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FEATURE ARTICLE

WATER ADVOCACY GROUP FILES PETITION FOR REVIEW OF AGENCY ACTION AGAINST EPA, SEEKING TO HAVE STORM WATER RUNOFF 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 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

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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

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 demonstrate 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*.

EASTERN WATER NEWS**GREAT LAKES BEACHES ARE DISAPPEARING
DUE TO RISING WATER LEVELS**

The waters of Lake Michigan are rising, removing beaches, encroaching on lakefront property, and exacerbating the weather for those living near the waterfront. Record-high water levels in the Great Lakes, as well as the bays and rivers connected to them, have caused beaches and shorelines to disappear all over the state of Michigan during the summer. The effects of rising water levels have reduced beach access in 37 state parks, not to mention the effects on residents and tourists.

Background

A combination of steady rain and Lake Michigan's rising tides with high winds recently resulted in floods in Manistee, Michigan and closure of portions of Lake Shore Drive in Chicago. Lake Erie's high levels have caused flooding that has endangered roads on Pelee Island, a Canadian island south of Windsor. Although water levels have receded in recent weeks, projected fall and winter storms are likely to mean more coastal flooding, erosion, ice floes and ice jams that could create havoc for those living or working near the lakes.

Year-Round Issues

While the summer season is impacted when rising water levels remove access to popular beaches, the effects of rising levels in the Great Lakes are truly year round. When the lakes freeze over in winter, ice jams can clog channels and impede water flows, creating significant flooding. The receding beaches make lakefront living far riskier, and can result in ice buildup against sea walls and harmful storms which can damage those homes.

Officials from the U.S. Army Corps of Engineers, which tracks lake levels and forecasts them at least six months in advance, predict a high probability stemming from more rain and high winds. The Great Lakes Basin experienced its wettest 60-month period (ending August 31, 2019) in 120 years of record-keeping. Even as waters recede, they are projected to remain well above average over the next six months.

And fall and winter storms tend to create further coastal erosion and coastal flooding, exacerbating issues.

The record lake levels have caused \$550,000 in emergency repairs in Michigan's Porcupine Mountains in the state's Upper Peninsula along the Lake Superior shoreline. In October, a combination of high lake levels and wind-driven waves swept away up to 20 feet of dunes along the Lake Michigan shoreline. Lakes Erie and Superior have set or tied all-time monthly records for the past four months, and the level for lakes Michigan and Huron is a foot higher than last year without touching records. Lake St. Clair has set all-time monthly highs for four consecutive months.

Last spring, elevated waters lifted cement docks off their pilings at Luna Pier Harbor Club in Monroe County off Lake Erie, causing \$20,000 in damage. Increased ice floes also threaten flooding along the shorelines.

State Parks are not just losing beaches, either. McLain State Park off Lake Superior had to be rebuilt for \$4.1 million after five years of constant erosion. Others are facing reductions in land area or even complete disappearance if present trends continue.

Conclusion and Implications

Rising water-levels are a problem for coastal communities world-wide. Much attention is focused on beachfront properties along the coast in California, New Orleans, or Florida. But the same basic risks face populations living along the Great Lakes, and can impact large swaths of the Midwest in years to come. These issues are not simply a problem for residents with coastal property, but can create massive damage to infrastructure and natural resources, cause flooding, exacerbate winter storms, and result in colder winters near lake fronts. The year-round effects of climate change are worsening, and projections for further record-breaking lake levels indicate these issues are not likely to recede in years to come.

(Jordan Ferguson)

NEWS FROM THE WEST

In this month's News from the West we report on California's primary water rights and water quality agency approval of a plan—long in the waiting—to address nitrates in California's main agriculture region, the Central Valley. We also report on efforts by a municipality in the State of Nevada to transport excess water to other parts of the state.

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. Thorme, Patrick F. Veasy, Meredith Nikkel)

One County in the State of Nevada Proposes the Novel Idea Exporting Excess Floodwaters

It's hard to believe that in Nevada—the most arid state in the nation—there might be *too much* water. But that is the case in one hydrologic basin on the northern edge of the Reno metropolitan area, where impervious desert playa soils, banner water years in 2017 and 2019, and development in the floodplain have combined to cause ongoing flooding that has not abated. To address the problem, the county responsible for flood management, Washoe County, has filed an application with the Nevada State Engineer to export excess floodwaters out of the basin. That application underscores the difficulties that can arise when a governing body's responsibility to manage public health and safety concerns intersects with the doctrine of prior appropriation.

Historic Flooding

Reno sits on the eastern edge of the Sierra Nevada. Lemmon Valley is one of several basins in the Reno area that receives run off from the mountains but has no natural outlet for water. Stormwater collects at the valley floor and fills Swan Lake, a shallow playa depression, where little infiltration occurs. Over the years, the City of Reno and Washoe County approved residential, industrial and commercial development along the shores of Swan Lake.

In normal years, sufficient water evaporates from the surface of Swan Lake to keep it confined to the natural lake bed and, sometimes, to dry completely. In 2017, however, precipitation and mountain snowpack were about 200 percent of normal. In response, Swan Lake rose above its historical elevation and flooded surrounding homes. To make matters worse, a wastewater treatment plant also discharges treated municipal effluent into Swan Lake, accounting for 5-6 percent of the lake's water.

Due to the sheer amount of moisture and saturated soils, the floodwaters did not sufficiently recede, notwithstanding a warm summer. Flooding or the threat of flooding continued into 2018. Compounding the situation, 2019 proved to be another very wet year. Three years into the flooding, it has become obvious that the problem will not resolve itself through natural processes within any reasonable time frame.

Initially, Washoe County implemented short-term measures to contain the lake water, which included

temporary barriers and pumps. When those measures did not alleviate the problem, a number of neighboring homeowners sued the City of Reno, claiming a taking of private property without just compensation. The plaintiffs contended that the flooding resulted from city and county planning decisions, which transformed Swan Lake into a water storage facility for run off. The city responded that extreme weather events, not development, created an unprecedented flooding situation beyond the city's control. In June 2019, however, a jury found for the neighbors.

The County's Application to Export Floodwater

On October 18, 2019, the county filed an application to appropriate 1,500 acre-feet per year of water from Swan Lake as part of a project to mitigate the flooding in Lemmon Valley. Through a pump, pipeline and other infrastructure, the county proposes to transport the floodwaters to two neighboring basins for discharge to ephemeral streams. The county identifies its proposed manner of use as wildlife purposes and suggests that ancillary benefits could include instream flow and groundwater recharge in the receiving basins. In other words, the purpose of the application is to get rid of water in Lemmon Valley, not address any needs in the basins to which the water would be moved.

The county's application acknowledges that, before implementing any such project, it will need to perform feasibility studies and acquire rights of way from property owners. There is no specified deadline within which the State Engineer must act on an application.

Private Appropriation of Floodwaters

One interesting twist in the county's flood mitigation effort is that a more senior application to appropriate the floodwaters of Swan Lake is already pending before the State Engineer. That application was filed by three individuals, who proposed:

- . . .to use 2,500 acre-feet of Swan Lake water for storage in reservoirs and underground aquifers. .
- .to alleviate an actual and potential hazard from flooding in Lemmon Valley.

The application also identifies potential secondary

beneficial uses, which could include “quasi-municipal, municipal, evaporation, irrigation, mining, recreation, wildlife, dust control and domestic.” According to the application:

The water pumped from the lake. . .will be. . .only for the purpose of pro-actively reducing if not entirely eliminating the existing and threatened flood situation. The goal is for mitigating flood situations in Lemmon Valley Lake [aka Swan Lake] that are due to increased runoff associated with climate change, development or extreme events. Public agencies, utilities and associations will implement.

The applicant does not own the land on which the flood storage structures would be built. The county protested this application, but in its own application, only requested the right to divert lake water above and beyond the 2,500 acre-feet sought in the more senior application.

Notably, the same private appropriators also filed applications for the floodwaters of two nearby playa lakes in the Reno area, one of which the State Engineer approved in 2012. In issuing that permit, the State Engineer indicated that:

. . .[t]he amount of water recoverable under [the permit] will be determined on an annual basis. . .[with]. . .[n]o carry over credit. . .allowed. . .unless approved by the State Engineer under a separate recharge, storage, and recovery permit.

Without any carry over credit, it remains to be seen what beneficial uses could actually be proved up.

The City of Reno also recently proposed a change to its development standards for stormwater control in the Federal Emergency Management Agency’s designated “flood hazard areas” in closed drainage basins. Going forward, the city will require:

. . .onsite detention/retention basins that are adequately sized to mitigate the increase of storm water runoff as the result of the development to a minimum mitigation ratio of 1:1.3 during the 100-year, 10-day storm.

This means a development must capture more stormwater than would naturally flow offsite, raising the question of whether a developer must file an application to appropriate the surplus stormwater that the oversized detention/retention basins will collect.

Nevada’s water statutes provide that “all water may be appropriated for beneficial use as provided in this chapter and not otherwise.” Nev. Rev. Stat. 533.030(1). One exception to this mandate is, in any county with a population of 700,000 or more, “[w]ater stored in an artificially created reservoir for use in flood control.” Currently, this provision applies only to Clark County, which encompasses the Las Vegas metropolitan area, and nowhere else in Nevada. The limited scope of the statute suggests that the stormwaters of Lemmon Valley are subject to private appropriation.

Conclusion and Implications

The assertion of private rights to appropriate run-off may not be compatible with a municipality’s obligation to manage stormwater flows and protect the community from flooding. Will the holder of a permit to appropriate stormwater be able to restrain the governing jurisdiction’s planning authority or dictate how floodwaters are managed? Must the governing jurisdiction pay the private appropriator for the right to manage those floodwaters? This seems at odds with the general police power to protect public health and safety. A legislative fix is probably the best means to address these vexing questions. In the meantime, though, the issue may soon come to a head in flood-prone Lemmon Valley.

(Debbie Leonard)

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)

ADVOCACY GROUPS PETITION THE NATIONAL MARINE FISHERIES SERVICE TO PROTECT CHINOOK SALMON UNDER THE FEDERAL ENDANGERED SPECIES ACT

On September 24, 2019, the Native Fish Society, Center for Biological Diversity, and Umpqua Watersheds (petitioners) petitioned the National Marine Fisheries Service (NMFS) to initiate a status review of spring-run Oregon Coast Chinook salmon under the federal Endangered Species Act (ESA). Cur-

rently, they are included with their fall-run cousins as part of the Oregon Coast Chinook Evolutionarily Significant Unit (ESU). Petitioners assert that spring Oregon Coast Chinook form a distinct ESU that qualifies independently for listing under the ESA. They request NMFS initiate a status review to deter-

mine whether spring Oregon Coast Chinook constitute an ESU, and if so, whether they should be listed as threatened or endangered under the ESA.

Spring-Run Oregon Coast Chinook

Chinook are the largest Pacific salmon, typically reaching three feet long and 30-40 pounds as adults. Like other salmonids, spring Chinook migrate from the ocean to the freshwater streams of their birth to reproduce. But unlike many other salmonids that run in the summer or fall, spring Chinook migrate upstream in the spring while still sexually immature, pass the summer in freshwater, and spawn in early fall.

Spring Oregon Coast Chinook historically inhabited nine river systems between Tillamook Bay and the Coquille River: Tillamook River and tributaries, Nestucca River, Siletz River and tributaries, Alsea River and tributaries, Siuslaw River, North Umpqua River and tributaries, South Umpqua River and tributaries, Coos River, Coquille River and tributaries, and Salmon River. Spring Oregon Coast Chinook have been extirpated from several of these rivers; other rivers support tiny but dwindling populations. The North Umpqua River is home to the only significant spring Oregon Coast Chinook population; it sees returns of 2,500 to 16,000 spawners annually.

NMFS Evolutionarily Significant Unit Policy

The ESA defines a “species” eligible for listing under the ESA to include:

...any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature. 16 U.S.C. § 1533(16). However, the ESA does not define the term “distinct population segment.” In 1991, NMFS developed the ESU Policy, which provides that a population or collection of populations of Pacific salmonids must meet two criteria to qualify as an ESU:

- The population must be substantially reproductively isolated from other nonspecific population units; and
- The population must represent an important

component in the evolutionary legacy of the species.

In 1998, NMFS delineated the Oregon Coast Chinook ESU, which included both spring- and fall-run Chinook. At that time, NMFS decided not to list Oregon Coast Chinook under the ESA.

According to petitioners, new evidence shows that spring Oregon Coast Chinook qualify as a separate ESU and are thus eligible for listing under the ESA distinct from fall Oregon Coast Chinook. It has been presumed that spring- and fall-run Oregon Coast Chinook were genetically similar, but petitioners assert that several recent studies on the:

...genomic basis for premature migration in salmonids demonstrate[] significant genetic differences underlie the phenotypic distinctions.

In other words, spring Oregon Coast Chinook run earlier because they are genetically different from Chinook that run in the fall. As petitioners explain:

A main benefit of the spring-run phenotype is that it allows access to exclusive temporal and/or spatial habitat that is partially or wholly inaccessible, or in some cases, less suited to fall-run Chinook salmon....A profound benefit to the species (as well as to the fisheries and ecological relationships that depend on the species) is the spreading of ecological risk by increased spatial diversity, behavioral and life history diversity, productivity, and population size afforded by the presence of the spring run form.

ESA Listing Process

If NMFS agrees with petitioners that spring Oregon Coast Chinook should now be considered a distinct ESU, the ESU will be potentially eligible for listing under the ESA. When considering whether a species or subspecies, including an ESU, is endangered or threatened, NMFS must consider:

- The present or threatened destruction, modification, or curtailment of its habitat or range;
- Overutilization for commercial, recreational, scientific, or educational purposes;

- Disease or predation;
- The inadequacy of existing regulatory mechanisms; or
- Other natural or manmade factors affecting its continued existence. 16 U.S.C. § 1533(a)(1).

The species shall be listed where the best available data indicates that the species is endangered or threatened because of any one or more of these factors. 50 C.F.R. § 424.11(c). Petitioners addressed all five factors in varying detail, but this article will focus on habitat destruction and the threat of human-caused hybridization between spring- and fall-run Chinook.

Habitat Destruction and Degradation

Petitioners assert spring Oregon Coast Chinook are threatened by habitat destruction caused by logging, dams and irrigation diversions, climate change, and other human activities. Logging and related road construction reduces stream shade, increases fine sediment levels, reduces instream large wood, and alters watershed hydrogeology, leading to sedimentation and warming that decrease salmonid access to the deep, cold pools they require for summer holding. Removal of water for irrigation and climate change also contribute to stream warming.

Lack of physical access to historic habitat is another threat to the spring Oregon Coast Chinook. There are nine dams and reservoirs in the North Umpqua River, and passage barriers exist on the South Umpqua and other waterways within the spring Oregon Coast Chinook's historic range. The 77-foot Soda Springs Dam is the first barrier to passage on the North Umpqua. It was relicensed for 35 years in 2001 amid a decades-long battle between PacifiCorp and environmental groups. As required by the relicensing agreement, fish passage was completed in 2012, but a

large coalition of advocacy groups continue to call for removal of the Soda Springs Dam.

Artificial Propagation and Hybridization

Petitioners identify artificial propagation (hatcheries) as another anthropogenic factor endangering the spring Oregon Coast Chinook. Intentional or inadvertent hybridization of spring- and fall-run coastal Chinook in hatcheries is a newly documented phenomenon that petitioners assert presents "a major, imminent man-made threat to the spring run population." As petitioners explain, hybridization likely harms both spring-and fall-run Chinook by producing:

...intermediate phenotypes that typically migrate later than the indigenous spring-run fish, but earlier than the fall run. Such intermediate phenotypes are almost certainly maladapted to long-term survival in natural habitats, consistent with their absence from indigenous wild Chinook salmon populations.

In other words, summer-run Chinook do not naturally occur, and there is probably a reason for that.

Conclusion and Implications

Petitioners request the National Marine Fisheries Service designate critical habitat for spring Oregon Coast Chinook, to include "all known and potential freshwater spawning and rearing areas, migratory routes, estuarine habitats, riparian habitats and buffers, and essential near-shore ocean habitats." Such designation, should it come to pass, could have far-reaching implications for Oregon's forest products, agriculture, and fishing industries. Final resolution may be several years in the offing, but the first test of petitioners' claims will be NFMS' decision whether to initiate a status review.

(Alexa Shasteen)

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— Water 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. The court 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.

•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 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 ten 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 imple-

ment 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)

JUDICIAL DEVELOPMENTS

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 fe-

cal 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.

Testimony As to Undated Instances of Dumping

Blankenship also asserted that the District Court abused its discretion in permitting U.S. 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 argu-

ment 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)

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 en-

vironment” 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)

U.S. DISTRICT COURT DECIDES THE 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 Massachusetts District Court in Massachusetts 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)

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