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FEATURE ARTICLE

WEED, WATERS AND WILDLIFE: THE ENVIRONMENTAL PERMITTING OF CANNABIS CULTIVATION IN CALIFORNIA—PART 2: STATE WATER RESOURCES CONTROL BOARD PERMITTING

By Clark Morrison, Esq. and Morgan Gallagher, Esq.

This article is the second of a two-part series describing California’s environmental regulatory structure for cannabis cultivation as implemented by the California Department of Fish and Wildlife (Department) and the State Water Resources Control Board (SWRCB). Part 1 addressed the Department’s permitting program for cannabis cultivation. This part addresses the requirements of the SWRCB.

Introduction

As discussed in Part I of this series, California’s legalization measure, the Adult Use of Marijuana Act (AUMA), or Proposition 64, was passed in 2016. In 2017, the Legislature Passed Senate Bill (SB) 94, which integrated AUMA with the state’s existing Medical Cannabis Regulation and Safety Act (MCRSA) to establish a single regulatory system to govern both medicinal and adult-use cannabis in California. These measures include a number of provisions calling on the State’s environmental agencies, particularly the Department and the State Water Resources Control Board, to develop programs for the regulation of cannabis cultivation.

At a fundamental level, Business and Professions Code § 26060.1(b) 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;

- 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.

With respect to the SWRCB specifically, § 13276 of the Water Code authorizes or directs the board, and the nine Regional Water Quality Control Boards (RWQCBs), to address discharges of waste from cultivation, including by adopting a general permit or establishing waste discharge requirements. In so doing, the 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 boards’ actions in response to this requirement are set forth below.

The State Water Resources Control Board’s Cannabis Cultivation Policy and General Order

In October 2017, the SWRCB promulgated its Cannabis Cultivation Policy (Cannabis Policy or Policy) and Cannabis General Order 2019-0001-DWQ (General Order or Order). The Policy and Order were adopted in October 2017. The Policy covers a variety of areas, including requirements for cannabis cultivation, activities to protect water quality and instream flows, implementation, means of compliance, and enforcement. The General Order implements the requirements of the Cannabis Policy, specifically those that address waste discharges associated with

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cannabis cultivation. The Cannabis Policy and the General Order were both updated and adopted by the SWRCB in February 2019, which updates became effective on April 16, 2019.

Originally, the Policy and General Order allowed the RWQCBs to adopt their own regional orders to regulate cannabis cultivation. Two RWQCBs, the North Coast Regional Water Quality Control Board and the Central Valley Regional Water Quality Control Board, adopted such regional orders. The 2019 Policy and General Order, however, were made to supersede all such regional orders. Therefore, enrollees previously covered by the North Coast Regional Order were required to either apply to transition their permit coverage to the Order or request termination of coverage under the Regional Cannabis Order by July 1, 2019.

The Central Valley RWQCB Cannabis General Order was rescinded in June 2019, and applicants have since been required to apply through the State-wide Cannabis General Order.

It should be noted that, although the new SWRCB's Order supersedes all regional orders, the General Order vests certain powers in the RWQCBs. For example, RWQCBs are allowed to issue site-specific waste discharge requirements for discharges from a cannabis cultivation site if the RWQCB determines that coverage under the General Order is not sufficiently protective of water quality.

The purpose of the Cannabis Policy is to ensure that the diversion of water and discharge of waste associated with cannabis cultivation do not negatively impact water quality, aquatic habitat, riparian habitat, wetlands, and springs. The Policy applies to the following cultivation activities: 1) Commercial Recreation, 2) Commercial Medical, and 3) Personal Use Medical. It does *not* apply to recreational cannabis cultivation for personal use (six or fewer plants in a contiguous cultivation area less than 1,000 square feet with no slopes over 20 percent), because personal use cultivation activities are not considered commercial activities and are therefore exempt from CDFA cultivation license requirements. Indoor commercial cultivation activities are conditionally exempt from the requirements, and outdoor commercial cultivation activities that disturb less than 2,000 square feet may be conditionally exempt under certain circumstances.

Tier and Risk Values

The General Order assigns tier and risk values to each cultivation site based on the site's threat to water quality. The threat to water quality for any site is based on three factors:

- **Disturbed area:** Threat levels are based in part on the area of disturbed soil, the amount of irrigation water used, the potential for storm water runoff, and the potential impacts to groundwater (*e.g.*, the use of fertilizers or soil amendments, the possible number of employees on site, *etc.*).
- **Slope of disturbed areas:** The General Order recognizes that increased slopes may be associated with decreased soil stability, especially when associated with vegetation removal. Storm water and excess irrigation water are more likely to runoff and discharge off-site from sloped surfaces.
- **Proximity to surface water body:** The General Order also recognizes that riparian setbacks from surface water bodies generally reduce impacts to water quality. Disturbed areas within the riparian setbacks are more likely to discharge waste constituents to surface water; therefore, sites that cannot meet riparian setback requirements are considered to be high risk sites.

Based on these factors, cultivation sites are characterized as either "Tier 1" or "Tier 2" sites, and the risk level of each site is characterized as low, moderate, or high. Tier 1 sites are characterized as sites with disturbed area between 2,000 square feet and one acre. Tier 2 sites are those equal to or greater than one acre. Low risk level sites are those with no slope greater than 30 percent that are not within a state riparian setback. Moderate risk level sites are those with slopes between 30 percent and 50 percent that are not within a state riparian setback. High risk sites are sites where any portion of disturbed area is within a state riparian setback. The assessment of the risk level of the cultivation site occurs through an online self-certification process established by the SWRCB, not unlike the self-certification process established by the Department under § 1600 of the Fish and Game Code (and described in Part 1 of this article).

Specific Substantive Requirements of the Policy

Consistent with its primary purpose of broadly protecting water quality, aquatic habitat, riparian habitat, wetlands, and springs, the Policy contains an exhaustive list of detailed performance measures specific to cultivation activities. Although they are too numerous to cover in detail here, examples of these measures include:

- General erosion control measures;
- Regulations for stream crossings and installations, culverts, and road development;
- Management of fertilizers, pesticides, and petroleum;
- Cleanup, restoration, and mitigation on existing sites;
- Proper soil, cultivation, and human waste disposal;
- Irrigation runoff control;
- Methods of water diversion and storage;
- Winterization.

Generally speaking, the performance standards contained in the Policy fall into the following three categories:

General Requirements and Prohibitions

The Policy's "General Requirements and Prohibitions" apply to all cannabis cultivators and include general measures to prevent discharges during construction and operation of cultivation activities, manage onsite pollutants, and protect on and off-site species. For example: The Policy requires cultivators to obtain coverage under the SWRCB's Construction Storm Water Program during construction of cannabis cultivation operations. Cannabis cultivators must apply for a Lake and Streambed Alteration Agreement or consult with CDFW to determine if a Lake and Streambed Alteration Agreement is needed prior to commencing any activity that may substantially:

- Divert or obstruct the natural flow of any river, stream, or lake;
- Change or use any material from the bed, channel, or bank of any river, stream, or lake; or
- Deposit debris, waste, or other materials that could pass into any river stream or lake.

Cultivators cannot take any action that would result in the taking of Special-Status Plants, Full Protected species, or a threatened, endangered, or candidate species under the California Endangered Species Act.

During land disturbance activities, cultivators must review the daily weather forecast and maintain records of the weather forecast for each day of land disturbance activities. If there is a 50 percent or greater chance of precipitation greater than 0.5 inches per 24-hour period during any 24-hour forecast, cultivators cannot disturb land.

Cultivators are required to immediately report any significant hazardous material release or spill to the California Office of Emergency Services, their local Unified Program Agency, the RWQCB, and CDFW.

Requirements Related to Water Diversions and Waste Discharge

The Policy includes requirements that apply specifically to any water diversion or waste discharge related to cannabis cultivation. By way of example:

- Cannabis cultivators cannot conduct grading activities on slopes exceeding 50 percent grade.
- Cannabis cultivators cannot drive or operate vehicles or equipment within riparian setbacks or within waters of the state unless authorized under a § 404 or § 401 Clean Water Act Permit, a CDFW Lake and Streambed Alteration Agreement, coverage under the Order, or site-specific water discharge restrictions issued by a RWQCB.
- Cannabis cultivators must control all dust related to cannabis cultivation activities to ensure dust does not produce sediment-laden runoff. Erosion control measures must be used to minimize erosion of disturbed areas, potting soil, and bulk soil to prevent waste discharges.

- Cannabis cultivators must comply with winterization requirements, which, among other things, prevent cultivators from operating heavy equipment during the winter period unless: 1) authorized by the RWQCB via a site management plan or 2) if emergency repairs are required and authorized by the SWRCB or another agency with jurisdiction over the cultivation activity.

Narrative and Numeric Instream Flow Requirements

Finally, the Policy contains narrative instream flow requirements that apply to all diversions of surface water and groundwater for cannabis cultivation. Within the umbrella of narrative instream flow requirements, there are requirements for surface water instream flow requirements, which apply to anyone diverting water for cannabis cultivation from a waterbody, as well as requirements specific to groundwater diversions and springs. An example of the Policy's narrative instream flow requirements follows:

Cannabis cultivators cannot divert surface water between April 1 and October 31 unless the water diverted is delivered from storage and the cultivator has a permit/license and a claim of right to the stored water. From November 1 through March 31, cultivators can only divert surface water when water is available for diversion under the cultivator's priority of right.

Numeric instream flow requirements apply when a site discharges to a SWRCB compliance gauge. The compliance gauges have Numeric Flow Requirements and the SWRCB has an online mapping tool to assist cultivators in determining which compliance gage applies to them and whether they may divert water. For example, the following requirement applies:

From November 1 through March 31, cultivators can divert water as long as the Numeric Flow Requirement is met at the compliance gauge assigned to the cannabis site. From November 1 through December 14 of each year, the surface water diversion period does not begin until after seven consecutive days in which the surface waterbody's real-time daily average flow is greater than the applicable Numeric Flow Requirement.

Updates to Policy and Order in 2019

The 2019 Policy and Order included four primary changes:

Tribal Buffers

Prior to acting on a cultivator's request to cultivate cannabis within 600 feet of tribal lands, the Water Boards will notify any affected California Native American Tribe and if any affected tribe rejects the proposed cultivation within 45 days, the cultivator is prohibited from cultivating cannabis on or within 600 feet of the land.

Onstream Reservoirs

Cultivators with pre-existing onstream reservoirs can now obtain water rights for cannabis cultivation if the reservoir existed prior to October 1, 2016 and both the Deputy Director for the Division of Water Rights and CDFW determine that removal of the reservoir and installation of off-stream storage would cause more environmental damage than continuing to use the onstream reservoir for diversion and storage. Cultivators with onstream reservoirs must install and maintain a measuring device that is installed and calibrated and is capable of recording the volume of diverted water year-round. Onstream reservoirs that do not qualify for ongoing operation must either be removed or otherwise rendered incapable of storing water.

Requirements for Indoor Cultivation Sites

Regarding requirement for indoor cultivation, cultivators with a building permit and certificate of occupancy for indoor cultivation sites that discharge waste to a permitted wastewater collection system are exempt from the Policy's riparian setbacks and tribal buffer requirements.

Winterization Requirements

Prior to the 2019 updates to the Policy and Order, cultivators were prohibited from operating any heavy equipment during the winter period, except for emergency repairs. The 2019 change to winterization requirements allows the RWQCB's Executive Officer or designee to approve a site management plan to permit the use of heavy equipment for routine cultivation soil preparation or planting during the winter period

if both the following conditions are met: 1) all soil preparation and planting activities occur outside of the riparian setbacks; and 2) all soil preparation and planting activities are located on an average slope equal to or less than 5 percent.

State Water Resources Control Board Enforcement Mechanisms

Regarding any enforcement action taken by the SWRCB, the board has primary enforcement responsibility for the regulations in the Policy, and is required to notify CDFA of any enforcement action that is taken. The SWRCB has a variety of enforcement tools for correcting noncompliance with the Policy and Order. In particular, the board may initiate an informal enforcement action, including a Notice of Violation letter if a violation is observed or reported. For formal violations, the SWRCB can issue a Notice to Comply, Administrative Civil Liability to assess monetary penalties,¹ a Cease and Desist Order, or a Cleanup and Abatement Order, among other enforcement mechanisms. The SWRCB also has the authority to revoke any water right permit, license, or registration under the Water Code.

¹ These actions can be costly. For example, an Administrative Civil Liability action resulting from a discharge to waters of the United States can result in a penalty of \$10,000 per day and \$10 per gallon of discharge.

Conclusion and Implications

Compliance with the complex requirements of the Policy is a prerequisite for obtaining a CDFA Cannabis Cultivators license. Cultivators must provide evidence of compliance (or certification that a permit is not necessary) as part of their application for a CDFA cannabis cultivation license. As noted above, Business and Professions Code § 26052.5(b) requires the CDFA to consult with the State Water Resources Control Board on the source or sources of water the cultivator will use for cultivation, and Business and Professions Code § 26060.1(b) requires that CDFA include conditions requested by the State Water Board (including the principals and guidelines of the Policy) in any license.

The State Water Resources Control Board's Cannabis Cultivation General Order can be found at: https://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/2019/wqo2019_0001_dwq.pdf.

The State Water Resources Control Board's Cannabis Cultivation Policy can be found at: https://www.waterboards.ca.gov/water_issues/programs/cannabis/docs/policy/final_cannabis_policy_with_attach_a.pdf.

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REGULATORY DEVELOPMENTS

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

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

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

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

In 2015, the Obama administration introduced new EPA regulations intended to address this lack of clarity. The 2015 Rule applied Justice Kennedy's "significant nexus" standard, and explicitly defined WOTUS to include headwaters, perennial streams, and seasonal wetlands. Under this rule, WOTUS included any water body within 4,000 feet of a tradi-

tional navigable water or tributary if the water body had a "significant nexus" to a traditional jurisdictional water. Per the 2015 Rule, a "significant nexus" exists where the water body, by itself or with another body of water, has a significant effect on the chemical, physical, and biological integrity of a traditional jurisdictional water. Headwaters, perennial streams, and seasonal wetlands were included within the scope of WOTUS under the 2015 rule.

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

The Trump Administration Suspends and Repeals the 2015 Rule

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

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

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

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

Redefining Waters of the United States

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

water facilities, waste treatment systems, and certain commercial and agricultural ponds and ditches.

Restores Pre-2015 Regulations

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

Conclusion and Implications

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

FEDERAL AGENCIES RELEASE NO JEOPARDY BIOLOGICAL OPINIONS FOR THE CENTRAL VALLEY PROJECT IN CALIFORNIA

On October 21, 2019, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) each issued Biological Opinions under the federal Endangered Species Act (ESA) regarding proposed operations of the federal Central Valley Project (CVP) and the State Water Project (SWP). Both FWS and NMFS found that proposed CVP and SWP long-term operations through 2030 would not jeopardize federally listed threatened or endangered species, including delta smelt and listed salmon, nor adversely modify their designated critical habitats, including those in the Sacramento-San Joaquin River Delta and in upstream tributaries. The

U.S. Bureau of Reclamation's (Bureau) proposed action includes significant investment in protection of endangered fish, more robust hatchery operations, changes to cold water pool operations and other actions at Lake Shasta, and increased management oversight in the Delta.

Background

The Central Valley Project is operated in close coordination with the State Water Project administered by the California Department of Water Resources (DWR). Together, the Projects provide water to more

than 25 million California residents and millions of acres of farmland throughout California.

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

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

The Bureau’s Plans for New Long-Term Operations

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

Beginning in 2016, the Bureau began developing

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

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

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

Investment to Support Fish

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

Landing Outfall Gates, to reduce the potential for fish entrainment in the Colusa Basin Drain.

Shasta and Cold Water Management Tiers

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

Fish Passage

Additionally, the Bureau will provide up to \$1,000,000 towards a collaborative project to construct fish passage downstream of the Deer Creek

Irrigation District Dam, which will provide spring-run chinook salmon and Central Valley steelhead with access to 25 miles of spawning habitat. The Bureau will additionally provide up to \$14,500,000 over ten years to reintroduce of winter-run chinook salmon to Battle Creek. This includes accelerating the reestablishment of approximately 42 miles of salmon and steelhead habitat on Battle Creek, and an additional six miles on its tributaries.

Conclusion and Implications

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

(Miles B. H. Krieger, Steve Anderson)

IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY SEEKING PUBLIC COMMENT REGARDING DRAFT RE-USE PERMIT PARTNERSHIP BETWEEN CITY OF NAMPA AND PIONEER IRRIGATION DISTRICT

On October 15, 2019, the Idaho Department of Environmental Quality (DEQ) released a draft recycled water reuse permit for public comment stemming from a proposal by the City of Nampa (Nampa) and Pioneer Irrigation District (Pioneer) to discharge Class A recycled municipal effluent to Pioneer’s Phyllis Canal on a seasonal basis. The permit, if ultimately issued, is believed to be the first of its kind in Idaho involving the direct discharge of municipal POTW effluent to an irrigation canal for irrigation re-use.

The Proposal

Nampa currently discharges approximately 18 cubic feet per second (cfs) (11.6 million gpd) from its POTW to Indian Creek, which is tributary to the Boise River. Like the Boise River, Indian Creek is a § 303(d)-listed waterbody for a variety of pollutants, including nutrients (phosphorus). The creek is also

designated as CWAL (cold water aquatic life) under Idaho’s Water Quality Standards. Consequently, Nampa wastewater discharge also implicates temperature concerns in the creek.

Due to regulatory pressures under its current Clean Water Act, National Pollutant Discharge Elimination System (NPDES) permit, including anticipated pressures in future permit cycles, combined with the need design, fund and implement large-scale POTW upgrades keeping pace with regulatory requirements and rapid population growth, Nampa explored various alternatives seeking to eliminate its POTW discharge to Indian Creek. It found a willing partner in Pioneer, whose largest canal (Phyllis Canal) flows past Nampa’s POTW in relatively close proximity.

Under an agreement between the parties resulting in the joint reuse permit application to DEQ, Nampa proposes to discharge up to 41 cfs of Class A recycled

water (IDAPA 58.01.17) to the Phyllis Canal at full POTW build out in 2065 during the irrigation season (roughly April 1 through November 1). If the permit issues, Nampa anticipates discharging approximately 18-20 cfs to the canal beginning no later than 2026.

Pioneer values the project as a cost-effective, and hopefully reliable, source of supplemental irrigation water input into its largest irrigation water delivery canal at a level of water quality (Class A recycled water) meeting, and in key respects exceeding, the background water quality of canal. The Nampa discharge will provide Pioneer greater operational flexibility within the Phyllis Canal system, and the opportunity to implement additional automation resulting in additional water savings and conservation. At a minimum, Pioneer expects the discharge to help offset declining Phyllis Canal diversion sources upstream (i.e., the Nampa project will assist Pioneer in combatting other water source shortages within its delivery system).

Water Right Implications

Aside from water quality improvement questions addressed in the draft DEQ permit, some have questioned the water right/water quantity side of the project. Generally speaking, the question centers on the potentially altered flow regime of Indian Creek (decrease in anticipated creek flows up to 41 cfs by 2065), and what that could mean from the perspective of other water users with creek-based water rights. This, in turn, hinges on what can be fairly and correctly considered “creek-origin” water.

In the case of the Nampa project, the original source (or origin) of its POTW discharge water is groundwater, not Indian Creek. Like most other municipalities in the Boise Valley, Nampa’s potable water supply system is heavily (if not entirely) derived from a network of groundwater wells plumbed together into an integrated delivery system. Thus, while there is no question that Nampa’s POTW discharge augments Indian Creek flows, the POTW discharge does not originate from creek flows.

In a more traditional irrigation use sense under Idaho’s prior appropriation doctrine, the doctrine of wastewater recapture and reuse is well-settled. See, e.g., *Sebern v. Moore*, 44 Idaho 410, 418, 258 P. 176, 178 (1927) (“surface waste and seepage water may be appropriated . . . subject to the right of the owner to cease wasting it, or in good faith to change the place

or manner of wasting it, or to recapture it, so long as he applies it to a beneficial use”); and *Crawford v. Inglin*, 44 Idaho 663, 669, 258 P. 541, 543 (1927) (“appellant cannot be required to waste water into the ditch. He can use all his water, waste none of it, or apply it to other lands, and thereby prevent its flow into the ditch.”). However, an irrigator’s right to recapture and reuse is restricted by concepts of original place of use and enlargement. For example, irrigators cannot apply more water than good husbandry requires, and they cannot conserve a block of water through efficiency gains (e.g., conversion from flood irrigation to sprinkler) and then use that conserved water to break out or cultivate new/additional ground—doing so would constitute an illegal “enlargement” of historical consumptive use under Idaho law.

These same basic principles (i.e., right of recapture and reuse) apply to municipal water rights as well, but municipalities enjoy even greater latitude in terms of recapture and reuse than do traditional irrigators, particularly in the context of wastewater treatment driven by environmental regulations. Moreover, municipal water rights are considered wholly consumptive by the Idaho Department of Water Resources (the agency authorizes and presumes that municipal water rights, once diverted, will be used to extinction).

For example, while traditional irrigators’ rights of recapture are limited to reuse on their original lands/place of use (i.e., there can be no enlargement in terms of new acres or new/different types of uses), municipalities are authorized to land apply their effluent on lands *outside* their municipal service area absent further water right modification or any transfer application requirement when the land application is used as a means to meet environmental regulatory requirements. Idaho Code § 42-201(8); see also, Idaho Code § 42-202B(9) (wherein the “service area” of a municipality is broadly defined to include lands outside corporate limits or other recognized boundaries (i.e., area of impact) in situations where the municipal system shares a “common water distribution system with lands located within the corporate limits”). Thus, municipal water rights are not as restricted as more traditional water rights in terms of place of use or historic consumptive volume.

In this case, it appears that unless Nampa relinquishes control of its POTW discharge, the end

destination and use of that discharge is up to Nampa to determine. And, it seems that regardless of the application of Idaho Code § 4-201(8) (and the comparatively broader municipal land use application authorizations contained in it), Nampa likely meets the more traditional “good faith” requirements of Idaho common law where its discharge of recycled water to the Phyllis Canal will not only result in water quality benefits to Indian Creek in terms of nutrient and temperature reductions, but also where it will save its taxpayers approximately \$20 Million in reduced POTW infrastructure capital expenditures by eliminating its discharge to the creek even seasonally.

Conclusion and Implications

While Pioneer is not immune from Nampa’s ultimate right to direct its POTW discharge elsewhere as it sees fit (i.e., some day Nampa could construct an entirely closed loop reuse system should the costs and benefits of such a system pencil out), Pioneer appreciates the opportunity Nampa’s discharge presents in the meantime.

It remains to be seen what the DEQ public comment period brings. But Nampa and Pioneer are hopeful that their partnership is viewed favorably by those who participate.
(Andrew J. Waldera)

OREGON MOVES TO DESIGNATE WALDO LAKE AND CRATER LAKE AS OUTSTANDING RESOURCE WATERS

In July, Oregon’s Environmental Quality Commission (EQC) directed the state Department of Environmental Quality (DEQ) to commence rulemakings to designate Waldo Lake and Crater Lake as Outstanding Resource Waters (ORW).

Background

The process began in April 2019, when the Northwest Environmental Defense Center in collaboration with the Oregon Chapter of the Sierra Club, Oregon Environmental Council, Oregon Wild, Cascadia Wildlands, and the Center for Biological Diversity petitioned the EQC and DEQ to designate Waldo Lake and its associated wetlands as ORW. After reviewing the petition, DEQ recommended that Crater Lake be added to the process as well. In July, the EQC approved DEQ’s recommendation and directed DEQ to begin the rulemaking process.

Oregon’s Antidegradation Policy

Oregon’s ORW policy comes from the state’s Antidegradation Policy, which is a component of its water quality standards. Water quality standards are comprised of: 1) designated beneficial use(s) for each waterbody in the state; 2) numeric and narrative water quality criteria designed to protect the designated beneficial use(s) of each waterbody; and 3) an Antidegradation Policy:

The purpose of the Antidegradation Policy is to guide decisions that affect water quality to prevent unnecessary further degradation from new or increased point or nonpoint sources of pollution and to protect, maintain, and enhance existing surface water quality to ensure the full protection of all existing beneficial uses. OAR 340-041-0004(1).

The ORW policy is one part of the Antidegradation Policy.

Oregon’s ORW Policy

Oregon’s ORW policy provides that:

... [w]here existing high quality waters constitute an outstanding State or national resource such as those waters designated as extraordinary resource waters, or as critical habitat areas, the existing water quality and water quality values must be maintained and protected, and classified as ‘Outstanding Resource Waters of Oregon.’ OAR 340-041-0004(8).

While the state’s ORW policy has existed for over 20 years, Oregon has designated only one ORW to date. The North Fork Smith River and its tributaries and wetlands were designated in July 2017. The North Fork Smith River originates in the Kalmiopsis

Wilderness in southern Oregon and is a federally-designated Wild and Scenic River that boasts exceptional clarity and color, Coho salmon habitat, and unique recreational opportunities.

Waldo Lake

Waldo Lake occupies 9.8 square miles in the Willamette National Forest, high in the Cascade Mountains in Lane County. It is the second deepest lake in Oregon. Some of the outstanding values of Waldo Lake include: 1) It is remote and pristine, located entirely on public land and surrounded by the Waldo Lake Wilderness Area; 2) it has exceptionally high water quality; 3) it is the source of the North Fork Middle Fork of the Willamette River, which was designated as a Wild and Scenic River in 1988—therefore, protecting Waldo Lake will also help protect North Fork Middle Fork; 4) it offers abundant recreational opportunities; 5) Waldo Lake and its watershed are home to rare plant and animal species including a rare semi-aquatic leafy liverwort, North-western salamanders, rough skinned newts, cascade frogs, western toads, spotted owls, pine martens, and Pacific fishers.

Petitioners proposed the following regulatory language to protect Waldo Lake as an ORW:

- The current high water quality, exceptional ecological values, and existing and designated uses of the ORWs identified in this rule (these waters) shall be maintained and protected except as altered by natural causes.
- No new NPDES [National Pollutant Discharge Elimination System] discharge or expansion of an existing discharge to these waters shall be allowed.
- No new NPDES discharge or expansion of an existing discharge to waters upstream of or tributary to these waters shall be allowed if such discharge would significantly degrade the water quality within these waters.
- No activities shall be allowed that would degrade the existing water quality and ecological characteristics and values of these waters.

These proposed conditions may change during the course of the rulemaking process.

Crater Lake

Crater Lake in Klamath County is the deepest lake in Oregon at approximately 1,949 feet deep. There are no streams flowing into or out of Crater Lake; all water that enters the lake is eventually lost from evaporation or subsurface seepage. Some of Crater Lake's outstanding values include:

- It is one of the clearest, bluest, deepest, and most pristine lakes in the world.
- It is fully contained within Crater Lake National Park, the only national park in Oregon.
- It is significant to Native American tribes including the Klamath Tribes and the Cow Creek Umpquas.
- Its pristine condition, relative lack of anthropogenic land use impacts, and active hydrothermal features make it ideal for scientific study.

DEQ has not yet proposed conditions for protecting Crater Lake as an ORW. DEQ plans to work with the National Park Service and other interested partners to:

- . . .adopt appropriate specific antidegradation policies to protect water quality in the lake, taking into consideration the Park Services General Management Plan.

Conclusion and Implications

The rulemaking process is in its early stages; DEQ has not yet released a schedule. Interested parties will have the opportunity to participate in the rulemaking through the public comment process. Interested parties should check DEQ's "Outstanding Resource Waters of Oregon" webpage, which provides links to sign up for water quality standards email updates from DEQ or contact DEQ for more information. (Alexa Shasteen)

LAKE POWELL PIPELINE REVIEW BY STATE OF UTAH SHIFTED TO U.S. BUREAU OF RECLAMATION REMOVES HYDROPOWER COMPONENTS, MAKING BUREAU OF RECLAMATION NEW LEAD AGENCY

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

History and Background of the Project

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

Similar to past projects, although much larger in scope, the Lake Powell Pipeline is a state-sponsored endeavor. That means that the original cost of the project—estimated at between \$1.1 and \$1.7 billion—will be first funded by the state of Utah and then repaid, with interest, by the actual water users through a combination of impact fees, water rates, and property taxes. Impact fees, one-time charges

for new development to connect to the system, are expected to bring in approximately \$2.96 billion through 2060. Current impact fee rates are \$8,400 per home, or about 2.4 percent of the median new home price in Washington County. The Washington County Water Conservation District impact fees are set to increase \$1,000 per year through 2025 after which they will be indexed to the Producer's Price Index for construction materials. Water rate charges are projected to generate an additional \$1.75 billion through 2060, while increased ad valorem property taxes for homeowners within the pipeline service area will contribute an estimated \$1.41 billion.

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

Recent Developments

As originally conceived, the Lake Powell Pipeline was slated to have six hydroelectric facilities along its length to both generate power for surrounding communities as well as power the five pump stations necessary to move the water the entire 140 miles. In August 2019, a Utah legislative audit raised additional questions about the cost of the project, repayment, and interest. Supporters of the project acknowledge the steep price tag but maintain the project is necessary to meet population needs in growing southern Utah where most of the water currently comes from

the Virgin River. Like all western rivers, the Virgin is susceptible to extreme swings in its flows from year to year, a variability that is likely to increase as the mountain west faces more warming issues related to climate change. Opponents of the project mostly fixate on the massive cost, pointing out that the entire state is on the hook for the initial payments even though only a small number of Utahans will directly benefit from the project. Those concerns aside, the August audit eventually concluded that it believed the funding structure, if operated as planned, will be sufficient.

Elimination of Two Proposed Reservoirs— FERC License No Longer Required

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

issues previously raised by the U.S. Fish and Wildlife Service, Army Corps of Engineers, and the Environmental Protection Agency. Those issues included potential inundation of several hundred acres of desert tortoise habitat as well as impacts to waters of the United States.

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

Conclusion and Implications

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

(John Sittler, Paul Noto)

PENALTIES & SANCTIONS

**RECENT INVESTIGATIONS, SETTLEMENTS,
PENALTIES, AND SANCTIONS****Civil Enforcement Actions and Settlements—
Water Quality**

•October 7, 2019—The U.S. Environmental Protection Agency announced two agreements to study indoor air quality, advance cleanup, and take action related to groundwater contamination in Sunnyvale, California. The first settlement, with Philips Semiconductors Inc. (Philips), requires the company to study indoor air quality in commercial buildings at the Signetics site and evaluate options to speed cleanup of contaminated groundwater. The second settlement adds Advanced Micro Devices (AMD) and Northrop Grumman Systems Corporation (Northrop) as signatory parties—with Philips as the party performing the work—to assess vapor intrusion and implement mitigation measures in residential buildings adjacent to the Signetics site that are located over the groundwater contamination. The work performed under these two settlements is estimated to cost \$4 million. In 1982, volatile organic compounds, including trichloroethene (TCE), were detected in groundwater below the Triple Site. Once released to soil and groundwater, TCE can evaporate and rise as a vapor, potentially accumulating in buildings above the groundwater plume. Health impacts from TCE exposure can include increased cancer risk from long-term exposure. Other health effects may result from short-term exposure, including liver and kidney damage, as well as heart defects in developing fetuses. The first agreement with Philips requires the company to study indoor air quality in four commercial buildings at the Signetics site and determine if any protective measures are needed. In addition, the agreement requires Philips to assess options for accelerating the ongoing groundwater cleanup at the Signetics site. The second agreement with Philips, AMD and Northrop provides for the continuation of residential and school vapor intrusion assessments begun under a settlement with Philips in 2015. For the past 4 years, EPA has overseen Philips' indoor air sampling efforts in more than

35 school buildings and 220 residences in the OOU and the installation of several school and residential mitigation systems. Under this new settlement, EPA will continue to oversee the design and construction of mitigation systems in affected buildings to prevent unacceptable levels of TCE vapors from accumulating indoors. Philips will continue to perform the work, with AMD and Northrop included as additional responsible parties. This settlement is subject to a 30-day comment period. For more information and to submit comments visit: <https://www.federalregister.gov/documents/2019/10/04/2019-21688/notice-of-proposed-administrative-settlement-agreement-and-order-on-consent-for-removal-site>.

**Civil Enforcement Actions and Settlements—
Chemical Regulation and Hazardous Waste**

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

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

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

- Failure to comply with a permit condition that requires deteriorating containers to be replaced or put inside larger containers in good condition at the point of generation.
- Failure to keep hazardous waste containers closed.
- Failure to properly manage universal wastes.

The facility has resolved the identified violations and is now in compliance with the RCRA requirements. For more information on EPA’s Resource

Conservation and Recovery Act please visit: www.epa.gov/rcra.

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

Excavation and off-site disposal of about 82,500 cubic yards of contaminated soils, sediment and debris. A portion of the groundwater cleanup was started in 2016 because a plume contaminated with 1,4-dioxane was migrating away from the property under the Assabet River towards the town of Acton’s

water supply. The remainder of the groundwater cleanup will be done under the agreement. The Consent Decree, lodged in the U.S. District Court for the District of Massachusetts on Oct. 9, 2019, is subject to a 30-day public comment period and approval by the federal court. A copy of the consent decree will be available on the U.S. Department of Justice's website at <https://www.justice.gov/enrd/consent-decrees>.

Indictments, Convictions, and Sentencing

•October 15, 2019—Two shipping companies incorporated in Liberia pled guilty in federal court in Wilmington, Delaware, to failing to notify the U.S. Coast Guard of a hazardous condition on one of its vessels and to violating the Act to Prevent Pollution from Ships (APPS) by presenting false documents to the Coast Guard that covered up vessel oil pollution. The agreement includes a \$1.8 million dollar criminal penalty. Defendants Nederland Shipping Company and Chartworld Shipping Company are the owner and operator of the 13,049 gross ton, ocean-going, refrigerated cargo/container vessel called the M/V NEDERLAND REEFER. Large ships like the M/V NEDERLAND REEFER generate oil-contaminated

bilge waste when water mixes in the bottom or bilges of the ship with oil that has leaked from the ship's engines and other areas. This waste must be processed to separate the water from the oil and other wastes by using pollution prevention equipment, including an Oily Water Separator (OWS), before being discharged into the sea. APPS requires that the disposal of the ship's bilge waste be recorded in the ship's Oil Record Book (ORB). Under the plea agreement, the companies will be placed on a four-year term of probation that includes a comprehensive environmental compliance plan to ensure, among other things, that ships operated by Chartworld entering the United States fully comply with all applicable national and international marine environmental protection laws. The compliance plan will be implemented by an independent auditing company and supervised by a court-appointed monitor. Trial Attorneys David P. Kehoe and Stephen Da Ponte at the Environmental Crimes Section of the Department of Justice and Assistant U.S. Attorney Edmund Falgowski of the District of Delaware prosecuted the case. The case was investigated by the Coast Guard's Investigative Service.

(Andre Monette)

LAWSUITS FILED OR PENDING

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

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

Background

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

The U.S. Environmental Protection Agency (EPA) and states administering NPDES permit programs historically have not required a federal permit

for discharges to groundwater. The Fourth, Sixth, and Ninth Circuit Courts of Appeal have issued opinions with conflicting interpretations of whether the CWA covers such discharges.

The Ninth Circuit's Decision

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

The Fourth Circuit's Decision

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

The Sixth Circuit's Decision

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

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

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

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

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

The Dispute over Settlement Authority and Whether or Not to Settle

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

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

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

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

Counsel for respondent Earthjustice filed a letter notifying the Supreme Court of the County Council's approval of the resolution approving the settlement on October 3, 2019. The next day, Maui's counsel of record submitted a letter to the Court, stating that

the case had not settled because the Mayor did not agree to settle the case or withdraw the petition.

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

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

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

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

Conclusion and Implications

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

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

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

JUDICIAL DEVELOPMENTS

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

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

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

Factual and Procedural Background

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

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

the EPA responded to all of the violations.

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

The Eleventh Circuit's Decision

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

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

Discharge Notices

First, the petitioners argued that the discharge notices required prior to issuing a NPDES permit were insufficient because they did not describe the proposed discharge points. Before issuing an NPDES permit, ADEM was required publish a notice within the area affected by the facility or activity, which included, among other information, a general description of the location of each existing or proposed discharge point and the name of the receiving water. Instead, the newspaper notice provided a website that

provided the required information. The EPA determined that ADEM substantially complied with federal regulations relating to notice but “encourage[d] ADEM to supplement its public notices with more specific notification.” Because the court already determined that the EPA was not required to implement withdrawal proceedings, the agency was allowed to act within its discretion. The court concluded EPA’s response to ADEM’s discharge notices was not impermissibly arbitrary.

Board Conflicts

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

Annual Inspections

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

state theoretically had the capability to do inspections. Thus, the EPA’s decision not to commence withdrawal proceedings was reasonable.

Lawsuit Limitations

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

Conclusion and Implications

In this case of first impression, the Eleventh Circuit has articulated a clear position that the EPA has discretion on whether to commence withdrawal proceedings for an authorized state. Thus, the EPA may allow authorized state programs to remedy violations of the Clean Water Act so long as the decision is not arbitrary, capricious, or otherwise a violation of law. It remains to be seen what violations could mandate a withdrawal proceeding by the EPA. The court’s decision is available online at:

<http://media.ca11.uscourts.gov/opinions/pub/files/201711972.pdf>.

(Anya Kwan, Rebecca Andrews)

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

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

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

Background

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

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

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

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

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

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

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

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

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

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

A state is not allowed to issue a Section 404 permit until EPA's objections have resolved, or a public hearing is held. *Ibid.* If the state takes no action following receipt of EPA objections, permitting authority returns to the Corps; "at that time, the Corps conducts its own analysis of the permit application. See 40 C.F.R. § 233.50(i)";

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

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

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

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

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

The District Court's Decision

Final Agency Action

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

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

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

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

'Tacit Jurisdictional Determination'

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

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

The District Court cited with approval various Circuit authorities holding that "EPA objections are not final agency actions." E.g., *Marquette Cty. Road Comm'n v. United States E.P.A.*, 726 F. App'x 461, 467 (6th Cir. 2018); *Friends of Crystal River v. United States E.P.A.*, 35 F.3d 1073, 1079 (6th Cir. 1994); *Am. Paper Inst. v. United States E.P.A.*, 890 F.2d 869

(7th Cir. 1989) (addressing NPDES permit program); *Champion Int'l Corp. v. United States E.P.A.*, 850 F.2d 182 (4th Cir. 1988). Consistent with these authorities, the court held that EPA's participation in MD-EQ's Section 404 permit process "merely reiterate[d] or affirm[ed] an earlier agency decision," i.e., the 1984 MOA, "and [did] not affect the rights or alter the status quo of the complaining party," and thus is not a final agency action. Quoting *Harris v. FAA*, 215 F. Supp. 2d 209, 213 (D. D.C. 2002).

In the end, the court found that EPA's objections did not reflect the consummation of a decision-making process; instead, the EPA's decision to object to the permit application, rather than assume primary authority over the permit, merely reflects the fact that

Michigan had already assumed permitting authority over the Menominee River in 1984. The EPA simply followed the requirements of the 1984 MOA, and the permitting process continued as directed by statute.

Conclusion and Implications

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

(Deborah Quick)

UTAH SUPREME COURT HOLDS LOCAL WATER DISTRICT'S REGULATORY POWERS REGARDING EASEMENTS CANNOT BROADLY RESTRICT THE FEE OWNER'S ACTIVITIES

Metropolitan Water District of Salt Lake and Sandy v. SHCH Alaska Trust, Andrea A. Oveson, Rocky Mountain Holding Trust, 2019 UT 62

The Utah Supreme Court has held that a local water district's regulatory powers concerning properties encumbered by its easement are rooted in and limited to common law easement principles. In so ruling, the Court rejected the efforts of a local district to broadly restrict the use of the fee owner of property encumbered by district easements.

Factual and Procedural Background

This Utah Supreme Court took this case on direct appeal from the state District Court. The controversy involves the Metropolitan Water District of Salt Lake and Sandy's (Metro) efforts to protect and enforce its easement rights within the Salt Lake Aqueduct Corridor, a 42-mile area stretching from Deer Creek Reservoir to Salt Lake County (the Corridor). Metro is the owner and operator of a pipeline that runs the length of the Corridor and Metro holds easements and fee-title property interests throughout the length of the Corridor. At issue in this case are the easement rights of Metro.

In an effort to protect its easement rights, Metro adopted a number of regulations restricting the uses

that could occur on the properties encumbered by its easements. These regulations included restrictions on plantings, construction, and fencing by the fee property owner on their own land. Additionally, the regulations require the fee owner to apply for and obtain a license from Metro before conducting certain activities on the fee owners' land.

SHCH Alaska Trust (Alaska) is the fee owner of one of the properties located within the Corridor that is encumbered by an easement in favor of Metro. Alaska desired to install and operate a zip line on its property and ultimately did so without applying for or obtaining a license from Metro, in contravention of Metro's regulations. Metro filed a complaint with the District Court requesting a mandatory injunction requiring Alaska to comply with Metro's regulations and seeking a declaratory judgment regarding its property interests. Alaska filed a counterclaim seeking a declaratory judgment regarding its property interests.

At the District Court

The District Court, after weighing conflicting summary judgment motions, ruled in favor of Metro.

The District Court held that, when read together, the provisions of the Limited Purpose Local Districts Act (Act), granted Metro the “authority to regulate private uses of its aqueduct corridors.” 2019 UT 62, ¶ 8. The court also found that Alaska had acquired its property subject to an easement 200 feet in width.

The Utah Supreme Court’s Decision

Alaska raised two issues on appeal. First, it argued that the District Court erred in interpreting the provisions of the Act as authorizing Metro to enact legislation regulating Alaska’s use of Alaska’s property. Second, it argued that the District Court erred in determining that Alaska acquired the property subject to a 200-foot wide easement.

The District Court had relied upon a number of provisions in the Act in determining that:

. . .when read together the provisions of the Act confer upon Metro the authority to regulate private uses of its aqueduct corridors, even where a private party owns the land over which the Corridor passes. *Id.* at ¶ 11.

The Utah Supreme Court disagreed with this conclusion and analyzed five provisions of the Act, before concluding that “[n]othing in the Act grants Metro the authority to enact legislation regulating the property rights of others.” *Id.*

Differentiating a Local Water District’s Limited Powers from a Municipality’s Broad Powers

At the outset, the Court highlighted the difference between a municipality, which has broad legislative authority, and a limited purpose local district, which has limited authority. *Id.* at ¶ 14. Additionally, the Court noted that Metro’s regulations “govern the use or development of land” and are thus accurately described as “land use regulations.” *Id.* at ¶ 15. With this context, the Court analyzed five provisions of the Act, which Metro asserted had granted them the authority to regulate Alaska’s use of its property.

First Provision

The first provision analyzed, granted Metro authority to “acquire or construct works, facilities, and improvements necessary or convenient to the full exercise of [Metro’s] powers, and operate, control,

maintain, and use those works, facilities, and improvements.” UCA § 17B-1-103(2)(d). The Court noted that Metro did not explain how this provision would authorize the regulation of Alaska’s property. Likewise, the plain language of this section does not provide such authority. 2019 UT 62, ¶ 19. Consequently, because Alaska conceded that Metro had the right, through its easement, to enter the property as is necessary to “operate, control, maintain, and use” Metro’s pipeline, the Court held that this provision was not at issue in this case. *Id.*

Second Provision

The second provision analyzed was Utah Code § 17B-1-103(2)(t), which allowed Metro to agree:

. . .with a . . . private owner of property on which [Metro] has a right-of-way or adjacent to which [Metro] owns fee title . . . and ii) to allow the use of property: (A) owned by Metro; or (B) on which Metro has a right-of-way.

The parties presented differing interpretations. Alaska argued that this provision authorized Metro to contract away its property rights or the contract for additional property rights. Conversely, Metro argued that it gave Metro authority to permit (or not to permit) a fee owner to use his or her land if the land was burdened by a Metro-owned easement. The Court rejected Metro’s argument because it distorted the common law meaning of right-of-way in a manner that was inconsistent with the other provisions of the Act. *Id.* at ¶ 21.

Fundamentally, Metro asserted that by virtue of its easement, Metro had obtained authority to dictate the terms upon which Alaska, the owner of the servient estate, may use its property. *Id.* at ¶ 23. It is well established as common law that the owner of the servient estate “may use his property in any manner and for any purpose consistent with the rights of the owner of the dominant estate” and that the owner of the dominant estate “may not alter its character so as to further burden or increase the restriction upon the servient estate.” *Id.* at ¶ 24, *citing McBride v. McBride*, 581 P.2d 996, 997 (Utah 1978). Consequently, Metro suggested that this provision implicitly overrode the parties’ respective common law rights in the property. *Id.* The Court rejected this interpretation and reversal of roles, holding that § 103(2)(t) merely authorized

Metro to negotiate agreements regarding its property interests. *Id.* at ¶ 29.

Third Provision

The third provision analyzed was Utah Code § 17B-1-103(2)(q), which states that Metro may:

...perform any act or exercise any power reasonably necessary for the efficient operation of the local district in carrying out its purposes.

Metro asserted that this general power governed the actions at hand, because the regulations it had adopted were vital to Metro's purpose. The Court contrasted Metro's position with that of a municipality, with regard to regulation of land it didn't own. The Utah Code expressly sets forth comprehensive statutory schemes detailing the authority for cities and counties to adopt land use laws. Notably, those processes involve public bodies, robust public input and are subject to an appeals process.

Metro asserted that § 103(2)(q) grants a similar legislative land use authority to Metro. The Court expressly rejected such a notion, holding that: 1) the legislature has enacted comprehensive statutory schemes governing the exercise of the land use power, and these statutory schemes explicitly prohibit non-legislative bodies from using this power; 2) § 17B-1-119 limits local districts' role in land use decision-making to consulting with land use authorities; and 3) such a broad interpretation of § 103(2)(q) would render most of § 103 and the Act superfluous. *Id.* at ¶ 38.

Final Provisions

The final provisions under which Metro asserted its authority are Utah Code §§ 17B-1-301(2)(i) and 301(2)(o). These provisions delineate the powers of the board of trustees for a local district. Specifically, § 301(2)(i) provides that the board of trustees of a local district may:

...adopt and enforce rules and regulations for the orderly operation of the local district or for carrying out the district's purposes.

Likewise, § 301(2)(o) states that the board of trustees may:

...exercise all powers and perform all functions in the operation of the local district and its properties as are ordinarily exercised by the governing body of a political subdivision of the state and as are necessary to accomplish the purposes of the district.

Metro broadly interpreted both of these provisions as providing Metro with general regulatory powers over property it did not own. The Court disagreed, stating that this section of the Utah Code related solely to the powers of the board of trustees of a local district. The Court noted that this section could not grant the board of trustees more power than is afforded to Metro as a whole. Rather, this provision more appropriately related to the internal operations of the Metro. Additionally, § 301(2)(o) could not be interpreted as granting Metro:

...all powers exercised by other political subdivisions because such a reading would erase the clear distinctions the Act establishes among the various types of local districts. 2019 UT 62, ¶ 45.

The Act provides local districts with limited powers and takes care to delineate the differing powers. Consequently, the Court held that these provisions could not grant Metro's board of trustees' authority to regulate property it didn't own.

Issues on Remand

The Supreme Court identified two issues to be addressed on remand. First, the District Court should have analyzed the facts of the case to determine if Alaska was unreasonably interfering with Metro's easement rights. Second, the District Court was charged with reconsidering the scope of Metro's easement, for which additional factual inquiry was necessary. Specifically, the District Court was charged with determining the scope of the easement using the common law guideline that an easement should be "as extensive as need be for its purposes." *Id.* at ¶ 57.

Conclusion and Implications

This decision highlighted the common law easement principles that guide property rights in Utah. Metro had enacted regulations to restrict the use of

property encumbered by its easements. The Court rejected these regulations as an overreach and reaffirmed Alaska's property rights at common law. This decision limited the scope of what local districts may do to enforce easement rights, but also aligned local district powers with common law principles.

The Utah Supreme Court Decision may be found at: https://www.utcourts.gov/opinions/supopin/Metro%20Water%20v.%20SHCH%20Alaska20191016_20171044_62.pdf

(Jonathan Clyde)

CALIFORNIA SUPERIOR COURT DISMISSES CHALLENGE TO WESTERN MUNICIPAL WATER DISTRICT'S WATER RATE STRUCTURE

Heath v Western Municipal Water District, Case No. RIC 1806580 (Riverside County Super. Ct. 2019).

The Riverside Superior Court has dismissed a lawsuit challenging Western Municipal Water District's (Western) five-tier water rate structure. The Superior Court ruled that Western's budget-based, rates structure complies with the California Constitution in that it is supported by the costs of water service as required under Proposition 218.

Background

During and following California's historic drought, budget-based rates have become a popular approach among water districts as a means to incentivize water conservation. The methodology for establishing and implementing those rate structures is critically important is often subjected to legal challenges. Under the California Constitution, water suppliers are prevented from charging more for water service than the costs incurred to provide that service.

In the 2015 seminal case, *Capistrano Taxpayers Association v City of San Juan Capistrano*, the California's Fourth District Court of Appeal struck down the city's tiered water rate structure. The District Court of Appeal found that the city's rates were arbitrarily set and that the incremental rate increases among the four tiers were not tied to corresponding differences in the cost of service. While the court struck down the city's approach in that case, the court recognized that a tiered rate system may be upheld, so long as the rates are justified by the costs.

Western's Five-Tier Budget-Based Rate Structure and the Legal Challenge

In 2017, in an effort to promote water conservation within its district, and to pay for additional costs

of providing water service to its customers, Western implemented a five-tier budget-based rate system. The five tiers are categorized as: 1) indoor, 2) outdoor, 3) inefficient, 4) wasteful, and 5) unsustainable water use. Western conducted a rate study in 2017 which linked the higher rates in Tiers 3, 4, and 5 directly to the higher costs of service.

In April 2018, two petitioners sought to invalidate the rate structure by filing a petition for a writ of mandate with the Riverside County Superior Court. The petitioners alleged that Western's rates violated Proposition 218 because the service rates did not correspond to the costs for their service.

The Superior Court's Ruling

The court ruled that Western's budget-based rates are compliant with the State Constitution, specifically Proposition 218, and satisfy the State's requirement that agencies implement measures to conserve California's water resources. In particular, the court found that as a direct consequence of inefficient water usage, Western's "wasteful" water users drive higher costs by requiring the District to acquire more expensive water, invest in capital improvements to expand water supplies and operate water efficiency programs to comply with California's water conservation laws. The court observed that Western derives 40 percent of its annual supply locally, which comprises relatively lower cost water, which it allocates to its Tier 1 rate for "health and sanitation." Western imports 60 percent of its water through the State Water Project, which comprises a significantly more expensive supply. The court found that Western's rates reflected those higher costs in a manner that is consistent with state law.

In response to the ruling, Western's general manager stated:

This is a good day for Western's retail water customers—more than 85 percent of whom conserve water, keeping their monthly water costs as low as possible. Had Western lost this challenge, customers who proactively stay within their monthly water allocation would have seen an increase in their monthly water bill to offset the excess use of other customers.

Conclusion and Implications

The Superior Court's ruling is viewed by many as a win for Western's customers, who will continue to pay less for water than those who do not conserve efficiently, and also for other local water agencies charged with promoting and following the state's water conservation goals. The ruling is also considered by many to be consistent with prior cases in meeting two important public policy goals in California: protecting the ratepayer from unjustified rate hikes and promoting water conservation.

(Chris Carrillo, Michael Duane Davis)

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