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EASTERN WATER LAW™

& POLICY REPORTER

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EASTERN WATER NEWS

DEMOCRATIC PRESIDENTIAL CANDIDATES' PLANS TO ADDRESS CLIMATE CHANGE IMPACTS IN THE AGRICULTURAL SECTOR

The Iowa State Fair is known as a staple of presidential campaigns. Over 20 Democratic presidential candidates made the rounds at the fair this summer, with a few of the candidates speaking about the connection between climate change and agriculture. Many of the candidates have released rural policy plans that include components to address climate change impacts in the agricultural sector. Excerpts from a few of the plans are highlighted below.

U.S. Senator Amy Klobuchar

Senator Klobuchar's plan, released August 7, 2019, is known as the "Plan from the Heartland: Strengthening our Agricultural and Rural Communities" (Klobuchar Plan). The Klobuchar Plan's main topics are "Economics," "Living in Rural America," "Protecting Our Future," and "Leaving No One Behind." The agriculture/climate change proposals are in the "Protecting Our Future" portion and include the following (excerpted from the Klobuchar Plan).

Expand Conservation Practices

Senator Klobuchar has been a champion of supporting farmer conservation efforts and promoting farming practices that reduce soil erosion and improve air and water quality, including by helping pass the 2018 Farm Bill, which included several of her priorities. As President, she will support significant new investments in conservation of working and retired lands. Senator Klobuchar will support the continued expansion of the Environmental Quality Incentives Program and increase resources for the Conservation Stewardship Program to help provide farmers the tools they need to protect and enhance natural resources on working agricultural lands. And after successfully increasing the acreage cap of the Conservation Reserve Program, Senator Klobuchar will work to attract more enrollees and ensure payment rates are fair.

Invest in Conservation Innovation

Senator Klobuchar will target research into soil carbon sequestration, which could improve soil health as well as reduce carbon levels in the atmosphere. She will also expand Conservation Innovation Grants to test emerging conservation approaches, including practices that increase carbon sequestration levels. And building on provisions she included in the 2018 farm bill, Senator Klobuchar will further improve agriculture data research of conservation practices to help farmers reduce risk and increase profitability.

Invest in and Provide Incentives for Homegrown Energy

Senator Klobuchar believes that homegrown biofuels are key to our rural economies, our nation's energy security, and reducing greenhouse gas emissions. In the Senate, she has been a leader when it comes to standing up to the administration's misuse of small refinery renewable fuel standard (RFS) waivers. She has also worked successfully in the Senate to provide financing and grant support to biobased manufacturers. She authored an amendment that was included in the Farm Bill that provides mandatory funding to support biobased marketing, manufacturing.

U.S. Senator Cory Booker

On August 8 2019, Senator Booker introduced the "Climate Stewardship Act of 2019." According to a press release issued by Senator Booker, the Climate Stewardship Act is a:

> . . .climate change bill focused on voluntary farm and ranch conservation practices, massive reforestation, and wetlands restoration.
>
> The Climate Stewardship Act will:
>
> •Plant over 4 billion trees by 2030, and 15 bil-

lion trees by 2050, on a combination of federal, state, local, tribal, and non-governmental lands. The ambitious level of tree planting outlined in the Climate Stewardship Act makes it the biggest reforestation measure ever to be introduced in Congress.

•Plant over 100 million of these trees in urban neighborhoods across America, with the priority going to low-income neighborhoods and communities of color. In addition to sequestering carbon, trees also absorb harmful air pollutants and reduce temperatures in urban areas.

•Support voluntary climate stewardship practices on over 100 million acres of farmland, reducing or offsetting agricultural emissions by one-third by 2025, through: Providing tens of billions of dollars of supplemental funding for the U.S. Department of Agriculture (USDA) working lands conservation programs, with new funding dedicated to stewardship practices such as rotational grazing, improved fertilizer efficiency, and planting tens of millions of new acres of cover crops.

•Protecting millions of acres of environmentally sensitive farmland.

•Doubling funding for agricultural research programs, including more funding for soil health demonstration trials.

•Tripling USDA funding to provide farmers with expert technical assistance on climate stewardship practices.

•Providing grant funding to tens of thousands of farmers, ranchers and rural businesses for renewable energy production, such as solar panels and wind turbines, and energy efficiency improvements.

•Invest in local and regional food systems to increase resilience in rural and urban communities.

•Restore or protect over 2 million acres of coastal wetlands by 2030 to sequester carbon emissions and reduce coastal flooding. Coastal wetlands act as an important sponge during extreme weather events with heavy rainfall. For example, although New Jersey has lost more than 40 percent of its coastal wetlands, the wetlands remaining helped prevent $625 million of property damage during Hurricane Sandy in 2012.

•Reestablish the Civilian Conservation Corps to provide youth from low-income communities, indigenous communities, and communities of color with skills and work experience in forestry and wetlands restoration.

Former Vice-President Joe Biden

Former Vice-President Joe Biden's plan, the Biden Plan for Rural America (Biden Plan), focuses on economic strategies for rural communities. One of the main climate change strategies in the Biden Plan is the goal of achieving net-zero emissions in the agricultural sector. The following is an excerpt from the Biden Plan:

> Partnering with farmers to make American agriculture first in the world to achieve net-zero emissions, giving farmers new sources of income in the process. Many farmers are some of the best stewards of our land, air, and water. The government needs to partner with them to accelerate progress toward net-zero emissions. As president, Biden will ensure our agricultural sector is the first in the world to achieve net-zero emissions, and that our farmers earn income as we meet this milestone. Toward this end, the Biden administration will dramatically expand and fortify the pioneering Conservation Stewardship Program, created by former Senate Agriculture Committee Chair Tom Harkin, to support farm income through payments based on farmers' practices to protect the environment, including carbon sequestration. In addition to seeking full federal funding for the program, the Biden administration will ensure the program can participate in carbon markets. Corporations, individuals, and foundations interested in promoting greenhouse gas reductions could offset their emissions by contributing to Conservation Stewardship Program payments to farmers for those sequestering carbon — for example, through cover crops. This will not only help combat climate change, which Vice President

Biden has called an existential threat, but also create additional revenue sources for farmers at a time when many are struggling to make ends meet. And, this approach will create a whole series of new businesses that survey, measure, certify, and quantify conservation results. In addition, the Biden Plan will make a significant investment in research to refine practices to build soil carbon while maximizing farm and ranch productivity. Soil is the next frontier for storing carbon.

U.S. Senator Bernie Sanders

Senator Bernie Sanders has laid out a three part plan to "Revitalize Rural America" (Sanders Plan). The Sanders Plan asserts that rural communities and family farms (as compared with large farms and agribusiness) are not only good for the environment, but resistant to climate change, due to "their greater genetic diversity, local knowledge, and likelihood of using livestock and crop breeds suited to the local environment." The second point of his strategy is entitled "Policies to Empower Farmers, Foresters & Ranchers to Address Climate Change and Protect Ecosystems" and includes plans to:

- Pass comprehensive legislation to address climate change that includes a transition to regenerative, independent family farming practices.

- Help farms of all sizes transition to sustainable agricultural practices that rebuild rural communities, protect the climate, and strengthen the environment.

- Provide grants, technical assistance, and debt relief to farmers to support their transition to more sustainable farming practices.

- Support a transition to more sustainable management of livestock systems that are ecologically sound, improve soil health, and sequester carbon in soil.

- Create financial mechanisms that compensate farmers for improving ecosystems.

- Establish a program to permanently set aside ecologically fragile farm and ranch land.

- Enforce the Clean Air and Water Acts for large, factory farms, and ensure all farmers have access to tools and resources to help them address pollution.

- Ensure rural residents have the right to protect their families and properties from chemical and biological pollution, including pesticide and herbicide drift.

Conclusion and Implications

One publication described the Democratic presidential candidates' willingness to discuss the connection between agriculture and climate change at the Iowa State Fair as "unprecedented." Many observers believe that the weather extremes and recent misfortunes faced by many Midwestern farmers this summer may create future inroads for positive steps to address climate change impacts in the agricultural sector. (Kathryn Casey, Miles Schuster)

STATE'S REVISED MERCURY TOTAL MAXIMUM DAILY LOAD RULEMAKING UNDER THE CLEAN WATER ACT HURTLES TOWARD COURT-ORDERED DEADLINE

The public comment period has closed on the Oregon Department of Environmental Quality's (DEQ) draft Willamette Basin Mercury Total Maximum Daily Load (TMDL), which will regulate the discharge of mercury into the Willamette River and its tributaries. By court order, the rule must be finalized by November 29, 2019.

Background

Mercury ingestion is harmful to humans and other species. Fish consumption is a major exposure pathway. Mercury is regulated under the federal Clean Water Act (CWA), with the aim of reducing mercury concentrations in waterbodies, fish, and ultimately,

the humans and other species that consume fish. Erosion and runoff of mercury deposited on the land are major sources of mercury to the Willamette, meaning the mercury TMDL is of interest to many farmers, landowners, and irrigation and drainage districts in the basin.

Sources of Mercury in the Willamette Basin

Most of the mercury deposited in the Willamette Basin comes from diffuse "nonpoint sources" as opposed to direct "point sources" like factory pipes or wastewater treatment plants. The largest source of mercury in the Willamette Basin is "atmospheric deposition," that is, airborne mercury that settles on land or water. Mercury deposited onto the land is then transported to waterbodies through erosion and surface runoff.

The vast majority of the airborne mercury deposited in the Willamette Basin originates outside of Oregon and even outside the United States. Mercury emissions from Asian coal-fired power plants are a major source of mercury deposition in Oregon. As the emissions themselves cannot be curtailed by U.S. authorities, reduction of mercury delivery into the Willamette and its tributaries is best achieved by reducing erosion and runoff that transport land-based mercury into the water.

History of the Willamette Basin Mercury TMDL

In 2006, DEQ issued and EPA approved the Willamette Basin Mercury TMDL based on then-existing water quality standards. In October 2011, EPA approved Oregon's decision to change the permissible concentration of mercury in fish tissue from 0.3 milligrams per kilogram of fish tissue to 0.04 mg/kg for the protection of public health, that is, to make the standard eight times stricter. This was in response to a tenfold increase in the benchmark daily fish consumption rate.

Subsequently, Northwest Environmental Advocates challenged the 2006 TMDL in federal court. In April 2017, the court gave DEQ two years to revise the TMDL. The deadline has since been extended to November 29, 2019.

The Rulemaking Process

In 2017, DEQ initiated the TMDL revision process by assembling a 25-member Rules Advisory Committee to provide input into the rulemaking process. The committee met nine times to assist DEQ in developing the draft TMDL. DEQ published the draft TMDL on July 3, 2019, which commenced the public comment process. The public comment period ended on September 6, 2019, representing a three-day extension from the initial 60-day comment period. Now that the public comment process has closed, DEQ will review and respond to the public's comments on the TMDL.

Anatomy of a TMDL

A TMDL starts with numeric and narrative water quality criteria that are established to support the designated beneficial uses for each waterbody. Fishing, for example, is a designated beneficial use in the Willamette Basin. That use is not currently "attained," as there are fish consumption advisories for mercury throughout the basin. Therefore, the basin's waterways are considered "impaired" under § 303(d) of the CWA. The Clean Water Act requires the development of a TMDL for impaired waterways.

Water quality standards are designed to be protective of the most sensitive designated beneficial use. Here, that in practice means that mercury concentrations in the fish need to be low enough that people can safely eat them. The human health numeric criterion is the most restrictive of the numeric and narrative water quality criteria and is therefore used to set the TMDL.

The total amount of a pollutant, such as mercury, that a waterbody can receive and still meet the relevant water quality standard is called the "loading" or "assimilative capacity" of the waterbody. It is from this number that the TMDL is calculated. A TMDL is comprised of four components: 1) wasteload allocations (for point sources, like wastewater treatment plants); 2) load allocations (for natural background or nonpoint sources, like agriculture); 3) reserve capacity; and 4) margin of safety.

The total mercury loading capacity of the Willamette Basin is 42 grams per day. The "excess" load (the difference between the actual mercury load and the loading capacity) is 318 g/day. This means dramatic reductions in the mercury load are necessary to achieve the loading capacity. For example, the proposed TMDL requires the forestry and agriculture sectors to achieve an 88 percent reduction in their

total daily mercury contribution to the load, and other sources are assigned similarly aggressive targets. Attainment is projected to take several decades.

A complete discussion of the proposed wasteload allocations and load allocations is beyond the scope of this article, but further information can be found at DEQ's Willamette Basin Mercury TMDL webpage.

The Water Quality Management Plan

Once loads are allocated, they are implemented through a Water Quality Management Plan (WQMP). The WQMP contains strategies aimed at reducing mercury loads to meet the TMDL. The WQMP identifies "responsible persons" and Designated Management Agencies (DMA) that are tasked with developing implementation plans pertaining to their specific sector. For example, the Oregon Department of Agriculture is a DMA and it uses Agricultural Water Quality Management Area Plans to implement management strategies aimed at attaining TMDLs. Following the issuance of the mercury TMDL and WQMP, each DMA will have 18 months to develop its implementation plan.

The Willamette Basin Mercury Variance

Concurrent with the development of the mercury TMDL, DEQ is conducting a separate rulemaking establishing a "variance" for certain dischargers of mercury. A variance is a temporary loosening of a water quality standard for a specific pollutant. Variances are implemented when it is not technically or practically feasible to achieve permit limits. Qualified holders of individual National Pollutant Discharge Elimination System (NPDES) permits (such as wastewater treatment facilities) may apply for coverage under the variance. In essence, they will apply to be assigned a permit limit they can achieve, instead of a limit that is designed to help meet water quality standards but is not actually achievable. The variance reflects the reality that even the complete elimination of all point sources of mercury in Oregon would not result in attainment of water quality standards because almost all of the mercury deposited in Oregon is coming from overseas.

Conclusion and Implications

DEQ may revise the draft TMDL based on the public comments it received, but the November 29 deadline is fast approaching. After DEQ finalizes the TMDL, DEQ will submit it to EPA for approval. Upon submission, EPA has 30 days to issue its approval or disapproval. If EPA disapproves the TMDL, it has 30 days to establish a replacement TMDL. The mercury variance is also expected to be submitted to EPA for approval in November 2019.
(Alexa Shasteen)

NEWS FROM THE WEST

In this month's News from the West we report on a decision out of the Colorado Supreme Court detailing the outer limits of jurisdiction that the state Water Courts possess—in this case—to unadjudicated water rights. Colorado, unlike other states in the West, established a trial court system for exclusively addressing water rights disputes within the state. Water Courts handle the bulk of these disputes but it's not always clear where the court's jurisdiction begins and ends. This is especially so as to matters ancillary to core water rights issues.

We also report on a new law in California addressing notice requirements for PFAS chemicals in the state's drinking water. PFAS chemicals synthetic organic chemicals known as per- and poly-fluoroalkyl substances.

Colorado Supreme Court Rules that Water Court Jurisdiction Does Not Extend to Unadjudicated Water Rights

In a recent appeal, on September 9, 2019, the Colorado Supreme Court ruled that the Water Court jurisdiction does not include unadjudicated water rights, and therefore also does not include any matters related to those water rights. This clarification of Water Court jurisdiction is the latest in a string of cases in which the Colorado Supreme Court has further defined exactly what matters a Water Court can

hear. [*The Luskin Daughters 1996 Trust v. Young*, 2019 CO 74 (Color. 2019).]

Background

The Luskin Daughters 1996 Trust (Trust) began the action by filing a complaint for declaratory judgment and injunctive relief and damages in the Water Court. The two parties own adjacent parcels of land and the Trust had historically utilized a system of springs and ditches to deliver water to their land for irrigation, animal watering, wildlife, and recreation purposes. The complaint alleged that in 2017, the Youngs built a house that destroyed one or more of the ditches, thereby denying the Trust the ability to deliver its water. The crux, however, was that none of the Trust's water rights had ever been adjudicated. Therefore, the complaint sought: 1) a declaratory judgment confirming the existence of the Trust's unadjudicated water rights, 2) a declaratory judgment confirming the existence of ditch easements for those water rights, 3) injunctive relief from the Youngs' interference with those water rights, 4) injunctive relief from the Youngs' trespass and damage to the Trust's ditch rights, and 5) damages.

Water Rights in Colorado

In Colorado a "water right" is defined as:

> . . .a right to use in accordance with its priority a certain portion of the waters of the state by reason of the appropriation of the same. C.R.S. § 37-92-103(12).

Importantly, this is only a usufructuary right and the water rights holder does not actually own the water itself. *Kobobel v. State Dep't of Nat. Res.*, 249 P.3d 1127, 1134 (Colo. 2011). The Colorado Constitution, as well as subsequent case law, provides that the water right is created when a person appropriates—through diversion and placement to a beneficial use—or initiates the appropriation of any yet unappropriated water. *Shirola v. Turkey Canon Ranch Ltd. Liab. Co.*, 937 P.2d 739, 748 (Colo. 1997). Critical to this case, "absent an adjudication under the [1969] Act, water rights are generally incapable of being enforced." *The Luskin Daughters 1996 Trust v. Young,* 2019 CO 74.

The above cited Act is the Water Right Determination and Administration Act of 1969 (Act), which controls all water rights appropriations in Colorado. The purpose of the Act was to take Colorado's ad hoc system of allocating water rights and provide a "comprehensive, integrated scheme of adjudication and tabulation of water rights." James N. Cobridge, Jr. & Teresa A. Rice, *Vranesh's Colorado Water Law* 139 (rev. ed. 1999). The Act was passed at a time when the state's population was beginning to grow exponentially and a statutory scheme was needed "to give notice of the nature, scope and impact" of potential new water rights to allow other users to file statements of opposition to protect their own rights against new appropriations. *S. Ute Indian Tribe v. King Consol. Ditch Co.*, 250 P.3d 1226, 1234 (Colo. 2011).

Water rights appropriations through the 1969 Act occur through Colorado's Water Courts, whose jurisdiction is limited to "water matters," although, because of the complex nature of many water matters, the jurisdiction also extends to "issues ancillary to water matters." C.R.S. §37-92-203; *Crystal Lakes Water & Sewer Ass'n v. Backlund*, 908 P.2d 534, 543 (Colo. 1996). Those jurisdictional issues, combined with the Trust's lack of adjudicated water rights, formed the basis of this case.

The Motion to Dismiss at the Water Court

In response to the complaint, the Youngs filed a motion to dismiss on three grounds. First, they asserted that the claim seeking to confirm existence of the unadjudicated rights was merely a work-around to the 1969 Act's provisions for "determination of a water right." That section proscribes certain notice and publication procedures that must accompany such an application and, because the Trust had not followed those procedures, the Water Court did not have jurisdiction to grant such declaratory relief. The Youngs' second grounds for dismissal also attacked the Water Court's jurisdiction, arguing that, because they did not have jurisdiction over the "water matter" of the first claim, the court similarly lacked ancillary jurisdiction over the remaining claims. The final argument was that, even if the court had jurisdiction, it could not grant the Trust's requested relief because, as discussed above, unadjudicated water rights are not judicially enforceable against a third party.

The Water Court granted the Youngs' motion, ruling that the Trust's claim for declaration of unadjudicated water rights, without following the correct

statutory procedures, was asking the Water Court "to operate outside the 1969 act" and therefore the court did not have the authority to grant such relief. The Trust then appealed to the Supreme Court. [In Colorado, Water Court appeals skip the Court of Appeals and go straight to the Colorado Supreme Court.]

The Supreme Court's Decision

On appeal, the Supreme Court fixated on the 1969 Act and the significance of a water right's adjudication. In addition to noting that unadjudicated rights are judicially unenforceable, the Court further stated that:

> . . .an adjudication is necessary for maintaining a related action premised upon the existence of a claimed water right. *See, In re Tonko*, 154 P.3d 397, 404 (Colo. 2007). . . .Because a condemnation action involves issues such as necessity and valuation in determining the compensation award for a ditch or pipeline right-of-way needed for water transportation in the exercise of a water right, we found in *Tonko*, that the adjudication of a water right was actually a "prerequisite" for maintaining the private condemnation action for ditch easements allowing for the exercise of that water right. *Young*, 2019 CO 74.

The Court went on to explain the 1969 Act adjudication process in detail, highlighting the importance of the process in notifying other water users of claims that could be adverse to their vested water rights.

Water Court Jurisdiction

The Supreme Court next turned to the issue of Water Court jurisdiction. Although it used different justification, the Court agreed that the Water Court did not have the requisite jurisdiction to grant the Trust's requested relief. Although never specifically stated by the Water Court, appellate briefs in this case characterized the Water Court's ruling as finding that, because of the absence of an adjudicated water right, the court lacked subject matter jurisdiction. Because the Trust had claimed a right to use water by appropriation, the Court reasoned, the Water Court did have subject matter jurisdiction. However, because of lack of notice and other adjudication procedures, the Supreme Court found that the Water Court lacked personal jurisdiction over the Trust's claims. To support this finding, the Court noted that water adjudications, although unique in nature, are in rem proceedings:

> To the extent the Trust's pleadings are properly construed to seek a determination of water right in regard to the Trust's use of water from the Youngs' springs, the Water Court lacked jurisdiction over the res of the action. *Id.*

The Trust countered this, instead claiming that it was not seeking determination of a water right, but rather a declaration that it's right to use that water is superior to the Youngs' right to interfere with that use. The Court summarily denied this, stating:

> . . .we have never suggested that priority over another's use of water could be established without having first adjudicated a water right according to the resume notice process prescribed by the 1969 Act. *Id.* ("Our statement…could [not] be reasonably understood to sanction a failure to comply with the statutory resume notice procedure for the determination of a water right by merely requesting declaratory of injunctive relief against a particular party.").

As a result, the Supreme Court upheld the Water Court's dismissal for failure to state a claim upon which relief could be granted.

Conclusion and Implications

The Supreme Court made it clear that 1969 Act is the supreme law of Colorado water rights. The statutory scheme and procedures of the Act are necessary to provide a uniform system of water rights adjudication that balances allowing new appropriations while affording existing water rights users the ability to protect their vested water rights. The Water Courts' jurisdiction was also further defined in that a "water matter" must be in relation to an adjudicated water right, or one that has otherwise complied with the procedures of the 1969 Act. Although a water right is created at the time of appropriation, this case emphasizes the critical need for water rights users to adjudicate their rights so that they can be judicially

enforced and protected in the future. The Colorado Supreme Court's opinion is available online at: https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Opinions/2018/18SA215.pdf (John Sittler, Paul Noto)

New California Law Provides New Notice Requirements for PFAS Chemicals in the State's Drinking Water

California's Legislature and the State Water Resources Control Board (SWRCB) both acted recently to address concerns over PFAS chemicals detected in drinking water. A new statute enacted in July 2019, Assembly Bill 756, requires water systems to report any detected level of PFAS in their annual consumer confidence reports next year, and requires water systems to remove a water source from service or provide extensive public notifications where PFAS levels are detected above a Response Level established by the board. And in August, the State Water Resources Control Board issued Notification Levels that urge water systems to notify their customers when PFAS in drinking water sources exceeds 5.1 parts per trillion for Perfluorooctanic acid (PFOA) and 6.5 parts per trillion for Perfluorooctane Sulfonate (PFOS). These are the lowest notice levels for PFAS in the nation. The SWRCB also indicated that it plans to revise its Response Level this Fall. And it announced that it has begun the process of establishing regulatory requirements, or Maximum Contaminant Levels (MCLs), for PFOA and PFAS, and may add requirements for other PFAS substances in the future.

Background

PFAS is the abbreviation for a class of synthetic organic chemicals known as per- and poly-fluoroalkyl substances. The most common are PFOA and PFOS. They are known for their nonstick, waterproof, heat- and stain-resistant properties, and have been widely used in consumer and industrial products such as fabric and carpet coatings, firefighting foams, food packaging, and nonstick cookware. Groundwater contamination with PFAS has been detected near facilities where the chemicals were used, manufactured, or where products containing them are disposed. PFAS concentrations are often detected near airports and military bases that use it in firefighting foam for training exercises and emergency response.

Over the past several years, studies have found that excessive PFOA and PFOS exposure may result in certain types of cancer, liver damage, thyroid risks, and developmental risks to fetuses and breastfed infants. Other, less common PFAS substances have also raised concerns among health officials because of their similarities with PFOA or PFOS: primarily PFHxS, PFNA, PFHpA, and PFDA.

Growing concerns about these health risks from PFAS in water supplies have prompted myriad responses from federal and state lawmakers, regulators, and courts.

EPA Advisory

In 2016, the U.S. Environmental Protection Agency (EPA) issued an advisory recommending that water systems notify customers when PFOA and PFOS levels combined exceed 70 parts per trillion in water supplies. It is currently assessing whether to develop a National Primary Drinking Water Regulation for PFOA and PFOS. EPA has also begun the regulatory development process to list PFOA and PFOS as hazardous substances under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

CDC Draft Report

In June 2018, the Centers for Disease Control's Agency for Toxic Substances and Disease Registry (ATSDR) released a draft report that proposed Minimum Risk Levels for drinking water for children of 21 parts per trillion for PFOA, 14 parts per trillion for PFOS, 140 parts per trillion for PFHxS, and 21 parts per trillion for PFNA. Although these Minimum Risk Levels are not designed to support regulation, their lower levels have prompted criticism of EPA's 70 part per trillion advisory and encouraged some states to move ahead of the Federal government.

Congress, the National Defense Authorization Act, Clean Water Act and CERCLA

The U.S. House of Representatives and Senate have been working to reconcile different versions of the 2020 National Defense Authorization Act, which contain several provisions concerning PFAS. The Senate bill would direct the U.S. EPA to issue a National Primary Drinking Water Regulation for PFAS within two years and require PFAS monitoring by

water systems serving more than 10,000 people. The House bill would require the EPA to designate PFAS substances as toxic pollutants and establish effluent and pretreatment standards under the federal Clean Water Act. It would also require the EPA to designate all PFAS substances as hazardous substances regulated under CERCLA. In addition, several bills are pending in Congress that would require PFAS regulation, disclosures of contamination, or compensation for damages under various statutes.

State Standards

Lawmakers and regulators in at least ten states have moved ahead of EPA with PFAS standards or requirements. Of particular note: 1) New Jersey adopted an MCL for PFNA in 2018, and proposed MCLs and groundwater standards for PFOA and PFOS in April. 2) New Hampshire adopted, effective October 1st, the first MCLs for PFOA, PFOS, and PFHxS. 3) New York proposed MCLs for PFOA and PFOS in July.

Litigation in the U.S. District Courts

PFAS manufacturers and contamination sources have been the targets of a growing number of lawsuits across the nation. One of the first was filed in 2010 by the State of Minnesota against 3M Corporation for PFAS discharges into surface and groundwater; it settled in 2018 for $850 million. *See, Minnesota v. 3M Corp.*, Case No. 27-cv-10-28862 (D. Minn. *filed* Dec. 30, 2010). Since then, the most noteworthy litigation is *In re Aqueous Film-Forming Foams Products Liability Litigation*, MDL Case No. 2:18-mn-2873 (D. S.C. *consolidated* Dec. 7, 2018), multi-district litigation that consolidates more than one hundred suits by states, local governments, and other parties seeking damages for the use and dispersal of PFOA and PFOS in firefighting foam. In addition, a nationwide proposed class action in Ohio seeks damages from PFAS manufacturers on behalf of all U.S. residents who have a detectable level of PFAS in their blood serum. *See, Hardwick v. 3M Co.*, Case No. 2:18-cv-1185 (S.D. Ohio *filed* Oct. 4, 2018).

Events in California

Over the past two years, California has taken a series of actions to address PFAS contamination. In November 2017, California added PFOA and PFOS to its list of chemicals subject to the Proposition 65 requirements for substances known to cause reproductive toxicity. Starting in 2018, businesses were required to provide warnings before knowingly and intentionally exposing persons to PFOA or PFOS, and in 2019 businesses were prohibited from knowingly discharging or releasing them into a drinking water source or land that can contaminate a drinking water source.

In July 2018, the State Water Resources Control Board established interim Notification Levels of 14 parts per trillion for PFOA and 13 parts per trillion for PFOS. Notification Levels are non-regulatory advisory standards, but water systems that detect PFAS exceeding Notification Levels must provide notice to local governing boards and the SWRCB. The board also established an interim 70 part per trillion Response Level. Assembly Bill 756 now requires that water systems either remove a water source from service or provide extensive public notifications where PFAS levels are detected above a Response Level.

In April 2019, the SWRCB began ordering water systems to sample drinking water wells. The first phase of orders focused on 660 source wells in 209 water systems that previously detected high PFAS concentrations or are located near airports or landfills. The SWRCB has stated that this Fall it plans to issue more phases of monitoring orders that focus on wells near refineries, bulk terminals, non-airport fire training areas, recent urban wildfire areas, manufacturing sites that used PFAS, and wastewater treatment and pre-treatment plants.

Governor Newsom Signs into Law Assembly Bill 756

In July 2019, Governor Newsom signed Assembly Bill 756 into law. In addition to mandating that water agencies remove water sources exceeding PFAS Response levels or provide extensive public notifications, it requires water systems to report *any* detected level of PFAS in their consumer confidence reports beginning January 1, 2020, and it also expands the State Water Resources Control Board's authority to issue testing orders to multiple or all water districts.

In August, the SWRCB lowered its drinking water Notification Levels for PFOA to 5.1 parts per trillion and for PFOS to 6.5 parts per trillion. These are now the strictest notice levels for PFAS substances in the nation. The SWRCB also announced it has

begun the process of establishing MCLs for PFOA and PFOS, and may add requirements for other PFAS substances in the future.

The State Water Resources Control Board's Notification Levels for PFOA and PFOS are based on California Environmental Protection Agency recommendations that they be set:

> . . .at the lowest levels at which PFOA and PFOS can be reliably detected in drinking water using available and appropriate technologies.

Water agencies in California are starting to prepare for the SWRCB to rely on this guidance and issue lower Response levels for PFAS that will impact more of their water sources and may be challenging to meet. Agencies and local governments should also be preparing to engage in the board's process of developing MCLs for PFAS.

Impacts to Water Agencies and Local Government

These state actions and proposed federal actions on PFAS present several potential issues for California water agencies, local governments, and their customers.

First is the prospect of tightening Response levels that lack a meaningful opportunity to raise questions or concerns with the regulatory agencies. The standard regulatory process for establishing an MCL allows water agencies and stakeholders to provide input on the science, health benefits, and economics of new requirements, but the process for establishing Response levels does not. The absence of opportunities for notice and comment on Response levels has been justified because they were advisory rather than regulatory. But with enactment of Assembly Bill 756, Response Levels for PFAS will bring removal or public notice requirements.

Second, where PFAS is detected above Response levels, water systems will be required to remove contaminated water sources or issue public notices. Removal will be challenging where water sources are scarce or expensive. Public notices will raise questions about the safety of local drinking water.

Third, the presence of PFAS may result in costly compliance requirements even though water agencies did not cause the contamination. State and Federal proposals may impose new monitoring requirements, discharge limitations, cleanup or responsibilities, or liability for wastewater and biosolids from the treatment process. Removal of PFAS from water requires advanced treatment methods that may be cost-prohibitive for the volume of water handled by water utilities, and that will take time and resources to put into place. Researchers are still working to develop validated methods for testing or removing PFAS in biosolids.

Finally, impacted agencies and communities will need to decide whether and how to pursue compensation or other remedies against companies and entities that generated or released the PFAS contamination.

Conclusion and Implications

After the State Water Resources Control Board followed recommendations to set Notification Levels for PFOA and PFOS at the lowest detectable levels in August, California's water agencies are facing the prospect of a new and lower Response Level for PFOA and PFOS in the near future. Under Assembly Bill 756, water systems will be required to remove any water sources with PFAS that exceeds that Response Level, or provide extensive public notifications of contamination. In areas where PFAS is present in groundwater, these developments will impact some combination of water supply, treatment costs, customers' water bills, and the public's confidence in its drinking water. The standard processes for developing regulatory standards for PFAS have begun at the Federal and state levels, and could have similar impacts. (Lowry Crook, Steve Anderson)

REGULATORY DEVELOPMENTS

U.S. FISH AND WILDLIFE SERVICE AND NOAA FISHERIES JOINTLY ANNOUNCE REVISIONS TO REGULATIONS IMPLEMENTING PORTIONS OF THE ENDANGERED SPECIES ACT

The U.S. Fish and Wildlife Service (Service) and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NOAA Fisheries) (collectively: The Services) have revised their regulations implementing the federal Endangered Species Act (ESA). These changes are focused on three aspects: 1) the standards under which listings, delisting, reclassifications, and critical habitat designations are made; 2) the manner in which protections are applied to threatened species; and 3) the parameters under which federal agencies must consult with the Services to ensure that their actions do not jeopardize the continued existence of listed species or destroy or adversely modify critical habitat.

Factual Background

The ESA provides a program for the conservation of threatened and endangered plants and animals and the habitats in which they are found. The lead federal agencies for implementing ESA are the Service and NOAA Fisheries. Species include birds, insects, fish, reptiles, mammals, crustaceans, flowers, grasses, and trees.

The ESA generally serves to accomplish these goals by way of two principle means. First, it prohibits any action that causes a "taking" of any listed species of endangered fish or wildlife. Likewise, the import, export, interstate, and foreign commerce of listed species are all generally prohibited. Second, the ESA requires federal agencies, in consultation with the Service and/or NOAA Fisheries, to ensure that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat of such species.

Revisions to Regulations

Listing and Delisting of Species

The ESA prescribes certain standards for the listing and delisting of threatened and endangered species. Among other things, the ESA requires the Services to decide whether to list a species "solely on the basis of the best scientific and commercial data available." The Services' prior regulations provided that they would make listing decisions "without reference to possible economic or other impacts of such determination." That phrase has now been deleted and would allow introduction of economic data (for informational purposes) into some listing decisions.

The ESA provides that a species may be listed as "threatened" if it:

> . . .is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

The new regulations also now specify that:

> . . .[t]he term foreseeable future extends only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely.

The Services will now:

> . . .describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability.

The rule also adds that "[t]he Services need not identify the foreseeable future in terms of a specific period of time."

The new regulations also address the delisting of species and clarify that:

> . . .[t]he standard for a decision to delist a species is the same as the standard for a decision not to list it in the first instance.

The Services stated that this is consistent with their existing practice and interpretation of the ESA.

Designating Critical Habitat

The ESA requires the Services to designate "critical habitat" for a listed species at the time of listing "to the maximum extent prudent." A critical habitat designation increases the level of protection afforded a listed species from a jeopardy standard to a recovery standard. The new rules clarify the circumstances under which the Services can decline to designate critical habitat. In particular, they limit the Services' ability to designate as critical habitat areas that are not currently occupied by a listed species—unoccupied habitat will be designated only if the Services determine that occupied critical habitat is inadequate for the conservation of the species.

The rules also add a requirement that, at a minimum, an unoccupied area must have one or more of the physical or biological features essential to the conservation of the species in order to be considered as potential critical habitat, and there must be a "reasonable certainty" that the land "will contribute to the conservation of the species."

Protection of Threatened Species

While the ESA prohibits the "take" of species listed as "endangered," this prohibition does not extend to species listed as "threatened" unless the Service or NOAA Fisheries adopts a rule extending that protection to such species. Historically, the Service has relied on a "blanket" rule that automatically extends these protections to threatened species. The new rules would rescind this blanket protection and permit the Service to extend protection on a species-by-species basis, consistent with the manner in which NOAA Fisheries has treated threatened species. The regulations do not alter any prohibitions for species already listed as threatened.

Agency Consultation

The new rules also change a number of definitions and procedural steps associated with the "Section 7" consultation process. These include, among other things: a simplified definition of "effects of the action"; a definition of "environmental baseline"; and a revision to the definition of "destruction or adverse modification."

Conclusion and Implications

These new and very substantial revisions to the Endangered Species Act modify important standards and procedures under which the ESA is implemented and have been the source of considerable debate. The new regulations are available online at: https://www.fws.gov/endangered/improving_ESA/regulation-revisions.html
(James Purvis)

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

• August 22, 2019—U.S. Environmental Protection Agency (EPA) Administrator Andrew Wheeler signed a final action establishing no new regulatory requirements under the Clean Water Act (CWA) § 311(j)(1)(C) authority for hazardous substance discharge prevention. "EPA's analysis concluded that current requirements for hazardous substance discharge prevention are protective of human health and the environment and, therefore, additional requirements are unnecessary," said EPA Administrator Andrew Wheeler. During the 40 years since CWA § 311(j)(1)(C) was enacted by Congress, many EPA statutory and regulatory requirements have been established to prevent and address CWA hazardous substance discharges. Based on a review of the existing EPA programs along with the frequency and impacts of reported CWA hazardous substance discharges, the agency determined the existing EPA regulatory framework meets the requirements of CWA § 311(j)(1)(C) and is serving to prevent, contain, and mitigate CWA hazardous substance discharges. This final action complies with a consent decree addressing CWA § 311(j)(1)(C) and is based on public comment regarding EPA's proposed approach. For more information on the final action, please visit https://www.epa.gov/rulemaking-preventing-hazardous-substance-spills.

• August 27, 2019—At a four-day event hosted in Medora, North Dakota, the U.S. Environmental Protection Agency announced that it is renewing its commitment to collaborate with the Interstate Oil and Gas Compact Commission (IOGCC) through the EPA-IOGCC Task Force. First established in 2002, the task force is made up of EPA's senior leaders and state oil and gas leadership and is a mechanism for better communication and collaboration between the federal government and the states. Together, EPA and IOGCC leadership will continue to promote protection of human health and the environment, while recognizing each other's missions, responsibilities and authorities, increasing efficiencies and facilitating the exchange of information and expertise. The agency looks forward to strengthening its relationship with IOGCC." "Having worked in oil and gas production for most of my career, as a state agency cabinet secretary and in the private sector, I know firsthand how important it is for state and federal agencies to work together to serve the communities where this vital part of our economy is taking place," said EPA Region 6 Administrator Ken McQueen. Produced water generated from oil and gas production was one of many topics covered at the IOGCC annual meeting in Medora earlier this week. Both EPA and certain IOGCC member regulators maintain authority and responsibility over produced water, making federal and state collaboration on the management and regulation of produced water essential. For more information, see EPA's Study of Oil and Gas Extraction Wastewater Management Under the Clean Water Act (Draft May 2019) and the forthcoming draft Water Reuse Action Plan, highlighting produced water reuse and recycling opportunities. EPA will soon be proposing changes to the new source performance standards applicable to the oil and natural gas industry. EPA's proposal will deliver on President Trump's executive order by removing unnecessary and duplicative regulatory burdens from the oil and gas industry, saving millions in regulatory costs from 2019 to 2025.

• September 5, 2019—The U.S. Environmental Protection Agency Administrator Andrew Wheeler announced an important step to help promote the use of market-based approaches to efficiently and cost-effectively improve water quality across the nation. Speaking at the Chesapeake Bay Executive Council

meeting, Administrator Wheeler announced several new policy proposals that could simplify and give more flexibility to states, tribes and stakeholders seeking to develop market-based programs or to generate or use nutrient reduction credits. "EPA is proposing updates to our water quality trading policy that would help state and local partners take advantage of new technologies or develop market-based programs for improving water quality," said EPA Administrator Andrew Wheeler. The action seeks comment on policy options related to one of the six market-based principles identified in EPA's February 6, 2019 Water Quality Trading Policy memo—encouraging simplicity and flexibility in implementing baseline concepts. The proposal seeks comment on approaches to clarify and provide flexibility for nonpoint sources to generate credits for use in water quality trading. Under the Clean Water Act, water quality trading is an option for those seeking compliance with a discharge permit. Under trading programs, permitted facilities facing higher pollution control costs may be able to meet their regulatory obligations by purchasing environmentally equivalent (or superior) pollution reductions from other sources at lower cost. While EPA has long interpreted the Clean Water Act to allow for pollutant reductions from water quality trading, the practice has not been used to its fullest potential. EPA will host a public meeting to facilitate discussion on this important aspect of market-based programs, including water quality trading, that can be used to cost-effectively achieve water quality improvements. For more information visit http://www.epa.gov/npdes/water-quality-trading.

•September 10, 2019—At the 34th Annual WateReuse Symposium in San Diego, California, the U.S. Environmental Protection Agency announced the release of a draft National Water Reuse Action Plan that identifies priority actions and the leadership and collaboration that is needed between governmental and nongovernmental organizations to implement these actions. Water reuse represents a major opportunity to support our nation's communities and economy by bolstering safe and reliable water supplies for human consumption, agriculture, business, industry, recreation and healthy ecosystems. The draft National Water Reuse Action Plan is the first initiative of this magnitude that is coordinated across the water sector. It was built upon extensive outreach, research and prior engagement with the water sector. The inclusive approach used to develop the draft plan recognizes that meaningful advancement of water reuse is best accomplished by working cooperatively with all water sector stakeholders. The draft plan incorporates federal, state, tribal and local water perspectives and highlights key actions that support consideration and implementation of water reuse. EPA's goal is to issue a final plan that will include clear commitments and milestones for actions that will further water reuse to bolster the sustainability, security and resilience of the nation's water resources. The draft plan was announced during a panel discussion with federal partners—the Department of Agriculture, the U.S. Department of Energy, Department of Interior, Department of the Army, Bureau of Reclamation, and the Council on Environmental Quality (CEQ). EPA seeks to collaborate with all stakeholder groups on this plan and is soliciting public input through a 90-day public comment period. For more information, including opportunities to engage with EPA on this effort, visit https://www.epa.gov/waterreuse/water-reuse-action-plan.

•September 12, 2019— At an event in Albany, New York, U.S. Environmental Protection Agency Regional Administrator Pete Lopez, accompanied by representatives from the New York Farm Bureau and the Business Council of New York State, announced that EPA and the Department of the Army are repealing a 2015 rule that impermissibly expanded the definition of "waters of the United States" (WOTUS) under the Clean Water Act. The agencies are also recodifying the longstanding and familiar regulatory text that existed prior to the 2015 rule—ending a regulatory patchwork that required implementing two competing Clean Water Act regulations, which has created regulatory uncertainty across the United States. "Today's Step 1 action fulfills a key promise of President Trump and sets the stage for Step 2—a new WOTUS definition that will provide greater regulatory certainty for farmers, landowners, home builders, and developers nationwide. . . .Today, Administrator Wheeler and I signed a final rule that repeals the 2015 Clean Water Rule and restores the previous regulatory regime exactly how it existed prior to finalization of the 2015 Rule," said R.D. James, Assistant Secretary of the Army for Civil Works. This final rule reestablishes national consistency across the country

by returning all jurisdictions to the longstanding regulatory framework that existed prior to the 2015 Rule, which is more familiar to the agencies, states, tribes, local governments, regulated entities, and the public while the agencies engage in a second rulemaking to revise the definition of "waters of the United States." Today's rule is the first step—Step 1—in a two-step rulemaking process to define the scope of "waters of the United States" that are regulated under the Clean Water Act. Step 1 provides regulatory certainty as to the definition of "waters of the United States" following years of litigation surrounding the 2015 Rule. The two federal District Courts that have reviewed the merits of the 2015 Rule found that the rule suffered from certain errors and issued orders remanding the 2015 Rule back to the agencies. Multiple other federal District Courts have preliminarily enjoined the 2015 Rule pending a decision on the merits of the rule. In this action, EPA and the Army jointly conclude that multiple substantive and procedural errors warrant a repeal of the 2015 Rule. For example, the 2015 Rule: Did not implement the legal limits on the scope of the agencies' authority under the Clean Water Act as intended by Congress and reflected in Supreme Court cases; Failed to adequately recognize, preserve, and protect the primary responsibilities and rights of states to manage their own land and water resources; Approached the limits of the agencies' constitutional and statutory authority absent a clear statement from Congress; Suffered from certain procedural errors and a lack of adequate record support as it relates to the 2015 rule's distance-based limitations. With this final repeal, the agencies will implement the pre-2015 regulations, that are currently in place in more than half of the states, informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice. The final rule takes effect 60 days after publication in the Federal Register. In December 2018, EPA and the Army proposed a new definition—Step 2—that would clearly define where federal jurisdiction begins and ends in accordance with the Clean Water Act and Supreme Court precedent. In the proposal, the agencies provide a clear definition of the difference between federally regulated waterways and those waters that rightfully remain solely under state authority. Additional information is available at: http://www.epa.gov/wotus-rule.

Civil Enforcement Actions and Settlements—Water Quality

• August 20, 2019—The U.S. Environmental Protection Agency has reached a settlement agreement with Mesa-based Precision Marine, Inc. over federal Clean Water Act violations. Under the terms of the settlement, Precision Marine will improve its operations to prevent pollutants from its boat building and repair business from reaching into Saguaro Lake, which lies within the Salt River watershed. The company will also pay a $7,200 fine. During a June 2018 inspection, EPA found pollution prevention measures were inadequate to prevent stormwater from Precision Marine's boat repair activities from contaminating local waterways. EPA coordinated the inspection with the Arizona Department of Environmental Quality and determined the facility was operating without the appropriate permits. The inspectors observed a leaking outdoor air cooler causing industrial pollutants to flow directly into the lake. Inspectors also observed boat repair, maintenance and cleaning operations taking place without the necessary containment systems to trap and prevent excess pollutants from running offsite. To view a copy of the settlement and provide public comment, please visit: https://www.epa.gov/az/precision-marine-llc-mesa-arizona-proposed-settlement-clean-water-act-class-i-administrative.

• August 26, 2019—The U.S. Environmental Protection Agency announced it has reached settlement agreements with five public drinking water systems in Los Angeles County. The agreements require the systems to ensure they meet federal drinking water standards. System owners have agreed they will provide customers with access to alternate, safe water until upgrades are complete. As part of the agreements, the five water systems will reduce levels of arsenic in the drinking water by installing new treatment systems, building wells or blending with other drinking water sources. Village Mobile Home Park Public Water System serves 25 residents and is developing an arsenic compliance plan to provide drinking water to meet federal standards for arsenic by June 30, 2022. Winterhaven Mobile Estates Public Water System serves 25 residents and will implement changes to its system to ensure compliance by October 31, 2021. Lands Project Mutual Water Company serves 1,500 residents and will pay a $4,193 penalty

for failing to meet compliance measures specified in a prior settlement agreement. Lancaster Park Mobile Home Park Public Water System serves 25 residents and is developing a compliance plan for EPA approval to provide drinking water to meet federal standards for arsenic by June 30, 2022. Mettler Valley Mutual Water Company serves 25 residents and is developing an arsenic compliance plan for EPA approval to provide drinking water to meet federal standards for arsenic by December 31, 2022. 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.

•August 28, 2019—The U.S. Environmental Protection Agency has ordered the Oasis Mobile Home Park on the Torres Martinez Tribe's lands in California to provide alternative drinking water, reduce the levels of arsenic in the system's water and monitor the water for contamination. The Oasis Mobile Home Park Public System serves approximately 1,900 residents using groundwater that has naturally occurring arsenic. The tribe has no direct control or ownership of the water system and has been consulted about the violations. The order requires Oasis Mobile Home Park and its owner to: Provide at least one gallon of drinking water per person per day for every individual served by the system; Increase sampling and reporting of arsenic levels; Provide a technical review of the arsenic treatment system to analyze the cause of the violations and identify how to correct it; Develop standard operating procedures to ensure proper operation of the arsenic treatment system; Provide verification that the system has a certified water operator. Failure to comply with the EPA's order could result in penalties levied against the Oasis Mobile Home Park of up to $23,963 per day.

•September 3, 2019—The U.S. Environmental Protection Agency announced that BP North America Products Inc. will pay a civil penalty and upgrade the company's secondary containment to settle violations of the Clean Water Act at its Peosta, Iowa, facility. BP North America Products will pay a civil penalty of $71,400. The violations occurred on Aug. 6, 2018, when a 2.5 million gallon storage tank discharged diesel fuel oil into a tributary of the South Fork of Catfish Creek, resulting in a visible sheen in the South Fork of Catfish Creek for multiple days. On Aug. 7, 2018, EPA inspected the facility and documented that defective secondary containment resulted in the release from the facility. The U.S. Department of Transportation (DOT) also investigated the cause of the spill and found it to be a defective repair at the bottom of the storage tank. In addition to the penalty settlement, BP North America Products also agreed to investigate and upgrade the secondary containment system at the facility. Secondary containment systems capture potential spills prior to release into the environment. The secondary containment system failed at the facility, resulting in oil discharges into waters of the United States. EPA coordinated the investigation and plans for upgrade of the secondary containment system with both DOT and the Iowa Department of Natural Resources (IDNR). EPA anticipates this upgrade to be complete within six months, depending on the results of the company's investigation.

•September 12, 2019—The U.S. Environmental Protection Agency has ordered Guam Shipyard to obtain a stormwater discharge permit and to achieve compliance with the Clean Water Act for discharges of pollutants into Apra Harbor, Guam. It has operated industrial activities, including boat repair, sandblasting, high pressure washing, painting and material storage since at least January 2016. EPA inspected the facility on September 2018 and found multiple violations of the Clean Water Act. EPA concluded the facility has been discharging pollutants in stormwater and process wastewater associated with industrial activity without Clean Water Act permit authorization. Inspectors also observed the facility failed to control blasting grit, paint particles and debris, which discharged directly into Apra Harbor; failed to have adequate secondary containment for oils; did not have spill response equipment available; and had a large accumulation of waste materials throughout the site. EPA is requiring the facility to: Obtain permit authorization; Develop a Stormwater Pollution Prevention Plan to control pollutants; Install adequate controls to contain sandblast and abrasive blast materials; Capture non-stormwater discharges to prevent their entry into Apra Harbor; Ensure spill response equipment available on site. For more information on industrial stormwater requirements, visit: https://www.epa.gov/npdes/industrial-stormwater-guidance.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•September 4, 2019—The U.S. Environmental Protection Agency has settled a case it brought against Joint Base Elmendorf-Richardson for violations of federal laws governing the handling, storage, and disposal of hazardous wastes. EPA alleges that between 2016 and 2018 JBER personnel violated the Resource Conservation and Recovery Act when they failed to evaluate and categorize two waste streams as hazardous waste; failed to conduct required weekly inspections of hazardous waste accumulation areas; improperly implemented container management and labeling requirements; and failed to ensure personnel took part in annual review of training. Only after evaluating the hazards posed by a waste stream can a generator properly manage the waste to prevent releases that endanger human health and the environment. Failure to label containers makes it difficult to maintain an inventory of wastes stored for proper waste management. JBER promptly corrected the violations and instituted new measures to prevent their recurrence. The base and its contractor have each agreed to pay a combined penalty totaling $78,919. A copy of the Compliance Agreement and Final Order can be found here: JBER Consent Agreement and Final Order.

•September 12, 2019—The U.S. Environmental Protection Agency announced an agreement with Chemical Solvents, Inc., resolving allegations that the company violated the Clean Air Act (CAA), Resource Conservation and Recovery Act (RCRA), and Clean Water Act (CWA) at the firm's contiguous Jennings and Denison sites located in Cleveland, Ohio. Chemical Solvents conducts its commodity chemical business at the Jennings site, and its solvent reclamation and chemical blending operations at the Denison site. Under the terms of the consent decree, Chemical Solvents will pay a $400,000 penalty and upgrade control devices and monitoring equipment, implement a leak detection and repair program for waste and product tanks, and close a wastewater sump. The firm will also install a new sewer lateral, hire a professional engineer to complete a piping audit, submit a compliance plan based on the wastewater sampling results, and update its stormwater pollution prevention plan. Chemical Solvents' alleged RCRA violations include failure to comply with emission control requirements for process vents, control devices, hazardous waste tanks, and equipment leaks, as well as assorted hazardous waste violations. The firm's alleged CAA violations include failure to meet control efficiency requirements, failure to operate and maintain monitoring equipment, and a lack of proper recordkeeping. Chemical Solvents' alleged CWA violations include numerous exceedances of effluent discharge limits into the regional sewer system, and stormwater violations.

Indictments, Convictions, and Sentencing

•August 27, 2019—In a settlement agreement with the U.S. Environmental Protection Agency and the Texas Commission on Environmental Quality (TCEQ), the city of Houston, Texas, has agreed to implement a comprehensive set of corrective measures and improvements to the city's sewer system to resolve longstanding problems with sanitary sewer overflows (SSOs) and discharges into various water bodies of pollutants in excess of permitted limits from the city's 39 wastewater treatment plants. The agreement, upon final approval by a U.S. District Court Judge, will resolve the city's noncompliance with the Clean Water Act and provisions of the Texas Water Code (TWC). These violations were alleged in a joint Complaint filed on Sept. 20, 2018, by the U.S. Department of Justice, on behalf of EPA, and the state of Texas, on behalf of the TCEQ. The city also has agreed to pay a civil penalty of $4.4 million, which will be shared equally with the State of Texas. The city of Houston operates one of the largest sewer systems in the nation, which serves nearly two million people. The system includes more than 6,000 miles of sewer lines, 390 lift stations, and more than 120,000 manholes. To come into compliance with the CWA and the TWC, the city will implement over a period of 15 years extensive measures to prevent SSOs and effluent violations, at an estimated cost of $2 billion. Preventing raw sewage in the form of SSOs from going onto the streets of the city and from entering waters of the United States and waters of the state eliminates a significant threat to human health and the environment. These discharges have contributed to bacteria contamination of Houston water bodies, degraded water quality, and contain viruses that may cause illnesses. During implementation of the work required under the consent decree the release of raw sewage from the city's sewer system

will be reduced by approximately six million gallons a year. Currently, this sewage is entering various water bodies in, around and near the city, including the Buffalo Bayou and the Houston Ship Channel. Under the consent decree, Houston will address the insufficient capacity of its sewer system in identified areas where large-volume SSOs have occurred during major rain events. In addition, some non-wet weather SSOs occurring in the city over the years have been caused by defective conditions such as cracked and broken sewer lines. The city has agreed to conduct a system-wide inspection of all its gravity sewer lines and manholes to assess their structural condition. The city will annually remediate no less than 150 miles of sewer lines based upon the results of the inspection and assessment. Further, to address another major cause of SSOs in the form of blockages caused by debris and fats, oil and grease (FOG), the city will implement two major cleaning programs. Under the first program, the city will target SSO-prone areas for cleaning in the first two years and complete cleaning of all gravity sewer lines in the first ten years of the consent decree with additional cleaning requirements thereafter. A second cleaning program will target areas that require more frequent cleaning to prevent SSOs from occurring, primarily due to FOG. Finally, the city has agreed to implement a number of measures as early action projects to address SSOs and effluent violations within the first few years of the consent decree. Several of the early action projects involve wastewater treatment plants. The city, the United States and the state identified ten wastewater treatment plants that have experienced a significant number of effluent violations, including such pollutants as E. Coli, ammonia and total suspended solids. The consent decree was lodged in the U.S. District Court for the Southern District of Texas, Houston Division. The consent decree is subject to a 30-day public comment period before the court can give final approval and enter the consent decree as a final judgment, at which time it will become effective. The consent decree is available at http://www.justice.gov/enrd/consent-decrees.

• August 28, 2019—An oilfield services company pleaded guilty and was sentenced today in federal court in Bismarck, North Dakota, on charges related to the death of an oilfield worker. The victim, Dustin Payne, worked for Nabors Completion and Production Services (NCPS) at its Williston, North Dakota facility. On Oct. 3, 2014, Payne welded on an uncleaned tanker trailer that had previously carried "production water" or "saltwater," a liquid waste generated by oil wells that contains flammable chemicals. The tank exploded and Payne was fatally injured. A Marine Corps veteran of campaigns in Iraq and Afghanistan, Payne had recently moved to North Dakota to work in the booming oil industry. He was 28 years old. Federal law makes it illegal to weld on tanks or other containers that have not been thoroughly cleaned to remove all flammable materials and explosion hazards. The defendant, C&J Well Services, is the corporate successor to NCPS. NCPS knew that it was against the law to weld on uncleaned tanks and had written policies prohibiting the practice. NCPS policies mandated special training for welders and internal auditing procedures to make sure that welding rules were actually being followed. However, NCPS did not provide welding-specific training to Payne or other welders at the Williston facility, did not effectively supervise the work of the Williston welders, did not require the welders to obtain hot work permits prior to welding and did not follow internal auditing procedures. As a result, Payne and other welders repeatedly welded on uncleaned tanks that contained flammable hydrocarbon residue. C&J pleaded guilty to a willful violation of the standard requiring that tanks be cleaned before welding. U.S. District Judge Daniel L. Hovland sentenced C&J to pay a $500,000 fine, $1.6 million in restitution to the victim's estate, and a three-year term of probation, during which C&J must allow the Occupational Safety and Health Administration (OSHA) to inspect its facilities and equipment across the country without a warrant, without advance notice and without a specified inspection reason "Federal law has long prohibited welding on uncleaned tanks and employers must comply with these standards to protect their workers," said Loren Sweatt, Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health at the U.S. Department of Labor.
(Andre Monette)

JUDICIAL DEVELOPMENTS

FOURTH CIRCUIT VACATES SECOND INCIDENTAL TAKE PERMIT FOR ATLANTIC COAST PIPELINE

Defenders of Wildlife v. Wildlife Services, ___F.3d___, Case No. 18-2090 (4th Cir. July 26, 2019).

On July 26, 2019, the Fourth Circuit Court of Appeals ruled that the U.S. Fish and Wildlife Service's (FWS) determination that the Atlantic Coast Pipeline (Pipeline) project would not harm endangered species was arbitrary and capricious. This ruling invalidated the FWS' 2018 Biological Opinion and Incidental Take Statement that encompassed these findings and requires the FWS to rewrite the documents.

Factual and Procedural Background

The Pipeline is a proposed 600-mile pipeline project to transport natural gas from West Virginia to Virginia and North Carolina. The location of the proposed Pipeline is in the habitat of four endangered species: the rusty patched bumble bee, clubshell, Indiana bat, and the Madison Cave isopod. As a result, the federal Endangered Species Act (ESA) requires the FWS to issue a Biological Opinion determining whether the endangered species will be impacted by the Pipeline project. In its 2017 Biological Opinion, the FWS determined that the species would not be jeopardized despite the incidental taking of these species and their habitat. To contend with the taking issue, the FWS issued the 2017 Incidental Take Statement that set limits on how many of each species could be taken by the project. Petitioners challenged these initial take limits and the court determined that these limits were arbitrary and thus, vacated the Incidental Take Statement.

Nineteen days after the 2017 Biological Opinion and Incidental Take Statement were vacated and formal consultation with the Federal Energy Regulatory Commission (FERC) resumed, the FWS issued a 2018 Biological Opinion and 2018 Incidental Take Statement. The 2018 Biological Opinion and Incidental Take Statement again placed limits on the number of species that could be taken during the project. Petitioners again challenged the findings in the Biological Opinion and Incidental Take Statement. Petitioners argued the determination that the construction will not harm the rusty patched bumble bee or the clubshell was improperly determined and that the limits placed on the Indiana bat and Madison Cave isopod were invalid.

The Fourth Circuit's Decision

Patched Bumble Bee

With regard to the rusty patched bumble bee, the court ruled that the FWS determination that the species would not be jeopardized by the project was arbitrary and capricious. The rusty patched bumble bee reproduces in a cyclically: the queens produce new queens and then die every year. As a result, each queen is theoretically able to produce multiple new hives the following year. The FWS action was arbitrary because it did not explain how the nest density number (*i.e.* the means to calculate the number of bees to be impacted by the project) was selected and determined that the project would not "negatively impact the fitness or survival of the population" despite the assertion that the project would reduce reproductive success. The court also concluded that the FWS did not take into account FWS' own determination, only one year earlier, that even without external stressors, the species is "so imperiled that every remaining population is important for its continued existence." Finally, the court concluded the FWS only considered the species survival and did not consider the recovery in the determination of no harm while failing to explain their reasoning. As a result of these unexplained FWS determinations, the court concluded the "no harm" determination was arbitrary and capricious in consideration of all of the facts related to the species.

Clubshell

With regard to the clubshell, the court ruled that the FWS' determination the clubshell would not be harmed by project construction was arbitrary and capricious. The clubshell is a type of freshwater mussel that lives buried in sand. The work of digging would clog the clubshell's feeding and breathing tubes, causing the clubshell to die. As a result, the FWS moved some of the mussels to a different stream following the 2017 Biological Opinion and issued the 2018 Biological Opinion. The movement of the species led to a colony of mussels that were alive, but unable to reproduce. FWS determined that this action was permissible because the clubshell population was not a reproducing population, therefore the number of the species would not be diminished by the work; they did not consider the fact that the recovery of the species was reduced because of the creation of a colony that was unable to reproduce. Since this action would push the species into likely extinction and the FWS' analysis improperly focused on reproduction as the sole recovery criteria, using out of date information, the court determined that the decision of no harm was arbitrary and capricious.

Indiana Bat

The court determined FWS' Indiana Bat taking requirements failed to satisfy the criteria for a proper surrogate habitat. The Indiana Bat is an endangered, migratory species and requires trees to roost and rest while migrating. The 2018 Biological Opinion established a numeric take limit of two bats and an acreage limit, as a habitat surrogate. For a habitat surrogate to be proper, three elements must be met: 1) FWS must describe the causal link between the surrogate and the take; 2) FWS must explain why it is not practical to express the amount or extent of anticipated take or to monitor take-related impacts in terms of individuals of the listed species; and 3) FWS must set a clear standard for determining when the level of anticipated take has been exceeded. Petitioners challenged the acreage limit. The court concluded FWS failed to satisfy these elements, in part, because the evidence showed two primary factors influencing the bat's status were habitat loss and degradation and forest fragmentation; nevertheless, FWS concluded that clearing forest habitation "regardless of the amount of acres being cleared" would have no impact on the species. The court concluded that no possible explanation was provided to support use of the habitat surrogate. As a result, the court determined that the decision was arbitrary.

Madison Cave Isopod

Finally, the FWS' determination regarding the take limits of the Madison Cave isopod was determined to be arbitrary and capricious. The Madison Cave isopod is a threatened subterranean freshwater crustacean. The FWS determined that 1,974 acres of habitat would be potentially impacted by the project. Despite this determination, FWS found that only 896.7 acres would be directly impacted by construction and only 896.7 acres would impact the species. The court concluded FWS did not consider indirect impacts that would harm the species in the other 1000 acres. Because the FWS did not explain why indirect impacts would be permissible, the court determined that the decision was arbitrary and capricious.

Conclusion and Implications

This case highlights the Fourth Circuit Court of Appeal's suspicion of the U.S. Fish and Wildlife Service's mere 19-day turnaround on reissuance of the 2018 Biological Opinion and Incidental Take Statement. Sometimes, agency deference can go only so far. It also suggests where an agency action is vacated as arbitrary and capricious, additional time and substantive evidence are needed to support the agency before it can take the same action. The court's decision is available online at: http://www.ca4.uscourts.gov/Opinions/182090.P.pdf
(Anya Kwan, Rebecca Andrews)

SEVENTH CIRCUIT HOLDS SETTLEMENT RESOLVING LIABILITY FOR NON-CERCLA CLAIMS TRIGGERS THREE-YEAR STATUTE OF LIMITATIONS FOR CONTRIBUTION ACTIONS

Refined Metals Corp. v. NL Industries, Inc., ___F.3d___, Case No. 18-3235 (7th Cir. Aug. 22, 2019).

A 1998 settlement agreement between the owners of a lead smelting site, the U.S. Environmental Protection Agency (EPA) and a state environmental agency did not resolve all of the property owner's liability for agency claims related to contamination. The property owner incurred cleanup costs and obtained approval of final corrective measures from EPA in 2014.. Nearly 20 years after the settlement agreement was entered into, the property owner sought to recover cleanup costs from a prior landowner, arguing that federal Comprehensive Environmental Response, Compensation, and Liability Act's (CERCLA) six-year, "permissive" statute of limitations for cost-recovery actions applied, rather than the statutes more stringent three-year limitations period for contribution actions.. The Seventh Circuit Court of Appeals extended its prior precedents in this area, interpreting CERCLA § 113(f) to mandate contribution actions where a PRP has entered into an agency-settlement agreement related to the contamination, even when that agreement does not resolve any CERCLA liability.

Background

In 1998, Refined Metal entered into a settlement with the EPA and the Indiana Department of Environmental Management, pursuant to which Refined agreed to pay a $210,000 fine and remediate contamination at a lead smelter site in the suburbs of Indianapolis. Refined had purchased the smelter site from NL Industries (NL) in 1980. In the settlement, the agencies had agreed not to pursue some of their potential claims against Refined.

Nineteen years later, Refined sued NL to recoup cleanup costs.. The U.S. District Court dismissed Refined's suit as untimely under CERCLA's three-year statute of limitation for contribution claims. 42 U.S.C. § 9613(f)(3)(B).

The Seventh Circuit's Decision

CERCLA allows a "potentially responsible party" or "PRP," *i.e.*, a party responsible for creating a hazard requiring clean-up, to seek compensation from other PRPs for "cleanup costs in excess of its fair share." *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682, 689 (7th Cir. 2014). "[C]osts incurred during a self-initiated environmental cleanup" may be sought under CERCLA section 107(a)'s cost-recovery provision (42 U.S.C. § 9607(a)), which imposes a six-year limitations period and "bars defendants from asserting equitable defenses.". *NCR Corp.*, 768 F.3d at 690. Section 113(f), separately, allows recovery of costs via a contribution action, and must be pursued—to the exclusion of cost-recovery claims—if the PRP seeking compensation has been involved in either "a qualifying lawsuit under section 113(f)(1) or a qualifying settlement under section 113(f)(3)(B).".

On appeal, Refined argued its claims were for cost-recovery under CERCLA's § 107(a), rather than contribution, and therefore subject to that provision's "more permissive" six year limitation period—and that the six year clock did not begin to run until EPA approved "final corrective measures" in 2014.

Determining if the 1998 Settlement Was a Qualifying Settlement under 113(f)(3)(B)

The Seventh Circuit's analysis focused primarily on the terms of the 1998 settlement among Refined, EPA and IDEM, to determine whether that agreement was a:

> . . .qualifying settlement under § 113(f)(3)(B), . . .which creates a right to contribution for a party that has 'resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement.'

In *Bernstein v. Bankert*, 733 F.3d 190 (7th Cir. 2013), the court "found that a settlement had not resolved enough of the PRP's liability to trigger a" contribution claim." However, the court explained that conclusion rested on particular circumstances:

> We reached this result when (1) the settlement expressly stated that the defendant companies did not admit any liability or the validity of the EPA's findings; *and* (2) the covenants not to sue were not immediately effective, but instead were conditional on complete performance of the terms of the settlement. 733 F.3d at 212..

Analysis under the *Bernstein* and NCR *Corp*. Decisions

Both of these circumstances were present in the settlement agreement at issue in *Bernstein*, so that:

> . . .it was 'very difficult to say, in light of [a section in the settlement agreement in which the defendant companies refused to admit liability], that the agreement between the parties constituted a resolution of liability.' *Ibid*.

In its subsequent *NCR* opinion, the court:

> . . .found that a settlement's inclusion of an immediately effective covenant not to sue meant that a PRP had 'resolved its liability. . .for some or all of a response action,' which in turn started the clock on a contribution claim. 768 F.3d at 682.

The court went on to state that *NCR*'s "reasoning leaves no doubt that the immediately effective covenant not to sue was the dispositive point." Extending *Bernstein* and *NCR*, the court held that:

> . . .section 113(f)(3)(B). . .does not limit covered settlements to those that specifically mention CERCLA.

The court arrived at that conclusion by interpreting § 113(f)'s subsection (3)(B) alongside subsection (1), which "explicitly limits its applicability to civil actions brought under CERCLA." In contrast, subsection (3)(B) is triggered—mandating a contribution, rather than cost-recovery, claim—when a settlement:

> . . .resolve[s a PRPs] liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement.

From this distinction, the court concluded that § 113(f) "does not limit covered settlements to those that specifically mention CRECLA."

> [T]he the disparity between these two closely related subsections in section 113(f) is a strong indication that Congress meant for the universe of qualifying settlements under section 113(f)(3)(B) to be broader than those specifically mentioned in § 113(f)(1).

There is further support for this reading in the text and structure of the act. The trigger for § 113(f)(3)(B) encompasses settlements that leave at least some liability open, given that this subpart of the statute describes a qualifying settlement as one that:

> . . .has resolved [a defendant's] liability to the United States or a State for some or all of a response action or for some or all of the costs of such action. (Emphasis added).

The court observed that CERCLA does not favor "slicing and dicing of costs incurred under the same administrative order ...." *NCR Corp*., 768 F.3d at 692. The same logic applied here.

> The text demonstrates Congress's\ intention to encourage parties that have reached even a partial settlement with respect to a contaminated site to act expeditiously in identifying costs, seeking compensation where necessary and completing the required cleanup.

It was undisputed that Refined's settlement agreement with the agencies resolved some, but not all, of its liability.. Thus, under the Court of Appeals' reading of § 113(f)(3)(B), the District Court's dismissal was affirmed.

Lastly, the court pointed out that Refined's reading of § 113(f) would allow a PRP who had entered into an agency-settlement "to drag out" by many years the date by which it must initiate an action to seek compensation from other PRPs.

Rejecting this result, the court stated:

> . . .[s]hort statutes of limitations encourage swift action, and that is the regime Congress chose

for the settlement trigger in section 113(f)(3)(B).

Conclusion and Implications

One lesson to draw from this case is that careful attention should be paid to the terms and scope of agreements addressing liability for CERCLA-governed remediation and cleanups, in light of the short statute of limitations that may be imposed for seeking compensation from other PRPs. The better lesson is probably to assume § 113(f) applies and file within the shorter limitations period, if at all possible. The court's decision is available online at: http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2019/D08-22/C:18-3235:J:Wood:aut:T:fnOp:N:2387979:S:0
(Deborah Quick)

SEVENTH CIRCUIT FINDS STATE SUIT DOES NOT BAR FEDERAL CERCLA COST RECOVERY CLAIM

Valbruna Slater Steel Corp. v. Joslyn Mfg. Co., ___F.3d___, Case No. 18-2633 (7th Cir. Aug. 8, 2019).

The Seventh Circuit Court of Appeals determined that a prior action under Indiana's Environmental Legal Actions (ELA) statute did not bar a subsequent cost-recovery claim under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

Factual and Procedural Background

Joslyn Manufacturing Company (Joslyn) owned and operated steel mill from 1928 to 1981. In 1981, Joslyn sold the site to Slater Steel Corporation (Slater). Shortly after purchasing the site, regulators pressured Slater to bring the site to compliance with the federal Resource Conservation and Recovery Act of 1976 (RCRA). Slater excavated sludge and contaminated soil from two areas on the site, but did not remove all contaminants. Pursuant to an agreement with the U.S. Environmental Protection Agency (EPA), Slater conducted monitoring, additional work, and capped the excavated area to prevent run-off. Indiana Department of Environmental Management (IDEM) issued a certification of completion for the work, but recognized that more work was needed at the site.

Following the work, Slater demanded payment from Joslyn for the clean-up costs under the CERCLA and ELA cost-recovery provisions. In 2000, Slater sued Joslyn for damages under ELA in state court after repeated refusal to pay for the clean-up. Slater, however, was barred from bringing a CERCLA claim in the Indiana state court. In 2004, while the case was still in trial, Valbruna Slater Steel Corporation (Valbruna) purchased the excavation site from Slater. As part of the purchase agreement, Valbruna agreed to dedicate $500,000 to cleanup costs at the site. Slater ultimately lost all claims under the ELA.

Following Valbruna's purchase of the site, IDEM approved a clean-up plan at a cost exceeding Valbruna's reserved amount. In 2010, Valbruna filed suit in federal court for cost recovery under CERCLA. Joslyn unsuccessfully moved to dismiss the suit on claim-preclusion grounds. After the first motion to dismiss was denied, Joslyn unsuccessfully moved to defeat the CERCLA claim on a statute of limitations defense. At trial, Valbruna was given a reduced cost-recovery award to prevent unfair compensation. Valbruna appealed the cost allocations and Joslyn appealed on the claim preclusion and statute of limitations rulings.

The Seventh Circuit's Decision

On the claim preclusion issue, the Seventh Circuit held that the judgment of similar claims in state courts did not bar federal litigation. Indiana's state law makes claim preclusion inapplicable when state courts lacked jurisdictional competency. Because of this state law and the lack of state jurisdiction over CERCLA, it was possible for a plaintiff to litigate an issue in federal courts.

Statute of Limitations

To determine the statute of limitations issue, the court analyzed the type of work Valbruna and Slater did to clean up the site. Under CERCLA, the time to file suit expires three years after the completion of removal actions and six years after the initiation of remedial actions. The court defined removal actions

as short-term action taken to halt risks posed by hazardous wastes. Remedial actions are those actions taken to permanently remedy the hazardous area. Ultimately, the court held that neither Valbruna's nor Slater's work on the site was comprehensive or permanent enough to be considered remedial. More specifically, both the 1980s and the 1991 clean-up were designed to temporarily address the concerns of regulators. Slater performed the work as a response to the threat of polluting nearby water sources. The use of a concrete cap for the impoundment area was deemed limited in nature because it only focused on the impoundment lot and not on the entire site. While the court acknowledged that the line between the two categories was not clear, it did note that the circumstances and purpose of the work done were the key considerations in their decision.

Cost Allocation

On the allocation of costs issue, the Seventh Circuit gave deference to the District Court's decision. Typically, a District Court will look at the *Gore* factors to determine the allocation of costs. These factors include: the parties' respective fault for the pollution, the degree of toxicity of the pollution, and the care exercised by the respective parties, however, the court made it clear that those factors are neither exhaustive nor binding. While the Seventh Circuit agreed that allocating 25 percent of the liability to Valbruna was striking, it upheld the allocation.

Conclusion and Implications

This case highlights the ability of a party to a bring cost recovery suit in a federal court after a litigating a state law action in state court, where a state court lacks subject matter jurisdiction over the federal claim. The court's opinion is available online at: https://protect-us.mimecast.com/s/iGEsCkRw1nIORgNqS2HAUe?domain=media.ca7.uscourts.gov
(Marco Antonio Ornelas, Rebecca Andrews)

DISTRICT COURT REMANDS 2015 'WATERS OF THE U.S.' RULE TO AGENCIES FOR FURTHER NOTICE AND COMMENT

Texas v. U.S. Environmental Protection Agency, 389 F.Supp.3d 497 (S.D. Tex. 2019).

The U.S. District Court for the Southern District of Texas recently found that the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corp of Engineers (Corps) violated the Administrative Procedure Act's (APA) notice and comment provisions in the 2015 "waters of the U.S." rulemaking. The court remanded the rulemaking to the EPA and the Corps so the agencies could resolve the notice and comment defects. The court also dismissed plaintiffs' federal Clean Water Act (CWA), Commerce Clause, and Tenth Amendment claims as moot because they were premature.

Background

The CWA made it unlawful to discharge any pollutant into "navigable waters" which were defined as "the waters of the United States." The term "waters of the U.S." defines the geographic scope of the CWA, however, the definition has been unclear. The Supreme Court has wrestled with providing a precise definition and the Circuits have disagreed as to how the phrase should be interpreted.

In 2014, the EPA and the Corps attempted to make the process of identifying "waters of the U.S." less complicated. That year, the agencies came out with a Proposed Rule that defined the "waters of the U.S" in terms of three jurisdictional categories: categorically covered waters, categorically excluded waters, and waters that required a case-specific inquiry to determine their coverage. Waters "adjacent" to the categorically covered waters were included in CWA jurisdiction. In the Proposed Rule, the term "adjacent," meant "bordering, contiguous or neighboring." In turn, "neighboring" was defined using ecologic and hydrologic connectivity criteria.

In 2015, after the notice and comment period for the Proposed Rule had closed, the EPA and the Corps released a Final Connectivity Report without providing opportunity for further notice and comment. Later in 2015 the EPA and the Corps released the Final Rule. The Final Rule differed from the Proposed Rule in defining "adjacent" waters using distance-based criteria (*e.g.* feet and inches), instead of the

ecologic and hydrologic criteria (*e.g.* examining water flows) from the Proposed Rule. The issuance of the Final Rule was the first time the EPA and the Corps gave notice that they intended to define adjacency by distance-based criteria.

Plaintiffs, on motions for summary judgment, asked the court to vacate the Final Rule because of APA, CWA, Commerce Clause, and Tenth Amendment violations. Plaintiffs asserted that the Final Rule violated the APA's notice and comment requirements because: 1) the Final Rule's definition of "adjacent" was not a logical outgrowth of the Proposed Rule's definition, and 2) the agencies denied interested parties an opportunity to comment on the Final Connectivity Report.

The District Court's Decision

The 'Logical Outgrowth' Inquiry

The court began by analyzing whether the Final Rule's definition of "adjacent" was a logical outgrowth of the Proposed Rule's definition. The court pointed out that an agency can promulgate a final rule that differs from the proposed rule, but the final rule must be a "logical outgrowth" of the proposed rule so that affected parties will not have been deprived of notice and an opportunity to respond.

The court found that the Final Rule violated the APA's notice and comment requirements because it deviated from the Proposed Rule in a way that the interested parties could not have reasonably anticipated. The court noted that the test of:

> . . .[w]hether a final rule is a 'logical outgrowth' of a proposed rule will turn on whether the interested parties 'should have anticipated' the final rule from the proposed rule.

Because the Final Rule abandoned the ecologic and hydrologic criteria to define "adjacent" in favor of distance-based criteria, the court found it "different in kind and degree" such that it violated APA notice and comment requirements. The court rejected the agencies' argument that the Proposed Rule's definition necessarily implied elements of reasonable proximity and put the interested parties on notice. In order to fulfill the APA requirements, the agencies needed to inform the interested parties with greater specificity that the agencies were considering distance-based criteria to alter the CWA's jurisdictional scope.

Opportunity to Comment on the Final Connectivity Report

The court then analyzed whether the Final Rule violated the APA by preventing interested parties from commenting on the studies that served as the technical basis for the rule. An agency commits a serious procedural error when it fails to reveal portions of its technical basis for a proposed rule in time to allow for meaningful commentary. Here, the court found that the EPA and the Corps failed to give interested parties an opportunity to refute the most critical factual material used to support the Final Rule.

Because the agencies decided not to reopen the Proposed Rule for comment after issuing the Final Connectivity Report, the court found that the agencies prejudiced the interested parties. The parties were unable to provide meaningful comments and mount a credible challenge to the Final Rule.

Remand Order

The court found that remand to the EPA and the Corps was the appropriate remedy. It rejected plaintiffs' argument that vacatur was appropriate because *vacatur* would be too disruptive when there is a serious possibility the agencies will resolve the notice and comment defects with the opportunity to do so. The court asserted that it takes "rare circumstances" to require any remedy other than remand for agency reconsideration. All other claims were dismissed as moot because they were premature.

Conclusion and Implications

This case clarifies that the APA notice and comment "logical outgrowth" test is not satisfied when agencies merely give interested parties generalized or vague references to the agencies' regulatory intent regarding significant changes to a rule. Practically, this case stalls the EPA and the Corps implementation of the 2015 "waters of the U.S." Final Rule in Texas, Louisiana, and Mississippi, pending further notice and comment. However, the EPA recently released a final rule repealing the 2015 Rule, indicating that no further notice or comment period is likely for the 2015 Rule.

(William Shepherd, Rebecca Andrews)

Eastern Water Law & Policy Reporter
Argent Communications Group
P.O. Box 1135
Batavia, IL 60510-1135

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