

**FOR LAWYERS,
CONSULTANTS, AND
LENDERS WHO
COUNSEL BUSINESS,
COMMERCIAL, AND
REAL ESTATE CLIENTS**

ENVIRONMENTAL LIABILITY, ENFORCEMENT & PENALTIES

R E P O R T E R

CONTENTS

FEATURE ARTICLE

Water Conservation NGO Seeks Review of Agency Action Against EPA, Seeking to Have Storm Water Runoff, Downstream of Los Alamos National Laboratory, Declared a Clean Water Act Point Source of Pollution by Christina J. Bruff, Esq., Law & Resource Planning Associates, P.C., Albuquerque, New Mexico 3

REGULATORY DEVELOPMENTS

U.S. Bureau of Land Management Takes a Stance, Finds Negligible Risk to Water Resources Posed by Hydraulic Fracturing 7

California State Water Resources Control Board Approves Long-Awaited Plan to Address Salts and Nitrates in the Central Valley 8

PENALTIES AND SANCTIONS

Recent Investigations, Settlements, Penalties and Sanctions 11

RECENT FEDERAL DECISIONS

Circuit Court of Appeals:
Third Circuit Reaffirms Its Prior Holding that CERCLA Responsible Parties Immune from Contribution Liability Cannot Bring Cost-Recovery Claims 14
Cranbury Brick Yard, LLC v. United States, ___F.3d___, Case No. 18-3287 (3rd Cir. Nov. 22, 2019).

Fourth Circuit Affirms Prison Sentence for Knowing and Intentional Violations of the Clean Water Act 16
United States v. Blankenship, Unpub., Case No. 19-4072 (4th Cir. Oct. 1, 2019).

Continued on next page

EDITORIAL BOARD
Robert M. Schuster, Esq.
Argent Communications
Group

Rebecca Andrews, Esq.
Best Best & Krieger
San Diego, CA

Andre Monette Esq.
Best, Best & Krieger
Washington, DC

Deborah Quick, Esq.
Morgan Lewis
San Francisco, CA

Harvey Sheldon, Esq.
Hinshaw & Culbertson
Chicago, IL

ADVISORY BOARD
Christopher Berka, Esq.
Perkins Coie
Palo Alto, CA

Jennifer T. Nijman Esq.
Nijman Franzetti LLP
Chicago, IL

Kristina M. Woods, Esq.
Ashland Inc.
Dublin, OH & Scottsdale,
AZ



District Court:

U.S. Army Corps of Engineers’ 2017 Nationwide Permit for Commercial Shellfish Aquaculture Set Aside by the District Court 17
Coalition to Protect Puget Sound Habitat v. U.S. Army Corps. of Engineers, ___F.Supp.3d___, Case No. 17-1209RSL (W.D. Wash. Oct. 10, 2019).

District Court finds EPA’s Interpretive Ruling on the Clean Water Act Deserves Chevron Deference in Addressing Groundwater Pollutants Linked to Surface Waters 19
Conservation Law Foundation, Inc. v. Longwood Venues & Destinations, Inc., ___ F.Supp.3d ___, Case No. 18-11821-WGY (D. Mass. 2019).

District Court Grants Motion for Summary Judgement on Administrative Violation of the Clean Water Act 20
The Blackstone Headwaters Coalition, Inc. v. Gallo Builders, Inc., ___F.Supp.3d___, Case No. 4:16-cv-40053 (D. Mass. Sep. 30, 2019).

Publisher’s Note: Accuracy is a fundamental of journalism which we take seriously. It is the policy of Argent Communications Group to promptly acknowledge errors. Inaccuracies should be called to our attention. As always, we welcome your comments and suggestions. Contact: Robert M. Schuster, Editor and Publisher; 530-852-7222; schuster@argentco.com.

WWW.ARGENTCO.COM

Copyright © 2019 by Argent Communications Group. All rights reserved. No portion of this publication may be reproduced or distributed, in print or through any electronic means, without the written permission of the publisher. The criminal penalties for copyright infringement are up to \$250,000 and up to three years imprisonment, and statutory damages in civil court are up to \$150,000 for each act of willful infringement. The No Electronic Theft (NET) Act, § 17 - 18 U.S.C., defines infringement by "reproduction or distribution" to include by tangible (i.e., print) as well as electronic means (i.e., PDF pass-alongs or password sharing). Further, not only sending, but also receiving, passed-along copyrighted electronic content (i.e., PDFs or passwords to allow access to copyrighted material) constitutes infringement under the Act (17 U.S.C. 101 et seq.). We share 10% of the net proceeds of settlements or jury awards with individuals who provide evidence of illegal infringement through photocopying or electronic distribution. To report violations confidentially, contact 530-852-7222. For photocopying or electronic redistribution authorization, contact us at the address below.

The material herein is provided for informational purposes. The contents are not intended and cannot be considered as legal advice. Before taking any action based upon this information, consult with legal counsel. Information has been obtained by Argent Communications Group from sources believed to be reliable. However, because of the possibility of human or mechanical error by our sources, or others, Argent Communications Group does not guarantee the accuracy, adequacy, or completeness of any information and is not responsible for any errors or omissions or for the results obtained from the use of such information.

Subscription Rate: 1 year (11 issues) \$875.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; Batavia, IL 60510-1135; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc.: President, Gala Argent; Vice-President and Secretary, Robert M. Schuster, Esq.

Environmental Liability, Enforcement & Penalties Reporter is a trademark of Argent Communications Group.

FEATURE ARTICLE**WATER CONSERVATION NGO FILES PETITION FOR REVIEW OF AGENCY ACTION AGAINST EPA, SEEKING TO HAVE STORM WATER RUNOFF, DOWNSTREAM OF LOS ALAMOS NATIONAL LABORATORY, DECLARED A CLEAN WATER ACT POINT SOURCE OF POLLUTION**

By Christina J. Bruff, Esq.

On September 16, 2019, clean water advocates Amigos Bravos filed a Petition for Review of Agency Action (Petition) against the U.S. Environmental Protection Agency (EPA) in federal court challenging the EPA's alleged failure to address unregulated high urban storm water pollution in Los Alamos County, New Mexico as required by the federal Clean Water Act. 33 U.S.C. § 1251 *et seq.*; [*Amigos Bravos v. U.S. Environmental Protection Agency*, Case No. 1:19-cv-852 (D. N.M. filed Sept. 16, 2019).] (Amigos Bravos is a statewide water conservation organization, see: <https://www.amigosbravos.org/mission>). Amigos Bravos first filed its letter of intent to sue EPA on June 16, 2019; see, https://www.epa.gov/sites/production/files/2019-07/documents/western_environmental_law_center-nois-2019-48_26jun19.pdf.

Amigos Bravos alleges some pollutants including PCBs, copper, zinc, nickel, and gross alpha radiation are in excess of 10,000 times public safety limits. Amigo Bravos at ¶ 55. Los Alamos National Laboratory, which is downstream of the City of Los Alamos and upstream of the Rio Grande, is a major contributing factor to the pollution as alleged by Amigos Bravos. The Petition is available online at: https://www.epa.gov/sites/production/files/2019-09/documents/amigos_bravos_sept_16_cwa_and_apr_complaint.pdf.

Background

Amigos Bravos' Petition for Review of Agency Action alleges that the activities within Los Alamos County resulted in a discharge of pollutants into

the waters of the United States, and therefore, were regulated under the federal Clean Water Act. *Id.* at ¶¶ 1-3. Amigos Bravos had previously filed Petitions with the EPA, asking the agency to require that the discharging parties obtain National Pollutant Discharge Elimination System (NPDES) Permits for this stormwater discharge. *Id.* at ¶¶ 1, 57; Exhibit A. The EPA had apparently not responded to Amigos Bravos Petitions either within the alleged statutory time for a response or within a reasonable time, which Amigos Bravos, in their September 16, 2019 Petition, contended was required under the Administrative Procedure Act (APA) *Id.* at ¶¶ 67-72. The substance of this Petition was the Amigos Bravos' demand that the federal court order the EPA to file a response to the Petitions and after a review of the Petition, the EPA should exercise its duty to require regulation of the discharge of these pollutants.

The Petition

Amigos Bravos first argument is that the discharge of pollutants by Los Alamos County in storm water required a Clean Water Act, National Pollutant Discharge Elimination System permit because the act of discharge constituted a violation of a water quality standard and/or resulted in the discharge being a significant contributor of pollutants to waters of the United States. *Id.* at ¶ A. Amigos Bravos had filed a separate letter Petition with the EPA, in which they argued had to be responded to within 90 days; no response had been filed as of the date of the filing of the

The opinions expressed in attributed articles in *Environmental Liability, Enforcement & Penalties Reporter* belong solely to the contributors and do not necessarily represent the opinions of Argent Communications Group or the editors of *Environmental Liability, Enforcement & Penalties Reporter*.

Petition by Amigos Bravos. *Id.* at ¶¶ 1, 57; Exhibit A.

The second allegation is that Los Alamos County had illegally declined to designate Los Alamos County discharges of storm water as the equivalent of a Small MS4. *Id.* at ¶¶ 67-72. Amigos Bravos filed a letter Petition requesting this designation. *Id.* at ¶¶ 1, 57, 69; Exhibit A. Under the regulations the EPA had an obligation to file a response to the letter Petition within 180 days. *Id.* at ¶ 35; 40 C.F.R. § 122.26(f)(5). It did not do so.

A small MS4 is defined as a storm sewer system “[o]wned or operated by the United States, a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes” in any municipality with a population under 100,000 people, and which is not otherwise designated as a large or medium MS4. 40 C.F.R. §§ 122.26(b)(16)(i)-(ii). Sewer systems “similar to separate storm sewer systems in municipalities, such as systems at military bases, large hospital or prison complexes, and highways and other thoroughfares” are also small MS4s. *Id.* § 122.26(b)(16)(iii). As of the date of filing the action by Amigos Bravos, no response had been filed to this second letter Petition. *Id.* at ¶¶ 1, 57.

The third allegation is that even if the above specific time deadlines were deemed to not apply, the Petition asks that the court order the EPA to establish a date certain when it would reply to the allegations. *Id.* at ¶ D. They argued that the failure to act at all was an unreasonable delay, and therefore, Amigos Bravos were entitled to review under the Administrative Procedure Act. *Id.* at ¶¶ 73-78.

Amigos Bravos alleges that under the Clean Water Act any person may Petition the EPA to require a NPDES permit for a discharge which is composed entirely of storm water which contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States within 90 days. See, 40 C.F.R. § 122.26(f)(2). Amigos Bravos further alleges that it submitted such a Letter Petition to EPA on June 30, 2014 and that the Clean Water Act’s implementing regulations expressly require EPA to make:

... a final determination on any Petition received under [40 C.F.R. § 122.26(f)(2)] within

90 days after receiving the Petition. See, 40 C.F.R. § 122.26(f)(5); Amigos Bravos, at Exhibit A.

The Petition states that EPA has failed to provide Amigos Bravos with a final determination on its June 2014 Petition and that EPA’s failure to act is a violation of the Clean Water Act and its implementing regulations. *Id.* at ¶¶ 67-72. A copy of the Letter Petition is attached as an exhibit to the Petition for Agency Review.

Amigos Bravos also alleges that under the Clean Water Act’s implementing regulations any person may petition the EPA “for the designation of a large, medium, or small municipal separate storm sewer system as defined by paragraph (b)(4)(iv), (b)(7)(iv), or (b)(16) of this section” (see, 40 C.F.R. § 122.26(f)(4)), that Amigos Bravos submitted such a Petition to EPA on June 30, 2014, that the Clean Water Act’s implementing regulations expressly require that EPA “shall make a final determination on the Petition within 180 days after its receipt” of any Petition under 40 C.F.R. § 122.26(f)(4) to designate a small MS4 (see, 40 C.F.R. § 122.26(f)(5)), that EPA has failed to provide Amigos Bravos with a final determination on its Letter Petition, and that EPA’s failure to act is a violation of the Clean Water Act and its implementing regulations. *Id.* at ¶¶ 67-72. A copy of the Letter Petition was attached as an exhibit to the Petition for Agency Review filed in federal court. *Id.* at Exhibit A.

Unreasonable Delay of Agency Action

Finally, Amigos Bravos rely on the Administrative Procedure Act as a basis for review.

Petitioners argue that the APA requires the EPA to conclude issues presented to them “within a reasonable time” and empowers reviewing courts to “compel agency action unlawfully withheld or unreasonably delayed.” See, 5 U.S.C. §§ 555(b), 706(1). The September 2019 Petition states that Amigos Bravos’ submission of its Letter Petition to EPA in June 2014, triggered EPA’s duty under the APA to conclude the issues presented in Amigos Bravos’ Letter Petition within a reasonable time. Amigos Bravos at ¶¶ 73-78. They argue that the EPA did not do so, because as of the filing of the Amigos Bravos Petition for Agency Review, EPA had not responded to the June 2014 Petition, and therefore, EPA’s failure to respond

to the Petition represents a failure to conclude the issues presented in that Petition within a reasonable time. *Id.* Amigos Bravos contend that EPA's failure to respond to the June 2014 Petition constitutes an unreasonable delay of agency action under 5 U.S.C. § 706(1). *Id.* at ¶ 78.

Factual Allegations

The Petition makes numerous factual allegations. The Petition contends that many of the watersheds in Los Alamos County are highly polluted and are water quality limited because they do not meet New Mexico's water quality standards. *Id.* at 2. Water quality standards for waters in Los Alamos County are detailed in the New Mexico Administrative Code (NMAC) at §§ 20.6.4.114, 20.6.4.126, 20.6.4.127, and 20.6.4.129, and include various designated uses such as high quality aquatic life, livestock watering, primary contact and wildlife habitat. Several other complained of criteria also describe numerous pollutants such as PCBs, copper, mercury, gross alpha, silver, selenium, and aluminum that also apply to these waters, within which these pollutants are known to be discharged with stormwater. *Id.* Further, Amigos Bravos contend that Los Alamos Canyon within LANL property is impaired for gross alpha (a measurement of overall radioactivity), PCBs, aluminum, radium, cyanide, mercury, and selenium. *Id.* Specifically, Amigos Bravos cite an LANL PCB Report, which found 40 of the 41 Los Alamos urban stormwater samples were above the New Mexico Human Health water quality criteria for PCBs and 19 of the 41 Los Alamos urban stormwater samples were above the New Mexico Wildlife Habitat water quality criteria for PCBs. *Id.* at 53. The LANL report concluded that suspended PCBs carried by urban runoff from the Los Alamos Townsite were 10 to 200 times more enriched with PCBs than at non-urban influenced Pajarito Plateau sites. *Id.*

Seeking an Order to Compel Action

This Petition for Agency Review, while making very significant and broad reaching allegations of violations of the federal Clean Water Act, seeks only that the court order the EPA to take action on the Letter Petition sent to The EPA on June 2014. The 2014 Letter Petition is attached as an appendix to their September 2019 Petition for Agency Review. Amigos Bravos' allegation is that the refusal to file

any response at all is in itself a denial of the Letter Petition. Therefore, this action through non-action confers jurisdiction on the U.S. District Court and is reviewable under the Administrative Procedure Act in accordance with 5 U.S.C. § 706(1).

There is, no doubt, a legitimate frustration by an environmental group that receives no response from the EPA to a Letter Petition which when federal regulations appear to require a response. Filing an action demanding a response is what one might expect. However, from the federal court's perspective, establishing the precedent that every inaction by a federal agency gives rise to APA jurisdiction could generate a large number of comparable lawsuits around the country. Many filed precipitously to get the matter in federal court. Conversely, where federal law requires a response, it is certainly reasonable to anticipate receiving one. Indeed, from the environmental perspective, A reasonable inference could be made that the failure to provide any response is designed to avoid review under the Administrative Procedure Act, by simply taking no action.

At a minimum, the Petition for Review of Agency Action in this case should ultimately generate an answer to the questions raised and for which the EPA has provided no answer. Under these facts, do the activities of Los Alamos County rise to the level of requiring a NPDES permit? But the case is procedurally somewhat awkward. There has been no trial on the factual allegations of the June 2014 Letter Petition, or on the Petition for Agency Review. Therefore, there is not a record that could be reviewed under the *Olenhouse* standard. *See, Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560 (10th Cir. 1994) (Cases on review under the APA should be decided on the record submitted to the federal court). There is no record because the EPA has not filed a response and there is, therefore, no explanation whether the EPA has determined whether the stormwater discharge contributes:

. . .to a violation of a water quality standard or is a significant contributor of pollutants of waters of the United States. 40 C.F.R. § 122.26(f)(2).

Interestingly, by refusing to respond at all, the EPA has, in effect avoided the consequence of a recent decision from the Ninth Circuit Court of Appeals: that specifies which party has the burden of proof to dem-

onstrate whether the Clean Water Act should apply in exceptional circumstances. The Ninth Circuit Court of Appeals recently held that an irrigation district seeking to avoid application of the Clean Water Act has the burden of proving that its discharges are exclusively of agricultural return flows and nothing else. In effect requiring that the irrigation district had the duty to prove the Clean Water Act did not apply because it met the irrigation runoff exception. See, *Pacific Coast Federation of Fishermen's Associations v. Donald R. Glazer, Regional Director of the U.S. Bureau of Reclamation*, Case No. 17-17130 (9th Cir. June 10, 2019). Were the U.S. District Court to order that the EPA make a determination on the Letter Petitions and were a record to be made, it would then be interesting to see how the above case adjusts the burden of proof applicable to Los Alamos County. Will the EPA and the Amigos Bravos be obligated to prove that the CWA should apply because of the facts, or will it be the burden of Los Alamos County to prove that the CWA does not apply to them, because their discharges are of a quality that they are exempted? The answer to that question is a long way from being decided based upon the current Petition for Review by the Amigos Bravos.

Conclusion and Implications

The question of the exact scope and reach of the Clean Water Act continues to provide diverse answers depending upon the entity or institution asking the question. The ultimate answer will probably have to be answered once again by the U.S. Supreme Court. But the answer will never be a definitive one because of the vague phrase utilized in the Act: the "waters of the United States." This is not a criticism because this phrase is more of a mission statement rather than a functional definition. For this reason, the breadth and scope of the reach of regulation of point source pollution will be even more dependent upon an analysis on a case by case basis. And, as in the case of the Amigos Bravos efforts at Los Alamos will ultimately depend upon negotiations between the affected parties and the regulatory agencies. Where negotiations fail, the matter will default to the courts. It is far from clear that this default outcome is the best one, because of the need for a sound grounding in policy and science that is not always forthcoming from the courts. The Amigos Bravos Petitions will be a test case to determine whether these matters can ultimately be resolved by negotiation or litigation.

Christina J. Bruff is the founding attorney and current managing attorney of the law firm, Law & Resource Planning Associates, P.C., in Albuquerque, New Mexico. Christina practices Water Rights and Water Quality Law, and also in the areas of Environmental Law, Real Estate Transactions, Real Property, Civil Litigation, Business Law, and Drone Law. Christina graduated from the University of New Mexico School of Law where she received a Certificate in Natural Resources and served as the Lead Articles Editor of the *Natural Resources Journal*. Since 1996, she has served as the New Mexico Editor of the *Western Water Law & Policy Reporter*.

REGULATORY DEVELOPMENTS

U.S. BUREAU OF LAND MANAGEMENT TAKES A STANCE ON 'FRACKING': FINDS NEGLIGIBLE RISK TO WATER RESOURCES POSED BY HYDRAULIC FRACTURING

On November 1, the U.S. Bureau of Land Management (BLM) issued a final Supplemental Environmental Impact Statement (EIS) relating to environmental impacts of hydraulic fracturing (fracking) in areas within western Kern, Kings, and nearby counties. In its supplemental impact statement, the BLM concluded that hydraulic fracturing posed negligible risks to surface and groundwater resources in the planning area subject to BLM jurisdiction.

Background

The Bureau of Land Management manages 400,000 acres of public lands, and 750,000 acres of federal mineral estate, within 17 million acres of public land in Kings, San Luis Obispo, Santa Barbara, Tulare, Ventura, Madera, Fresno, and Kern counties.

The surface and subsurface acreage managed by the BLM encompasses sensitive ecological resources and biodiversity. For instance, nearly one third of the threatened or endangered animal species in California may be found within the BLM's management area, and subsurface acreage includes a variety of groundwater systems that form part of the water supplies used by agricultural and municipal users in the area.

In September 2011, the BLM made available a draft Resource Management Plan (RMP) for the management area, which replaced an existing plan. The BLM also made available its draft Environmental Impact Statement under the National Environmental Policy Act (NEPA), which provided five alternatives to managing the public lands and mineral estate under BLM's jurisdiction.

In 2013, the BLM issued its final EIS, and subsequently commissioned an independent assessment of hydraulic fracturing (fracking) in California by the California Council of Science and Technology (CCST). CCST's study was designed to assess the available published scientific and engineering information associated with fracking in California, and was released in 2014. However, the BLM concluded that CCST's report did not provide significant new

information to warrant supplementing its EIS. In 2015, the BLM selected Alternative B as the operative RMP, which would open slightly more than 1 million acres to oil and gas exploration while closing nearly 150,000 acres.

Shortly after the BLM adopted Alternative B as its Resource Management Plan, several environmental groups filed a lawsuit in federal court challenging the sufficiency of the BLM's EIS, contending that the BLM failed to adequately consider the environmental impacts of fracking under NEPA on the roughly 1.2 million surface and subsurface acreage managed by BLM. In September 2016, the court granted most of the environmental parties' claimed relief, catalyzing a settlement agreement between the parties.

The settlement agreement conditioned dismissal of the case on the BLM preparing a supplemental EIS assessing the environmental impacts of fracking on the managed area. The settlement agreement also provided that the court would no longer have jurisdiction over the case within 14 days of the BLM issuing its supplemental EIS, provided any motions for attorneys' fees and costs on the part of the environmental groups had been resolved. The BLM issued its supplemental EIS (SEIS) on November 1, 2019.

The National Environmental Policy Act and Litigation

As interpreted by the Ninth Circuit in prior cases, NEPA obligates a federal agency to consider every significant aspect of the environmental impact of a proposed action, and ensures the agency will inform the public that it has indeed considered environmental concerns in its decision-making process. In reviewing the adequacy of an EIS, courts apply a "rule of reason" standard to determine whether the EIS contains a reasonably thorough discussion of the significant aspects of probable environmental consequences. Accordingly, judicial review of an EIS consists only of ensuring that the agency took a "hard look."

The U.S. District Court faulted BLM for failing to meaningfully discuss fracking in its EIS, instead only mentioning fracking three times throughout the report. The court concluded that the agency failed to take the requisite hard look required by NEPA, particularly where, under the RMP, a quarter of new wells in BLM's managed area were expected to use fracking. The court also focused on the CCST study that identified several potential concerns and calls for additional information and analysis, such as potential impacts to surface and groundwater posed by fracking.

The SEIS recognizes that fracking may have an impact on surface and groundwater resources. In the SEIS, BLM assumed that between zero and four wells under any new lease would be drilled per year over the ten-year planning period (totaling 40 wells per lease). BLM estimates that approximately 400 wells per year would be fracked in California, resulting the consumption of roughly 246 acre-feet per year, based on an annual average use of 200,000 gallons per fracked well. According to BLM, that consumption would be negligible for zero to four wells drilled per year over the planning period, compared to the more than 2 million acre-feet of water used per year in Kern County, mostly for agriculture. Additionally, BLM concluded that, while spilled fracking fluids and materials could pose a risk to groundwater, the relatively small number of wells likely to use fracking meant the risk was negligible, as was the risk from flowback fluids used during the well drilling and fracking process.

In the SEIS, BLM generally recognized that injecting fracking fluids into wells poses contamination risks to groundwater. According to BLM, there are

two major pathways through which fracking fluids may impact groundwater. These are: 1) a breakdown in barriers designed to prevent leakage of fluids from the well, and 2) migration of fractures outside of the target producing formation. Addressing the former, the SEIS relies on the concept of well integrity, and state regulations designed to ensure it, in support of its conclusion that the impact of drilling zero to four new wells per year would cause negligible risks to groundwater. Similarly, BLM concluded that the risk of migrating fractures for zero to four wells per year posed a negligible risk of groundwater contamination. However, BLM noted that an interagency partnership called the California Oil, Gas, and Groundwater Program has been formed to study the problem posed by oil and gas activities to groundwater.

Conclusion and Implications

With respect to the impact posed by fracking on water resources, the SEIS generally concludes that the risks of fracking in the planning area managed by BLM are negligible. The SEIS includes reference to a variety of studies and reports, and thus appears to consider more information about fracking than the original EIS. However, it is unclear whether environmental groups will bring suit over the SEIS, and whether the information and analyses relied by BLM will stand up to the "hard look" standard required by NEPA. The BLM Supplemental Environmental Impact Statement, is available online at: https://eplanning.blm.gov/epl-front-office/projects/nepa/100601/20006500/250007620/FINAL_Bakersfield_Hydraulic_Fracturing_SEIS_10-25-19.pdf. (Miles Krieger, Steve Anderson)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD APPROVES LONG-AWAITED PLAN TO ADDRESS SALTS AND NITRATES IN THE CENTRAL VALLEY

On October 16, 2019, the California State Water Resources Control Board (SWRCB) approved a long-awaited plan to address salinity and nitrate build-up in groundwater basins and surface waters in the Central Valley. Over ten years in the making, the new Central Valley-wide Basin Plan Amendments (BPAs) implementing a Salt and Nitrate Management Plan (SNMP) is intended to improve drinking water

supplies contaminated with nitrates from decades of agriculture practices, and further reduce nitrate discharges to prevent groundwater contamination. The SNMP also requires agricultural and wastewater dischargers to address the build-up of salts in groundwater and surface waters.

Developed by the Central Valley Regional Water Quality Control Board (Central Valley RWQCB) and

a diverse group of stakeholders, the SNMP is expected to help protect and preserve vital agricultural and drinking water sources in the Central Valley well into the future. However, specific initiatives under the SNMP will certainly lead to some growing pains, especially within the agriculture and wastewater communities.

Background

In 2006, after large enforcement actions were taken to enforce stringent salinity requirements on discharges, the Central Valley RWQCB initiated a collaborative effort to address elevated levels of salinity in groundwater basins and surface waters known as the Central Valley Salinity Alternatives for Long-Term Sustainability (CV-SALTS). The CV-SALTS initiative recognized that groundwater and surface water supplies were becoming limited, years of certain agriculture practices such as fertilizer use were leading to the build-up of salt in water supplies, and this in turn was leading to more concentrated levels of salt in wastewater streams. As a result, the CV-SALTS initiative spurred the development of a regulatory and programmatic approach for the management of salts in groundwater and surface waters, including through Basin Plan amendments and a Central Valley-wide SNMP. Part way through the process, the environmental justice community urged the process to also include nitrate, which was more of a human health concern related to groundwater. As a result, the focus was broadened to add nitrate to the program.

Pursuant to California Water Code § 13240 *et seq.*, a Water Quality Control Plan or “Basin Plan” is the RWQCB’s master water quality control planning document. A Basin Plan contains the regulations adopted by the RWQCB to control the discharge of waste and other controllable factors impacting water quality, and designates beneficial uses and water quality objectives for surface water, groundwater, as well as “saline waters,” which are included in the definition of “waters of the State.” *See*, Cal. Water Code § 13050(e).

After several years of development, in January 2017, CV-SALTS submitted the SNMP to the Central Valley RWQCB. In March 2017, the Central Valley RWQCB adopted Resolution No. R5-2017-0031, which approved the SNMP and directed staff to start developing Basin Plan amendments to incorporate the SNMP’s policies and strategies to address nitrates

and salt build-up into the Central Valley RWQCB’s Basin Plans.

A little over one year later, in May 2018, the Central Valley RWQCB adopted Resolution No. R5-2018-0034, which amended the Board’s Basin Plans for the Sacramento and San Joaquin River Basins and Tulare Lake Basin—the three main basins under the Central Valley Water Board’s jurisdiction. These Basin Plan amendments also specifically incorporated the SNMP.

The Central Valley-wide Salt and Nitrate Management Plan

On October 16, 2019, the SWRCB officially approved the BPAs implementing the SNMP. The Plan’s specific goals are: 1) to ensure a safe drinking water supply, 2) to achieve balanced and salt nitrate loads, and 3) to implement long-term and managed aquifer restoration programs where reasonable, feasible, and practicable.

The Central Valley RWQCB will accomplish these goals through mandatory and voluntary actions, including by requiring dischargers to form nitrate Management Zones, prepare and implement nutrient management plans, improve irrigation practices, as well as through pilot studies, monitoring, and additional research. The Central Valley RWQCB also intends to issue or amend individual permits to dischargers to track and meet these goals. Furthermore, dischargers will be required to develop strategies to reduce their contribution of salts to surface waters and groundwater sources.

In addition to the above changes, the SWRCB directed the Central Valley Water Board to revise and strengthen the SNMP in one year with respect to certain requirements, including the following:

- Revising requirements to accelerate the reduction of nitrate discharges to groundwater basins for dischargers or categories of dischargers participating in a Management Zone as soon as practicable, but not more than in 35 years. This was revised down from the Central Valley Water Board’s timeline of 50 years.
- Revising waste discharge requirements for nitrate to have enforceable interim deadlines or time schedules, as well as final compliance deadlines, to meet water quality objectives.

- Revising Management Zone implementation plan requirements to include a voluntary residential sampling program for residents whose water supplies may be contaminated.

The SWRCB's approval of the Basin Plan amendments incorporating the SNMP will now be submitted to the Office of Administrative Law (OAL). Basin Plan amendments do not become effective until OAL approves the provisions. The regulations and provisions of the BPAs related to federal surface waters or to National Pollutant Discharge Elimination System (NPDES) permits for surface waters must also receive approval from the U.S. Environmental Protection Agency.

Conclusion and Implications

Although the SWRCB formally adopted the BPAs implementing the SNMP, many of the SNMP's initiatives are still under development and will be implemented over time. For example, the related BPAs establish a prioritized nitrate control program for discharges to selected groundwater basins and sub-basins, as well as a phased salt control program for discharges to surface water and groundwater. The Central Valley Regional Water Quality Control Board intended the phased and prioritized nature of

these nitrate and salt control initiatives to be implemented over the next several years in part to first address drinking water sources impacted by nitrate contamination. The nitrate program requires Early Action Plans for priority areas to ensure that residents with nitrate-impacted drinking water sources are provided with drinking water from another source until a long-term solution can be implemented. The salinity program will begin collecting fees to pay for a large Priority and Optimization (P&O) Study to determine potential salinity treatment removal projects that could be located and to determine sources of funding for implementation. The costs of the P&O Study, anticipated to be \$1.5 million per year over ten years, will be imposed based on permit type or industry.

In summary, although the operational impact of the SNMP remains to be seen and will likely lead to some growing pains, especially within the regulated community, the SNMP represents a significant milestone to address nitrate and salt contamination in surface waters and groundwater basins within the Central Valley well into the future. It also remains to be seen whether this program will coordinate well with the Groundwater Sustainability Agency work being done under the Sustainable Groundwater Management Act.
(Melissa A. Thorne, Patrick F. Veasy, Meredith Nikkel)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

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

Civil Enforcement Actions and Settlements— Air Quality

•October 29, 2019 - The U.S. District Court for the District of Massachusetts recently ordered R.M. Packer Company, Inc., and Tisbury Towing and Transportation Co., Inc., to comply with environmental laws and pay penalties of \$1.3 million to resolve violations of the federal Clean Air Act and Clean Water Act. The U.S. Environmental Protection Agency (EPA) had cited numerous violations and urged the companies to come into compliance with federal and state environmental laws. The two related Massachusetts companies distribute gasoline and other petroleum products. R.M. Packer, which owns and operates a petroleum bulk fuel terminal was cited for violations of the Clean Air Act and the federal Clean Water Act. Specifically, the court found that R.M. Packer violated the federal Clean Air Act and applicable Massachusetts regulations by failing to properly operate and maintain emission control equipment, failing to repair vapor leaks from equipment and failing to inspect, document and report on operations. Gasoline vapors contain volatile organic compounds (VOCs) and hazardous air pollutants such as benzene. The court also found that R.M. Packer failed to comply with industrial stormwater requirements under the Clean Water Act. Stormwater runoff from the R.M. Packer facility contains contaminants that threaten the sensitive coastal waters of Lagoon Pond and Vineyard Haven Harbor. To protect these resources, EPA's industrial stormwater permit requires R.M. Packer to implement stormwater controls, known as best management practices, to filter out

pollutants and/or prevent pollution by controlling it at its source. The court found that R.M. Packer failed to install and maintain proper stormwater best management practices for boat cleaning operations, waste stockpiles, and oil and waste storage containers. In addition to ordering R.M. Packer to fully comply with stormwater requirements, the court ordered R.M. Packer to comply with facility requirements for implementation of the Oil Spill Prevention, Control and Countermeasure Plan, and the Facility Response Plan. Tisbury Towing operates fuel barges that transport gasoline and other petroleum products between its pier on Herman Melville Boulevard in New Bedford, Massachusetts, and local destinations including the R.M. Packer terminal in Tisbury. The court found that Tisbury Towing failed to comply with Massachusetts Air Pollution Control regulations by failing to meet requirements for demonstrating vapor-tightness and failing to obtain an emission control plan.

Civil Enforcement Actions and Settlements— Water Quality

•November 6, 2019 - Sitka-based seafood processor Silver Bay Seafoods, LLC has reached a settlement with the U.S. Environmental Protection Agency over federal Clean Water Act discharge violations. EPA found violations of Silver Bay's wastewater discharge permit during a routine inspection of its Sitka facility. Following the inspection, EPA notified the company of the Clean Water Act violations and required Silver Bay Seafoods to complete a dive survey to assess seafloor conditions near its discharge pipe. The results of that survey, completed in 2017, revealed a 2.76-acre seafood waste pile—more than double the one-acre limit in their permit. . Based on the dive survey findings, Silver Bay Seafoods took proactive measures to reduce discharge volumes and help reduce the size of the pile. In response to the dive survey, the company installed new treatment technology that decreased the volume of seafood

waste they discharged by almost 90 percent. The settlement with EPA calls for continued monitoring of the seafood waste pile and a more extensive assessment of environmental impacts if the pile size has not decreased to below the one-acre limit by December 2022. Silver Bay Seafoods also paid an \$82,500 civil penalty.

Civil Enforcement Actions and Settlements— Chemical Regulation and Hazardous Waste

•October 23, 2019— The U.S. Environmental Protection Agency (EPA) settled with Miles Chemical Company Inc. of Arleta, California, for failing to timely report chemical substances it imported. Under the settlement, the company will pay a \$45,000 penalty. Between 2012 and 2015, Miles Chemical Company failed to timely submit forms to EPA documenting the import of large quantities of two chemicals, according to the agency. Under the Toxic Substances Control Act (TSCA), chemical importers and manufactures are required to submit Chemical Data Reporting (CDR) information to EPA every four years. This allows EPA to track the chemicals being imported into the country, assess potential human health and environmental effects of these chemicals, and make the non-confidential business information it receives available to the public.

•October 23, 2019—The U.S. Environmental Protection Agency announced that it completed 117 federal enforcement actions from October 2018 through September 2019 to ensure that entities such as renovation contractors, landlords, realtors and others comply with rules that protect the public from exposure to lead from lead-based paint. Exposure to lead dust, chips or debris from lead-based paint can pose serious risks to human health, particularly for young children. EPA has designated the reduction of childhood lead exposures as a high priority. The actions announced today support the agency's implementation of the Federal Action Plan to Reduce Childhood Lead Exposures and Associated Health Impacts issued December 2018. Regulations promulgated under the federal Toxic Substances Control Act (TSCA) and the Residential Lead-Based Paint Hazard Reduction Act (LHRA) apply to most pre-1978 dwellings and child-occupied facilities. These regulations—TSCA's Renovation, Repair and Painting (RRP) Rule, TSCA's Lead-based Paint Activities

Rule, and LHRA's Section 1018 Lead Disclosure Rule (LDR)—require lead-safe work practices and disclosure of information about lead-based paint, among other things. By ensuring compliance with federal lead-based paint requirements, EPA can address a major source of lead exposure that occurs in communities across the nation.

•October 31, 2019 - AFCO C&S, LLC, a chemical manufacturer in Chambersburg, Pennsylvania, will pay a \$1,489,000 penalty to settle alleged violations of federal pesticide regulations involving 12 products used in the cleaning and sanitizing of food and beverage processing facilities, the U.S. Environmental Protection Agency announced today. EPA cited AFCO for violating the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), a federal law requiring the registration of pesticide products and pesticide production facilities, and the proper labeling of pesticides. FIFRA's requirements protect public health and the environment by ensuring the safe production, handling and application of pesticides; and by preventing false, misleading, or unverifiable product claims. The alleged violations involved the sale and/or distribution of 10 unregistered pesticide products as well as a misbranded product and a product with claims beyond its FIFRA registration. AFCO distributed these cleaning and sanitizing products to facilities such as dairy and meat processing plants, food production factories, commercial bakeries, and breweries, where they were used without EPA reviewing product claims and health and environmental risks. As part of the settlement, the company did not admit liability for the alleged violations, but has certified that it is now in compliance with relevant requirements.

Indictments, Convictions, and Sentencing

•November 6, 2019 - Electro-Plating Services Inc. (EPS), located in Madison Heights, Michigan, was sentenced in federal court in Detroit to five years of probation, and was ordered to pay restitution of \$1,449,963.94 joint and several with Gary Sayers to the U.S. Environmental Protection Agency (EPA). Sayers, EPS' owner, was sentenced to one year in prison followed by three years of supervised release. The Honorable Stephen J. Murphy issued the sentence, having accepted each of their pleas of guilty to a federal hazardous waste storage felony on Feb. 14,

2019. The crime related to Sayers's operation of EPS, which used chemicals such as cyanide, chromium, nickel, chloride, trichloroethylene, and various acids and bases, as part of the plating process. After these chemicals no longer served their intended purpose, they became hazardous wastes, which required handling in compliance with the Resource Conservation and Recovery Act. Rather than having EPS' hazardous wastes legally transported to a licensed hazardous waste facility, Sayers stored the hazardous waste in numerous drums and other containers, including a pit dug into the ground in the lower level of the EPS building in Madison Heights. Ultimately, the EPA's Superfund program spent \$1,449,963.94 to clean up and dispose of the hazardous wastes. According to court records, Sayers—who owned and was the President of EPS—knew that such storage was illegal and had managed the company's former Detroit facility where he kept hazardous wastes illegally. Starting in 1996, the Michigan Department of Environmental Quality (MDEQ) repeatedly sent him warnings about his illegal handling of hazardous waste. In 2005, Sayers was charged with and pleaded guilty to illegally transporting hazardous wastes in state court. During the ensuing years, the MDEQ attempted to get Sayers and EPS to properly manage the amounts of hazardous wastes piling up at the Madison Heights location. The MDEQ issued numerous letters of warning and violation notices to the company regarding its hazardous wastes. In 2016, the MDEQ identified over 5,000 containers of liquid and solid wastes at the Madison Heights location. That same year, the city of Madison Heights revoked the company's occupancy permit. In January 2017, the EPA initiated a Superfund removal action, after determining that nature and threats posed by the stored hazardous waste required a time-critical response. The cleanup was completed in January 2018.

- November 8, 2019 - Under a proposed settlement announced by the United States, the State of

Michigan and the Saginaw Chippewa Indian Tribe of Michigan, The Dow Chemical Company will implement and fund an estimated \$77 million in natural resource restoration projects intended to compensate the public for injuries to natural resources caused by the release of hazardous substances from Dow's Midland, Michigan facility. The proposed settlement, which was lodged in the U.S. District Court for the Eastern District of Michigan, is subject to public comment and to approval by the court. According to a complaint filed on behalf of federal, state and tribal natural resource trustees, Dow released dioxin-related compounds and other hazardous substances from its Midland, Michigan, facility, and such releases caused injuries to natural resources. The complaint alleges that hazardous substances from Dow's facility adversely affected fish, invertebrates, birds and mammals, contributed to the adoption of health advisories to limit consumption of certain wild game and fish, and resulted in soil contact advisories in certain areas including some public parks. Dow will implement eight natural resource restoration projects described in the settlement at the company's expense, subject to oversight and approval by the natural resource trustees. In addition, Dow will pay \$6.75 million, plus interest, to a Restoration Account that will be used by Trustees to fund five other restoration projects described in the settlement. The settlement also requires Dow to pay another \$15 million, plus interest. At least \$5 million of this funding will be used to support implementation of additional natural resource restoration projects that will be selected by the trustees in the future, after a separate opportunity for public input on restoration project proposals. This funding will also be used to cover costs of long-term monitoring and maintenance of restoration projects under the settlement, as well as costs that the Trustees will incur in overseeing restoration projects. Finally, Dow is required to reimburse costs previously incurred by federal and state trustees in connection with the assessment of natural resource damages relating to Dow's releases.
(Andre Monette)

RECENT FEDERAL DECISIONS

THIRD CIRCUIT REAFFIRMS ITS PRIOR HOLDING THAT CERCLA RESPONSIBLE PARTIES IMMUNE FROM CONTRIBUTION LIABILITY CANNOT BRING COST-RECOVERY CLAIMS

Cranbury Brick Yard, LLC v. United States, ___F.3d___, Case No. 18-3287 (3rd Cir. Nov. 22, 2019).

Reaffirming its prior holding, the Third Circuit Court of Appeals reiterated that by entering into a settlement agreement with the government that immunizes themselves from contribution liability under the federal Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. § 9601 *et seq.*, CERCLA), responsible party-polluters relinquish their ability to bring cost-recovery claims against fellow polluters. This opinion notes as well that the Third Circuit's 2010 position has been adopted by half of the federal circuits.

Background

In 1954, a grenade-fuse warehouse at Unexcelled Manufacturing Co.'s arms manufacturing facility in Cranbury, New Jersey, exploded. Two people died and more were injured. Manufacturing was discontinued and the site was left contaminated with hazardous substances, including unexploded weapons.

In the mid-1970s Cranbury Development Co. purchased the site from Maxxam Group, Inc., Unexcelled's successor in interest. The New Jersey Department of Environmental Protection (NJDEP) completed its site investigation thirty years later and "issued a directive" ordering that Unexcelled, Maxxam and Cranbury Development Co.—along with the U.S. Navy:

. . . which had funded and effectively controlled the site. . . 'memorialize their commitment to perform the remediation in an Administrative Consent Order.' But the Navy rebuffed NJDEP and refused to take part.

In 2005, Cranbury Development and Maxxam entered into a Consent Order with NJDEP. The Consent Order did three things: First, Cranbury Development and Maxxam agreed to clean up the site. Sec-

ond, NJDEP agreed not to sue them if they complied. Third, all the parties agreed that the "Consent Order constitutes an administrative settlement within the meaning of CERCLA" and "resolve[s] the liability of [Cranbury Development] and Maxxam to the State of New Jersey for some or all of" the cleanup costs."

In 2006, Cranbury Brick Yard purchased the site, at the same time agreeing to join the NJDEP Consent Order, which was "amended to 'remove Cranbury Development' and 'replace' it with Cranbury Brick Yard 'as a Respondent.'" Cranbury Brick Yard obtained permits and began the cleanup in 2013. But during the cleanup, problems arose. Among them, the contractors unexpectedly punctured and dug up an underground tank holding water and roughly 20 gallons of petroleum. Some of the liquid spilled. Cranbury Brick Yard promptly notified NJDEP. Then it mixed the contaminated dirt with clean dirt and reburied it on-site. Cranbury Brick Yard claimed to have spent "well over \$50 million" on the cleanup.

Cranbury Brick Yard sued the Navy in 2015, seeking both cost recovery and contribution. The district court held: 1) that by amending the Consent Order to step into the shoes of Cranbury Development Co., Cranbury Brick Yard was "immunized from contribution liability" pursuant to § 9613(f) (2), but that therefore Cranbury Brick Yard could not bring a cost-recovery claim; 2) Cranbury Brick Yard brought its own contribution claim outside the limitations period, nine years after the amendment to the Consent Order was entered into; and 3) Cranbury Brick Yard was not a "bona fide purchaser" because it had, after having taken title, reburied contaminated dirt on site, thereby engaging in activity amounting to "disposal."

The Third Circuit's Decision

The Third Circuit initially noted that CERCLA

gives private litigants two causes of action: cost recovery under § 107(a) and contribution under § 113(f) (1). 42 U.S.C. §§ 9607(a), 9613(f)(1). The court differentiated between the two remedies, elaborating on and applying its holding in *Agere Sys., Inc. v. Advanced Envtl. Tech. Corp.*, 602 F.3d 204, 229 (3rd Cir. 2010), that “if a polluter is immune from contribution claims, it cannot bring cost-recovery claims.”

Under CERCLA, anyone who has incurred costs to cleanup a contaminated site may sue “to recover ‘any ... necessary costs of response.’” 42 U.S.C. § 9607(a)(4)(B):

If a cost-recovery suit succeeds, the defendants are strictly as well as jointly and severally liable. *Pa. Dep’t of Envtl. Prot. v. Trainer Custom Chem., LLC*, 906 F.3d 85, 89–90 (3d Cir. 2018).

Potentially responsible parties, who may be held liable for cost-recovery:

... include[e] the site’s current owner and anyone who owned the site ‘at the time of disposal of any hazardous substance.’ 42 U.S.C. § 9607(a)(1)–(2), 40 C.F.R. § 304.12(m). Further,

If a polluter is or may be liable under CERCLA or has settled its liability with a state or the federal government, it may sue other polluters for “contribution.” *Id.* § 9613(f)(1), (3)(B). Contribution is a:

... tortfeasor’s right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, [with] the shares being determined as a percentage of fault. *Atlantic Research*, 551 U.S. at 138, 127 S.Ct. 2331 (quoting *Contribution*, *Black’s Law Dictionary* 353 (8th ed. 2004)).

So, a contribution action lets a court “allocate response costs among liable parties using ... equitable factors.” 42 U.S.C. § 9613(f)(1).

The Third Circuit’s Previous Decision in *Agere Systems*

But while “[a] polluter who settles its CERCLA liability with the federal government or a state

government enjoys immunity under § 9613(f)(2) from contribution claims,” in *Agere Systems* the Third Circuit held that “if a polluter is immune from contribution claims, it cannot bring cost-recovery claims.” *Agere*, 602 F.3d at 229. Instead, it can bring only contribution claims. This rule prevents a responsible party from using its settlement with the government as both a “sword and shield.” In the absence of *Agere*’s restriction, a responsible party could settle with the government for only a portion of the total cleanup costs, thereby eliminating its exposure to joint and several liability from fellow responsible parties seeking cost-recovery—while itself seeking to impose liability on others. Numerous other Circuits have concurred with *Agere*, see, *Whittaker Corp. v. United States*, 825 F.3d 1002, 1007 & n.4 (9th Cir. 2016); *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 758 F.3d 757, 768 (6th Cir. 2014); *Bernstein v. Bankert*, 733 F.3d 190, 202 (7th Cir. 2013); *Solutia, Inc. v. McWane, Inc.*, 672 F.3d 1230, 1236–37 (11th Cir. 2012); *Morrison Enters. v. Dravo Corp.*, 638 F.3d 594, 603 (8th Cir. 2011); *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 127–28 (2d Cir. 2010).

Applying this consensus position here, the Third Circuit concluded that:

... [b]ecause the amended Consent Order gave Cranbury Brick Yard immunity from contribution claims, it barred Cranbury Brick Yard from seeking cost recovery from other potentially responsible parties.

Conclusion and Implications

The *Agere* holding continues to gain traction among the Circuits, as it makes practical sense of a statute “notorious for its lack of clarity and poor draftsmanship,” *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3rd Cir. 1993), particularly in light of the Supreme Court’s holding in *United States v. Atl. Research Corp.*, 551 U.S. 128, 141 (2007), that responsible parties could bring both cost-recovery and contribution claims against one another. The court’s decision is available online at: <https://www2.ca3.uscourts.gov/opinarch/183287p.pdf>. (Deborah Quick)

FOURTH CIRCUIT AFFIRMS PRISON SENTENCE FOR KNOWING AND INTENTIONAL VIOLATIONS OF THE CLEAN WATER ACT

United States v. Blankenship, Unpub., Case No. 19-4072 (4th Cir. Oct. 1, 2019).

The U.S. Court of Appeals for the Fourth Circuit, in an *unpublished decision*, recently upheld a U.S. District Court's sentencing of Michael Blankenship (Blankenship) for violation of the federal Clean Water Act. The Court of Appeals held that several evidentiary determinations by the District Court did not amount to substantial prejudice against Blankenship.

Factual and Procedural Background

A jury sitting in the U.S. District Court convicted Blankenship of two counts of violating the Clean Water Act for knowingly discharging untreated sewage and portable waste into Little Huff Creek near Hanover, West Virginia. The District Court sentenced Blankenship to 15 months in prison and ordered him to pay a \$10,000 fine. Blankenship appealed and challenged four of the District Court's rulings.

The Fourth Circuit's Decision

Exclusion of Evidence at Trial

Blankenship argued that the District Court abused its discretion in excluding a chart demonstrating that there were other sources of fecal pollution in Little Huff Creek. The District Court excluded the evidence for lack of relevancy and the chart's potential to confuse the jury. Blankenship contended that the chart was relevant because it could explain the source of the foul odors described by the witnesses as emanating from the creek. The Fourth Circuit held that a District Court may exclude relevant evidence if its ability to prove something as true is substantially outweighed by the ability to mislead the jury. Here, the chart of fecal bacteria testing contained no testing date or location of testing that matched the date and location of Blankenship's alleged dumping.

Additionally, the Fourth Circuit ruled that the fecal content of the stream had no bearing on whether Blankenship dumped sewage into the creek. Therefore, the chart lacked the ability to validate Blankenship's point, while having the potential to confuse the jury of the source of foul odors emanating from the creek.

ship's point, while having the potential to confuse the jury of the source of foul odors emanating from the creek.

Testimony as to Undated Instances of Dumping

Blankenship also asserted that the District Court abused its discretion in permitting Government witnesses to testify to undated instances of dumping. The District Court admitted the evidence as essential to the charged dates and to support allegations of Blankenship's knowledge and intent. Evidence is essential if it is necessary to provide context relevant to the criminal charges. Here, the Government was required to establish that Blankenship knowingly dumped sewage. Accordingly, evidence that Blankenship dumped sewage repeatedly was essential to proving the act was not an accident. While evidence of the acts was undated, it was relevant to the issue at hand, necessary to prove the claim, and reliable. Therefore, the court affirmed the District Court's judgment as not unduly prejudicial.

Jury Instructions

Finally, Blankenship contended that the District Court abused its discretion in refusing to give jury instruction on the lesser-included offense of negligent dumping. Blankenship argued that the evidence supported the instruction because the element of knowledge was in dispute. Failure to give a requested instruction is not a reversible error unless the record as a whole demonstrates prejudice. The Fourth Circuit deemed testimonies of Blankenship's truck discharging sewage, Blankenship's pattern of dumping, and Blankenship's own admission of twice dumping into the creek as sufficient to dismiss Blankenship's argument for lack of merit. Therefore, the Fourth Circuit held that Blankenship failed to demonstrate that the ruling was prejudicial.

The Court of Appeals upheld the District Court's sentence of 15 months in prison and a \$10,000 fine:

Negligent dumping is a lesser-included offense

of knowingly dumping. 33 U.S.C. § 1319(c)(1) (A) (West 2016 & Supp. 2019). Blankenship's argument, however, has no merit. West Virginia Department of Environmental Protection inspectors testified that Blankenship's truck was discharging sewage into the creek on the day in question, and neighbors' testimony established that Blankenship had a pattern of dumping sewage into the creek. Furthermore, Blankenship twice admitted to investigators that he dumped sewage into the creek on the date charged. Blankenship's argument that he admitted to dumping sewage but not doing so knowingly makes little logical sense, and we conclude that

the district court did not abuse its discretion in refusing to give the negligent dumping instruction.

Conclusion and Implications

This *unpublished decision* illustrates the deference given to District Courts by the Courts of Appeal in determining the admission of evidence for criminal violations of the federal Clean Water Act. When sufficient evidence is offered to support an essential element, the prejudicial effect on a party must be substantial. The court's decision is available online at: <http://www.ca4.uscourts.gov/Opinions/194072.U.pdf>. (Marco Antonio Ornelas, Rebecca Andrews)

U.S. ARMY CORPS OF ENGINEERS' 2017 NATIONWIDE PERMIT FOR COMMERCIAL SHELLFISH AQUACULTURE SET ASIDE BY THE DISTRICT COURT

Coalition to Protect Puget Sound Habitat v. U.S. Army Corps of Engineers, ___F.Supp.3d___, Case No. 17-1209RSL (W.D. Wash. Oct. 10, 2019).

The U.S. District Court for the Western District of Washington recently found that the U.S. Army Corps of Engineers (Corps) violated the Administrative Procedure Act (APA), the National Environmental Policy Act (NEPA), and the federal Clean Water Act (CWA) in issuing the 2017 Nationwide Permit for commercial shellfish aquaculture activities (NWP 48). The District Court held NWP 48 unlawful with respect to activities in the waters of the State of Washington. The court heavily considered vacating NWP 48 outright, but agreed to accept additional briefing from the Swinomish Indian Tribal Community before issuing a final remedy.

Background

The CWA authorizes the Corps to issue permits for discharges of dredge or fill material into navigable waters of the United States. If the Corps determines activities involving discharges of dredged or fill material are similar in nature and will cause only minimal adverse environmental effects both separately and cumulatively, the CWA allows the Corps to issue general permits on a nationwide basis for that set of activities. Nationwide permits last five years before

the Corps must renew them.

In 2017, the Corps reissued NWP 48, authorizing: 1) the cultivation of nonindigenous shellfish species as long as the species had previously been cultivated in the body of water at issue, 2) all shellfish operations affecting half an acre or less of submerged aquatic vegetation, and 3) all operations affecting more than half an acre of submerged aquatic vegetation if the area had been used for commercial shellfish aquaculture activities any time in the last 100 years.

In addition to the CWA requirement that the Corps find minimal adverse environmental effects before issuing a general permit, NEPA requires that the Corps analyze the environmental impact of its actions through an Environmental Assessment (EA). If the Corps is unable to state that the proposed action "will not have a significant effect on the human environment" after conducting the EA, the Corps must complete a comprehensive Environmental Impact Statement (EIS).

Ultimately, the Corps determined that issuing NWP 48 would not result in significant impacts on the human environment for the purposes of NEPA, and would result in no more than minimal individual

and cumulative adverse effects on the aquatic environment for purposes of the CWA. Plaintiffs, on motion for summary judgment, asked the District Court to vacate NWP 48 under the APA because the Corps' conclusions regarding environmental impacts were arbitrary and capricious and unsupported by evidence from the record. Plaintiffs also argued the Corps failed to comply with the CWA, NEPA, and the Endangered Species Act (ESA) in reissuing NWP 48.

The District Court's Decision

Corps' Evidence and Analysis Regarding Environmental Impacts

The court began by analyzing the Corps' scientific evidence and findings regarding environmental impacts. Under the APA, a reviewing court must set aside agency actions that are arbitrary and capricious. Agency action is arbitrary and capricious if the agency has entirely failed to consider important aspects of the problem, offered an explanation that runs counter to the evidence before the agency, or offered an explanation that is completely implausible. The court noted that agency predictions *must* have a substantial basis in fact.

Here, the District Court found there was insufficient evidence in the record to support the Corps' conclusion that reissuance of NWP 48 would have minimal environmental impacts. The Corps acknowledged multiple times that commercial shellfish aquaculture activities could have adverse environmental effects, but it did not provide sufficient evidence that the effects were minimal.

First, the court found the Corps improperly shifted the scale of impact evaluation to a landscape-scale analysis, rather than using the site-specific analysis that the CWA required. Second, the court found that the Corps broadly concluded that impacts would be minimal because the relevant ecosystems were resilient, relying on one scientific paper that lacked evidence to support the Corps' broad conclusion. The paper only studied effects of shellfish aquaculture on seagrass; it lacked any discussion of impacts on other types of vegetation, the benthic community, fish, birds, water quality/chemistry/structure, substrate characteristics, the tidal zone, or impacts of plastic use. The court found that the paper's limited findings did not support the Corps' broad conclusion that

entire ecosystems are resilient to the disturbances caused by shellfish aquaculture, or that the impacts of those operations were minimal.

Third, the court found that the Corps' minimal impact determination was inadequate under the CWA and NEPA because the Corps should have analyzed the impacts of the proposed activity against the environmental baseline, not as a percentage of the decades of degrading activities that came before. The Corps improperly compared the impacts of shellfish aquaculture to the impacts of the rest of human activity, noting that a particular environmental resource was degraded as a justification for further degradation.

Corps' Reliance on General Conditions Imposed under Nationwide Permits

The court then analyzed the Corps' use of the general terms and conditions imposed on all nationwide permits to make its environmental impact findings. Because the Corps relied on the general conditions imposed on all nationwide permits to find minimal impacts, without more evidence, the court found that the Corps did not satisfy the requirements of the CWA and NEPA. The general terms and conditions imposed on a nationwide permit can be relevant to minimal impact findings, but they are "simply too general to be the primary 'data' on which the agency relies when evaluating impacts."

Corps' Delegation of Impacts Analysis to Regional Corps Districts

Lastly, the court analyzed the Corps' finding that regional district engineers would review projects and bring their impacts to a minimal level. Generally, district engineers have the ability to modify a nationwide permit within particular classes of waters, add regional conditions to the nationwide permit, and impose special conditions on particular projects to safeguard against risks of greater than minimal impacts. Here, the Corps relied on these abilities of the district engineers in finding there would only be a minimal impact. The court found the Corps "effectively threw up its hands and turned the impact analysis over to the district engineers." It held the Corps' impact determinations were entirely conclusory, and the Corps abdicated its responsibility in violation of the CWA and NEPA.

The Remedy

The court held the U.S. Army Corps of Engineer's issuance of NWP 48 was arbitrary and capricious and not in accord with the CWA or NEPA. As a result, the court held unlawful and set aside NWP 48 insofar as it authorized activities in Washington. The court considered vacating NWP 48 outright but decided to accept briefing from the Swinomish Indian Tribal

Community regarding the scope of the remedy before making a decision.

Conclusion and Implications

This case exemplifies the rule that agency actions must be supported by substantial evidence to be upheld under the APA. Practically, this case sets aside NWP 48 in the State of Washington.

<https://ecf.wawd.uscourts.gov/doc1/19718788103>.

(William Shepherd IV, Rebecca Andrews)

DISTRICT COURT FINDS EPA'S INTERPRETIVE RULING ON THE CLEAN WATER ACT DESERVES CHEVRON DEFERENCE IN ADDRESSING GROUNDWATER POLLUTANTS LINKED TO SURFACE WATERS

Conservation Law Foundation, Inc. v. Longwood Venues & Destinations, Inc.,
___ F.Supp.3d ___, Case No. 18-11821-WGY (D. Mass. 2019).

On April 23, 2019 the U.S. Environmental Protection Agency (EPA) published its interpretation of the scope of the federal Clean Water Act (CWA) discharge permitting program regulation, formally announcing that the CWA does not extend to situations where there are discharges to groundwater that are thereafter known to be conveyed to "waters of the United States." Federal Register, 84 Fed. Reg. 16,810 (Apr. 23, 2019).

In what may be the first case since the EPA's announcement to deal with the issue of whether discharges to groundwater are subject to National Pollutant Discharge Elimination System (NPDES) permitting under the Clean Water Act, a U.S. District Court judge in Massachusetts has upheld the rationale and interpretation the EPA published in April of this year. In *Conservation Law Found., Inc. v. Longwood Venues & Destinations, Inc.* Judge William Young ruled:

As fully explained below, the Court rules that EPA's interpretation is a permissible construction of the CWA. The Court affords *Chevron* deference to EPA's interpretation and holds that discharges into groundwater are categorically excluded from the CWA's regulatory regime, irrespective of any hydrological connection to navigable waters.

Background

The fact situation involved a sizeable seaside resort and beach club on Cape Cod and its on-site wastewater treatment works. The resort had no NPDES permit for the treatment works, but the State of Massachusetts had issued it a groundwater discharge permit for the treatment works operations. The treatment works itself consists of a series of steps of settling, separation, and filtration. The last step involved the injection of the treated wastewater into a field of concrete leaching pits surrounded by crushed stone wells, with all pits at least four inches above the highest groundwater elevation. The wastewater then leached into groundwater.

The treatment works were not right on the harbor shore, but they were nearby. Most of the wastewater and its nitrogen loading, entrained in groundwaters, would eventually work their way to the open water. Time involved for the wastewater to reach the open water varied from 45 and 223 days.

The resort had problems regularly meeting its state permitted nitrogen loading limitations. The water quality in the harbor and affected channel suffered from degradation over the years and a significant reason was excessive nitrogen. Eventually, a citizens group gave notice and filed suit alleging that the treatment works was in violation of the national

permitting requirements of the Act that govern point source discharges to waters of the United States.

The District Court's Decision

The defendant beach club sought to convince the court that the leaching pits, which were the final stage of sewage treatment, were not “point sources,” and that the CWA does not regulate discharges conveyed by the movement of groundwater. The court rejected the first argument, noting that the design of the leaching devices formed a discrete conveyance within the express definition of “point source.” As to the question of the regulation of groundwater, the court does a careful explication of the various theories by which federal circuits have found the permit requirement to apply. These include the Ninth Circuit Court of Appeals’ “direct hydrological connection” view, whenever the CWA requires *permits* when”

. . .the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water. . .[and]. . .the pollutant levels reaching navigable water are more than *de minimis*. *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737, 749 (9th Cir. 2018).

The District Court also looked to the Sixth Circuit Court of Appeals ruling that discharges other than directly to waters of the United States are *not* subject to the NPDES permit program.

The EPA 2019 Interpretive Statement and Chevron Deference

The District Court then discussed at great length the interpretive statement that EPA published in April 2019. The questions the court asked and answered were whether the interpretive statement is entitled to deference and whether (and how) the so-called *Chevron* tests should apply to answer the deference question. The court in the course of its analysis noted the basic duality in the CWA consisting of imposition of a national regulatory program while at the same time expressly preserving the States a primary role in regulation of their waters, particularly groundwater. The court also noted that groundwater is not expressly mentioned in the waters to which discharge permits are required.

In the end the District Court determined that the April 23, 2019 “interpretive ruling” of EPA deserves deference from courts asked to determine whether discharges to groundwaters are regulated by the NPDES permit requirement.

Conclusion and Implications

With a split in the Circuits regarding the scope of the Clean Water Act’s jurisdiction over scenarios where groundwater has some direct nexus to surface Waters of the United States, the U.S. District Court for Massachusetts had a difficult task. But with the U.S. Environmental Protection Agency’s 2019 Interpretive Statement on the CWA’s scope, the court found refuge in established precedent of applying agency deference in light of guidance by the *Chevron* decision. In the end, agency deference trumped all. (Harvey Sheldon)

DISTRICT COURT GRANTS MOTION FOR SUMMARY JUDGEMENT ON ADMINISTRATIVE VIOLATION OF THE CLEAN WATER ACT

The Blackstone Headwaters Coalition, Inc. v. Gallo Builders, Inc.,
___F.Supp.3d___, Case No. 4:16-cv-40053 (D. Mass. Sep. 30, 2019).

The U.S. District Court for Massachusetts recently determined that citizen suits are not available for administrative violations of the federal Clean Water Act for failure to properly transfer a permit to a new owner in certain circumstances.

Background

Plaintiff, Blackstone Headwaters Coalition (Blackstone) brought this action under the citizen suit provision of the federal Clean Water Act (CWA).

The Clean Water Act requires “operators” of construction activities that “will disturb one or more acres of land, or will disturb less than one acre but are part of a common plan of development ... that will disturb more than one acres of land,” to obtain a Construction General Permit (Permit) from the U.S. Environmental Protection Agency (EPA) authorized by the National Pollutant Discharge Elimination System (NPDES).

The Permit allows operators to discharge pollutants in accordance with set limitations and conditions. An “operator” is defined as either: 1) a party with “operational control over construction plans and specifications, including the ability to make modifications to those plans and specifications,” or 2) a party with “day-to-day operational control of those activities at a project that are necessary to ensure compliance with the [Permit] conditions.”

The site at issue was acquired by father and son Robert H. Gallo and Steven A. Gallo (Gallos) through several transactions conducted between 1995 and 2005. In 2005, the Gallos consolidated ownership of the site under their company—Fox Hill Builders, Inc. In 2007, the site was conveyed to Arboretum Village, LLC where the Gallos serve as members. In February 2006, Gallo Builders, Inc. (GBI) owned by the Gallos, obtained a Permit for the site and listed GBI as the operator of the site. In May 2012, the EPA revamped the Permit process to require permit holders to re-apply. GBI elected to allow its Permit to lapse and reapplied for it to be held by Arboretum. A Permit was issued to Arboretum in May of 2012.

The Massachusetts Department of Environmental Protection (DEP) has authority over the site under the Massachusetts Clean Water Act, Massachusetts Surface Water Quality Standards and the Massachusetts Wetlands Protection Act. These statutes and their corresponding regulations invest the DEP with enforcement powers. On June 21, 2013, the DEP issued a Unilateral Administrative Order (UAO) alleging storm water violations on the site that forced Arboretum to comply with state and regulatory authority. The matter was ultimately settled by a jointly executed Administrative Consent Order (ACOP).

The District Court’s Decision

The only remaining claim in this action was whether GBI and its owners, the Gallos (collectively referred to as: defendants), violated the CWA by failing to obtain a Permit for construction on the site. Defendants relied on similar case from the First Circuit Court of Appeals, which held that a business’ failure to properly transfer an analogous state permit to a new business was *not* a substantive violation of the CWA that could be the basis for a civil enforcement suit. The First Circuit Court of Appeals reasoned that because: 1) the transferor and recipient businesses were controlled by the same person; 2) the identity of the current owner of the property was known to the state permitting authority; and 3) the current owner was complying with relevant regulations, the name on the permit amounted to no more than an administrative issue.

In reviewing applicability of the First Circuit Court’s case, the U.S. District Court applied the three-step analysis to the present case. First, both the prior operator listed on the Permit and the current operator that was not listed, were owned and controlled by the same person—the Gallos. Second, there was “voluminous evidence” demonstrating the identity of the site’s owners was known to the state agencies. Third, GBI and the Gallos complied with the relevant regulations by continuing to comply with the ACOP.

In sum, the District Court held that the underlying purpose of the NPDES and the Permit provisions was met when a valid permit was issued to Arboretum. As seen in the First Circuit Court case, listing Arboretum as the permit holder did not rise to the level of a substantive violation of the CWA and could not form the basis of a civil enforcement suit. The court granted defendant’s motion for summary judgement.

Conclusion and Implications

This case holds that where the three-step analysis is met, the name on a Construction General Permit for purposes of complying with the Federal Clean Water Act may amount to no more than administrative issue. When such an issue arises, it is not sufficient basis of a civil enforcement suit under the CWA. (Nathalie Camarena, Rebecca Andrews)

*Environmental Liability, Enforcement &
Penalties Reporter*
Argent Communications Group
P.O. Box 1135
Batavia, IL 60510-1135

FIRST CLASS MAIL
U.S. POSTAGE
PAID
AUBURN, CA
PERMIT # 108

CHANGE SERVICE REQUESTED