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EASTERN WATER LAW™

& POLICY REPORTER

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EWL

EASTERN WATER NEWS

CALIFORNIA'S ENVIRONMENTAL BATTLE AGAINST THE TRUMP ADMINISTRATION RAGES ON AMIDST CLASH BETWEEN THE FEDERAL AND STATE ENVIRONMENTAL PROTECTION AGENCIES

Recently, California Governor Gavin Newsom received quite the letter from the Administrator of the U.S. Environmental Protection Agency (EPA), Andrew Wheeler. Alleging numerous failures by the state to properly implement the federal Clean Water Act (CWA) and the Safe Drinking Water Act (SDWA), the letter gave an ultimatum for California to fix its water troubles: Either California is to take immediate action or the EPA will.

Concerns Addressed in the Letter

From the outset of the letter, Mr. Wheeler alleges a failure by California to fulfill its obligations in implementing the CWA and the SDWA as delegated by the federal government. Beginning with what he refers to as the "homelessness crisis," Wheeler takes specific aim at the City of San Francisco throughout the letter. Citing a 2018 article from *NPR*, Wheeler expresses the concern of the EPA that pathogens and other contaminants from untreated human waste might have potential water quality impacts by entering nearby waters. Reiterating that California's responsibility to implement proper municipal storm water management and waste treatment requirements, the letter's first allegation is a failure by California to adhere to this responsibility. Ending this first complaint, Wheeler asserts that the City of San Francisco and the state:

> . . .do not appear to be acting with urgency to mitigate the risks to human health and the environment that may result from the homelessness crisis.

In another allegation targeting San Francisco, Wheeler continues by discussing the city's discharge of more than 1 billion gallons of combined storm water and sewage into San Francisco Bay and the Pacific Ocean annually. The CWA demands that municipal waste be treated to certain levels, but in the letter Wheeler asserts that the city lacks biological treatment of this sewage and storm water, instead opting to remove only "floatables and settleable solids" in violation of the CWA. Additionally, the letter alleges the city's failure to maintain its sewage infrastructure. In quite the critical manner, Wheeler writes that:

> San Francisco must invest billions of dollars to modernize its sewer system to meet CWA standards . . . and keep raw sewage inside pipes instead of in homes and businesses.

Citing further alleged violations of the CWA, Wheeler asserts that the EPA found 23 significant exceedances of the Clean Water Act's National Pollutant Discharge Elimination System permits throughout the state (including exceedances of copper by 420 percent and the County of Marin's exceedances of cyanide by 5,194 percent).

Lastly, Wheeler turns to recent reports of health-based exceedances under the SDWA, totaling 665 health-based exceedances in 202 Community Water Systems, serving a population of nearly 800,000. Among the various instances cited here in the letter, Wheeler claims exceedances of arsenic, Ground Water Rule compliance issues, and violations of radiological standards.

Administrator Wheeler's Demands

In response to the problems pointed out in the letter, Wheeler concluded his letter to Governor Newsom by requesting a written response from the state, within 30 days, that details how the state intends to resolve the problems addressed in the letter—providing "specific anticipated milestones"—and how the state has the authority to accomplish the resolutions required.

In a similar fashion to the recent EPA/California EPA run-in regarding air quality, Wheeler's letter alluded to federal intervention should California fail to correct the problems alleged in the letter.

Governor Newsom Responds

While reports have stated that staff at the EPA have claimed that the letter was a part of "routine monitoring," California officials have had other thoughts. In a statement following receipt of the letter, Governor Newsom's Chief Spokesman, Nathan Click, called the letter "political retribution," proclaiming that "this is not about clean air, clean water, or helping our state with homelessness." Providing more powerful words about the matter, Mr. Click described the letter as a way for President Trump's administration to "weaponize" a government agency.

Conclusion and Implications

With the 30-day mark fast approaching, it will certainly be interesting to see the state's response to Wheeler's demands—if any response is provided. October 10 represented the deadline set by the EPA regarding the previous conflict between it and the state, so California has certainly had an eventful month between the two demands put forth by Andrew Wheeler and the EPA. In any case, this clash represents yet another point of contention in the collision course between the Trump administration and the Golden State. While the California policy pendulum has been increasingly swinging to correct for rollback efforts by the federal administration of environmental protections, to have the federal administration calling foul on the state for not doing enough is an irony and a storyline with much more to be written.
(Wesley A. Miliband, Kristopher T. Strouse)

NEWS FROM THE WEST

This month, in News from the West, we report on a decision by the State of Utah to expedite a water pipeline project, which transfers federal lead agency under the National Environmental Policy Act, from the Federal Energy Regulatory Commission to the U.S. Bureau of Reclamation, by removing two hydroelectric related reservoirs from the project plan.

We also report on the issuance of new "no jeopardy" Biological Opinions by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) associated with the joint operation of California's Central Valley Project by U.S. Bureau of Reclamation and the California Department of Water Resources.

Lake Powell Pipeline Review by State of Utah Shifted to U.S. Bureau of Reclamation after Removal of Hydropower Components

The Utah Board of Water Resources (UBWR) recently simplified the long-planned Lake Powell Pipeline by eliminating two proposed reservoirs and their accompanying hydroelectric power plants. This major change will reduce the estimated project costs by more than $100 million as well as changing the regulatory oversight of the project. The elimination of the reservoirs means that the Federal Energy Regulatory Commission (FERC) will no longer be the lead federal agency—instead the U.S. Bureau of Reclamation (Bureau) will oversee the review process.

History and Background of the Project

The Lake Powell Pipeline was first conceived and brought to life in 2006 when the Utah State Legislature passed the Lake Powell Pipeline Development Act authorizing the project. The proposed pipeline will take water from Lake Powell, near Glen Canyon Dam, to Sand Hollow Reservoir in Washington County, Utah. The fully buried pipeline will travel approximately 140 miles, including five pumping stations, and bring an annual total of 86,249 acre-feet of water to Washington (82,249 acre-feet) and Kane (4,000 acre-feet) counties in southern Utah. St. George is the largest of the 13 communities that will be served by the pipeline, however the total population in the rapidly-growing service area is expected to be more than 500,000 residents by 2065, including 295,600 new residents in Washington County alone. The state has acknowledged that increased conservation, other water development projects, and agricultural water transfers will also be necessary to meet southern Utah's water needs; However the Lake Powell Pipeline is seen as a critical component of the state's comprehensive, long-term water supply plan.

Similar to past projects, although much larger in scope, the Lake Powell Pipeline is a state-sponsored endeavor. That means that the original cost of the project—estimated at between $1.1 and $1.7 billion—will be first funded by the state of Utah and then repaid, with interest, by the actual water users through a combination of impact fees, water rates, and property taxes. Impact fees, one-time charges for new development to connect to the system, are expected to bring in approximately $2.96 billion through 2060. Current impact fee rates are $8,400 per home, or about 2.4 percent of the median new home price in Washington County. The Washington County Water Conservation District impact fees are set to increase $1,000 per year through 2025 after which they will be indexed to the Producer's Price Index for construction materials. Water rate charges are projected to generate an additional $1.75 billion through 2060, while increased ad valorem property taxes for homeowners within the pipeline service area will contribute an estimated $1.41 billion.

Given the extensive scope, the project is still only in the middle of a long development timeline. After approval in 2006, the next ten years were spent in research, studies, and preliminary design, with the preliminary license application submitted in 2015 and the final license application submitted in 2016. Due to the hydropower aspects of the project, FERC was the primary federal oversight agency. As such, information on cultural resources and other pertinent materials were submitted to FERC in late 2018 and early 2019. The draft Environmental Impact Statement (EIS) was begun in 2019. The remaining timeline, for which estimated dates have not been released, is as follows: 1) release of draft EIS, 2) release of final EIS, 3) records of decision from appropriate federal agencies (now Bureau), 4) final project design, 5) final financing plan, and 6) construction.

Recent Developments

As originally conceived, the Lake Powell Pipeline was slated to have six hydroelectric facilities along its length to both generate power for surrounding communities as well as power the five pump stations necessary to move the water the entire 140 miles. In August 2019, a Utah legislative audit raised additional questions about the cost of the project, repayment, and interest. Supporters of the project acknowledge the steep price tag but maintain the project is necessary to meet population needs in growing southern Utah where most of the water currently comes from the Virgin River. Like all western rivers, the Virgin is susceptible to extreme swings in its flows from year to year, a variability that is likely to increase as the mountain west faces more warming issues related to climate change. Opponents of the project mostly fixate on the massive cost, pointing out that the entire state is on the hook for the initial payments even though only a small number of Utahans will directly benefit from the project. Those concerns aside, the August audit eventually concluded that it believed the funding structure, if operated as planned, will be sufficient.

Elimination of Two Proposed Reservoirs—FERC License No Longer Required

More importantly, in September the UBWR decided to eliminate two proposed reservoirs that were to be located above and below Hurricane Cliffs. These reservoirs and their corresponding hydro plants would have supplied power during times of peak demand. The project will still retain several in-line power generation features. With the elimination of the major hydroelectric plants, a FERC license is no longer required. Instead, the other smaller generation systems fall under a FERC conduit exemption covering in-line hydro projects whose generating capacity is less than 40 megawatts. Utah had originally pushed to have FERC be the lone federal permitting agency, however this claim was rejected in 2017 on the basis that water delivery was the principal purpose of the pipeline, with electrical generation (FERC's purview) only constituting a peripheral part of the project. With the two reservoirs eliminated, the Department of the Interior elected to have the Bureau step in as the lead federal agency. This means the Bureau will oversee the EIS as well as all other review and permitting. The elimination of the reservoirs also helps to address, but does not complete solve, environmental issues previously raised by the U.S. Fish and Wildlife Service, Army Corps of Engineers, and the Environmental Protection Agency. Those issues included potential inundation of several hundred acres of desert tortoise habit as well as impacts to waters of the United States.

In addition to simplifying the permitting process, the elimination of the two reservoirs is also expected to reduce total project cost by more than $100 million. This reduction, while relatively small compared to total project costs (less than 10 percent) is still significant and helps to allay concerns about funding. That being said, opponents of the project were still upset that the state spent several million dollars and almost a decade submitting thousands of pages of documents to FERC, only to later decide that was all unnecessary.

Conclusion and Implications

The transfer from the Federal Energy Regulatory Commission to the U.S. Bureau of Reclamation is not expected to cause any further delays in the project. Rather, the state will continue compiling its materials with the only difference being the agency where everything is submitted. As discussed above, there are still several steps and levels of review before final approval of the project. Once everything is approved, the state will be able to market and sell the 86,249 acre-feet delivered by the pipeline. Construction will not begin until 70 percent of that water, roughly 60,000 acre-feet, is under contract. Water supply issues in the face of growing communities is not a new problem in the west—rather this has become the norm. Regardless of the final outcome of this project, it will surely be an example for other western states going forward.
(John Sittler, Paul Noto)

Federal Agencies Release No Jeopardy Biological Opinions for the Central Valley Project

On October 21, 2019, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) each issued Biological Opinions under the federal Endangered Species Act (ESA) regarding proposed operations of the federal Central Valley Project (CVP) and the State Water Project

(SWP). Both FWS and NMFS found that proposed CVP and SWP long-term operations through 2030 would not jeopardize federally listed threatened or endangered species, including delta smelt and listed salmon, nor adversely modify their designated critical habitats, including those in the Sacramento-San Joaquin River Delta and in upstream tributaries. The U.S. Bureau of Reclamation's (Bureau) proposed action includes significant investment in protection of endangered fish, more robust hatchery operations, changes to cold water pool operations and other actions at Lake Shasta, and increased management oversight in the Delta.

Background

The Central Valley Project is operated in close coordination with the State Water Project (SWP) administered by the California Department of Water Resources (DWR). Together, the Projects provide water to more than 25 million California residents and millions of acres of farmland throughout California.

The Endangered Species Act imposes requirements for protection of endangered and threatened species and their ecosystems, and makes endangered species protection a governmental priority. For marine and anadromous species (like salmon), the Secretary of Commerce acting through NMFS may list any species, subspecies, or geographically isolated populations of species as endangered or threatened. In addition to listing a species as endangered or threatened, the Secretary must also designate "critical habitat" for each species, to the maximum extent prudent and determinable. For species other than marine or anadromous species, such as for terrestrial species, the Secretary of the Interior acting through FWS may list and otherwise regulate the take of such species.

At its most basic level, a Biological Opinion evaluates whether an agency action is likely to either jeopardize the continued existence of a listed species or result in the destruction or adverse modification of such species' designated critical habitat. Opinions concluding that the proposed action is likely to jeopardize a species' continued existence or adversely modify its critical habitat are called "jeopardy opinions," and must suggest "reasonable and prudent alternatives" that the Secretary believes will minimize the subject action's adverse effects. However, "no jeopardy" opinions do not require reasonable and prudent alternatives, but may still set forth reasonable and prudent measures that the action agency must follow if it is to obtain "incidental take" coverage, i.e. legal protection for incidentally taking a protected species.

The Bureau's Plans for New Long-Term Operations

In 2008 and 2009, FWS and NMFS, respectively, issued "jeopardy" Biological Opinions regarding ongoing operations of the CVP and SWP. These opinions included reasonable and prudent alternatives that effectively compelled the Bureau and DWR to operate many aspects of their water projects according to the direction of the federal wildlife agencies, rather than in compliance with the proposed operating plans offered by the Bureau and DWR. Many years of litigation followed which ultimately concluded with the Ninth Circuit Court of Appeals upholding the opinions.

Beginning in 2016, the Bureau began developing a new long-term operations plan for the CVP and SWP, in close coordination with DWR. As part of the review process, the Bureau and DWR undertook review of the effects the new plan might have on listed species under the ESA, including delta smelt, green sturgeon, and salmon and steelhead (aka "salmonid") species, many of which are considered keystone species in the Sacramento-San Joaquin Delta.

In 2018, the White House directed that the Bureau complete its Biological Assessment (BA) regarding its new proposed action (*i.e.*, the updated long-term coordination operations plan) no later than January 2019. The Bureau completed the original version of its BA on January 31, 2019 and submitted it to FWS and NMFS.

In June 2019, FWS and NMFS provided portions of their draft Biological Opinions to the Bureau. Those draft chapters suggested FWS and NMFS preliminarily believed the new proposed CVP and SWP operations would continue to have potential jeopardizing impacts on listed species, and thus lead to the issuance of another round of reasonable and prudent alternatives. Thereafter, the Bureau worked with DWR, NMFS and FWS to more closely examine the proposed operations plan in view of the most recent available science. This coordinated effort resulted in the issuance of the "no jeopardy" Biological Opinions.

Investment to Support Fish

The proposed operations plan will include an estimated $1.5 billion in investment to support threatened and endangered fish survival and recovery through research and restoration actions over a ten-year period, including for delta smelt and salmonid species. For instance, the Bureau will implement a program to supplement Delta smelt in the wild by using the existing U.C. Davis Fish Conservation and Culture Laboratory (FCCL). The Bureau will fund a process to supplement the wild delta smelt population with captive-bred fish from FCCL within three-five years following expansion, through additional funding, to increase rearing capacity up to approximately 125,000 adult Delta smelt within three years. Additionally, the operations plan will manage Old and Middle River reverse flows for limiting larval and juvenile delta smelt entrainment based on modeled recruitment estimates. The Bureau will also provide up to $700,000 for reconstruction of the Knights Landing Outfall Gates, to reduce the potential for fish entrainment in the Colusa Basin Drain.

Shasta and Cold Water Management Tiers

The operations plan also provides a detailed description of Shasta Dam operations and Cold Water Management Tiers for the benefit of salmonid species. The operations plan also sets performance metrics for incubation and juvenile production of salmonids under a proposed "Shasta Cold Water Pool Management" strategy. Similarly, the operations plan sets performance metrics for managing Old and Middle River reverse flows to limit salmonid loss to similar levels observed under the previous Biological Opinion through explicit reductions in export pumping. Condition-appropriate actions will occur after two years of low winter-run chinook salmon egg-to-fry survival.

Fish Passage

Additionally, the Bureau will provide up to $1,000,000 towards a collaborative project to construct fish passage downstream of the Deer Creek Irrigation District Dam, which will provide spring-run chinook salmon and Central Valley steelhead with access to 25 miles of spawning habitat. The Bureau will additionally provide up to $14,500,000 over ten years to reintroduce of winter-run chinook salmon to Battle Creek. This includes accelerating the reestablishment of approximately 42 miles of salmon and steelhead habitat on Battle Creek, and an additional 6 miles on its tributaries.

Conclusion and Implications

The newly released Biological Opinions are controversial in some arenas. Interested parties, including environmental groups, have suggested they may file 60-day notices under the ESA and lawsuits to challenge the Biological Opinions. The FWS Biological Opinion is available at: https://www.fws.gov/sfbaydelta/CVP-SWP/documents/10182019_ROC_BO_final.pdf; *and* the NMFS Biological Opinion available at: https://www.fisheries.noaa.gov/resource/document/biological-opinion-reinitiation-consultation-long-term-operation-central-valley
(Miles B. H. Krieger, Steve Anderson)

REGULATORY DEVELOPMENTS

OBAMA ADMINISTRATION-ERA CLEAN WATER RULE REPEALED, ADDITIONAL CHANGES TO WATERS OF THE UNITED STATES DEFINITION IN STORE

On September 12, 2019, the U.S. Environmental Protection Agency (EPA) announced the formal repeal of the Obama administration's 2015 Clean Water Rule (2015 Rule). The 2015 Rule was one step in an ongoing series of efforts to clarify the reach of the United States' jurisdiction under the federal Clean Water Act (CWA) by defining the jurisdictional waters of the United States (WOTUS) to which that jurisdiction extended. The repeal takes effect on December 23, 2019, and a new rule revising the definition of WOTUS is expected to be adopted in the same timeframe.

The Clean Water Act, *Rapanos*, and the 2015 Clean Water Rule

The jurisdiction of the federal government under the Clean Water Act is limited to the "navigable waters" of the United States, or WOTUS. In its 2006 *Rapanos v. Unites States* decision, the U.S. Supreme Court grappled with the scope of this definition, but was unable to reach a majority opinion. In a concurring opinion, Justice Kennedy opined that a non-navigable waterway falls within the United States' jurisdiction if it bears a "significant nexus" to a traditional navigable waterway. Justice Scalia's plurality opinion articulated a different standard: The United States only has jurisdiction over non-navigable waters where the waters have a somewhat permanent flow. That standard also would limit federal jurisdiction to those wetlands that had a continuous surface connection to a relative permanent water body. In the absence of a majority opinion, the scope of federal jurisdiction remained unclear.

In 2015, the Obama administration introduced new EPA regulations intended to address this lack of clarity. The 2015 Rule applied Justice Kennedy's "significant nexus" standard, and explicitly defined WOTUS to include headwaters, perennial streams, and seasonal wetlands. Under this rule, WOTUS included any water body within 4,000 feet of a traditional navigable water or tributary if the water body had a "significant nexus" to a traditional jurisdictional water. Per the 2015 Rule, a "significant nexus" exists where the water body, by itself or with another body of water, has a significant effect on the chemical, physical, and biological integrity of a traditional jurisdictional water. Headwaters, perennial streams, and seasonal wetlands were included within the scope of WOTUS under the 2015 rule.

However, legal challenges to the 2015 Rule resulted in patchwork enforcement and application of the rule. At the time of its repeal, 23 states were operating under the pre-2015 Rule definitions and guidance for the scope of federal jurisdiction under the Clean Water Act, while the remaining 27 operated under 2015 Rule definitions.

The Trump Administration Suspends and Repeals the 2015 Rule

President Trump campaigned on the issue of repealing the 2015 Rule, and almost immediately after assuming office began work on repealing the 2015 Rule. The Trump administration adopted a two-phased approach: it would first repeal the 2015 Rule and then implement a new rule applying a narrower definition of WOTUS. The Trump administration adopted a rule to delay the implementation of the 2015 Rule for a period of two years on February 6, 2018, but two separate federal District Courts in Washington and South Carolina vacated this rule nationwide in the end of 2018. Unlike the 2018 delayed-implementation rule, the new rule repeals the 2015 Rule entirely.

EPA stated four reasons for repealing the 2015 Rule. First, the EPA and the U.S. Department of the Army determined that the prior rule extended WOTUS beyond the scope permitted by the Clean Water Act and Justice Kennedy's significant nexus test in *Rapanos*. Second, the 2015 Rule did not adequately consider the primary role of the states in pollution

control and the development and use of water resources. Third, the 2015 Rule's extension of jurisdiction into realms traditionally regulated by states did not have express approval from Congress. Fourth, the adoption of the 2015 Rule was procedurally flawed and the rule lacked adequate support in the record.

On September 12, 2019, EPA formally adopted the rule repealing the Obama administration's 2015 Rule.

Redefining Waters of the United States

On December 11, 2018, the EPA and the United States Department of the Army, Army Corps of Engineers (Corps) released a proposed rule adopting a narrower WOTUS definition. The Trump administration has promulgated a rule that would replace the pre-2015 regulations and implement a narrower WOTUS definition. Instead of the case-by-case approach of the 2015 Rule, the new rule would apply blanket categories of waterways that would qualify as WOTUS, in line with Justice Scalia's plurality opinion in *Rapanos*. Categories include traditional navigable waters, tributaries to navigable waters, ditches that operate as traditional navigable waters or were constructed as navigable waters, lakes or ponds that act as navigable waters, impoundments on navigable waters, and wetlands adjacent to navigable waters. The new rule also includes a number of express exemptions from the definition of WOTUS. This would include ephemeral waters, groundwater, certain wastewater and recycled water facilities, waste treatment systems, and certain commercial and agricultural ponds and ditches.

Restores Pre-2015 Regulations

In addition to repealing the 2015 Clean Water Rule, the new rule restores the regulations defining the scope of WOTUS that were in effect prior to the 2015 Clean Water Rule. The comment period on the proposed rule closed on April 15, 2019, and the final rule is expected to be adopted this winter. If the new rule is not adopted, the pre-2015 rules will remain in effect, leaving stakeholders with an imprecise WOTUS definition that spurred the adoption of the 2015 Rule and the Trump administration's proposed rule.

Conclusion and Implications

The return to a pre-2015 definition of WOTUS is only the first step in a two-step process by the Trump administration to more narrowly and precisely define WOTUS, and additional changes are anticipated with the adoption of the new rule this winter. Proponents look forward to the clarity and new land development opportunities that will be afforded by the new rule, while opponents express alarm at the significant reduction in federal protection of waterways that would likely result. Additional information on the status of the WOTUS rule, as well as comments submitted on the new rule, can be found at: https://www.epa.gov/wotus-rule/step-two-revise
(Brian Hamilton, Meredith Nikkel)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

Civil Enforcement Actions and Settlements—Water Quality

•October 7, 2019—The U.S. Environmental Protection Agency announced two agreements to study indoor air quality, advance cleanup, and take action related to groundwater contamination in Sunnyvale, California. The first settlement, with Philips Semiconductors Inc. (Philips), requires the company to study indoor air quality in commercial buildings at the Signetics site and evaluate options to speed cleanup of contaminated groundwater. The second settlement adds Advanced Micro Devices (AMD) and Northrop Grumman Systems Corporation (Northrop) as signatory parties—with Philips as the party performing the work— to assess vapor intrusion and implement mitigation measures in residential buildings adjacent to the Signetics site that are located over the groundwater contamination. The work performed under these two settlements is estimated to cost $4 million. In 1982, volatile organic compounds, including trichloroethene (TCE), were detected in groundwater below the Triple Site. Once released to soil and groundwater, TCE can evaporate and rise as a vapor, potentially accumulating in buildings above the groundwater plume. Health impacts from TCE exposure can include increased cancer risk from long-term exposure. Other health effects may result from short-term exposure, including liver and kidney damage, as well as heart defects in developing fetuses. The first agreement with Philips requires the company to study indoor air quality in four commercial buildings at the Signetics site and determine if any protective measures are needed. In addition, the agreement requires Philips to assess options for accelerating the ongoing groundwater cleanup at the Signetics site. The second agreement with Philips, AMD and Northrop provides for the continuation of residential and school vapor intrusion assessments begun under a settlement with Philips in 2015. For the past 4 years, EPA has overseen Philips' indoor air sampling efforts in more than 35 school buildings and 220 residences in the OOU and the installation of several school and residential mitigation systems. Under this new settlement, EPA will continue to oversee the design and construction of mitigation systems in affected buildings to prevent unacceptable levels of TCE vapors from accumulating indoors. Philips will continue to perform the work, with AMD and Northrup included as additional responsible parties. This settlement is subject to a 30-day comment period. For more information and to submit comments visit: https://www.federalregister.gov/documents/2019/10/04/2019-21688/notice-of-proposed-administrative-settlement-agreement-and-order-on-consent-for-removal-site.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•September 30, 2019—The U.S. Environmental Protection Agency announced that Total Petroleum Puerto Rico Corp. will provide the Puerto Rico Department of Public Security and the Aircraft Rescue and Fire Fighting Department of the Virgin Islands Ports Authority with $110,000 worth of emergency equipment as part of a settlement of alleged violations of provisions of the Resource Conservation and Recovery Act (RCRA) governing handling hazardous waste. The new equipment and gear will aid responders in addressing fires and emergencies that may cause serious damage to properties, human health, and the environment. Total Petroleum is a petroleum products wholesale distributor for gas stations and aviation fuel supply at three locations: the Luis Muñoz Marín International Airport in Carolina, Puerto Rico; the Guaynabo Bulk Terminal, in Guaynabo, Puerto Rico; and the Cyril King Airport in Charlotte Amalie in St. Thomas, U.S. Virgin Islands. In August 2015 and March and April 2017, EPA inspected the three facilities and cited Total Petroleum for six violations: failure to make a hazardous waste determination; operation of hazardous waste storage facilities without a RCRA permit; failure to minimize risk; failure to have a proper contingency plan; failure to maintain containers with hazardous waste closed and in good

condition; and, failure to comply with universal waste management requirements. As a result of this enforcement action, Total Petroleum has corrected the violations and has committed in the settlement to maintain compliance. The settlement includes a penalty of $180,000 for the past violations.

•October 3, 2019—The U.S. Environmental Protection Agency announced a settlement with the Department of the Navy for improperly managing hazardous waste at the Naval Air Weapons Station in China Lake. Under the agreement, the federal facility will pay a $23,700 penalty. "It is critical for federal agencies to comply with laws that protect public health and our natural resources," said EPA Pacific Southwest Regional Administrator Mike Stoker. "This agreement will bring the Department of the Navy into compliance with hazardous waste laws and help minimize the potential for hazardous waste releases to the environment." The Naval Air Weapons Station—China Lake is in the Western Mojave Desert region of California, approximately 150 miles north of Los Angeles. Operations at the facility include research and development of explosive materials and weapons, aircraft maintenance, facilities maintenance operations, metal fabrication operations, and storage of hazardous materials and waste. EPA's 2018 inspections identified violations of Resource Conservation and Recovery Act (RCRA) regulations. RCRA rules require the safe management of hazardous waste to protect public health and the environment and to prevent the need for costly and extensive cleanups. Violations identified during the inspection included:

Failure to comply with a permit condition that requires deteriorating containers to be replaced or put inside larger containers in good condition at the point of generation.

Failure to keep hazardous waste containers closed.

Failure to properly manage universal wastes.

The facility has resolved the identified violations and is now in compliance with the RCRA requirements. For more information on EPA's Resource Conservation and Recovery Act please visit: www.epa.gov/rcra.

•October 19, 2019—The U.S. Environmental Protection Agency announced the filing of a consent decree with the four parties responsible for contamination at the Nuclear Metals Superfund site in Concord, Massachusetts. Under the agreement, the United States, on behalf of the U.S. Army and U.S. Department of Energy, along with Textron Inc. and Whittaker Corporation, will address the cleanup of the site at an estimated cost of approximately $125 million. Textron and Whittaker will perform the cleanup at the site, with financial contribution from the federal government. The four parties will also pay approximately $400,000 for the EPA's past cleanup costs at the site, as well as the agency's costs to oversee the cleanup. The site, also known as the Starmet Corporation site, includes the 46-acre parcel located at 2229 Main Street in Concord and the surrounding areas where groundwater contamination has migrated. Several prior owners/operators used the site for research and specialized metals manufacturing and were licensed to possess low-level radioactive substances. From 1958 to 1985, wastes contaminated with depleted uranium, copper, and nitric acid were disposed into an unlined holding basin at the site. Volatile organic compounds (VOCs), which likely contained 1,4-dioxane as a stabilizer, were used as solvents and degreasers for the cleaning of machines and machined parts/products and discharged through floor drains to an on-site cooling water pond that resulted in contamination of an on-site supply well. The facility was listed as a Superfund site in 2001, and EPA placed a temporary cover over the holding basin in 2002 to address one of the most immediate risks at the site. Approximately 185,000 square feet of building space was demolished between 2011 and 2017 at a cost of $54 million under a previous agreement with the EPA. The long-term cleanup plan for the site was selected by EPA in 2015 and generally includes the following components, which will be completed under the proposed agreement:

Excavation and off-site disposal of about 82,500 cubic yards of contaminated soils, sediment and debris. A portion of the groundwater cleanup was started in 2016 because a plume contaminated with 1,4-dioxane was migrating away from the property under the Assabet River towards the town of Acton's water supply. The remainder of the groundwater cleanup will be done under the agreement. The Consent Decree, lodged in the U.S. District Court for the District of Massachusetts on Oct. 9, 2019, is subject to a 30-day public comment period and approval by the federal court. A copy of the consent decree will

be available on the U.S. Department of Justice's website at https://www.justice.gov/enrd/consent-decrees.

Indictments, Convictions, and Sentencing

•October 15, 2019—Two shipping companies incorporated in Liberia pled guilty in federal court in Wilmington, Delaware, to failing to notify the U.S. Coast Guard of a hazardous condition on one if its vessels and to violating the Act to Prevent Pollution from Ships (APPS) by presenting false documents to the Coast Guard that covered up vessel oil pollution. The agreement includes a $1.8 million dollar criminal penalty. Defendants Nederland Shipping Company and Chartworld Shipping Company are the owner and operator of the 13,049 gross ton, ocean-going, refrigerated cargo/container vessel called the M/V NEDERLAND REEFER. Large ships like the M/V NEDERLAND REEFER generate oil-contaminated bilge waste when water mixes in the bottom or bilges of the ship with oil that has leaked from the ship's engines and other areas. This waste must be processed to separate the water from the oil and other wastes by using pollution prevention equipment, including an Oily Water Separator (OWS), before being discharged into the sea. APPS requires that the disposal of the ship's bilge waste be recorded in the ship's Oil Record Book (ORB). Under the plea agreement, the companies will be placed on a four-year term of probation that includes a comprehensive environmental compliance plan to ensure, among other things, that ships operated by Chartworld entering the United States fully comply with all applicable national and international marine environmental protection laws. The compliance plan will be implemented by an independent auditing company and supervised by a court-appointed monitor. Trial Attorneys David P. Kehoe and Stephen Da Ponte at the Environmental Crimes Section of the Department of Justice and Assistant U.S. Attorney Edmund Falgowski of the District of Delaware prosecuted the case. The case was investigated by the Coast Guard's Investigative Service.
(Andre Monette)

LAWSUITS FILED OR PENDING

MAYOR OF MAUI AND COUNTY COUNCIL WRANGLE OVER SETTLEMENT AUTHORITY WHILE U.S. SUPREME COURT PRESSES ON IN *MAUI V. HAWAII WILDLIFE FUND* CLEAN WATER ACT CASE

A disagreement between City of Maui's Mayor and County Council over who has authority to settle lawsuits has injected a complex state law issue into the already tense proceedings of the closely watched federal Clean Water Act case, *Maui v. Hawaii Wildlife Fund*, pending before the U.S. Supreme Court. The Court is scheduled to hear arguments on November 6, 2019, on whether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater. Maui County Council recently voted to approve a settlement with the plaintiffs-respondents and to withdraw the petition. Maui's Mayor, however, has refused to withdraw the petition and maintained that the office of Mayor, not the office of County Council, has sole authority to settle lawsuits. Maui County Corporation Counsel has backed the Mayor, and so far, the Supreme Court has not taken any action to change the argument schedule or dismiss the case. [*County of Maui v. Hawaii Wildlife Fund et al.*, 886 F.3d 737 (9th Cir. 2018), petition granted S. Ct. No. 18-260 (Feb. 19, 2019).]

Background

Section 301 of the federal Clean Water Act (CWA) prohibits "the discharge of any pollutant by any person" except, in part, pursuant to a National Pollutant Discharge Elimination System (NPDES) permit. The CWA defines "discharge of a pollutant" as "(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft," and "navigable waters" as "the waters of the United States, including the territorial seas."

The U.S. Environmental Protection Agency (EPA) and states administering NPDES permit programs historically have not required a federal permit for discharges to groundwater. The Fourth, Sixth, and Ninth Circuit Courts of Appeal have issued opinions with conflicting interpretations of whether the CWA covers such discharges.

The Ninth Circuit's Decision

In *Maui*, the Ninth Circuit Court of Appeals affirmed the U.S. District Court's holding that Maui County was required to obtain an NPDES permit to operate waste water injection wells that discharged to groundwater where the groundwater had a direct hydrologic connection to the Pacific Ocean and the pollutants were "fairly traceable" from the wells to the ocean "such that the discharge [was] the functional equivalent of a discharge into the navigable water."

The Fourth Circuit's Decision

Consistent with the Ninth Circuit's decision in *Maui*, the Fourth Circuit in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018) petition docketed No. 18-268 (Sept. 4, 2018) (*Upstate Forever*) reversed the District Court's dismissal of a conservation group's citizen suit, holding that a plaintiff asserts a viable claim under the CWA by alleging the unauthorized discharge of a pollutant to navigable waters through groundwater with a "direct hydrologic connection" to the surface water. The petition for a writ of *certiorari* is still pending at the Supreme Court.

The Sixth Circuit's Decision

Shortly thereafter, in two separate decisions, the Sixth Circuit Court of Appeals rejected the Fourth and Ninth Circuits' analysis and held that the Clean Water Act does not regulate pollutants discharged to navigable waters through hydrologically connected groundwater. One of these decisions, *Tennessee Clean Water Network v. Tennessee Valley Authority*, was also appealed to the Supreme Court.

Grant of *Maui* Petition for *Certiorari* by the U.S. Supreme Court

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

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

Subsequently, the parties and numerous *amici* filed briefs with the Court.

The Dispute over Settlement Authority and Whether or Not to Settle

On April 15, 2019, the EPA issued an Interpretive Statement addressing whether the NPDES permit program applies to releases of a pollutant from a point source to groundwater. In this Interpretive Statement, EPA concluded that the:

> . . .CWA is best read as excluding all releases of pollutants from a point source to groundwater from NPDES program coverage, regardless of a hydrologic connection between the groundwater and jurisdictional surface water.

Five months after the Interpretive Statement was released, and before the Court acted on the petition for writ of *certiorari* in the *Tennessee Clean Water Network* case, the parties moved to dismiss the petition. The petition was dismissed on September 23, 2019.

During this same time, the Maui County Council approved a settlement with plaintiff-respondents. Council Chair, Kelley King, requested the County Corporation Counsel to execute the settlement agreement and take all necessary action to withdraw the petition. County Corporation Counsel responded to the Council Chair, noting that Maui's Mayor, Michael Victorino, must agree to withdraw the petition, which he refused to do.

Counsel for respondent Earthjustice filed a letter notifying the Supreme Court of the County Council's approval of the resolution approving the settlement on October 3, 2019. The next day, Maui's counsel of record submitted a letter to the Court, stating that the case had not settled because the Mayor did not agree to settle the case or withdraw the petition.

On October 9, 2019, Council Chair King filed a letter with the Court clerk informing the Court of the settlement, setting out the Council's position that the Maui County Charter grants it authority to settle and dismiss lawsuits, and requesting that the Court dismiss the petition or postpone argument until the dispute between the Mayor and Council is resolved.

In a letter also dated October 9, 2019, and submitted to the Court on October 10, 2019, Corporation Counsel apologized to the Court for King's letter requesting dismissal, asserted that as Corporation Counsel she is the "chief legal advisor and legal representative of the County," and stating that the County is not requesting a delay or dismissal.

On October 18, 2019, Mayor Victorino issued a statement explaining that he has decided not exercise his authority to settle the case because of the "staggering costs of retrofitting treatment plants," and that he believes a decision from the Court is needed to clarify the issue "once and for all" in order to avoid endlessly relitigating the dispute at taxpayers' expense.

On October 29, 2019, the County Council is set to consider a resolution to hire special counsel to resolve the County Charter interpretation dispute.

Conclusion and Implications

Wow. The dispute over the scope of a local government's charter under state law may affect whether the U.S. Supreme Court weighs in on a matter of national significance. The Supreme Court has stated its belief that:

> . . .post-*certiorari* maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye.

No matter the outcome of the dispute, the petition for *certiorari* in the *Tennessee Clean Water Network* case remains pending. Thus, there is a good chance the Court may issue an opinion resolving "once and for all" the applicability of the Clean Water Act to discharges via nonpoint sources, such as groundwater. For more information, *see:* https://www.supremecourt.gov/docket/docketfiles/html/public/18-260.html
(Dakotah Benjamin, Rebecca Andrews)

JUDICIAL DEVELOPMENTS

ELEVENTH CIRCUIT AFFIRMS EPA'S BROAD DISCRETION ON REVOKING STATE CLEAN WATER ACT NPDES PERMITTING SYSTEM

Cahaba Riverkeeper et al. v. U.S. Environmental Protection Agency, 938 F.3d 1157 (11th Cir. 2019).

On September 12, 2019, the Eleventh Circuit Court of Appeals ruled that the U.S. Environmental Protection Agency (EPA) has discretion to determine whether to revoke Alabama's authorized status under the federal Clean Water Act's National Pollutant Discharge Elimination System (NPDES) program. Because the EPA's determination was deemed neither arbitrary nor capricious, the Court of Appeals upheld its determination not to revoke the state's approval.

Factual and Procedural Background

Under the federal Clean Water Act (CWA), the EPA is permitted to authorize states to implement the NPDES requirements under state law. To allow a state to operate its own NPDES program, EPA must confirm that the state follows the CWA requirements and, at a minimum: 1) provides adequate public notice of certain actions, including notice of discharges, 2) has capable board members, 3) has the ability to inspect major dischargers, and 4) enforces regulations. The EPA is allowed to withdraw its approval of a state program if the state does not adequately implement the regulations described in the CWA after the EPA has provided opportunities to correct deficiencies. The question in this appeal is whether the EPA *must* withdraw approval if the state has been repeatedly out of compliance with the relevant federal law.

In 1979, the EPA approved the Alabama Department of Environmental Management's (ADEM) plans to implement the NPDES permitting program within Alabama. On January 14, 2010, fourteen environmental groups petitioned the EPA to end ADEM's approved status due to twenty-six statutory and regulatory violations. On April 9, 2014, the EPA responded to twenty of the alleged violations and deferred decision on the remaining six. Seven of the original environmental groups appealed this interim response and the court dismissed the appeal with prejudice since the appeal was not ripe. The court determined the decision could only be challenged once the EPA responded to all of the violations.

On January 11, 2017, the EPA issued its final response to the remaining six petitions. The EPA affirmed its previous decision and determined that the revocation of ADEM's authority was improper. The same seven environmental groups that appealed previously (petitioners) challenged this decision on the grounds that the EPA was required to initiate withdrawal proceedings based on the plain text of the CWA. Alternatively, the environmental groups argued that the decision to not commence withdrawal proceedings against Alabama was arbitrary and capricious given the NPDES violations.

The Eleventh Circuit's Decision

Before addressing the petitioners' substantive arguments, the court first noted that the EPA's decision on whether to begin withdrawal proceedings is a discretionary decision. It reasoned that the CWA does not impose any required method or specific time limits on the EPA. Judicial review of EPA's response to the withdrawal petition was limited to whether EPA reasonably exercised its discretion to refuse to commence withdrawal proceedings.

Petitioners argued that four violations of EPA's regulations obligated EPA to withdraw ADEM's approved status. The court disagreed on all four points.

Discharge Notices

First, the petitioners argued that the discharge notices required prior to issuing a NPDES permit were insufficient because they did not describe the proposed discharge points. Before issuing an NPDES permit, ADEM was required publish a notice within the area affected by the facility or activity, which

included, among other information, a general description of the location of each existing or proposed discharge point and the name of the receiving water. Instead, the newspaper notice provided a website that provided the required information. The EPA determined that ADEM substantially complied with federal regulations relating to notice but "encourage[d] ADEM to supplement its public notices with more specific notification." Because the court already determined that the EPA was not required to implement withdrawal proceedings, the agency was allowed to act within its discretion. The court concluded EPA's response to ADEM's discharge notices was not impermissibly arbitrary.

Board Conflicts

Second, the petitioners argued that the method of handling board conflicts was impermissible. The CWA prohibits certain conflicts of interests on boards and bodies that approve permit applications but is unclear on whether certain conflicts prohibit membership on the state board or require recusal in relevant circumstances. Alabama implemented a board recusal system that was approved by the EPA. Petitioners argued the recusal system was impermissible because conflicts should preclude board membership. Because the statute was ambiguous, the court determined that the approval of the board recusal system was permissible. Therefore, the EPA's decision not to implement withdrawal proceedings was not capricious.

Annual Inspections

Third, the petitioners also argued that ADEM did not comply with the annual inspection requirements. The CWA requires state NPDES programs to have the procedures and ability to annually monitor the major discharge facilities. The petitioners argued that the state did not have the means to monitor facilities because the state moved the allocated resources to other areas. The court reasoned that there was no proof that the resources could not be returned to perform the inspections if they became required. The state theoretically had the capability to do inspections. Thus, the EPA's decision not to commence withdrawal proceedings was reasonable.

Lawsuit Limitations

Finally, the petitioners argued that the state program was impermissible because the sovereign immunity established by the Alabama Constitution prevented ADEM from using its state agencies or entities. Federal regulations require a state to be able to assess or sue to recover civil penalties and to seek criminal remedies for violations of the Act or a discharge permit. Petitioners claimed that because ADEM could not sue state agencies, recovery for any harm caused by the state was impossible. The court determined that Congress did not explicitly require the states to waive sovereign immunity, which allowed the EPA to determine if waiver was necessary. On balance, the court determined that requiring this waiver would raise a variety of constitutional problems. Thus, EPA's decision to permit Alabama to retain sovereign immunity was not arbitrary or capricious.

Conclusion and Implications

In this case of first impression, the Eleventh Circuit has articulated a clear position that the EPA has discretion on whether to commence withdrawal proceedings for an authorized state. Thus, the EPA may allow authorized state programs to remedy violations of the Clean Water Act so long as the decision is not arbitrary, capricious, or otherwise a violation of law. It remains to be seen what violations could mandate a withdrawal proceeding by the EPA. The court's decision is available online at:
http://media.ca11.uscourts.gov/opinions/pub/files/201711972.pdf
(Anya Kwan, Rebecca Andrews)

DISTRICT COURT HOLDS EPA'S WITHDRAWAL OF OBJECTIONS TO STATE-ADMINISTERED SECTION 404 PERMIT APPLICATION IS NOT FINAL AGENCY FOR APA CHALLENGE

Coalition to Save the Menominee River Inc. v. U.S. Environmental Protection Agency, ___F.Supp.3d___, Case No. 18-C-1798 (E.D. Wisc. Oct. 21, 2019).

Michigan, one of two states with a Section 404 Clean Water Act permit program, approved a mining permit following resolution of objections from the U.S. Environmental Protection Agency (EPA). An environmental group sued, claiming EPA's withdrawal of its objections was a reviewable agency action. The U.S. District Court for the Eastern District of Wisconsin concluded that the 1984 approval of Michigan's state-administered Section 404 permit program was the only final agency action at issue, and that action was well outside the six-year limitations period under the Administrative Procedure Act.

Background

The Clean Water Act (33 U.S.C. § 1251 *et seq.*, the CWA) "generally prohibits the discharge of pollutants into navigable waters without a permit." 33 U.S.C. § 1311(a). The U.S. Army Corps of Engineers (Corps) administers the CWA Section 404 permit program, which authorizes the issuance of Section 404 permits for the discharge of dredged or fill material into navigable waters. 33 U.S.C. § 1344(a). EPA:

> . . .retains oversight of the Section 404 permitting program and may veto the Corps' approval of a permit when the dredged or fill material would have 'an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas. . ., wildlife, or recreational areas.' 33 U.S.C. § 1344(c).

States may obtain EPA's permission to administer a state-specific CWA:

> . . .individual and general permit program for the discharge of dredged or fill material into 'navigable waters. . .other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce. . .including wetlands adjacent thereto.' 33 U.S.C. § 1344(g)(1).

On EPA approval of a state-administered Section 404 permitting program:

> . . .the federal permit program is suspended, except for those waters exempted from the assumption, and the state assumes jurisdiction over the permitting process. [33 U.S.C.] § 1344(h). . . .Even though the federal program is suspended, the federal government acts as an overseer of the state's process by reviewing any action the state takes with respect to Section 404 permits. [33 U.S.C.] § 1344(j).

Under state-administered Section 404 programs, EPA and the Corps are provided with a copy of every permit application and the proposed state-issued Section 404 permit:

> If the EPA intends to comment on the state's handling of the application, it must notify the state within 30 days of its intent to do so.

Any federal agency comments on the proposed permit must be sent, by EPA, to the state within 90 days. 33 U.S.C. § 1344(j).

> Once a state receives notice that the EPA intends to comment on the application, the state may not issue a permit until it has received the EPA's comments or the 90-day commenting period has passed. The EPA may also request that the state submit additional information that it determines is necessary for its review.

A state is not allowed to issue a Section 404 permit until EPA's objections have resolved, or a public hearing is held. *Ibid.* If the state takes no action following receipt of EPA objections, permitting authority

returns to the Corps; "at that time, the Corps conducts its own analysis of the permit application. *See* 40 C.F.R. § 233.50(i)":

> Only Michigan and New Jersey have been federally approved to administer Section 404 permit procedures. The EPA approved Michigan's Section 404 permit program in 1984, after the Corps entered into a Memorandum of Agreement (MOA) with the State of Michigan on April 3, 1984. *See* 49 Fed. Reg. 38,947 (Oct. 2, 1984).

Aquila Resources, Inc., first applied to Michigan's Department of Environmental Quality (MDEQ) in November of 2015, seeking a Section 404 permit to build a polymetallic zinc, copper, and gold mine, referred to as the Back Forty Mine, along the Menominee River in Menominee County, Michigan. After some back-and-forth between Aquila and MDEQ, in December 2017 MDEQ declared Aquila's Section 404 application:

> . . .administratively complete, scheduled a public hearing on the permit application, and provided the EPA with a copy of the Section 404 permit application.

EPA, in turn, provided several rounds of comments on the permit application, to which both Aquila and MDEQ responded. Ultimately, in June 2018 EPA stated that MDEQ's proposed permit conditions "resolved its objections" and MDEQ issued the permit. Plaintiff environmental group sued, challenging MDEQ's permitting authority as an:

> . . .as-applied challenge under the Administrative Procedure Act …. which 'must rest on final agency action under the APA,' taken within six years of the filing of the complaint. Quoting *Nat'l Wildlife Fed'n v. EPA*, 945 F.Supp.2d 39, 43 (D.D.C. 2013).

The District Court's Decision

Final Agency Action

The District Court first rejected plaintiff's argument that the 1984 MOA authorizing Michigan's Section 404 permitting program was not a final agency action outside the six-year APA limitations period. Per plaintiff, the MOA:

> . . .reflects a federal agency opinion that certain stretches of the River were not within Michigan's assumed authority, but that is a far cry from being a final decision that all the remaining parts of the River were within Michigan's authority.

That argument failed because the District Court found that the plain terms of the MOA "determined that Michigan has permitting authority, under Section 404, over all the waters in the state other than those listed" in an attachment to the MOA. The court found that:

> Accordingly, when the EPA approved Michigan's permitting program in 1984, the EPA made a final decision that Michigan would assume permitting authority over the portion of the Menominee River at issue in this case.

'Tacit Jurisdictional Determination'

Next, the court tackled plaintiff's contention that EPA's 2018 statement that its objections to MDEQ's issuance of the permit had been resolved was a "tacit jurisdictional determination" and thus a final agency action subject to review under *United States Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016). In *Hawkes*, the U.S. Supreme Court held Corps approval of jurisdictional determinations are final agency actions triggering the APA six-year limitations period because they "have direct and appreciable legal consequences":

> [U]nder the applicable statutes and regulations, a negative jurisdictional determination binds the Corps and the EPA to a determination that the parcel lacks federally-regulated waters or that the parcel contains such waters. In addition, if the petitioner failed to heed the jurisdictional determination, it did so at the risk of significant criminal and civil consequences.

The District Court cited with approval various Circuit authorities holding that "EPA objections are not final agency actions." *E.g.*, *Marquette Cty. Road*

Comm'n v. United States E.P.A., 726 F. App'x 461, 467 (6th Cir. 2018); *Friends of Crystal River v. United States E.P.A.*, 35 F.3d 1073, 1079 (6th Cir. 1994); *Am. Paper Inst. v. United States E.P.A.*, 890 F.2d 869 (7th Cir. 1989) (addressing NPDES permit program); *Champion Int'l Corp. v. United States E.P.A.*, 850 F.2d 182 (4th Cir. 1988). Consistent with these authorities, the court held that EPA's participation in MDEQ's Section 404 permit process "merely reiterate[d] or affirm[ed] an earlier agency decision," *i.e.*, the 1984 MOA, "and [did] not affect the rights or alter the status quo of the complaining party," and thus is not a final agency action. Quoting *Harris v. FAA*, 215 F. Supp. 2d 209, 213 (D.D.C. 2002).

In the end, the court found that EPA's objections did not reflect the consummation of a decision-making process; instead, the EPA's decision to object to the permit application, rather than assume primary authority over the permit, merely reflects the fact that Michigan had already assumed permitting authority over the Menominee River in 1984. The EPA simply followed the requirements of the 1984 MOA, and the permitting process continued as directed by statute.

Conclusion and Implications

Given that EPA's participation in the state-administered Section 404 permit process did result in substantive changes to the permit that was eventually issued, plaintiff's position in this case is not without logical force. Nonetheless, it remains the better view that the withdrawal of objections by a commenting agency does not constitute final agency action under the APA.
(Deborah Quick)

CALIFORNIA COURT OF APPEAL FINDS STATE ENVIRONMENTAL CHALLENGE TO HYDROELECTRIC DAM RELICENSING PROCESS IS PREEMPTED BY FEDERAL POWER ACT

County of Butte v. Department of Water Resources, 39 Cal.App.5th 708 (Cal.App. 2019).

Plaintiffs filed suit against the California Department of Water Resources (DWR) and others, alleging a failure to comply with the California Environmental Quality Act (CEQA) as part of a federal relicensing application to operate a hydroelectric dam. The Superior Court dismissed the complaint and the Court of Appeal affirmed. After the California Supreme Court granted the petition and transferred the case to the Court of Appeal with directions to reconsider the case in light of *Friends of the Eel River v. North Coast Railroad Authority*, 3 Cal.5th 677 (2017), the Court of Appeal found *Friends of the Eel River* to be distinguishable and re-affirmed.

Factual and Procedural Background

DWR applied to the Federal Energy Regulatory Commission (FERC) to extend its federal license to operate the Oroville Dam and related facilities as a hydroelectric dam. The Oroville hydroelectric facilities are operated for power generation, water quality improvement in the Sacramento–San Joaquin Delta, recreation, fish and wildlife enhancement, and flood management. In connection with this process, DWR filed a programmatic Environmental Impact Report (EIR) as the lead agency pursuant to CEQA.

Under the Federal Power Act (FPA), federal and state licensing procedures are merged into a single procedure called an "alternative license process" (ALP), which combines the federal and state environmental review processes into a single process by which affected parties, federal and state agencies, local entities, and affected private parties agree to the terms of relicensing in a final "settlement agreement." The purpose of this process is to resolve all issues that have or could have been raised by the various participating parties in connection with FERC's order issuing a new project license. The settlement agreement then incorporates these requirements in to the license as condition of the license.

Here, some 52 parties including the plaintiffs and the Department of the Interior, representing all interested federal agencies, participated in the alternative license process. Plaintiffs, however, withdrew as parties and instead challenged the sufficiency of the EIR in state court, seeking to enjoin the issuance of an extended license until their environmental claims were reviewed. The Superior Court denied the petition on grounds that the environmental claims were speculative, and the Court of Appeal then held that the authority to review the EIR was preempted by the FPA, and that the superior court therefore lacked subject matter jurisdiction.

Plaintiffs petitioned for review to the California Supreme Court. Review was granted, and the matter ultimately was transferred back to the Court of Appeal with directions to reconsider the case in light of the Supreme Court's recent opinion in *Friends of the Eel River*. This opinion then followed.

The Court of Appeal's Decision

Federal Preemption

The Fifth District Court of Appeal began its analysis with a discussion of federal preemption principles. Generally, the FPA occupies the field of licensing a hydroelectric dam and bars environmental review of the federal licensing procedure in the state courts. The reason is that "a dual final authority with a duplicate system of state permits and federal licenses required for each project would be unworkable."

The only relevant exception is § 401 of the federal Clean Water Act, which requires the State Water Resources Control Board to issue a water quality certificate pursuant to § 401 of the Clean Water Act and the state Porter-Cologne Act before a FERC can issue a license to DWR. Preparation and certification of an EIR is required in connection with this process, although the FPA places various time limits and constraints on the state's power under § 401. However, any disputes regarding the FERC licensing process or the adequacy of "required studies" are generally subject to FERC's jurisdiction and review.

Federal Court Jurisdiction

After analyzing preemption, the Court of Appeal concluded that plaintiffs could not challenge the environmental sufficiency of the environmental review studies for the relicensing in state court because jurisdiction to review the matter lies with FERC, and plaintiffs did not seek federal review as required by 18 Code of Federal Regulations part 4.34(i)(6)(vii). Further, the plaintiffs did not challenge and could not have challenged the State Water Resources Control Board's certification in their pleadings because it did not exist at the time that the complaint was filed.

Analysis under *Friends of the Eel River*

As directed, the Court of Appeal then reviewed *Friends of the Eel River* and found that the Interstate Commerce Commission Termination Act (ICCTA), which was at issue in that case, is materially distinguishable from the FPA. The specific question in *Friends of the Eel River* was whether ICCTA preempted application of CEQA to a project to resume freight service on a stretch of rail line owned by the North Coast Railroad Authority. The California Legislature had created the North Coast Railroad Authority and gave it power to acquire property and operate a railroad, to be owned by a subsidiary of the state. For this reason, the California Supreme Court found that the purpose of the federal law was deregulatory, and the state as the owner of the railroad was granted autonomy to apply its environmental law. Unlike in this case, federal law therefore did not preempt the application of CEQA to the railroad.

Conclusion and Implications

The case is significant because it is an example of federal preemption being applied in the context of CEQA and it distinguishes the California's Supreme Court's recent decision in *Friends of the Eel River v. North Coast Railroad Authority*. The decision is available online at: https://www.courts.ca.gov/opinions/documents/C071785A.PDF.
(James Purvis)

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