

# WESTERN WATER LAW™

## & POLICY REPORTER

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## FEATURE ARTICLE

WEED, WATERS AND WILDLIFE: ENVIRONMENTAL PERMITTING  
OF CANNABIS CULTIVATION IN CALIFORNIA—  
PART 1: FISH AND GAME PERMITTING

By Clark Morrison

This article is the first of a two-part series describing California's environmental regulatory structure for cannabis cultivation as implemented by the California Department of Fish and Wildlife (the Department, or CDFW) and the State Water Resources Control Board (SWRCB).

In part 1, the author provides a brief introduction to Proposition 64's environmental requirements as subsequently codified by the California Legislature through the passage of Senate Bill 94. Following this introduction, the author describes the Department's regulations under §§ 1602 and 1617 of the Fish and Game Code (lake and streambed alterations), which code provisions were amended or adopted by SB 94 specifically to address cannabis cultivation.

In the second part of this article, to follow in a subsequent issue, the author will discuss the cannabis policy and permitting requirements adopted by the SWRCB to implement the directives of Proposition 64 and SB 94.

### Introduction

Last year, the California Department of Fish and Wildlife published a report entitled, *A Review of the Potential Impacts of Cannabis Cultivation on Fish and Wildlife Resources* (July 2018). The Department's report identified a variety of environmental challenges related to the production of cannabis, including the direct and indirect impacts of pesticides and rodenticides on wildlife; water diversion impacts on flow regimes (including dewatering) and water quality; the impacts of dams and stream crossings; the delivery of pollutants; terrestrial impacts associated with site development, use and maintenance (including road

use, noise and artificial lighting); and health hazards to wildlife from the ingestion of crops.

The Department's findings were neither new nor surprising. California's regulatory agencies had long known that unregulated grows were affecting water quality, and fish and wildlife habitat, in areas of the state where cultivation was most concentrated. Accordingly, when Proposition 64 was crafted for consideration by California voters in 2016, significant funding was included for three conservation priorities: the restoration of watersheds and habitat damaged by cultivation; improved management of state parks and wildlife areas to minimize future degradation; and the enforcement of environmental laws that had hitherto been largely unenforced. According to the Conservation Strategy Group, Proposition 64 initially was expected to generate up to \$200 million year for these purposes.

In 2017, Proposition 64 was codified through the passage SB 94. The law includes a number of provisions calling upon the state's environmental agencies, particularly the Department and the SWRCB to develop programs for the regulation of cannabis cultivation. In particular, the law requires the California Department of Food and Agriculture (CDFA) to include in any license for cultivation conditions requested by the Department or the SWRCB to:

- Ensure that the effects of diversion and discharge associated with cultivation do not affect the instream flows needed for fish spawning, migration and rearing, and the flows needed to maintain natural flow variability;

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- Ensure that cultivation does not negatively impact springs, riparian habitat, wetlands or aquatic habitat; and
- Otherwise protect fish, wildlife, fish and wildlife habitat, and water quality.

The law further directs CDFA, in consultation with the SWRCB and the Department, to implement a program for the issuance of unique identifiers to be attached to the base of marijuana plants grown under a state license. In implementing the program, CDFA is required to consider issues such as water use and environmental impacts, including 1) flows needed for fish spawning, migration and rearing, and the flows needed to maintain natural flow variability and 2) impacts on springs, riparian wetlands and aquatic habitats. If a watershed cannot support additional cultivation, no new plant identifiers may be issued for that watershed.

With respect to the SWRCB and the Regional Water Quality Control Boards (RWQCBs) specifically, the law amended § 13276 of the Water Code to authorize the SWRCB and direct the RWQCBs to address discharges of waste from cultivation, including by adopting a general permit, establishing waste discharge requirements or taking action under Water Code § 13269. In so doing, the water boards must include conditions addressing a dozen different considerations including, for example, riparian and wetland protection, water storage and use, fertilizers, pesticides and herbicides, petroleum and other chemicals, cultivation-related waste and refuse and human waste. The water boards' programs to implement these requirements, and SB 94's requirements relating to water rights, will be addressed in Part II of this article.

With respect to the Department, the law amended certain provisions of the Fish and Game Code governing the diversion of water from, and certain alterations and discharges to, rivers, streams and lakes in California. These provisions, and the Department's implementation of them, are further described below.

Finally, the law directs the Department and the SWRCB to prioritize the enforcement of environmental laws governing cannabis cultivation, and establishes steep penalties (including imprisonment) on those whose activities violate various provisions of, among other statutes, the Water Code (§ 1052

regarding diversions or §§ 13260, 13264, 13272, or 13387 regarding waste discharges) or the Fish and Game Code (§§ 5650 or 5652 regarding discharges of waste or, § 1602 regarding streambed alterations, § 2080 regarding listed species and § 3513 regarding migratory birds).

### **The Department of Fish and Wildlife's Lake and Streambed Alteration Program**

SB 94 supplemented the Department's existing authority under § 1602 of the Fish and Game Code to issue "Lake and Streambed Alteration Agreements" for certain activities affecting rivers, streams and lake (*i.e.*, water diversions, modifications to bed and bank, certain deposits of waste). The Department's lake and streambed alteration program is one of California's original environmental regulatory structures, hailing from the days of the gold rush.

Under the statute, an "entity" (*i.e.*, permittee) intending to engage in a potentially regulated activity provides a "notification" to the Department. Upon receipt, the Department evaluates whether the activity is covered by § 1602 and, if it is, recommends a set of reasonable measures to protect fish and wildlife resources. Those measures are set forth in a draft Lake and Streambed Alteration Agreement (LSAA) delivered to the permittee, who then has the opportunity to objection to one or more of those measures and negotiate a final agreement with the Department. If the Department and permittee cannot resolve their differences, the matter is submitted to binding arbitration.

The LSAA process is generally fairly quick. The Department has 30 days to determine if a notification is complete and, if it is, 60 days to issue a draft agreement. In many cases the Department will simply decline to act within the 60-day period, in which case the proposed activity becomes authorized as a matter of law. LSAs can be authorized for individual projects or in the form of long-term, programmatic agreements that might cover a complex or multi-phase project.

### **SB 94 Requirements Regarding LSAs**

Under SB 94, any cultivation license must contain a condition that it not become effective until the licensee has demonstrated compliance with § 1602 or receives written verification from the Department

that an LSAA is not required. Given the potential deluge of LSAA applications expected to swamp the Department as a result, even the efficiencies associated with the 1600 process were not expected to be sufficient to implement this requirement. Accordingly, the law amended to Fish and Game Code to further streamline the process.

First, it amended § 1602 to exempt any permittee from the need to secure an LSAA if, following notification and the payment of fees, the Department determines that conditions contained in the license in accordance with the Department’s recommendations as described above (and codified at § 26060.1 of the Business and Professions Code) “will adequately protect existing fish and wildlife resources that may be substantially adversely affected by the cultivation without the need for additional measures” that would ordinarily be included in an LSAA. This process is described by the Department as “self-certification.” Where this occurs, any failure to comply with the CDFA’s license conditions will constitute a violation of the Fish and Game Code.

Second, SB 94 added a new § 1617 to the Fish and Game Code, allowing the Department to adopt a “general” LSAA (referred to as the “General Agreement”) authorizing certain cannabis cultivation activities on an essentially automatic basis. As more fully described below, a permittee secures this coverage by submitting to the Department information to the Department demonstrating that the proposed project qualifies for coverage, and the Department issues its authorization on a perfunctory, non-discretionary basis. There is no need for a specific LSAA for the activities proposed. Under the General Agreement, however, there is no opportunity for a permittee to object to the required fish and wildlife protections or to arbitrate any disagreement with the Department.

**The General Agreement**

On January 2, 2018, the Department, acting on an emergency basis (as authorized by SB 94), added § 722 to the Department’s existing regulations in Title 14 of the California Code of Regulations. Section 722 constitutes the the General Agreement authorized by the Legislature.

Although coverage under the General Agreement is more or less automatic, compliance is anything but simple. Anyone wishing to pursue authorization

under the General Agreement must certify that he or she will comply with an exhaustive and detailed list of environmental protections. These are described below. Notably, neither § 1617 nor § 722 include any requirement for compensatory mitigation in the form of conservation easements or other tools typically required under § 1600, the California Endangered Species Act (CESA) and other state regulatory programs.

The General Agreement covers certain construction projects as well as certain water diversions associated with cannabis cultivation, including the planting, growing, harvesting, drying, curing, grading or trimming of cannabis. In particular, the General Agreement covers: 1) the construction, reconstruction, maintenance or repair of a bridge, culvert or rock ford in or over a stream or river, including all fill material within the crossing “prism”; and 2) water diversions on *nonfish* rivers, streams, and lakes where such diversions are used or will be used for the purpose of cannabis cultivation. Covered diversions include diversions of either surface flow or hydrologically connected subsurface flow for use or storage, including all infrastructure used to divert or store the flow (e.g., rock dams, excavation pools in fast-moving water, and wells).

For an activity to be eligible for coverage, the permittee must certify to the Department that the proposed activity: 1) will meet certain design criteria and other requirements described in § 722, 2) will not occur on or in a “finfish” (i.e., inhabited by any species of bony fish) stream or lake, and 3) is not already the subject of a complaint by the Department or other law enforcement agency or any resulting court order; provided, however, that the General Agreement process may be used on an after-the-fact basis to permit prior unauthorized work.

The permittee must also certify that the activity will not result in the “take” of a species that is listed under the CESA, the Native Plant Protect Act (NPPA) or the Fish and Game Code’s provisions establishing statutory, “fully protected” status for certain species.

Section 722(e) establishes the Department’s required design criteria for bridges, culverts, rock fords and water diversions, respectively.

Bridges, for example, must be single span with abutments located outside of top of bank and the tops of any abutment footings located below the scour line; allow 100-year peak flows with one foot of

freeboard; and allow free passage of fish upstream and downstream. Culverts must be comprised of a single pipe constructed in a particular manner and sufficient to, among other things, convey or withstand a 100-year peak storm flow. Rock fords must be located in a stable stream reach with a coarse gravel and cobble streambed, oriented particular to the flow, designed and constructed to withstand multiple flow velocities, and must not impede fish passage.

The design criteria for water diversions are more complicated. Among other things, diversions may not exceed ten gallons per minute and must allow a minimum 50 percent of the flow to bypass the diversion. Water diverted to storage must not exceed five acre-feet per year, with storage facilities located off-stream and outside the 100-year floodplain.

In addition to these design criteria, any authorized structure must be constructed in a manner consistent with a number of general and specific measures to protect fish and wildlife resources, which are described more fully below.

### Applying for Coverage

To apply for coverage, a permittee must—in addition to paying certain fees and making the certifications described above—submit certain information to the Department (through the Department’s website at <https://wildlife.ca.gov/Conservation/LSA>) describing the identity of the permittee and the nature and location of the project. Following the submittal of that information, the Department notifies the permittee of the issuance of coverage.

Among the required information is a certification that the permittee has in his or her possession and will retain at the project site: 1) a detailed design plan prepared by a licensed engineer, geologist, land surveyor, professional forester or professional hydrologist, 2) a detailed a property diagram; and 3) a detailed biological resources assessment prepared by a qualified biologist. This information, as well certain other information such as any cannabis cultivation license issued by CDFA, must be presented upon request to CDFW employees upon request. CDFW employees are permitted access to any project site for inspection purposes—without notice—between 8 am or 5 pm or at other reasonable times as may be mutually agreed between the Department and the permittee.

### Biological Resource Assessment and Impact Avoidance

The biological resource assessment must identify the presence or potential presence of “Species of Greatest Conservation Need” (as listed in the State’s *Wildlife Action Plan*), rare or endangered species (as defined in § 15380 of the California Environmental Quality Act (CEQA) Guidelines), any finfish or their habitat, and any invasive species. In so doing, the biologist must rely on certain classification systems promulgated by the U.S. Department of Agriculture (USDA), the Department, the U.S. Geological Service (USGS), the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), respectively. Notably, the species covered by the biological resource assessment are somewhat different from those whose take is expressly prohibited under the terms of the General Permit.

Because the primary purpose of the Department’s LSAA program is to protect fish and wildlife resources, the General Permit establishes a long list of detailed measures to avoid and minimize impacts to those resources. These include the following:

- Seasonal restrictions on work within the bed, bank or channel (*i.e.*, June 15 to October 15 only) and dry-weather-only work requirements;
- Any wildlife encountered must not be disturbed or harmed;
- Disturbances to aquatic and riparian habitat must be minimized;
- Daily morning inspections of the project site for wildlife;
- Installation of overnight escape ramps in open trenches;
- Seasonal (*i.e.*, February 1 through August 31) focused surveys for nests and dens of birds and mammals, and the establishment of work buffers if any are found;
- Vegetation removal must be minimized and buffers established for any plant designated as a Species of Greatest Conservation Need;

- Implementation of measures to protect water flow and minimize turbidity, siltation and pollution.
- Prohibitions on the use of chemical herbicides and pesticides that are deleterious to fish, plants, birds or mammals where they may “pass into” any “waters of the State” as defined in § 89.1 of the Fish and Game Code);
- Implementation of a variety of erosion control measures throughout all work phases

Measures related to the storage or migration of toxic materials and hazardous substances

Invasive species controls, including prohibitions on the stocking of fish;

A variety of additional design requirements for all stream crossings, and also specifically for bridges, culverts, and water diversions.

Not surprisingly, the regulation includes significant reporting requirements, including a project comple-

tion report, water diversion and use reports, and reports on any observations of Species of Greatest Conservation Need (to be submitted to the Department’s Natural Diversity Database, *i.e.* CNDDDB). If a permittee fails to comply fully with the General Agreement, or if any activity undertaken by a person does not actually qualify for the General Agreement, the Department may take action, including suspension or revocation of the permittee’s authorization or the pursuit of formal enforcement.

### Conclusion and Implications

The Department’s cannabis program website: (<https://www.wildlife.ca.gov/Conservation/Cannabis#53534664-resources>) includes a number of helpful tools for the prospective permittee, including best management practices for watershed management and pesticide use, a compliance handbook issued by the Department’s North Coast region, frequently asked questions, and other materials. A review of the Department’s page for LSAs is also helpful. It is cited above.

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## LEGISLATIVE DEVELOPMENTS

### 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 Ser-

vice 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](https://www.fws.gov/endangered/improving_ESA/regulation-revisions.html)  
(James Purvis)

## OREGON DEQ’S REVISED WILLAMETTE BASIN MERCURY TOTAL MAXIMUM DAILY LOAD RULEMAKING HURTLES TOWARD COURT-ORDERED NOVEMBER 2019 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 Desig-

nated 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)

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**PENALTIES & SANCTIONS**

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**RECENT INVESTIGATIONS, SETTLEMENTS,  
PENALTIES AND SANCTIONS**

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

**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>.

- 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 Water Reuse 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. 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 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. 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. 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.

•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. 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**

•August 30, 2019—The U.S. Environmental Protection Agency announced a settlement with Safety-Kleen Systems, Inc., that resolved the company's alleged failure to properly report required information about six toxic chemicals it received at and transported from at a facility in Bridgeport. Under the settlement, Safety-Kleen will pay an \$82,000 penalty. The company has also come into compliance with federal Emergency Planning and Community Right-to-Know Act (EPCRA) issues that EPA raised in 2017. The Safety-Kleen facility in Bridgeport receives and transfers used motor oil for recycling. The facility also blends and receives windshield wiper fluid product containing methanol and receives antifreeze product containing ethylene glycol for distribution and collects used wastewater and waste antifreeze. The Bridgeport facility is in an area where environmental justice issues exist. Safety-Kleen failed to timely submit to EPA required forms for six chemicals for 2015 based on a miscalculation of full-time employees at the facility. After discussions with EPA, the facility filed the proper forms for 2015. Companies that meet certain criteria and use certain materials containing toxic chemicals must report each year how much of each toxic chemical is released to the environment and how much is managed through recycling, energy recovery and treatment, according to federal right to know laws. For more information on EPCRA, visit <https://www.epa.gov/epcra>.

•September 9, 2019—The U.S. Environmental Protection Agency has settled with two real estate companies for violating the federal Toxic Substances Control Act (TSCA) by failing to provide proper lead-based paint disclosure to buyers and renters of homes built before 1978 in Maui and the Big Island. Century 21 Homefinders of Hawaii in Hilo, and Coldwell Banker Island Properties of Kahului, Maui, are paying, collectively, a total of more than \$26,000 in penalties. The companies were cited under TSCA's lead-based paint Disclosure Rule, which applies to housing built before the residential use of lead-based

paint was banned in 1978. With this knowledge, potential homebuyers and tenants can make informed decisions about whether to buy or rent a specific residence. Century 21 Homefinders of Hawaii has agreed to pay a \$6,962 penalty to settle alleged disclosure violations. Coldwell Banker Island Properties paid a \$19,344 penalty in an earlier settlement. Both real estate companies have certified that they are presently in compliance with the requirement to provide prospective buyers and lessees with lead-based paint hazard disclosure information.

- 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.

### **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 thereaf-

ter. 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>. (Andre Monette)

## LAWSUITS FILED OR PENDING

### FISHING GROUPS AND TRIBES CHALLENGE BIOLOGICAL OPINION ON KLAMATH PROJECT OPERATIONS

On July 31, 2019 a coalition of environmental, fishing, and Native American groups (collectively: plaintiffs) filed suit against the U.S. Bureau of Reclamation (Bureau) and the National Marine Fisheries Services (NMFS). The plaintiffs challenged a recent Biological Opinion that governs how the Bureau manages Klamath River flows, including irrigation water and water for the protection of species including coho salmon. The lawsuit was filed by the Yurok Tribe, the Pacific Coast Federation of Fishermen's Associations and the Institute for Fisheries Resource, and generally claims the Biological Opinion is improper because it found no jeopardy to protected species and fails to require dilution flows in the event of disease outbreak among salmonids. [*Yurok Tribe, et. al. v. U.S. Bureau of Reclamation et. al.*, Case No. 3:19-cv-04405 (N.D. Cal.).]

#### Background

Congress authorized construction and development of the Klamath Project (Project) in 1905, and the Project includes over 185 miles of various diversions, canals, and pumping stations. The Project provides irrigation water to approximately 200,000 acres of agricultural land each year, as well as to four national wildlife refuges within its boundaries.

In 1997, NMFS listed the Southern Oregon Northern California coho (coho) as threatened under the federal Endangered Species Act (ESA). According to plaintiffs, the Bureau subsequently established a real-time program that could produce flows, including dilution flows, for species' benefits when infection rates for the parasite *Ceratonova Shasta* (*C. shasta*) were observed above certain thresholds. Water was made available for the flows from an Environmental Water Account (EWA), which is an amount of Klamath River water set aside to meet the needs of coho between March 1 and September 30.

In NMFS's subsequent May 2013 Biological Opinion (BiOp), it determined that a Project operations plan that would have covered the period of

2013-2023 would not jeopardize the species because it found that the plan would improve conditions for coho. The related 2013 Incidental Take Statement—the part of the BiOp that specifies the extent to which a proposed action may result in the incidental taking of a threatened or endangered species—set a take limit of 49 percent of annual juvenile coho outmigrating from the Shasta River, based on incidence of previously observed *C. shasta* infections. According to plaintiffs, *C. shasta* infection rates spiked in 2014 and 2015, and the District Court in response required water flows, including dilution flows, for disease management until formal reinitiated consultation completed.

On March 29, 2019, the Bureau and NMFS completed consultation, and issued a new BiOp (2019 BiOp) and Incidental Take Statement for the Bureau's Project operations for the 2019-2024 period (Plan). The 2019 BiOp concluded the Plan is not likely to jeopardize coho and established a take limit of the same 49 percent.

#### Plaintiffs' Allegations

By their action plaintiffs seek declaratory and injunctive relief under both the federal Endangered Species Act and the National Environmental Policy Act (NEPA).

#### Flawed No Jeopardy Conclusion

Specifically, the plaintiffs argue that NMFS' no-jeopardy conclusion for coho is flawed because it is improperly based on whether impacts will be reduced by the Project's operations instead of whether impacts will impede species' survival or recovery. Plaintiffs claim that minimum flows and surface flushing flows designed to reduce disease risks would not eliminate elevated risks from *C. shasta* observed during 2014 and 2015, or otherwise bring them into acceptable levels. Plaintiffs also claim NMFS did not assess whether the prior elevated infection rates will impede coho recovery.

## Discretionary Dilution Flows

According to plaintiffs, the Plan also improperly makes dilution flows discretionary and is contrary to NMFS' past findings and the best available science. Plaintiffs complain the Plan does not require dilution flows when C. shasta infection rates spike and that no water is set aside for such dilution flows. Plaintiffs further object that both the irrigation allocation and EWA allocation are locked in on April 1 of each year, without regard to whether hydrologic conditions later show that more EWA water is needed.

### 2019 Biological Opinion's Take Limit

Plaintiffs also assert the 2019 BiOp's limit on take is invalid. NMFS set the take limit at a maximum prevalence of mortality of 49 percent, which NMFS estimated would have been the highest on record. Plaintiffs assert that setting the take limit at the highest estimated C. shasta mortalities allows an unacceptably high level of take which could cause adverse population effects.

## The Environmental Assessment

Under NEPA, plaintiffs claim the Bureau's Environmental Assessment failed to compare the Plan to the prior court-ordered dilution flows. According to plaintiffs, the court ordered flows in 2014 and 2015 are a viable alternative to the Plan that should be analyzed.

## The Finding of No Significant Impacts

Plaintiffs also assert that the EA's Finding of No

Significant Impact is unlawfully based on a belief that conditions will improve under the Plan, as opposed to whether impacts will be insignificant. Plaintiffs claim that because the Bureau's 2019-2024 Plan may have significant adverse environmental impacts, an environmental impact statement must be prepared.

## Remedies Sought

By its action plaintiffs seek a declaration that the 2019 BiOp and the limits NMFS set for allowable take are arbitrary and capricious, and contrary to the ESA. Plaintiffs also seek a declaration that the Bureau's EA be set aside as arbitrary, capricious, and contrary to NEPA. Plaintiffs thus request the court vacate the 2019 BiOp and take limits, and instruct NMFS to reopen and complete reinitiated consultation. During the reinitiated consultation, plaintiffs seek to enjoin the Bureau to provide sufficient flows to prevent irreparable harm to species.

## Conclusion and Implications

As it stands, the current 2019 Biological Opinion will cover the Bureau operations on the Klamath River through 2024. However, conditions on the Klamath River could significantly change during this time period under a plan by the Klamath River Renewal Corp to remove four dams on the river. Such action requires its own Endangered Species Act and National Environmental Policy Act compliance and is pending approval by federal and state energy regulators. It remains to be seen how the court will evaluate the Bureau's 2019-2024 Plan in light of the potential for significant physical change on the river. (David E. Cameron, Meredith Nikkel)

## 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 ca-

pricious. 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's 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)

## U.S. 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

In 1972, Congress passed the CWA to restore and maintain the chemical, physical, and biological integrity of the nation’s waters. 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. Under the APA, agencies must publish notice of the proposed rulemaking, provide the substance of the proposed rule, and allow interested persons an opportunity to participate in the rulemaking by submitting comments. 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. The court noted that the prejudice was especially severe given the changes made to the Final Connectivity Report.

**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)

**COLORADO SUPREME COURT RULES THAT WATER COURT JURISDICTION DOES NOT EXTEND TO UNADJUDICATED WATER RIGHTS**

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

In a recent appeal, on September 9, 2019, the Colorado Supreme Court ruled that 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.

**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 Lusk 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](https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Opinions/2018/18SA215.pdf) (John Sittler, Paul Noto)

## IDAHO SUPREME COURT ISSUES COMPREHENSIVE DECISION REGARDING FEDERAL RESERVED WATER RIGHT CLAIMS CONCERNING THE COEUR D'ALENE TRIBE AND RESERVATION

*United States, et al. v. State of Idaho, et al.*, \_\_\_P.3d\_\_\_, Case Nos. 45381, 45382, 45383, and 45384 (Id. 2019).

On September 5, 2019, the Idaho Supreme Court affirmed in part, and reversed in part, a variety of District Court holdings regarding water rights claims filed by the United States on behalf of the Coeur d'Alene Tribe in the Coeur d'Alene—Spokane River Basin Adjudication (CSRBA). The commencement of the CSRBA came on the heels of the winding down of the much larger Snake River Basin Adjudication (SRBA) encompassing most of Idaho south and east of Lewiston in the Idaho panhandle. The Court's decision in *United States, et al. v. State of Idaho, et al.* is surprisingly comprehensive given the voluminous precedent developed during the 30-plus year SRBA and the federal reserved water rights claimed therein also involving tribal reservations.

### Nature of the Disputed Claims

The United States, acting as trustee for the Coeur d'Alene Tribe (Tribe) filed 353 water right claims in the CSRBA to fulfill the purposes of the Tribe's reservation (Reservation) created by Executive Order in 1873. The Tribe joined the litigation, and the water right claims were objected to by the State of Idaho and other private interests. The state's Fifth District Court bifurcated the claims proceedings, first addressing threshold claim entitlement issues before wading into claim quantification issues.

In short, the District Court allowed pursuit of reserved water rights for agriculture, fishing and hunting, and domestic purposes. It also allowed pursuit of minimum instream flows within Reservation boundaries, but disallowed such claims extending outside Reservation boundaries. The District Court also rejected tribal claims seeking a minimum lake level for Lake Coeur d'Alene. In terms of proposed priority, the District Court found a date of reservation (1873) priority for claims for consumptive uses of water, and a time immemorial priority for non-consumptive uses of water. The District Court further gradated priority dates for claims appurtenant to Reservation lands homesteaded by non-Indians, but that were later reacquired by the Tribe.

Broadly speaking, the District Court denied claims brought based on a "homeland purpose" theory and those based on "secondary" purposes (such as industrial commercial, aesthetic, and recreational uses). Instead, the District Court focused its claim allowance analysis on those claims related to the express purposes for which the Reservation was created. In this vein, the state and others argued that the only claims to which the Tribe were entitled were agriculturally-related irrigation claims and domestic claims, citing that the purpose of the Reservation was to facilitate the Tribe's transition to an agricultural-based economy. The District Court disagreed, finding that fishing and hunting-related water rights fell within the purposes of the Reservation. Ultimately, the Idaho Supreme Court held that the District Court did not go far enough, determining that the "homeland purpose" of the Reservation gave rise to additional water rights otherwise disallowed by the District Court (including some culled under the "secondary purpose" theory).

### The Idaho Supreme Court's Decision

#### Homeland Purpose

At the heart of the Idaho Supreme Court's decision is support and application of the "homeland purpose" theory governing the creation of the Reservation. Setting aside the parties' competing arguments over Reservation formation timing, Congressional ratification, and subsequent agreements and federal acts, the Court's decision concerning water right entitlements crystalized around the reservation language: "shall be held forever as Indian land and as homes for the [Tribe]."

Accordingly, while the Tribe was encouraged to transition from its aboriginal hunting and gathering ways to a more sedentary agrarian society, the "homeland purpose" of the Reservation and the water rights needed to support it were greater in purpose than irrigation and domestic uses alone.

Relying on precedent from the U.S. Supreme Court, the Ninth Circuit Court of Appeals, and the

Arizona and Montana supreme courts, the Idaho Supreme Court held that “homeland purpose” includes traditional hunting, fishing and gathering on-Reservation, in addition to more agrarian pursuits. The Idaho Supreme Court agreed that the “homeland purpose” must be liberally applied to promote the twin goals of “Indian self-determination and economic self-sufficiency,” goals engrafting traditional cultural uses of water resources and more modern, economically-developed uses. Consequently, the Court remanded the matter back to the District Court to include water right entitlements to reserved rights supporting domestic, agricultural, hunting and fishing, plant gathering, and cultural uses.

However, the Court’s remand was not without limits placed on broader tribal claims to off-Reservation instream flows and more present day/modern commercial and industrial uses.

### **Off Reservation Instream Flows**

Regarding off-Reservation instream flows claimed to support hunting and fishing opportunities on-Reservation, the Court affirmed the disallowance of such claims by operation of an 1889 agreement between the United States and the Tribe where the Tribe ceded original Reservation lands and resources through very broad language: “all right, title and claim which they now have, or ever had, to all lands in said Territories and elsewhere . . .” Thus, the Court found this language constituted a voluntary relinquishment of all rights and claims to off-Reservation lands, including off-Reservation water rights, even though those rights could/would arguably benefit/foster on-Reservation use and activities.

### **Modern Commercial and Industrial Water Right Claims**

Regarding more modern commercial and industrial water right claims, the Court confirmed disallowance of the same based on canons of treaty construction, including the importance of agriculture and tribal understandings at the time (1873) of the original reservation. In sum, hindsight is not 20/20, and Indian treaties are not interpreted through a modern lens; rather historical timing and perspective control.

### **Minimum Lake Level Claim**

Regarding the Tribe’s minimum lake level claim, the Court rejected that claim because the Reservation only touches a comparatively small sliver of Lake Coeur d’Alene. The Court found Congressional intent to understand that the Tribe would use the lake for a variety of homeland purposes, but not that it (the Tribe) would be the sole entity controlling overall uses and levels of the lake merely because the Reservation touches it (as opposed to encompassing it).

### **Conclusion and Implications**

Overall, the Court’s opinion touches on a number of issues, not all of which are discussed herein. But the Court’s focus on the “homeland purpose” is an interesting one in this, perhaps, more conservative state. For example, the Court disagreed with neighboring Wyoming precedent more narrowly applying reservation creation orders and treaties, and even some more restrictive holdings of the Ninth Circuit. What the forthcoming “quantification” proceedings will bring remains to be seen. The Idaho Supreme Court’s opinion is available online at: <https://isc.idaho.gov/opinions/45381.pdf> (Andrew J. Waldera)

## NEVADA SUPREME COURT MAY CONTINUE TO EXERCISE EQUITABLE POWERS OVER WATER RIGHTS MATTERS

*Wilson v. Happy Creek, Inc.*, 135 Nev.Adv.Op. 41 (Nev. 2019).

On September 12, 2019, the Nevada Supreme Court issued a decision that confirmed the authority of Nevada's District Courts to grant equitable relief when reviewing non-discretionary decisions of the Nevada State Engineer. The Court held that, even though the State Engineer has no discretion to restore the original priority date of a permit when rescinding its cancellation, a court may. *Happy Creek* followed a long line of Nevada cases that affirmed the courts' equitable powers to right perceived wrongs in statutory water rights matters, even where the legislature declined to grant the State Engineer authority to do so.

### Nevada's Permit Cancellation Statute

As in many other western states, a permit to appropriate water in Nevada is conditional. The permit holder must meet certain statutory deadlines for filing a proof of competition of the diversion works and proof of beneficial use (PBU) before the State Engineer will issue a water rights certificate. Failure of the permit holder to meet these deadlines or to timely seek an extension of time (EOT) requires the State Engineer to cancel the permit. Nev. Rev. Stat. §533.395(1); 533.410.

A permit holder may petition the State Engineer to review the cancellation, which after considering evidence, the State Engineer may affirm, modify or rescind. Nev. Rev. Stat. § 533.395(2). However, even if the State Engineer reinstates the cancelled permit, the State Engineer cannot restore the permit's original priority date. Rather, the State Engineer must assign as a new priority date the date on which the permit holder filed its petition to rescind the cancellation. Nev. Rev. Stat. §533.395(3). The statute does not afford the State Engineer any discretion on this point.

### Precedent for the Exercise of Equitable Powers Over Statutory Water Permits

The Nevada Supreme Court has a long line of precedent upholding the authority of the courts to

grant equitable relief in water cases. As noted by the Supreme Court:

. . . [a]lthough [the statute] provides that water permits 'shall' be cancelled by the State Engineer when a permittee fails to file proof of application of water to beneficial use, this directive does not affect the power of the District Court to grant equitable relief to a permittee when warranted. *Engelmann v. Westergard*, 647 P.2d 385, 387 (Nev. 1982).

Even where the State Engineer correctly cancelled a permit due to his statutory mandate, a court still has power to grant equitable relief to the permit holder to restore the permit. *See id.*, citing *Bailey v. State of Nevada*, 594 P.2d 734 (Nev. 1979); *State Engineer v. American Nat'l Ins. Co.*, 498 P.2d 1329, 1330 (Nev. 1972); *Donoghue v. Tonopah Oriental Mining Co.*, 198 P. 553 (Nev. 1921) [This is consistent with the Supreme Court's jurisprudence regarding equitable relief, generally, which broadly allowed a court to fashion equitable remedies when legal remedies "are not available or are inadequate."] *State Dep't of Health & Human Services, Div. of Pub. & Behavioral Health Med. Marijuana Establishment Program v. Samantha Inc.*, 407 P.3d 327, 329 (Nev. 2017) (quoting Richard J. Pierce Jr., *Administrative Law Treatise*, 1700, 1701 (5th ed. 2010)).

As recently as 2010, the Supreme Court had fashioned appropriate equitable remedies to address an error committed by the State Engineer. *See, Great Basin Water Network v. State Eng'r*, 234 P.3d 912, 920 (Nev. 2010).

### Factual and Procedural Background

The permit holder at issue in *Happy Creek* was a ranching and farming company that operates a ranch with 1,399 acres of deeded land and 855 irrigated acres. The groundwater irrigation rights for the ranch, totaling 3,063 acre-feet annually, had priority dates ranging from 1954 to 1990. They had been put to beneficial use and certificated under Nevada's statutory procedures. The ranch enlisted the help of a

licensed water rights surveyor to serve as its agent to handle all its filings with the State Engineer.

To use its water more efficiently, Happy Creek decided in 2007 to convert from flood irrigation to a center-pivot irrigation system. To effectuate this conversion, the ranch—through its agent—filed applications to change the place of use for the ranch’s certificated groundwater rights, as required under Nevada’s statutes. *See*, Nev. Rev. Stat. § 533.325. The State Engineer approved the change applications and set an April 29, 2012 deadline for Happy Creek to file PBUs.

Happy Creek spent almost \$1 million and several years upgrading its water system. The PBUs required Happy Creek to submit meter readings for 12 consecutive months. Though the conversion work was complete, each year one or more of the totalizing flow meters on the irrigation wells failed, resulting in incomplete data. As a result, Happy Creek’s agent filed, and the State Engineer granted, EOTs for Happy Creek to file its PBUs. *See*, Nev. Rev. Stat. § 533.380(3), 533.410.

On May 19, 2016, the State Engineer mailed Happy Creek notice that it needed to file the PBUs (or EOTs) within 30 days to avoid cancellation of the permits. Happy Creek received the notice on May 23, 2016, and emailed it that same day to its agent, but the agent accidentally missed the deadline, realizing his mistake shortly thereafter. As mandated by statute, the State Engineer cancelled Happy Creek’s permits.

Happy Creek petitioned for review of the cancellation, and the State Engineer reinstated the permits. However, because he was statutorily barred from doing so, the State Engineer did not restore the permits’ original priority dates. Instead, as required by statute, he made the new priority date the date on which Happy Creek filed its petition.

Happy Creek sought judicial review and equitable relief. The state District Court agreed with Happy Creek, concluding that based on these facts, equity demanded that the permits retain their senior priority dates. The State Engineer appealed.

### **The Supreme Court’s Decision**

On appeal, the State Engineer contended that the Nevada Supreme Court’s precedent was no longer good law because the core cases addressed a pre-1981 version of Nev. Rev. Stat. § 533.395, which made

no provision for the State Engineer to review permit cancellation cases. The Court disagreed, concluding that “neither the text nor the legislative history of the 1981 amendments” implicitly terminated the courts’ authority to grant equitable relief. The Court emphasized that a:

. . . court’s exercise of its equitable authority to revise priority date changes mandated by NRS 533.395(3) differs fundamentally from its differential review of the State Engineer’s discretionary decision to affirm, modify, or rescind a cancellation.

The Nevada Legislature, the Court reasoned, did nothing to limit the equitable jurisdiction of the courts.

Evaluating the facts, the Court determined that equitable relief in this case improved: 1) efficiency of Nevada’s water laws; 2) sustainability of the resource; 3) fairness; and 4) clarity in the law and was therefore warranted. It affirmed the District Court’s decision.

### **The Dissent**

*Happy Creek* contained a scathing dissent from two justices. The dissenters opined that the Court’s precedent was distinguishable and that the 1981 statutory amendment rendered that precedent inapplicable now. They also disagreed with the majority’s conclusion that equitable relief was justified in this case.

### **Conclusion and Implications**

This case reconfirms the powers of the courts to provide equitable relief where Nevada’s water statutes create draconian results. It implicates separation of powers issues, holding that, even where the Legislature has declined to give the State Engineer the authority act, the courts may step in. A single ranch can have numerous water permits, each with its associated filing deadlines. The paperwork can be onerous, and it is not uncommon for deadlines to be overlooked. Where a priority date can mean everything to the long-term sustainability of a ranch in a state such as Nevada where water is scarce, *Happy Creek* gives permit holders comfort that inadvertent mistakes will not have devastating implications. For more information on the case and decision, *see*, <http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=44498> (Debbie Leonard)

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