as well as "water quality criteria." 40 C.F.R. § 131.16. A water body's designated use "reflects" its uses by people, animals and plants. 40 C.F.R. § 131.10(a). "For example, a State might designate a water body for recreational use or agricultural use." Water quality standards, when met, "will generally protect the designated use," and include both numeric limitations on the concentration of specific pollutants as well as a narrative statements "applicable to a wide set of pollutants." 40 C.F.R. § 131.3(b); *Am. Paper Inst., Inc. v. EPA*, 996 F.2d 246, 349 (D.C. Cir. 1993).

To enforce the Clean Water Act's pollution limitations, "point source" discharge of pollutants, *i.e.*, from a "discernible, confined and discrete conveyance," requires the issuance of a National Pollutant Discharge Elimination System (NPDES) permit requiring the discharge to meet the state's approved water quality standards. 33 U.S.C. § 1362(14). However, non-point source discharge "such as natural erosion, agricultural runoff, or overflows from urban areas" is not captured by the NPDES permit system, the NPDES system "alone does not ensure that pollution levels satisfy water quality standards."

Separately, states have a duty to monitor water quality in covered water bodies, and identify on a biennial basis "which of their water bodies do not, and based on existing pollution limitations are not expected to, attain the applicable water standards," submitting to EPA "so-called "303(d) lists.'" 40 C.F.R. § 130.7(d). For every water body on its 303(d) list, a state must "develop maximum daily loads" (TMDLs) that "specify the absolute amount of particular pollutants the entire water body can take on while still satisfying all water quality standards." *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F.Supp.2d 210, 215 (D. D.C. 2011), citing 33 U.S.C. § 1313(d)(c).

> The [CWA] requires States to engage in a 'continuing planning process' to improve water body conditions, including by implementing TMDLs, 33 U.S.C. § 1313(e)(3)(C), and to consider TMDLs as part of water quality management plans to improve water conditions, 40 C.F.R. § 130.6(c)(1).

While "TMDLs themselves have no self-executing regulatory force," "NPDES permits must be 'consistent with the assumptions and requirements of any available wasteload allocation" in a TMDL. 40 C.F.R. § 122.44(d)(1)(vii)(B).'"

> In short, the TMDL process requires States to account for the background pollution caused by non-point sources and budget to each point source a daily discharge limit that will ensure compliance with the underlying water quality standards.

The District of Columbia, which is subject to the state-requirements of the Clean Water Act, classifies its covered water bodies as "Class A" waters for "primary contact recreation," or "activities that result in frequent whole body immersion or involve

a significant risk of ingestion of water." Its narrative water quality standards, therefore, state that the District's "surface waters of the District shall be free from substances in amounts or combinations that ... [c]ause injury to, are toxic to, or produce adverse physiological or behavioral changes in humans" and that they shall "be free of discharges of untreated sewage ... that would constitute a hazard to the users of Class A waters." The District adopted two numeric criteria, "a 'geometric mean' and a 'single sample value'—for *E. coli* concentration in the District's waters," specifying that:

> . . .'[t]he geometric mean criterion shall be used for assessing water quality trends and for permitting,' while '[t]he single sample value criterion shall be used for assessing water quality trends only.'

As a result of water sampling demonstrating the standards had not been met, in 2004 the District "for the first time developed TMDLs for fecal bacteria." The D.C. Circuit rejected EPA's approval of those TMDLs because they were expressed in "annual or season, rather than daily, terms." Following an extended process including multiple iterations of draft TMDLs and notice and comment periods, the District submitted revised TMDLs to EPA for approval in 2014. EPA approved the TMDLs in 2014, but subsequently withdrew the approval and its decision rationale after EPA was sued by D.C. Water, the operator of "Blue Plains Advanced Wastewater Treatment Plant, the world's largest advanced wastewater-treatment facility." It re-approved the TMDLs and issued a revised decision rationale in 2017.

The District Court's Decision

Applying the *Friends of the Earth v. EPA* Decision

The bulk of the District Court's decision applies the D.C. Circuit's opinion in *Friends of the Earth v. EPA*, 446 F.3d 140 at 144 (D.C. Cir. 2006), which held that the plain language of the Clean Water Act requires the adoption of total maximum *daily*, rather than seasonal or annual, pollutant loads. Environmental petitioners alleged the 2014 District TMDLs for the Blue Plains facility failed to comply with the *Friends of the Earth*, particularly as interpreted in the decision rationale.

The 2014 TMDLs establish "dry weather" "Max daily loads" for two separate outfalls at Blue Plains. The decision rationale explained that the Max daily load:

> . . .is not intended—despite its label—to function as a ceiling or limit applicable to discharges … [b]ut represents an average of the daily maximum loadings expected to occur. . .and still achieve the applicable water quality standard.

Further, the Max daily load is not a "'never-to-be-exceeded-on-a-daily-basis' target[] or value[]. … Rather, they "express on a 'daily' basis the modeled loads of *E. coli* predicted to meet'" the 30-day geometric mean numeric value. In other words, so long as the 30-day geometric mean numeric standard can be met, the daily maximum can be understood as, functionally, a "maximum daily load that varies on the basis of previous discharges."

The District Court held this rationale is contrary to *Friends of the Earth*, as it would:

> . . .allow[] the District to fold the first condition (establishing a daily maximum) into the second (ensuring the daily maximum is sufficiently low to achieve the water quality standard.

This conclusion is supported, the District Court reasoned, not only by the plain language of the Act but also by TMDLs' remedial and planning role. Remedial, because TMDLs are only required once a state concludes that its water quality standards cannot be met solely by enforcement of NPDES. Planning, because NPDES permits need only reflect and take account of TMDLs, rather incorporate TMDLs as strict limits on discharges:

> [T]he Act treats TMDLs as informational tools. They allow stakeholders—whether regulated sewer authorities, federal or local regulators, environmental groups, or recreational users—to plan and monitor water body anti-pollution efforts. Thus, regardless of whether identifying a daily maximum has immediate regulatory impact through NPDES permitting, it serves a purpose in the statutory scheme

Faithfully applying *Friends of the Earth*, the District Court also rejected EPA's argument that *E. coli* is not

a pollutant suited to the expression of maximum daily loads, noting that the agency—exercising statutory discretion granted by Congress—has the ability to revise its own regulatory pronouncement that *all* pollutants are suitable to be subject to TMDLs.

Conclusion and Implications

The D.C. District Court's application of *Friends of the Earth* reflects the Circuit split established by the D.C. Circuit when it "declined to follow the Second Circuit in holding that requiring daily loads" for all pollutants "would be 'absurd,'" *NRDC v. Muszynski*, 268 F.3d 91, 99 (2nd Cir. 2001)." That split may well persist so long as EPA declines to revise its blanket declaration that all pollutants are suitable for the expression of Total Maximum Daily Loads under the Clean Water Act. The court's opinion is available online at: https://earthjustice.org/sites/default/files/files/50_Judge_Memo%20Opinion_08-12-2019.pdf (Deborah Quick)

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