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FEATURE ARTICLE

AMIGOS BRAVOS 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_apa_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 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'

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 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.

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WESTERN WATER NEWS

CALIFORNIA AMERICAN WATER'S MONTEREY BAY DESALINATION PROJECT CONTINUES TO FACE OPPOSITION

California American Water (Cal Am), a private investor-owned utility that provides water and wastewater services to over 600,000 customers in the Monterey area, has been moving forward with plans for a desalination plant project (Desal Project) to be constructed near the Monterey One Water Regional Treatment Plant. Cal Am conceived of the Desal Project as a response to current and anticipated supply challenges facing the company. Though Cal Am has been steadily working to obtain the requisite approvals and commence construction, the Desal Project has faced ongoing opposition, primarily as a result of the project's expected costs and environmental impacts.

The Cal Am Desalination Project

The Desal Project largely arose as a response to a State Water Resources Control Board cease and desist order limiting Cal Am's pumping from the Carmel River, with restrictions expected to take full effect by December 31, 2021. As contemplated, the project involves drawing seawater through the ocean floor using subsurface slant wells constructed near the tide line north of the city of Marina, which would then be sent to the new 6.4 million gpd desalination plant for treatment. A new pipeline was previously built in order to transmit the seawater from the wells to the plant.

The Desal Project is among three primary components included in the broader Cal Am initiative known as the Monterey Peninsula Water Supply Project (Water Supply Project), and is expected to cost a total of $329 million over 30 years, according to Cal Am. Notwithstanding Cal Am's particular supply pressures, the company has characterized the Water Supply Project as a groundbreaking step toward the development of a sustainable water supply for the Monterey Peninsula.

Critics Cite Environmental and Economic Concerns

Primary criticisms levied against the Desal Project involve anticipated environmental impacts as well as anticipated costs associated with the project. Environmental opponents claim that instead of seawater, the slant wells for the Desal Project will draw freshwater from a nearby aquifer that is recharging and protecting the Salinas Valley Groundwater Basin (Basin) against seawater intrusion. They argue that the Desal Project would contaminate and result in further depletion of the Basin, already been deemed to be in a state of critical overdraft by the Department of Water Resources. Cal Am asserts that monitoring wells will allow the company to closely observe the situation during operation and quickly respond by shutting down the slant wells should any seawater intrusion occur.

Substantial opposition to the Desal Project has also been based on expected short and long term economic impacts, as desalination remains one of the costlier solutions to water supply challenges generally. Some argue that the Desal Project could end up costing almost four times the $329 million Cal Am projects, based on previous information disclosed by Cal Am in connection with prior permit approvals, claiming that the $329 million figure cited by Cal Am represents only the capital cost of constructing the plant. Whatever the total cost, it is ultimately expected be passed on in large part to consumers in Cal Am water bills, which Cal Am estimates could rise by about 50 percent on average. Local officials have also suggested that costs of remediating any seawater intrusion into the Basin caused by the Desal Project would be disproportionately borne by residents in lower-income areas, to the benefit of residents in more affluent areas serviced by Cal Am.

Many opponents believe that options for extensively treating recycled water for potable represents a much more cost-effective alternative solution to the region's water supply needs. This could include the expansion of Cal Am's Pure Water Monterey program, another component of the Cal Am Water Supply Project. While an expansion of the Pure Water Monterey program is being pursued in conjunction

with the Desal Project, that program faces obstacles of its own in obtaining approvals and otherwise moving ahead to generate water production within the timeframe Cal Am had anticipated.

Challenges to Project and Recent Setbacks

The Marina Coast Water District (District) has taken the lead in several notable efforts to block the Desal Project, including the August 2019 filing of a lawsuit in Monterey County Superior Court to enjoin construction on the project, due to the alleged inadequacy of the California Environmental Quality Act (CEQA) review on which the County of Monterey's (County) board of supervisors relied in approving a key use permit for the project that enabled construction to commence. Specifically, the District argues that the environmental studies did not account for newly available information that substantially supports the position that the project could negatively impact the Basin on a much larger scale than previously believed, so further review needs to be conducted under CEQA. The District also alleges that the County's approval of the permit violated zoning laws and the Water Code because the District did not demonstrate that it had obtained the requisite water rights for purposes of the County use permit. The District's recent action is the ninth lawsuit brought against the Desal Project, and the fifth brought by the District.

While Cal Am has been successful in fending off legal and administrative challenges to date, recent complications and delays arising out of the District's lawsuit and the California Coastal Commission's consideration of a necessary project permit have seriously limited Cal Am's ability to move forward, at least in the short term. On October 28, 2019, Coastal Commission staff recommended that the approval of the Desal Project permit be denied due to the viability of an expanded Pure Water Monterey recycled water treatment program as an alternative to the Desal Project. Shortly thereafter, the Coastal Commission decided to postpone a vote on the Desal Project until March, pending further review of the viability of alternatives to the project. Subsequently, on November 19, Judge Lydia Villarreal, presiding over the District's lawsuit, issued an order extending a stay on construction until March 2020, corresponding to the expected timing of the decision of the California Coastal Commission regarding a permit for the Desal Project.

Conclusion and Implications

The Desal Project is an ambitious undertaking borne largely out of necessity for Cal Am. Challenges to the project have had limited success, but the November 19 order in the District's lawsuit extending the stay on construction of the project represents a notable victory. Such delays, along with recent delays involving the expansion of Pure Water Monterey, mean that Cal Am may be unable to obtain the supplemental water supply in time needed to offset the full imposition of restrictions on production in Carmel River. Though the recent setbacks and present circumstances do not suggest that the eventual completion of the Desal Project will be compromised, Cal Am still needs to secure certain approvals relating to the project and opponents appear likely to continue pursuing all avenues undermine it.

ONE NEVADA COUNTY PROPOSES THE NOVEL IDEA OF 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 might be 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)

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 Peelee 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 alone 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)

LEGISLATIVE DEVELOPMENTS

COLORADO VOTERS PASS PROPOSITION 'DD' TO FUND WATER PROJECTS FROM NEWLY-LEGALIZED SPORTS BETTING

Colorado voters narrowly passed Proposition DD during the general election on November 5, 2019. Proposition DD legalizes sports betting in Colorado while enacting a tax on the gambling that, among other things, will primarily be used to fund projects called for under the Colorado Water Plan.

Background

In May 2018, the U.S. Supreme Court nullified a federal law limiting sports betting to a few select states. In the immediate aftermath 42 states began working toward legalizing sports betting within their borders. In Colorado, the General Assembly passed HB 19-1327 and it was signed into law by Governor Jared Polis. (*See*, https://leg.colorado.gov/sites/default/files/2019a_1327_signed.pdf) However, that bill did not in itself legalize the practice. Instead, the Taxpayers' Bill of Rights (TABOR) requires a vote from affected citizens for all Colorado tax increases, and a tax was proposed on the gaming revenue. Accordingly, the passage of HB 19-1327 sent Proposition DD to Colorado voters last month. (*See*, https://leg.colorado.gov/sites/default/files/initiative%2520referendum_2019-2020%20hb%2019-1327v3.pdf) Passage of the measure legalized sports betting at all 33 licensed Colorado casinos, as well as allowing those casinos to contract with private companies to provide for online betting. Crucially, those casinos will pay a 10 percent tax on their proceeds with the majority of that money going to fund water projects in Colorado. That tax would be capped at $29 million a year, although most estimates put the annual figure at closer to $16 million. In addition to funding the Colorado Water Plan, revenue from the sports betting tax will contribute $130,000 per year to human services, discussed below, and another 6 percent per year (estimated at $960,000) to a "hold harmless" fund. This fund would reimburse "traditional" gambling entities, such as horse racing, if they can prove that they lost money in a given year due to the legalization of sports betting in Colorado.

Colorado Water Plan

The majority of the tax revenue from sports betting will go toward furthering projects identified in the Colorado Water Plan. Development of the Colorado Water Plan began in 2014 under then-governor John Hickenlooper. The resulting plan identifies more than $20 billion worth of water projects relevant to the state's continued growth, development, and success throughout the rest of this century. Critically, the plan is chronically underfunded, owning partly to its sizeable budget, but also to the TABOR issues plaguing tax increases in Colorado. The potential $29 million per year in gambling tax revenue would more than triple the average budget currently given to the Colorado Division of Water Resources, the agency tasked with overseeing and carrying out the Colorado Water Plan.

The Water Plan estimates the funding shortfall as $3 billion, or $100 million per year for 30 years. Although that is only a rough estimate, it is clear that both that a significant amount of funding is needed, and that the revenues from Proposition DD will not cover the difference. Instead, supporters of the new measure have called the projected $13-29 million per year a "down payment" to begin funding the dozens of waiting projects. The Water Plan's compilation of various Basin Implementation Plans (BIPs) throughout the state's seven basins lists 14 of the 31 top BIPs as "TBD" in their funding needs. Not only is it unclear where the money will come from, it is yet unclear how much money is even needed to achieve some of the Water Plan's goals.

Passage of Proposition DD

There was almost no paid opposition to Proposition DD. That is, there were no advocacy groups, PACs, or the like organized to oppose the ballot measure. In contrast, the Colorado Gaming Association, conservation groups, and agricultural coalitions all supported Proposition DD and almost $1 million was spent in support, primarily from casinos and other

gaming groups. In addition to the casino industry which obviously supported the measure, Proposition DD was also backed by environmental groups such as Western Resource Advocates which said in a statement:

> . . .[t]axing the revenue from legalized sports betting will create a dedicated down payment to help ensure that Colorado has healthy rivers and enough water for all.

Although there was no organized resistance to Proposition DD, the close vote was probably attributable to those who have moral qualms about gambling, and those who feel the same about taxes. Several newspaper editorials pointed out that Proposition DD earmarks $130,000 a year for the state Department of Human Services, Office of Behavioral Health to create a crisis hotline and fund gambling addiction counselors. The fact that the state acknowledges that issue, the argument goes, is proof enough that we should not legalize something that we know—and in fact are planning for—to be to the detriment of some of our citizens. The other main prong of opposition stemmed from how the ballot language was worded. Although the 10 percent tax is only attributable to the casinos themselves, not Colorado voters, or even Colorado gamblers, the ballot read:

> Shall state taxes be increase by twenty-nine millions dollars annually to fund state water projects and commitments and to pay for the regulation of sports betting through licensed casinos by authorizing a tax on sports betting of ten percent of net sports betting proceeds, and to impose the tax on persons licensed to conduct sports betting?

As supporters of Proposition DD later admitted, the ballot language was not artfully crafted and there were probably many voters who did not make it past "shall state taxes be increased by twenty-nine million dollars." There was also small opposition from Coloradans for Climate Justice, a group that opposed the measure purely because they believe that water projects and other expenses directly attributable to climate change should be paid for by the fossil fuel industry, not by Colorado citizens. That being said, the measure passed by the razor thin margin of 50.8 to 49.2 percent, or about 22,000 votes out of the total 1.4 million votes cast.

Conclusion and Implications

Sports betting will become legal in Colorado on May 1, 2020. Supporters are hopeful that, while not an ultimate fix, the accompanying tax on casino proceeds will begin to put a dent in the funding deficit for water projects identified in the Colorado Water Plan. If the measure proves successful and meaningful gains are seeing in the development of water projects, perhaps the state will begin to explore other means of getting funding to the Colorado Water Plan. With almost every other state legalizing, or attempting to legalize sports betting, the Colorado model could become a draft for other western states looking to use this new source of revenue to support their arid landscapes in a dry 21st century.
(John Sittler, Paul Noto)

REGULATORY DEVELOPMENTS

ADVOCACY GROUPS PETITION THE NATIONAL MARINE FISHERIES SERVICE TO LIST SPRING-RUN OREGON COAST 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). Currently, 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 determine 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)(l).

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)

U.S. BUREAU OF RECLAMATION PUBLISHES NOTICE OF PROPOSED WATER SUPPLY CONTRACT WITH WESTLANDS WATER DISTRICT

In November 2019, the U.S. Bureau of Reclamation (Bureau) made public a proposed water contract with Westlands Water District for 1.15 million acre-feet of water from the federally operated Central Valley Project in California. The proposed contract, which would convert Westlands' existing water service contract into a repayment contract, would provide Westlands a perpetual supply of water, depending on water availability and continued satisfaction of repayment obligations by Westlands provided for in the contract.

Background

The U.S. Bureau of Reclamation constructed and operates the Central Valley Project (CVP) that diverts from the Sacramento River, the American River, the Trinity River, and the San Joaquin River and their tributaries. The CVP provides for a variety of beneficial uses, including diversion and storage, flood control, irrigation, municipal, domestic, industrial, fish and wildlife mitigation, and electricity generation and distribution. Annually, the CVP delivers an average of 5 million acre-feet of water for farms, 600,000 for municipal and industrial uses, 410,000 acre-feet for wildlife refuges, and 800,000 acre-feet for other fish and wildlife needs.

The Bureau acquired water rights to operate the CVP under California law, and has entered into long-term water service agreements with more than 250 contractors, including Westlands. Generally, CVP contracts are water service contracts, which are authorized under the federal Reclamation Project Act of 1939 (1939 Act). Water service contracts are used where the CVP includes multiple facilities benefiting different CVP functions, and where construction and final cost allocations have not yet been completed. For those types of facilities, costs are recovered from contractors, via water service contracts, according to the annual number of acre-feet of water the contractor diverted. Rates are set by the Bureau. The 1939 Act also authorizes repayment contracts, which are used when specific cost obligations can be assigned to contractors when specific facilities are constructed for the sole benefit of a single contractor. Repayments are generally made in 40 annual installments to repay a fixed amount.

In 1960, Westlands assigned its state water rights to the Bureau in exchange for a long-term water service contract with the Bureau. Accordingly, CVP water is delivered to Westlands pursuant to a contract from 1963 and a stipulated judgment in federal court. Westlands and the Bureau subsequently entered into binding agreements relating to the terms and conditions for renewing Westlands' contract.

The Water Infrastructure Improvement Act

In 2016, Congress passed the Water Infrastructure Improvement Act (WIIN Act), which allows for the conversion of current water service contracts into repayment contracts under the 1939 Act. In particular, § 4011(a)(1) provides that:

> . . .upon request of the contractor, the Secretary of the Interior shall convert any water service contract in effect on the date of enactment of this subtitle and between the United States and a water users' association to allow for prepayment of the repayment contract pursuant to paragraph (2) under mutually agreeable terms and conditions.

For purposes of this section, Westlands is deemed a "water users' association" and thus is deemed eligible by the Bureau for conversion of its water service contract.

Section 4011(a)(1) further prescribes the manner in which water service contracts are converted into repayment contracts. For instance, water service contracts under § (e) of the 1939 Act become repayment contracts under § 9(d) of the 1939 Act, and water service contracts under subsection (c)(2) of the 1939 Act become repayment contracts under § 9(c)(2). Accordingly, the Bureau deemed Westlands' water service contract subject to conversion into a repayment contract. Moreover, the WIIN Act provides that newly converted repayment contracts are eligible for prepayment of construction cost obligations, discounted at half the Treasury rate. If Westlands' existing contract is converted into a repayment contract, its repayment obligation, if prepaid, may be discounted.

Proposed Terms

Under the proposed terms, the effective date of the contract would be March 1, 2020, and would continue "so long as the Contractor [Westlands] pays applicable Rates and Charges" under the contract, consistent with §§ 9(d) or 9(c)(1) of the 1939 Act. During each year, the Bureau would attempt to make available for delivery to Westlands 1,150,000 acre-feet of CVP water for irrigation, municipal, and industrial purposes. However, the proposed contract recognizes that the amount of contract water "is uncertain" due to hydrological conditions and the operation of state and federal law.

Although the contract contemplates Westlands' use of water for irrigation, municipal, and industrial purposes, the contract provides that Westlands may transfer, assign, reschedule, or convey CVP and other water to minimize the impacts of shortage conditions and to maximize the beneficial use of water. The contract would thus provide Westlands, and other contractors receiving similar provisions in their contracts, with greater flexibility to address hydrological and operation conditions within the CVP. It may also provide a general degree of flexibility for water planning and storage purposes, depending on the unique circumstances the contractor may be experience or anticipate experiencing. For instance, under the terms of the contract, "reasonable and beneficial use" broadly includes storage activities, including groundwater recharge programs, groundwater banking programs, surface water storage programs, and other similar programs using CVP or other water Westlands receives within its service area, provided those uses are consistent with state law and the use is consistent with federal Reclamation laws. Notably, "rescheduled water" contemplates "pre-use" of water, where Westlands may request permission to use during the current year a quantity of CVP water which may be made available by the Bureau to Westlands during the subsequent year. Whether these uses are "reasonable and beneficial" uses as a matter of state law is not clear.

Conclusion and Implications

While the proposed contract between the Bureau and Westlands has already generated controversy, the mechanism for negotiating and converting water service contracts for the CVP was put in place by the WIIN Act of 2016. It remains to be seen whether any amendments to the contract will be made, as the comment period closes in January 2020, or whether the contract will be fully executed before the March 1, 2020 effective date. Bureau of Reclamation's Negotiated Conversion Contracts are available online at: https://www.usbr.gov/mp/wiin-act/negotiated-conversion-contracts.html
(Steve Anderson, Miles Krieger)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

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 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 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 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.

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 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 IN WASHINGTON STATE

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)

U.S. 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 au-

thority. 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; 3) and 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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