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CALIFORNIA WATER™
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FEATURE ARTICLE

U.S. EPA AND THE CORPS RELEASE WATERS OF THE UNITED STATES RULE THAT CLOSELY ADHERES TO JUSTICE SCALIA'S *RAPANOS* OPINION—BUT DUE TO CALIFORNIA'S NEW WETLANDS PROGRAM—PROVIDES LITTLE RELIEF TO THE STATE REGULATED COMMUNITY

By Nicole E. Granquist and Meghan A. Quinn

On January 23, 2020, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (together referred to as: the Agencies) released a pre-publication version of a joint final rule that sets forth a new definition of the Waters of the United States (Joint Rule). The Joint Rule attempts to provide long-awaited certainty to an area of the law typically wrought with confusion, through the establishment of new bright line rules, added definitions, and the elimination of the vague "significant nexus" test established by Justice Kennedy's concurring opinion in *Rapanos v. United States*, 547 U.S. 715 (2006)—a notoriously fractured Supreme Court decision regarding the appropriate limitations of waters subject to the federal Clean Water Act (CWA). The Joint Rule will become effective 60 days after publication in the Federal Register.

Background

Publication of the Joint Rule is the final step in the Trump administration's effort to repeal and replace the controversial 2015 Waters of the United States (WOTUS) Rule (2015 WOTUS Rule), issued under the Obama administration, which never became effective nationwide due to claims that the rule stretched the WOTUS definition to its constitutional limit, failed to comply with the Administrative Procedure Act (APA), and inappropriately interpreted Justice Kennedy's significant nexus test. However, whether the Trump administration's "repeal and replace" efforts will succeed is still uncertain due to threatened and anticipated litigation by a number of states and environmental organizations. To wit, on February 13, 2020, 13 environmental groups filed a Notice of Intent to sue the Agencies over the Joint Rule.

The Joint Rules' opponents have and continue to boisterously exclaim rollbacks established by the rule. Politics aside, the Joint Rule appears broader than advertised based on the multitude of ways that connectivity, and thus, jurisdiction over a water can be established. That being said, the Joint Rule will no doubt provide the regulated community outside of California with significant relief given the breadth of the earlier 2015 WOTUS Rule. However, within California the 2015 WOTUS Rule essentially becomes effective once again on May 28, 2020— the date on which California's new State Wetland Definition and Procedures for Discharges of Dredged and Fill Material (Procedures) become effective, depriving the regulated community in California of much of the relief and clarity offered by the Joint Rule.

Summary of the Joint Rule

The Agencies' main goal in promulgating the Joint Rule was to reduce controversy and provide clarity, while adhering to the statutory text of the CWA and the limits placed thereon by the Constitution and the Supreme Court. Thus, the Joint Rule streamlines the categories of water features that are considered "jurisdictional-by-rule" by eliminating several, arguably overlapping categories as bases for jurisdiction. Consequently, only four categories of water features will be considered "jurisdictional-by-rule." The Joint Rule also streamlines codification of the new WOTUS definition—limiting placement to only two sections of the Code of Federal Regulations (33 CFR 328.3, and 40 CFR 120.2), as opposed to the 13 regu-

lations in which it was previously found.

Under the Joint Rule, the following four features are considered jurisdictional-by-rule: 1) traditional navigable waters, including the territorial seas; 2) tributaries that contribute perennial or intermittent flow to such waters; 3) certain lakes, ponds, and impoundments of jurisdictional waters; and 4) wetlands adjacent to other jurisdictional waters. The following 11 categories of waters will not be considered WOTUS under the rule: 1) groundwater; 2) ephemeral water features that flow only in direct response to precipitation; 3) diffuse stormwater runoff and directional sheet flow over upland; 4) ditches that are not traditional navigable waters, tributaries, or that are not constructed in adjacent wetlands, subject to certain limitations; 5) prior converted cropland; 6) artificially irrigated areas that would revert to upland if irrigation ceased; 7) artificial lakes and ponds that are not jurisdictional impoundments and that are constructed or excavated in upland or non-jurisdictional waters; 8) water-filled depressions excavated or constructed in upland or in non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or in non-jurisdictional waters for the purpose of obtaining fill, sand, or gravel; 9) stormwater control features constructed or excavated in upland or in non-jurisdictional waters; 10) groundwater recharge, water reuse, and wastewater recycling structures constructed or excavated in upland or in non-jurisdictional waters; and 11) waste treatment systems.

While several of the above-listed non-jurisdictional features, such as ditches and artificial ponds, have been refined (*i.e.*, to indicate that the features must be constructed in uplands or in non-jurisdictional waters to qualify for the exemption), the only new categories are: 1) ephemeral water features that flow only in direct response to precipitation; and 2) diffuse stormwater runoff and directional sheet flow over upland.

The lists of jurisdictional-by-rule and non-jurisdictional waters are accompanied by 16 definitions that provide context for determining whether an artificial water feature is constructed in upland, and whether a feature ought to be considered ephemeral, among other considerations important for determining jurisdictional status. A summary and analysis of the most noteworthy definitions follows.

But in sum, the Joint Rule sets forth a WOTUS definition which would seem to eliminate a large degree of agency discretion in identifying jurisdictional waters, and significantly reduces the expanded reach of federal jurisdiction established in 2015, by eliminating from the definition of WOTUS: 1) numerous types of ephemeral water bodies; and 2) waters that are subject to a case-specific significant nexus analyses, including certain regional water features (*i.e.*, prairie potholes, vernal pools and pocosins), those waters located within the 100-year floodplain of any primary water, and all waters located within 4,000 feet of the high tide line or ordinary high water mark of any jurisdictional water. Some of the excluded features in the Joint Rule adhere closely to the categories of non-jurisdictional waters set forth in the 2015 WOTUS Rule, while others eliminate categories such as artificial and ephemeral features previously encompassed by several now-eliminated adjacency criteria (*i.e.*, "neighboring" waters and "all waters located within 4,000 feet of the high tide line or ordinary high water mark").

Significant Changes

While some of the changes the Agencies made to the Joint Rule are consistent with prior iterations of the WOTUS definition, there are several modifications that deviate from both the 1986/1988 WOTUS Rule (as accompanied by guidance) and the 2015 WOTUS Rule.

Interstate Waters

Instead of following prior iterations of the WOTUS definition, the Joint Rule eliminates interstate waters, including interstate wetlands, as a *separate category* of waters subject to federal jurisdiction. Going forward, for an interstate water to be considered jurisdictional, the feature must fall within another category of jurisdictional-by-rule features. For instance, if a navigable-in-fact river were to flow from one state to another, that water feature's status would not change under the Joint Rule. However, an isolated wetland that straddles state lines will no longer be subject to the CWA.

Tributaries

Tributaries subject to federal jurisdiction will be confined to those waters that contribute "perennial" or "intermittent" flow to jurisdictional-by-rule waters in a "typical year." To enhance the clarity of this new standard, the Joint Rule provides definitions for those

terms necessary for interpreting this standard. Specifically, a jurisdictional tributary is one that either contributes flow year-round (perennial) or "continuously during certain times of the year and more than in direct response to precipitation" (intermittent), during those years where precipitation and climactic conditions are approximately average, when taking into account a 30-year rolling period (typical year).

The term *tributary* includes ditches that either relocate a tributary, are constructed in a tributary, or are constructed in an adjacent wetland as long as the ditch satisfies the flow conditions described above. Furthermore, the Joint Rule's preamble clarifies that managed tributary systems, or tributaries that have been altered or relocated (such as the water distribution systems that are channelized and armored throughout the State of California) will be considered jurisdictional as long as they satisfy the definition of "tributary," including flow conditions.

Breaks Affecting Jurisdictional Status

The Joint Rule also clarifies those instances in which a break in flow would *not* cause the tributary (or other water) to lose its jurisdictional status. Specifically, a tributary would continue to be subject to federal jurisdiction where it contributes surface water flow in a typical year to a downstream jurisdictional water through: 1) a channelized non-jurisdictional surface water feature, 2) a subterranean river, 3) a culvert, 4) dam, 5) tunnel or similar artificial feature, or 6) a debris pile, boulder field, or similar natural feature.

Furthermore, the Joint Rule explains that the underground tunneling or channelization of flow is not considered groundwater; nor are subterranean rivers and streams. Consequently, if an artificial tunnel system is erected and a river diverted to that system to facilitate development, the water feature remains subject to the CWA. Because subterranean rivers and streams are not considered groundwater under the Joint Rule, such subterranean features do not nullify the jurisdictional status of upstream tributaries.

The inclusion of subterranean rivers among the breaks that would not cause a tributary to lose its jurisdictional status is a notable deviation from the text of the proposed Joint Rule. However, it is worth noting that the use of a subterranean feature to establish jurisdiction over a tributary is not without limitation. According to the Joint Rule, the distinguishing feature is whether the subterranean river resurfaces as part of the same river, instead of: 1) not resurfacing; 2) resurfacing as an aquifer-fed spring; or 3) resurfacing as the headwaters of another river. Nonetheless, this modification will likely result in continued federal jurisdiction over a multitude of western waterways that only flow above ground throughout their entire course when the water table is sufficiently high, such as the Ventura River.

Thus, while the definition of a tributary under the Joint Rule is narrower than the 2015 WOTUS Rule, which provided that a tributary was *any water that contributes flow directly or through another water* to a water considered jurisdictional-by-rule, the Joint Rule sets forth a number of instances in which a tributary will remain subject to the CWA where it does not flow above ground, has been altered throughout its course, or flows through a number of different types of breaks. The regulated community should carefully examine any culverts, dams, ditches or other breaks along the path of a tributary before determining that a water to which they discharge a pollutant or dredged or fill material does not require federal permitting.

Ditches

The Joint Rule has a surprisingly complex treatment of ditches. While most ditches are considered non-jurisdictional under the Joint Rule, a non-jurisdictional ditch could be capable of conveying channelized surface water flow between upstream relatively permanent jurisdictional waters and downstream jurisdictional waters in a typical year. Consequently, the non-jurisdictional ditch could provide a connection sufficient to support classification of the upstream water feature as jurisdictional. However, the preamble to the Joint Rule is careful to point out that:

> . . .a non-jurisdictional feature remains non-jurisdictional even if it provides a channelized surface water connection between jurisdictional waters in a typical year.

Thus, even where a ditch provides the jurisdictional basis for an upstream feature, the ditch itself is not jurisdictional.

The Joint Rule also enumerates several instances in which a ditch would be considered jurisdictional, including where the ditch: 1) relocates a tributary; 2) is constructed within a jurisdictional water; or 3) receives overflow from a jurisdictional water (such as

a perennial river), which extends the ordinary high water mark of the overflowing jurisdictional water into the ditch. However, it is worth noting that in each of these instances, the ditch in question must meet the perennial or intermittent flow requirements established by the Joint Rule to be subject to CWA jurisdiction.

Ephemeral Waters

Another notable difference between the 2015 WOTUS Rule and Joint Rule is the elimination of ephemeral waters from the WOTUS definition. The Joint Rule specifies that waters, which flow *only in response to precipitation events* are not considered WOTUS, while those that contribute flow either perennially or intermittently (based on the definitions set forth above) to a jurisdictional-by-rule water would remain jurisdictional. The standard set by the Joint Rule is not new, but rather, codifies the standard set forth in *Rapanos* and agency practice prior to adoption of the 2015 WOTUS Rule.

In December 2008, the Agencies released a guidance document titled "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabella v. United States*," which specifies that the Agencies would assert jurisdiction over:

> . . .non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally.

The Joint Rule codifies this standard by clarifying that ephemeral waters, which flow only in response to precipitation, such as desert arroyos, would not be subject to federal jurisdiction. Such a position is consistent with Supreme Court precedent on the topic of ephemeral waterways. (*See, Rapanos,* 547 U.S. at 733; https://www.epa.gov/sites/production/files/2016-04/documents/rapanos_decision_2006.pdf)

It is also worth noting that while an ephemeral water feature may not itself be considered jurisdictional, an ephemeral water may be used to establish federal jurisdiction over an upstream relatively permanent water. The Joint Rule provides:

> . . .certain ephemeral features between upstream relatively permanent jurisdictional waters and downstream jurisdictional waters do not sever jurisdiction upstream so long as such features satisfy [certain] conditions.

In other words, while the ephemeral flow between two water bodies may not be considered jurisdictional if that flow is of insufficient duration to be considered "intermittent" in a " typical year," the water features that the ephemeral water body connects, such as a mountain lake fed by snowpack and a navigable-in fact river, would both nonetheless retain their jurisdictional status under the Joint Rule.

Lakes, Ponds, and Impoundments of Jurisdictional Waters

Pursuant to the Joint Rule, lakes, ponds, and impoundments of jurisdictional waters must either be navigable-in-fact, or must contribute flow in a typical year to a water feature that is considered jurisdictional-by-rule in order to itself be jurisdictional. According to the Joint Rules' defined terms:

> . . .[a] lake, pond, or impoundment of a jurisdictional water does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature, through a culvert, dike, spillway, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature.

Thus, if a lake or pond is connected to a jurisdictional water through a subterranean river or channelized flow, the lake or pond would be considered jurisdictional as well.

Especially important, the Joint Rule also specifies that inundation from an otherwise jurisdictional water can support federal jurisdiction over these types of features. This clarification is critical to members of the regulated community that may have in the distant past constructed features adjacent to navigable-in-fact waters that receive flow from that water body, such as water diversion features, or settling basins. Such water features would almost certainly be considered subject to the CWA, unless the features fit squarely within one of the exemptions from jurisdiction discussed above.

Adjacent Wetlands

The Joint Rule's treatment of wetlands adopts what the Agencies see as an approach that is more

consistent with the Supreme Court's decisions in *Rapanos* and *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985); https://www.epa.gov/sites/production/files/2015-09/documents/riversidebayviewhomes_opinion.pdf (hereafter *Riverside Bayview*). Consequently, the rule eliminates several controversial aspects of the 2015 WOTUS Rule through its modified treatment of wetlands. Specifically, the Agencies have reworked the concept of adjacency to eliminate the category of "neighboring waters." Under the 2015 WOTUS Rule, the Agencies set forth a wide range of distances, from 100 feet to 4,000 feet from a jurisdictional-by-rule water, that potentially established jurisdictional status for other bodies of water meeting certain criteria. However, according to the current administration, such an approach ran counter to Supreme Court precedent.

In *Riverside Bayview,* the Supreme Court upheld "jurisdiction over wetlands that actually abutted on a navigable waterway" given that those wetlands were "inseparably bound up with the 'waters' of the United States." *Id.* at 167. Consequently, the Joint Rule provides that only those wetlands which "abut" or have a direct hydrologic surface connection to other jurisdictional non-wetland waters in a typical year are considered jurisdictional. The Joint Rule defines "abut" as "to touch at least at one point or side of" an otherwise jurisdictional water." Wetlands separated from jurisdictional waters only by a natural berm, bank, dune, or other similar natural feature would also be subject to federal jurisdictional.

Furthermore, where a constructed feature, such as a roadway, separates a wetland from a jurisdictional water, the wetland will be considered adjacent where a surface water connection exists in a typical year. Wetlands that are connected to jurisdictional waters through a culvert, flood or tide gate, pump, or similar artificial feature in a typical year, are also considered adjacent wetlands. However, to be considered jurisdictional:

> . . .wetlands cannot be adjacent to other wetlands; they can only be adjacent to the territorial seas, a traditional navigable water, a tributary, or a lake, pond, or impoundment of a jurisdictional water.

Thus, where chain wetlands exist, only that wetland which is directly adjacent to the otherwise jurisdictional water would be considered subject to federal jurisdiction—potentially a major change from prior iterations of the WOTUS definition.

Significant Nexus

Through the Joint Rule, the Agencies seek to establish "categorical bright lines to improve clarity and predictability for regulators and the regulated community. . ." To accomplish that goal, the Agencies attempted to eliminate discretion for case-by-case variation among waters subject to federal jurisdiction. Thus, the Joint Rule eliminates the case-specific "significant nexus" analyses derived from the *Rapanos* decision through the categorical treatment of tributaries and wetlands. Under the Joint Rule, only those tributaries and wetlands which fall under the bright line concepts set forth therein will be subject to federal jurisdiction. The elimination of the significant nexus standard will likely provide additional certainty to the regulated community and consistency in federal delineations going forward, given the often vague concepts that some in the Agencies applied to determine that a significant nexus existed.

The following list of enumerated waters that were subject to case-specific significant nexus analysis under the 2015 WOTUS Rule have been eliminated entirely from consideration under the Joint Rule: 1) prairie potholes, 2) Carolina and Delmarva bays, 3) pocosins, 4) western vernal pools in California, and 5) Texas coastal prairie wetlands. However, such water features would presumably continue to be considered jurisdictional where the features meet another category set forth in the Joint Rule. For instance, where a pocosin meets the definition of a wetland and either has a direct surface water connection with or abuts a jurisdictional water, the feature would remain subject to federal jurisdiction.

Challenges to the Repeal and Replace Rules

On February 13, 2020, the Center for Biological Diversity, Waterkeeper Alliance, Center for Food Safety, Turtle Island Restoration Network, Humboldt Baykeeper , Lake Worth Waterkeeper, Missouri Confluence Waterkeeper, Monterey Coastkeeper, WildEarth Guardians (Rio Grande Waterkeeper), Russian Riverkeeper, Snake River Waterkeeper, Sound Rivers, and Upper Missouri Waterkeeper (Conservation Groups), issued a Notice of Intent to Sue (60 Day Notice Letter) for the Agencies' alleged

failure to comply with the federal Endangered Species Act (ESA) when issuing the Joint Rule.

According to the 60 Day Notice Letter, the Conservation Groups allege the Agencies : 1) violated § 7(a) of the ESA by failing to ensure no jeopardy to endangered species and their critical habitat under the Joint Rule; and 2) violated § 7(d) of the ESA, which prohibits a federal agency from "mak[ing] any irreversible or irretrievable commitment of resources." The Conservation Groups base their allegations on their opinion that:

> . . .millions of acres of rivers, streams, lakes, wetlands, impoundments, and other waterbodies will now be excluded from CWA jurisdictional protections. These waters directly and indirectly provide and support habitat for breeding, feeding, or sheltering for a large number of endangered and threatened species across the nation, as further detailed below. This includes, but is not limited to, species in the arid West—an area that lost a vast majority of its CWA protections as a result of the rule.

The 60 Day Notice Letter also attaches a prior Notice of Intent to Sue that the same Conservation Groups issued to the Agencies when they officially repealed the 2015 WOTUS Rule. The allegations in the prior Notice of Intent to Sue are essentially identical to those set forth in the 60 Day Notice Letter.

Additional challenges under the CWA itself may be forthcoming, as various states (California among them) oppose the "rollbacks" presumably embodied by the Joint Rule. Should other challenges to the Joint Rule be brought under the CWA itself, those challenges will be heard in the U.S. District Courts pursuant to a unanimous U.S. Supreme Court holding that such challenges are subject to direct review in the district courts. *See, National Association of Mfrs. v. Department of Defense*, 138 S. Ct. 617 (2018); https://www.supremecourt.gov/opinions/17pdf/16-299_8nk0.pdf)

The Procedures and Permitting in California

On the heels of the Agencies' release of the draft version of the Joint Rule, the California State Water Resources Control Board (SWRCB) sought to fill the perceived gap created by the replacement of the 2015 WOTUS Rule, by creating a new regulatory program aimed at requiring State permits for those features that may no longer qualify as jurisdictional at the federal level. On April 2, 2019, the SWRCB adopted a state dredge and fill program—the "Procedures"—for inclusion in the Water Quality Control Plan for Inland Surface Waters and Enclosed Bays and Estuaries (known as the SIP) and the Water Quality Control Plan for Ocean Waters of California (Ocean Plan). However, whether the state's attempt to regulate discharges of dredge and fill will succeed remains uncertain, as the Procedures are currently the subject of ongoing litigation. On May 1, 2019, certain members of the San Joaquin Tributaries Authority (Authority), a Joint Powers Authority, filed a petition for writ of mandate and complaint for mandatory relief in Sacramento County Superior Court. According to the Authority, the SWRCB's adoption of the Procedures was unlawful for a number or reasons, and must therefore be set aside.

Currently, the Procedures are slated to become effective on May 28, 2020, and consist of three major components: 1) A new state-wide definition of wetlands that includes: a) a wetlands definition; b) a jurisdictional framework for determining whether a wetland qualifies as a waters of the State (Jurisdictional Framework); and c) wetland delineation procedures that rely on Corps delineation materials; and 2) a new guidance for what qualifies as a "waters of the State"; and 3) Procedures for application submittal, review and approval of: a) water quality certifications; b) waste discharge requirement orders (WDRs); and c) waivers of WDRs for dredge and fill activities (collectively Orders).

The Procedures apply to all earth moving activities that "could" result in the discharge of dredged and fill material to waters of the State, which are broadly defined by the state to include "any surface water or groundwater, including saline waters, within the boundaries of the state." (Water Code § 13050(e)). Thus, the Procedures could have closed any real or perceived "permitting gap" created by the Joint Rule simply by regulating discharges of dredged or fill material to such broadly defined waters. However, the SWRCB used the Procedures' release as an opportunity to formally enshrine the 2015 WOTUS Rule in California law through modification of the state's definition of wetlands that qualify as "waters of the State."

Generally, all WOTUS in California are also "waters of the State" (23 CCR § 3831(w)). As the

definition of WOTUS evolves, so would the dually corresponding "waters of the State." However, with the SWRCB's recent action, the Procedures modify the scope of WOTUS-related wetlands/"waters of the State" to include any features considered WOTUS under *any* federal definition prior to April 2019 (no matter if they conflict), such that wetland "waters of the State" can be established using the expansive, now-rescinded 2015 WOTUS Rule. Specifically, the Procedures indicate that:

> . . .waters of the state includes features that have been determined by the U.S. Environmental Protection Agency (U.S. EPA) or the U.S. Army Corps of Engineers (Corps) to be 'waters of the U.S.' in an approved jurisdictional determination; 'waters of the U.S.' identified in an aquatic resource report verified by the Corps upon which a permitting decision was based; and features that are consistent with any current or historic final judicial interpretation of 'waters of the U.S.' or any current or historic federal regulation defining 'waters of the U.S.' under the federal Clean Water Act. (Procedures § II, n. 2).

Conclusion and Implications

As a practical matter, the inclusion of these categories of WOTUS rules within the state's definition of wetland "waters of the State" creates a regulatory predicament given that each iteration of the WOTUS definition has refined prior versions, though many assume the state regulators will simply apply the most stringent definition. As such, projects that may no longer fall into federal jurisdiction and permitting (*e.g.*, Clean Water Act § 404 permitting and the corresponding Clean Water Act § 401 water quality certification), may nonetheless fall into newly expanded state jurisdiction that now requires permitting under a recently enacted state program that contains elements more stringent than the corresponding Clean Water Act § 404 permitting program. [Note: Limitations on the length of this article preclude in-depth discussion regarding the specific nature of regulation under the Procedures, which is complex and likely the subject of future articles. The Authors recommend detailed review by practitioners charged with permitting and regulatory compliance.]

Given the timing of the Procedures' release (and the political nature of the program), the regulated community can largely infer that the State Water Resources Control Board meant by the above language to maintain the regulatory *status quo* in the state, broadly regulating essentially all features within a football field (or 3 or 4 or 10) of a navigable-in-fact water. Thus, the regulated community in California will very likely continue to experience confusion as to what water features require permitting for years to come, given that state permitting authorities—the State Water Resources Control Board and Regional Water Quality Control Boards—will embark anew on implementation of the fuzzy significant nexus standard that ultimately led to the repeal of the 2015 WOTUS Rule.

For more information on the new Final Rule, *see:* https://www.epa.gov/nwpr/final-rule-navigable-waters-protection-rule.

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CALIFORNIA WATER NEWS

SAN JUAN CAPISTRANO CITY COUNCIL APPROVES SANTA MARGARITA WATER DISTRICT ANNEXATION AGREEMENT

At its January 21, 2020 meeting, the San Juan Capistrano City Council (Council) unanimously voted to adopt a resolution approving an annexation agreement (Annexation Agreement) transferring (Service Transfer) all water, wastewater and recycled water services (System) of the City of San Juan Capistrano (City) to the Santa Margarita Water District (SMWD), whose board of directors approved the Agreement days earlier on January 17.

Background

The City expects that the transfer of the System to SMWD will relieve short-term financial pressures and improve the overall reliability, cost and efficiency of services within the City over the long term. Following the parties' approval of the Annexation Agreement, the Orange County Local Area Formation Commission (LAFCO) must approve the annexation application of SMWD and public hearing and protest procedures must be completed in order for the Service Transfer to be finalized.

The Service Transfer

The Service Transfer contemplated by the Annexation Agreement is the expected culmination of a process that began in 2015, when the Council authorized a study to examine the potential benefits of transferring the System to a dedicated water agency. In addition to potential long-term benefits of management by a water agency, the City has undertaken utility reorganization as a means of responding to increasing financial challenges facing the System in the near term, particularly capital replacement needs and regional sewage treatment contribution obligations. The City believes that retaining the water and sewer utility would necessitate significant rate increases.

Based on the study's findings and in accordance with the Cortese-Knox Hertzberg Local Government Reorganization Act of 2000 (Act), the City sought a Municipal Services Review (MSR) from LAFCO. Completed in October 2018, the MSR concluded that SMWD, Moulton Niguel Water District and South Coast Water District, three adjacent water agencies interested in the Service Transfer, were each capable of managing the needs of the System and eligible for selection by the City for further negotiations. The MSR suggested that the agencies were generally better equipped than the City to provide water and sewer services and that a transfer of the System would be likely to result in cost and efficiency savings of which could help alleviate the financing pressures facing the system.

After evaluating the proposals of the three eligible water agencies, the Council selected SMWD as the agency with whom the City would negotiate for the Service Transfer. The foundation of the Annexation Agreement with SMWD was outlined in a Memorandum of Understanding (MOU) setting forth the major terms of the Service Transfer, approved by the Council in August 2019. Major points of negotiation included the assumption of existing debt and pension obligations of the System, water rights, infrastructure and service rates within the City.

The Annexation Agreement

With few exceptions, the Annexation Agreement transfers all assets of the System to SMWD, including existing real property, infrastructure, water rights and easements. The Annexation Agreement provides that SMWD will use its best efforts to invest at least $25 million in capital improvements to benefit the System over the next decade. As part of the proposal process that led to its selection, SMWD presented a plan for investment that included the replacement of the City System's aging infrastructure. To ensure adequate supply, SMWD plans to accelerate the development of groundwater resources in the San Juan Basin and explore partnerships with other agencies for desalination projects.

In order to limit the financial impact on City ratepayers, SMWD agrees to temporarily reduce average potable water charges for City users during the initial stages of Service Transfer implementation, and to set future rates in accordance with rate stud-

ies accounting for the particular needs of the System and contributions of City ratepayers. To facilitate the provisions of the Annexation Agreement specific to the City, SMWD intends to create an improvement district applicable only to the City service area. The improvement district and other terms specific to City ratepayers do not limit the ability of City ratepayers to participate in district-wide elections held by SMWD.

The majority of existing City water department employees are to be extended offers to work in comparable positions with SMWD according to the Annexation Agreement. To the extent possible, existing obligations and liabilities of the System will be assumed by SMWD, including the payment of outstanding bonds, pension funding obligations and certain existing settlement agreements. The City and SMWD also agree to pursue any negotiations necessary to accomplish a transfer of memberships in joint powers authorities and rights with respect to other existing joint ventures relating to the System to SMWD.

Moving Forward

To complete the Service Transfer, LAFCO must review and approve SMWD's annexation application and the Annexation Agreement as approved by the parties. LAFCO is expected to reach a decision in Spring 2020, after which a mandatory 30-day reconsideration period will commence, during which any person affected agency can seek reconsideration or amendment of the resolution making determinations with respect to the annexation. Pursuant to the Act, LAFCO will then hold a hearing with respect to the annexation application and public protest period of up to 60 days. While some City residents have expressed concerns regarding water rates and large users have sought to be involved in the process to ensure continued satisfaction of existing service obligations of the City, there have been no indications that protests sufficient to trigger the calling of an election or to block the Service Transfer under the Act are forthcoming.

Conclusion and Implications

This transfer demonstrates on a broader level what might become more common for various public water systems around the State of California. The City of San Juan Capistrano has promoted the Service Transfer as an important step in alleviating financial and operational pressures on the City associated with the management of the System, and an opportunity to protect the long-term interests of ratepayers within the City. Notwithstanding the City's financial considerations for the Service Transfer, the System has produced net operating revenues in recent years and the arrangement will notably expand the Santa Margarita Water District's footprint in the region. The coming months will determine whether the City and SMWD can successfully complete the final steps in the process of finalizing the Service Transfer pursuant to LAFCO regulations and the Cortese-Knox Hertzberg Local Government Reorganization Act. The findings of the Orange County Local Area Formation Commission set forth in the MSR and apparently low levels of local opposition leave little reason to suspect that either LAFCO or protestors will stand in the way.

(Wesley A. Miliband, Andrew D. Foley)

REGULATORY DEVELOPMENTS

FEDERAL COUNCIL ON ENVIRONMENTAL QUALITY ANNOUNCES NOTICE OF PROPOSED RULEMAKING TO THE REGULATIONS IMPLEMENTING PROVISIONS OF THE NATIONAL ENVIRONMENTAL POLICY ACT

For the first time in over 40 years, the federal Council on Environmental Quality (CEQ) is proposing to modernize its National Environmental Policy Act (NEPA) regulations. According to the CEQ, the proposal aims "to facilitate more efficient, effective, and timely NEPA reviews." Given NEPA's applicability to major federal actions, these changes could have significant implications for projects throughout the country. If finalized, the proposed rule would comprehensively update and substantially revise the 1978 regulations.

Background

The National Environmental Policy Act, signed into law in 1970, is a procedural statute that requires federal agencies proposing to undertake, approve, or fund "major Federal actions" to evaluate the action's environmental impacts, including both direct and reasonably foreseeable indirect effects. Agencies typically comply with NEPA in one of three ways: 1) preparing an Environmental Impact Statement (EIS) for major federal actions significantly affecting the quality of the environment; 2) preparing an Environmental Assessment (EA) to determine whether an EIS is required or to document that an EIS is not required; or 3) identifying an applicable categorical exclusion for actions that do not individually or cumulatively have a significant effect on the environment.

The CEQ issued regulations for federal agencies to implement NEPA in 1978. Since that time, the CEQ has not comprehensively updated its regulations and has made only one limited substantive amendment in 1986. In 2017, President Trump issued Executive Order 13807 establishing a "One Federal Decision" policy, including a two-year goal for completing environmental review for major infrastructure projects, and directing the CEQ to consider revisions to modernize its regulations. In 2018, the CEQ issued an Advance Notice of Proposed Rulemaking requesting comments on potential updates to its regulations, in response to which over 12,5000 comments were received. This proposed rulemaking then followed.

Overview of the CEQ's Proposed Changes

The CEQ categorization and proposed changes follow in summary form.

Modernize, Simplify, and Accelerate the NEPA Process

The CEQ proposes to modernize, simplify and accelerate the process by the following:

- Establish presumptive time limits of two years for completion of EISs and one year for completion of EAs;
- Specify presumptive page limits;
- Require joint schedules, a single EIS, and a single record of decision (ROD), where appropriate, for EISs involving multiple agencies;
- Strengthen the role of the lead agency and require senior agency officials to timely resolve disputes to avoid delays;
- Promote use of modern technologies for information sharing and public outreach;

Clarify Terms, Application, and Scope of NEPA Review

The CEQ proposes to clarify terms, the application and the scope of the process as follows:

- Provide direction regarding the threshold consideration of whether NEPA applies to a particular action;
- Require earlier solicitation of input from the pub-

lic to ensure informed decision-making by federal agencies;

•Require comments to be specific and timely to ensure appropriate consideration;

•Require agencies to summarize alternatives, analyses, and information submitted by commenters and to certify consideration of submitted information in the ROD;

•Simplify the definition of environmental "effects" and clarify that effects must be reasonably foreseeable and have a reasonably close causal relationship to the proposed action;

•State that analysis of cumulative effects is not required under NEPA;

•Clarify that "major Federal action" does not include non-discretionary decisions and non-Federal projects (those with minimal Federal funding or involvement);

•Clarify that "reasonable alternatives" requiring consideration must be technically and economically feasible.

Enhance Coordination with States, Tribes, and Localities

The CEQ is promoting the coordination of states, tribes and localities as follows:

•Reduce duplication by facilitating use of documents required by other statutes or prepared by State, Tribal, and local agencies to comply with NEPA;

•Ensure appropriate consultation with affected Tribal governments and agencies;

•Eliminate the provisions in the current regulations that limit Tribal interest to reservations.

Reduce Unnecessary Burdens, and Delays

The CEQ is attempting to reduce "unnecessary burdens" and delays, as follows:

•Facilitate use of efficient reviews (*i.e.*, categorical exclusions, environmental assessments);

•Allow agencies to establish procedures for adopting other agencies' categorical exclusions;

•Allow applicants/contractors to assume a greater role in preparing EISs under the supervision of an agency.

Conclusion and Implications

The proposed regulations were open for public comment through March 10, 2020. The CEQ also will host two public hearings in Denver, Colorado, and Washington, D.C. The CEQ will then review public comments and may revise the proposed regulations based on comments.

The proposed rule is important because it is the first time that the CEQ has made substantive revisions to its regulations in decades and these changes will impact federal actions throughout the country. The proposed rule is available here: https://www.govinfo.gov/content/pkg/FR-2020-01-10/pdf/2019-28106.pdf

(James Purvis)

CALIFORNIA DEPARTMENT OF WATER RESOURCES ANNOUNCES STATE WATER PROJECT WATER ALLOCATION INCREASES, BUT UNCERTAINTY CONTINUES

In January, the California Department of Water Resources (DWR) announced that State Water Project allocations would increase from 10 percent initially announced in December to 15 percent. The increased allocation follows large precipitation events in December. Allocation amounts are typically finalized in late spring. However, there has been a dearth of precipitation in the month of February throughout much of California, so it will be interesting to see how DWR approaches the issue as spring soon arrives.

Background

The State Water Project (SWP) is a water storage and delivery system comprised of reservoirs, aqueducts, power plants, and pumping plants spanning more than 700 miles from northern to southern California. Water from rain and snowmelt is stored in SWP conservation facilities, such as Lake Oroville, before flowing through the Sacramento-San Joaquin Delta (Delta) before being delivered by way of SWP transportation facilities. According to the California Department of Water Resources, the SWP supplies water to more than 27 million people across California, and irrigates roughly 750,000 acres of farmland. The SWP is capable of delivering roughly 4.2 million acre-feet of water per year. However, the amount of water available to water contractors varies each year because supply is impacted by variability in precipitation and snowpack, operational conditions, as well as environmental and other legal constraints. For instance, in 2019, SWP contractors received 70 percent of their contractual allocations.

DWR's increased allocation announcement follows large precipitation events in December 2019. On average, snowpack supplies about 30 percent of California's water needs in the form of runoff during the late spring and early summer months. In late January, DWR conducted a manual snow survey at a location known as the Phillips Station in the Sierra Nevada Mountains. The survey is one of five that DWR conducts at station each winter in January, February, March, April and, depending on conditions, May. The January snow survey recorded 40.5 inches of snow depth and a snow water equivalent (SWE) of 14.5 inches. Collectively, this amount is 79 percent of average for the Phillips Station. In addition to the manual surveys, DWR collects data from over 100 electronic snow sensors throughout the state. Measurements from those sensors indicate that the statewide SWE was 12 inches, which was 72 percent of the January 30 average.

Importantly, SWE measures the amount of water contained in snowpack, which provides a forecast of spring runoff that is used by a number of water stakeholders throughout the state. For instance, SWE information is used by operators of flood control projects, including the SWP, the federally operated Central Valley Project, and local reservoir operators, to determine how much water can be stored in a reservoir while reserving space for predicted inflows. Water districts also use SWE information to manage surface and groundwater storage, allocate available supply, plan water deliveries, and coordinate conjunctive use (surface/groundwater) operations. Public and private utilities use SWE information to determine what percentage of electrical energy generation will be hydropower.

Water Allocations from the State Water Project

The State Water Project is designed, among other purposes, to provide a consistent water supply to 29 public agencies, commonly known as state water contractors. These contractors have entered into long-term water supply contracts with DWR for water allocations from the SWP, and distribute SWP water to agricultural, residential, commercial, and industrial users. The long-term water supply contracts, which are set to expire in 2035 but will likely be extended, establish maximum amounts of SWP water that a contractor may request annually (known as Table A amounts), although the contracts also provide for situations where surplus water may be available. SWP contractors are contractually obligated to repay principal and interest on general obligation and revenue bonds used to pay for the SWP's initial construction and additional facilities. Contractors also pay for the maintenance and operation of SWP facilities.

According to DWR, allocations are based on conservative assumptions and may change depending on winter precipitation. In addition to being dependent on rain and snowpack, water supplies available for delivery through the SWP are affected by reservoir storage, pumping capacity of SWP facilities, and regulatory and environmental restrictions on SWP operations. At this time, as indicated by DWR's increased allocation for SWP deliveries, the majority of SWP contractors may receive 15 percent of their requests, circumscribed by their Table A amounts. This is a 5 percent increase from December of 2019, when DWR initially indicated that allocations would only be 10 percent of what contractors requested. Although December precipitation events prompted DWR to announce allocation increases, a similar pattern occurred in 2019, when DWR announced in January that SWP contractors may receive 15 percent of their Table A amounts.

Conclusion and Implications

Because SWP deliveries are dependent on meteorological, hydrological, and environmental conditions affecting SWP facilities, it is uncertain whether SWP contractors will receive the percentages of their Table A amounts announced by DWR or whether the 2020 allocation will increase—or due to a dry February—decrease allocation amounts in the coming months. This remains a moving target of sorts. For more information, *see:*

DWR Announces SWP Allocation Increases (Jan. 24, 2020), available at: https://water.ca.gov/News/News-Releases/2020/State-Water-Project-Allocation-Increases-to-15-Percent

(Miles Krieger, Steve Anderson)

CALIFORNIA DEPARTMENT OF WATER RESOURCES RELEASES NOTICE OF PREPARATION FOR DELTA CONVEYANCE PROJECT

On January 15, 2020 the California Department of Water Resources (DWR) released its Notice of Preparation of Environmental Impact Report for the Delta Conveyance Project (NOP). The NOP details a familiar plan to update reliability in water deliveries to the State Water Project (SWP), this time under the name Delta Water Project (Project). Previously, the plan of action described by the Delta Water Project was laid out in DWR's California WaterFix. WaterFix was put on hold and went away, however, after Governor Gavin Newsom took office, rejecting the plan's use of a two-tunnel conveyance system proposed by WaterFix and stating that the project would better utilize a single-tunnel system.

Background

After the issuance of Executive Order N-10-19, directing the agencies of the state to focus on the implementation of this single-tunnel system, the Delta Water Project was created. Under this new title, the Project seeks to utilize water from the Sacramento River north of the Delta in coordination with its current conveyance systems to optimize water deliveries to the SWP. In doing so, the Project plans to implement a dual-intake system to convey water from the Sacramento River to a system of forebays near the SWP's existing Banks Pumping Plant. There, the water will be diverted to the pumping plant and used for the SWP accordingly.

Project Description

In addition to the existing points of diversion and conveyance systems, the SWP in the Delta area contains the Clifton Court Forebay and the nearby Banks Pumping Plant. Water diverted here is then lifted into the California Aqueduct for its use down the line. The Delta Conveyance Project seeks to expand upon this infrastructure by adding another point of diversion north of the Delta on the Sacramento River to "restore and protect the reliability of SWP water deliveries . . . consistent with the State's Water Resilience Portfolio." Additionally, the NOP addresses the potential for connecting the federal Central Valley Project (CVP) as an added beneficiary of the Project.

Following the flow of the water, the Project begins north of the Delta with several locations as possible points of diversion for the proposed dual-intake system. This system will utilize two on-river intakes at two of three potential sites near Clarksburg, Hood, and Courtland. From here, the NOP describes the

meeting of these tunnels at a 100-acre Intermediate Forebay just north of Thornton, where a single-tunnel is then used to send the water south.

As written, the NOP describes two potential routes for the single tunnel. First, the Central Tunnel Corridor takes a direct route from the Intermediate Forebay to the Project's proposed 900-acre Southern Forebay near Discover Bay. Alternatively, the Eastern Tunnel Corridor is routed due south until reaching the Holt area before cutting westward for the Southern Forebay. In either case, the water will be received by a Pumping Plant before being released into the Southern Forebay. From here, the water may be diverted via newly constructed canals and two tunnels running under Byron Highway to either the SWP's Banks Pumping Plant and/or the CVP's Jones Pumping Plant if the CVP is ultimately involved in the Project.

Extent of the NOP's Details

In its current state, the Notice of Preparation of Environmental Impact Report for the Delta Conveyance Project proposes conveyances of up to 6,000 cubic-feet per second (cfs), or 3,000 cfs per intake, to SWP and potentially CVP facilities. Throughout the Delta Conveyance Project's operation, DWR is said to do so as to "not reduce DWR's current ability to meet standards in the Delta to protect biological resources and water quality for beneficial uses."

That being said, the Project's initial operating criteria are set to be determined after the development of a Draft Environmental Impact Report (EIR). Furthermore, final operating criteria and/or operating plans are set to develop only after the review process pursuant to the California Environmental Quality Act (CEQA) has been completed, all water rights approvals have been cleared by the State Water Resources Control Board, and the consultation and review processes required by the federal and California Endangered Species Acts have been completed.

In discussing alternatives to the Project as required by CEQA, the NOP notes that varying levels of conveyances are being considered, ranging from 3,000 cfs to 7,500 cfs. As noted earlier, another alternative being considered is the inclusion—or not—of the CVP as a beneficiary to the Project.

Finally, with respect to the potential environmental impacts of the Project, the NOP simply provides a laundry-list of the resource categories listed in Appendix G of the CEQA Guidelines. Without going into much detail, the NOP notes one by one the potential impacts for each category ranging from potential impacts on river flows in the Delta to the impact of operation facilities on water quality constituents and concentrations.

Conclusion and Implications

The Delta Water Project affords an opportunity for south of the Delta water users to increase the resiliency of the SWP and potentially CVP by providing additional security in water conveyances for deliveries. To be successful, the Project cannot violate the rights of water right holders, which means the Project and all supporting environmental and regulatory approvals need to adequately demonstrate that the Project will not infringe on existing water rights or related water quality. In addition, the Project is a massive undertaking—with construction times estimated at 13 years for completion—after all of the environmental review and regulatory approvals are properly completed.

The period for comments on the NOP is being held open by DWR until 5p.m. on March 20, 2020. In reaching the DWR, the NOP directs commenters to submit such comments via the following ways: 1) Email: DeltaConveyanceScoping@water.ca.gov; 2) Mail: Delta Conveyance Scoping Comments, Attn: Renee Rodriguez, Department of Water Resources, P.O. Box 942836, Sacramento, CA 94236.
(Wesley A. Miliband, Kristopher T. Strouse)

LAWSUITS FILED OR PENDING

WASHINGTON SUPREME COURT ACCEPTS REVIEW OF RECENT RULING INVALIDATING PORTIONS OF STATE INSTREAM FLOW RULE

The Washington Supreme Court ruled on petition from the State of Washington's water resource agency, the Department of Ecology (Ecology), granting discretionary review of a recent State Court of Appeals decision invalidating a portion of Ecology's instream flows for the Spokane River. [*Center for Environmental Law & Policy, et al., v. State of Washington, Department of Ecology* (Jan. 8, 2020), accepting review of *Center for Environmental Law & Policy, American Whitewater, and Sierra Club v State of Washington, Department of Ecology*, 444 P.3d 622 (Ct. of Appeals, Div. II, 2019).]

Background

The Department of Ecology went through the process for formal adoption of an administrative rule establishing minimum instream flows for portions of the Spokane River in 2015. A collection of environmental groups challenged the validity of a portion of the Rule, calling into question the Agency's authority and methodology for establishing instream flow rules.

The Spokane River

The Spokane River runs 111 miles from its Lake Coeur D'Alene headwaters in Northern Idaho across the state line into Washington where it flows through the heart of the City of Spokane to its eventual confluence with the Columbia River. The Spokane River is a focal point in an otherwise arid landscape, providing cultural, economic and recreational touch points to a growing population of the Inland Northwest and is home to much fish and wildlife, including trout and mountain whitefish among other species.

The flows of the Spokane River are heavily controlled by hydroelectric dam facilities. From its headwaters to its confluence, there are seven major dams, one owned by the City of Spokane, the rest by Avista, a private utility. Both owner entities operate under licenses issued by the Federal Energy Regulatory Commission (FERC). The Avista licenses were reissued in 2009, with expiration in 2059. The City of Spokane's license expires in 2031. The 2009 FERC license sets instream flow levels for dam operations in the same reaches as the State issued instream flow rule.

Regulation of Instream Flows in Washington

The case arises from a challenge to instream flows set by rule. Ecology is authorized and directed by various statues to manage the waters of the state for a myriad of purposes, including setting instream flows by regulation. The authority for setting instream flows arises under multiple code sections, adopted and amended over the course of the last fifty plus years. The creation of instream flow rules has become increasingly controversial, as these rules have become the fulcrum in the balance between authorizing new uses of water with protection of flows for fish and senior water rights. Once adopted, the minimum instream flow established by rule becomes an appropriative right within the priority scheme of "first in time, first in right," which must be protected from injury by junior water uses.

Under the general provisions of the state water code, Ecology has exclusive authority to establish "minimum instream flows" but to do so Ecology must consult with and consider proposals of the State Fish and Wildlife Agency. RCW 90.03.247 (first adopted in 1979, amended in 1980, 1987, 1994, 1996, 2003 and 2018).

Under the Minimum Water Flows and Levels Act (Ch 90.22 RCW, first adopted in 1969, amended in 1987, 1988, 1994, and 1997), Ecology is authorized to establish:

> . . .minimum water flows or levels. . .for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be in the public interest to establish the same. RCW 90.22.010.

Again, Ecology must defer to recommendations

of the State Fish and Wildlife Agency to protect fish, game or other wildlife or to itself in adopting flows protective of water quality. Note the permissive disjunctive in the purposes list, with the mandatory directive for flows for fish and water quality.

Under the Water Resources Act (Ch 90.54 RCW, adopted in 1971, amended in 1990), the legislature added additional nuance to Ecology's water management considerations, with such additional goals as directing the agency to allocate water for "the maximum net benefits for the people of the state" while also converting and refining the laundry list of purposes from the Minimum Water Flows and Levels Act including making the list of purposes to be considered conjunctive and obligatory with the use of "shall" and "and" in the contexts of protecting and enhancing the quality of the natural environment, and retaining "base flows" "for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values."

The Court of Appeals' Decision

At the core of dispute at the Court of Appeals is the path which Ecology is to take to thread the needle between and among the various legislative directions, with Ecology taking a narrow read by relying solely on the Minimum Water Flows and Levels Act in setting instream flows levels on the basis of fish needs alone, and the appellants taking a more expansive position that Ecology is required to consider and address all instream flows uses under the direction of the Water Resources Act.

The Court of Appeals ruled certain portions of Ecology's rule invalid on two of the four Administrative Procedures Act tests for determining rule validity. An agency rule may only be invalidated if it is: 1) unconstitutional; 2) exceeds the agency's statutory authority; 3) was adopted without complying with the statutory rule making procedures; or 4) is arbitrary and capricious. The court found the rule both exceeded the Agency's statutory authority and was arbitrary and capricious.

On the finding of exceedance of the agency's statutory authority, the court attempted to sort through the labyrinth and make its own path of reconciliation, and in doing so determined Ecology did not properly thread the needle. While the court found flows for fish to be a priority under the statutes, flows for fish alone cannot be the only consideration by Ecology in setting flows; and while not going so far as petitioners argued was required—preservation of all instream values—that Ecology must still consider other instream values beyond fish flows in adopting instream flows.

On the finding of arbitrary and capricious, an agency's action is arbitrary and capricious "if it is willful and unreasoning and taken without regard to the attending facts or circumstances." The Court of Appeals found Ecology's efforts at setting instream flows to be lacking substance. The record as cited in the opinion appeared to be narrowly focused on flows for fish as recommended by the State Fish and Wildlife Agency and little else. This inadequacy of the record was found to be so "cursory" as to meet the standard of arbitrary and capricious.

In addition to the Administrative Procedures arguments, the appellants presented a Public Trust Doctrine argument which the Court did not find persuasive. Appellants sought to invalidate the Rule under the Public Trust Doctrine arguing that insufficient minimum instream flows degrade the Public's interest in the waters of the state. The court rejected this argument upholding previous caselaw that Ecology does not have the authority to assume the Public Trust duties of the state, taking it further to determine that then conversely Ecology does not and cannot have the authority to give up the interest of the public through its rulemaking authorities. The Court echoed again previous caselaw declining to apply the Public Trust Doctrine as a separate canon of authority for interpreting the state's water code.

Beyond the dispositive rulings, there was a procedural skirmish over whether the agency should have included specific documents in the rulemaking file, and a footnote rejecting any relationship between instream flow rules set by state regulation versus instream flow targets set by FERC.

In the end, while the purposes for which setting instream flows are somewhat discretionary beyond the required consultation with the fish and wildlife agency, the apparent failure to consider flows above the fish and wildlife agency proved fatal to the rule in the Court of Appeals' eyes. The court held that Ecology exceeded its authority in establishing minimum summer instream flows and therefore that portion of the rule is invalid. Ecology must revisit its analysis and include review of some if not all the water uses enumerated in the Water Resources Act to balance in

and out of stream uses. The result of the ruling leaves no clear standard of what Ecology must consider (apparently all instream uses) and to what extent it must then take those considerations into effect (not full use of each but more than none).

This raises the question of whether Ecology must always adopt flows above fish flows to accommodate other uses, and if so, to what level and for which uses. The alternative is that this is a question of preparing the proper record of decision. If Ecology's record demonstrated consideration of flows for other instream uses regardless of the final level, this rule would have likely met the APA challenge.

Conclusion and Implications

In making its ruling, the Court of Appeals overturned a lower court ruling upholding the instream flow. Appellants initially sought direct review to the Supreme Court. The Supreme Court declined direct review of the rule as valid, resulting in the review defaulting to the Court of Appeals. In now accepting the case for direct review, the Supreme Court has elected to wade back into water cases for the first time since 2016 (Whatcom County v Hirst Et Al, 186 Wash.2d 648, 381 P.2d 1 (2016)).

Of interest from the Supreme Court would be a road map for Ecology in reconciling the many and varied directives on the nature, purpose and extent of considerations in setting instream flows by agency regulation now in statute. Additionally, Supreme Court review has the potential to reopen application of the Public Trust Doctrine as guiding the Agency's management of water resources. The Court of Appeals' decision is available online at: https://www.bd-law.com/content/uploads/2019/01/2019-06-26-CELP-v.-Ecology-Instream-Flow-Rule-Case-D2-51439-7-II-Published-Opinion.pdf.
(Jamie Morin)

CITY OF CORCORAN FILES LAWSUIT AGAINST DAIRY, ALLEGING NITRATE CONTAMINATION OF GROUNDWATER WELLS

In 2018, the City of Corcoran (City) filed a lawsuit against the Curtimade Dairy (Curtimade) alleging that the dairy was responsible for contaminating the City's municipal groundwater wells with nitrates from liquid animal manure. The City seeks $65 million for costs associated with repairing the City's wells and mitigating the presence of nitrate in the City's water supply. The matter was recently set for trial. [*City of Corcoran vs. Curtimade Dairy Inc.*, Case No. VCU276661 (Tulare Super. Ct. Dec. 18, 2018).]

Background

Based in California's Central Valley, the City of Corcoran is located in one of California's most productive agricultural regions. In particular, the City is situated near a significant number of dairy and agriculture operations, including Curtimade, a dairy that has been operating next to the City for over a hundred years. However, significant water use in the region, including substantial groundwater production, has led to concerns relating to the depletion of groundwater supplies and water quality impacts. A frequently occurring problem in the region has been the presence of nitrate in groundwater.

Nitrate, an essential nutrient for crops, occurs naturally in soil and can dissipate over the course of agricultural operations. To combat nitrate dissipation, agricultural operations apply nitrogen fertilizers to replenish lost nitrate. Dairies, for instance, may use manure produced by livestock as a natural fertilizer for other crops associated with the dairy. In the Central Valley, fertilizer use is common and may reach surface and groundwater bodies through runoff or leaching into soil.

According to the City's complaint, human populations may be impacted through ingestion of nitrate, with high nitrate levels potentially affecting human respiratory and reproductive systems, kidneys, and the spleen and thyroid. High nitrate levels may also affect the ability of red blood cells to carry oxygen to body tissues. In May 2017, the Central Valley Regional Water Quality Control Board (RWQCB) sought to create a solution to mitigate and address nitrate contamination issues in the City's wells. Serving as an intermediary, the Regional Board invited the City and landowners in close proximity to the City's wells to begin discussing and potentially negotiating a resolution to nitrate contamination concerns.

However, in December 2018, the City filed a lawsuit against Curtimade Dairy in Tulare County Superior Court, seeking $65 million in damages and alleging that Curtimade was responsible for contaminating the City's municipal wells with nitrates.

Positions on the Lawsuit

The City asserts a number of allegations in support of its damage claims. For instance, the City alleges that waste from Curtimade's dairy operation has led to excessive nitrate leakage into the City's water supply, thus contaminating local wells. Prior to filing its lawsuit, the City commissioned a water quality study to determine whether the City's wells were being affected by nitrates. The study, in turn, implicated dairy operations by concluding that some of the nitrates in the City's wells could be traced back to animal manure, which was allegedly used by Curtimade. Accordingly, the City alleges that Curtimade applies too much liquid manure on land located south of the City's wells, which causes nitrates to leach into the soil and the groundwater, eventually reaching the City's municipal wells.

The City also alleges that Curtimade's manure lagoons, the place where manure is stored, leaks into the groundwater. The City therefore seeks damages from Curtimade for the costs of repairing and mitigating nitrate impacts on the City's wells.

Curtimade, with support from the local community and other agricultural stakeholders, contends that the dairy has complied with all applicable regulations. Western United Dairies, an agricultural industry group, has publicly challenged the findings of the City's water quality study, arguing that the study was prepared by non-experts in the hydrology and groundwater fields in such a manner that would encourage litigation, and contravenes the findings of the RWQCB regarding contaminant levels in local groundwater supplies. Additionally, Curtimade contends that the City's contamination claims are not hydrologically sound. Because Curtimade's operations are allegedly down gradient of groundwater that reaches the City's wells, Curtimade asserts that any nitrate or other contamination in the City's wells could not have originated from Curtimade's operations. Similarly, Curtimade argues that the City cannot prove that Curtimade was the sole contributor to the contamination of the City's municipal wells. In particular, even if the nitrates were traced back to animal manure, Curtimade alleges that it is impossible to determine their point or source of origin, because numerous dairies are located in the area near the City's wells.

Conclusion and Implications

Large animal and dairy operations, throughout the nation, have often been the focus of allegations of impaired water quality from seepage and runoff. California's Central Valley have many such operations. With trial slated for later in the year, it is unclear whether the City of Corcoran will be able to successfully prove its claims. The facts in this case are obviously key to its determination and its very likely that evidence proffered by experts in hydrology and water quality will play a large role. Further, it is unclear what impacts a win by the City may have on dairy and other agricultural interests that allegedly impact groundwater supplies, including for domestic purposes.
(Miles Krieger, Steve Anderson)

RECENT FEDERAL DECISIONS

SEVENTH CIRCUIT AFFIRMS DISMISSAL OF CHALLENGE TO STATE-ISSUED CLEAN WATER ACT 404 PERMIT

Menominee Indian Tribe of Wisconsin v. U.S. EPA and U.S. Army Corps of Engineers, et al., ___F.3d___, Case No. 19-1130 (7th Cir. Jan.27, 2020).

The U.S. Court of Appeals for the Seventh Circuit recently declined to review the U.S. Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) actions regarding a federal Clean Water Act §404 permit issued by the Michigan Department of Environmental Quality (DEQ) for a proposed mine along the Menominee River. The court found it cannot judicially review a challenge to agency action unless it is final. A request to amend the plaintiff's complaint was also denied.

Factual and Procedural Background

The Clean Water Act requires parties to acquire a § 404 permit for dredge-and-fill projects prior to construction. The U.S. Environmental Protection Agency and the Army Corps of Engineers are initially tasked with enforcing § 404. However, states may apply to assume § 404 permitting authority over their jurisdictional waters. If states are granted this power, the EPA retains an oversight role by reviewing state-proposed permits. Through this function, the EPA has the power to approve or object to proposed state permits. If the EPA objects to a proposed permit, the state must revise and resubmit the permit for approval.

To challenge this permit process, parties must bring claims under the Administrative Procedure Act (APA). The APA limits judicial review to "final agency action," meaning the agency's decision must be a consummation of the agency's decision-making process. Additionally, agency decisions are exempt from judicial review as a matter of law if the decisions are committed to agency discretion. However, courts may compel agency action unlawfully withheld or unreasonably delayed.

Petitioner Menominee Tribe (petitioner) objected to the EPA's decision to not exercise authority over a dredge-and-fill permit issued by the State of Michigan. The U.S. District Court concluded that it did not have the authority to review EPA's decision because it was not a "final agency action" within the meaning of the APA. Additionally, the District Court denied petitioner's motion for leave to amend its complaint to include two APA claims: 1) EPA's withdrawal of objections to the state-issued permit; and 2) the agency's failure to consult the National Historic Preservation Act.

The Seventh Circuit's Decision

Final Agency Action

The court addressed two issues in its decision. The first was whether the agency action is judicially reviewable. The APA limits judicial review to "final agency actions" that determine rights or obligations or from which legal consequences will flow. Using this framework, the court examined the agencies' responses to the plaintiff's concerns by analyzing the letter sent by the EPA to the plaintiff. The Court of Appeals determined this letter as merely informational in nature because it "impose[d] no obligations and denie[d] no relief." Additionally, the court noted that the EPA and Corps, in its communications, did not address the plaintiff's contentions nor did they detail the proper challenge process for this matter.

Parallel State Proceedings

Despite the absence of final agency action, the Court of Appeals further reasoned that the presence of parallel proceedings ongoing in Michigan's Administrative Hearing System inhibited their authority to hear the case. Duplicative litigation in federal and state courts may cause problems, including conflicting judgment and coordination problems. The court, however, noted that Michigan state courts are equally able to adjudicate questions of federal law.

Motion for Leave to Amend

Second, the Court of Appeals addressed the District Court's denial of the plaintiff's motion for leave to amend its complaint. Addressing plaintiff's first claim—that the EPA's decision to withdraw their objection to the permit was arbitrary and capricious—the court asked whether the agency's decision was discretionary. The court reviewed the applicable regulations governing the withdrawal of objections and determined there was a lack judicially manageable standards for judging how and when an agency should exercise its discretion to withdraw objections. The court reasoned the decision to withdrawal an objection is committed to the agency's discretion.

In regard to plaintiff's second claim, the court rejected the plaintiff's contention that the EPA failed to recognize the tribe's consultation rights conferred by the National Historical Preservation Act (NHPA). Under the NHPA, a federal agency overseeing a project must "take into account the effect of the undertaking on any historic property." However, the NHPA only applies to undertakings that are federal or federally assisted. Here, the Court of Appeals reasoned that the proposed project is privately funded and state-licensed, thus the NHPA would not be triggered.

Conclusion and Implications

The Seventh Circuit recognized that the plaintiff ran into a "legal labyrinth and regulatory misdirection" in seeking resolution for their claims. Reluctantly, the court upheld the U.S. District Court's decision to dismiss the case, advising the plaintiff to pursue its challenge in Michigan's administrative system and state courts.

This case upheld a challenge to an agency's decision-based procedures and protections set forth by the Administrative Procedure Act. This case provided an example depicting the power and limitations set forth by the APA in deciding whether an agency acted properly in its decision. The court's decision is available online at: http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2020/D01-27/C:19-1130:J:Scudder:aut:T:fnOp:N:2464851:S:0. (Megan Kilmer, Rebecca Andrews)

TENTH CIRCUIT AFFIRMS U.S. ARMY CORPS OF ENGINEERS' LACK OF DISCRETIONARY AUTHORITY TO OPERATE DAMS ALONG THE RIO GRANDE UNDER THE ENDANGERED SPECIES ACT

WildEarth Guardians v. U.S. Army Corps of Engineers, 947 F.3d 635 (10th Cir. 2020).

In January, the U.S. Court of Appeals for the Tenth Circuit affirmed the decision of the U.S. District Court that the U.S. Army Corps of Engineers (Corps) was not required to consult with the U.S. Fish and Wildlife Service (FWS) about the operation of various dams and reservoirs on the Rio Grande that would have benefited endangered species living along the river. Because neither the Flood Control Acts of 1948 and 1960 nor the Rio Grande Compact imbued the Corps with discretion over its operations of projects within the Middle Rio Grande Valley, the Corps did not need to engage in formal consultations with the FWS pursuant to the federal Endangered Species Act (ESA).

Factual Background

In 1939, Colorado, New Mexico and Texas entered into the Rio Grande Compact, which apportions water from the Rio Grande to each state. The consolidation of water rights and formation and rehabilitation of irrigation systems in the Middle Rio Grande Valley, located in central New Mexico, are governed by the Middle Rio Grande Conservancy District (District). The District was unable to perform its duties without additional dam storage, leading Congress to approve the Middle Rio Grande Conservancy District Project (Project). The Project delegated to the Corps the ability to rehabilitate, construct, maintain, and operate dams on the Rio Grande. The Corps must operate the dams within the parameters of the Flood Control Acts of 1948 and 1960, which authorized the construction and maintenance of the dams at issue in the case.

The ESA requires federal agencies to consult with the FWS or the National Marine Fisheries Service (NMFS) when performing discretionary acts

to ensure that the acts do not jeopardize or harm endangered or threatened species within the respective agencies' jurisdiction. After formal consultation, FWS and/or NMFS then issues a Biological Opinion outlining how the action agency's proposed activities affects different species. (Id. at 638.) In 2003, FWS issued a Biological Opinion discussing the Corps' and the Bureau of Reclamation's effects on endangered species in the Rio Grande. Congress directed compliance with this opinion until it expired in 2013. The Corps reinitiated consultation with FWS before the 2003 opinion expired, but FWS refused to issue an individual Biological Opinion specific to Corps activities. The Corps then determined that its actions in the Middle Rio Grande were not discretionary and thus no consultation was required.

The WildEarth Guardians, a non-profit environmental organization, subsequently filed this ESA claim against the Corps, arguing that the Corps failed to exercise its discretion and consult with the FWS about alternative water management policies that would have helped protect two endangered species, the Southwestern Willow Flycatcher and the Rio Grande Silvery Minnow, living along the Rio Grande.

The Tenth Circuit's Decision

The court grappled with the sole issue of whether the Corps had discretion to operate its projects in the Middle Rio Grande such that it had the requirement of formally consulting with the FWS pursuant to § 7(a)(2) of the ESA. After determining that the Corps must operate the projects in accordance with the Flood Control Acts of 1948 and 1960 and the Rio Grande Compact, the court determined that each of these authorities gave the Corps strict instructions on the operation of the projects such that the Corps was not able "to operate the Middle Rio Grande projects as it pleases."

The 1948 Act states that the project will be "operated solely for flood control" purposes while the 1960 Act outlines specific storage amounts and maximum flow rates that the Corps must adhere to. (Id. at 639-640.) The 1960 Act also mandates that the releases of water from the Galisteo and Jemez Canyon Reservoirs be limited to the amount necessary to control summer floods. These strict requirements, the court held, stripped any discretion of operation from the Corps. (Id. at 640.)

Looking to the *National Home Builders* Decision

The court also drew support from *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007). In *Home Builders*, the EPA was instructed by the Clean Water Act to transfer authority to Arizona upon completion of nine statutory criteria. In that case, the EPA was considered to not have discretion over this transfer of authority because of the statutory criteria. The Tenth Circuit felt that the Corps here was similarly bound by the Flood Control Acts in the same way the EPA was bound by the Clean Water Act. The court found that requiring the Corps to consult with FWS would effectively add another statutory requirement. (Id. at 640-641.)

Previous Corps Actions and the 2018 Water Infrastructure Act

WildEarth argued that the Corps had previously deviated from the Flood Control Acts to protect the minnow and flycatcher, indicating that it did have discretion over its actions. (Id. at 641.) The Compact Commission had previously approved several deviations from normal operations at Middle Rio Grande dams, one of which allowed the Corps to simulate flood flow to promote minnow spawning. But the Tenth Circuit determined that these previous deviations were not instructive as to whether the Corps' dam operations are actually discretionary. Further, the court dismissed WildEarth's contention that the America's Water Infrastructure Act of 2018 gave the Corps discretion to further ESA objectives. It found instead that this act further stripped the Corps of any discretion by requiring the Corps to seek approval from three different entities before implementing "fill and spill" deviations involving the Cochiti and Jemez Canyon dams. (Id. at 642.)

Conclusion and Implications

Despite the Corps' previous deviations from its controlling authorities the Flood Control Acts and Rio Grande Compact, the Tenth Circuit Court of Appeals' held that the Corps does not have the discretionary authority to operate projects along the Rio Grande in a manner that requires it to consult with Fish and Wildlife Service pursuant to the Endangered Species Act. The court's holding emphasizes that an agency's discretion pursuant to the ESA derives from

the legislation governing the actions of that agency. The court's decision is available online at: http://ca10.washburnlaw.edu/cases/2020/01/18-2153.pdf (Monica Browner, Meredith Nikkel)

CITIZEN SUIT AGAINST COUNTY FOR CLEAN WATER ACT VIOLATIONS WITHSTANDS MOTION TO DISMISS IN THE U.S. DISTRICT COURT

Cox v. Board of County Commissioners of Franklin County, Ohio, ___F.Supp.3d___, Case No. 2:18-cv-1631 (S.D. Ohio Jan. 31, 2020).

On January 31, 2020, the U.S. District Court for the Southern District Court of Ohio determined that Jeffery Cox alleged valid claims under the federal Clean Water Act (CWA) against Franklin County, Ohio. The court determined that the notice of the harms was adequate even though the specific date when the violation occurred was not included in the notice. The court, however, also determined that two claims against the county that were similar to those made in a related state suit were impermissible under the CWA as they were duplicative.

Factual and Procedural Background

Jeffery Cox moved to the Sharon Township in 2016 where he noticed "noxious sewage odors and gases" from the storm sewer on his street. He alleged that this impinged on his use and enjoyment of the nearby waterbodies. Cox claimed that the issues were caused by discharges of sewage water and pollutants into the storm drains. He further asserted that the issues were not isolated to the storm drain on his street; instead, all of the storm drains covered by the Franklin County National Pollutant Discharge Elimination System (NPDES) permit suffered from the same issues.

On August 20, 2018, Cox sent a Notice of Intent to sue to Franklin County, the Ohio Environmental Protection Agency (Ohio EPA), and the U.S. Environmental Protection Agency (EPA) for violating effluent standards and limitations established by the Clean Water Act. Cox alleged illicit connections caused impermissible discharges, that Franklin County was aware of the presence of the sewage in the surface waters through the previously performed dry-water screenings, and that Franklin County violated the CWA by not addressing the illegal connections.

On October 17, 2018, the Ohio EPA filed suit against Franklin County. On November 9, 2018, the Ohio EPA and Franklin County reached a Proposed Consent Degree. Cox felt the decree did not include meaningful enforcement mechanisms and failed to address most of the violations described in the notice letter. Due to the perceived inadequacies of the Proposed Consent Decree, Cox filed suit against Franklin County alleging violations of the CWA and National Pollutant Discharge Elimination System permit for allowing the pollution, failing to eliminate the contamination, failing to follow the requirements of the permit, negligence, and other related claims.

The District Court's Decision

Franklin County filed a motion to dismiss on the grounds that Cox failed to satisfy the statutory notice requirements by not providing the date(s) of the violations and argued that Ohio EPA's lawsuit against Franklin County barred the citizen suit. Franklin County also argued that Cox did not have standing, the alleged injuries were not redressable, and there was no harm outside of the township where he resides. Lastly, Franklin County argued that the violations were time barred.

Subject Matter Jurisdiction

The CWA requires a Notice of Intent to sue explaining what violations have occurred and providing enough information to understand what instances are discussed. Franklin County alleged that the notice requirement was not satisfied because the dates of the violations were not provided. Instead, the complaint and notice simply asserted that the violations occurred every day since the violations began. Here, the court determined that the individual dates were not necessary because the description of the dates was non-ambiguous and could not be determined to have any other meaning. Therefore, the court deemed this

language sufficient to satisfy the notice requirement.

The CWA also provides that a citizen suit may not be commenced if the state is or has already diligently prosecuted the same harms in a different lawsuit. Here, Franklin County asserted that Cox's claims were impermissible because the state brought a previous lawsuit alleging five claims regarding various Franklin County violations of its NPDES permit requirements. These claims related to a failure to comply with the NPDES permit by not creating a storm sewer map, identifying where sewage was connected on this map, tracking the sewage connections, knowing when sewage was being discharged, and determining if sewage systems could be connected to the sewage lines. Cox argued the duplicative claims should be permissible because the state did not diligently prosecute these claims. Cox claimed the decree was vague and did not contain adequate enforcement mechanisms.

The court rejected Franklin County's diligent prosecution defense as to five claims regarding the daily illicit discharges for the last five years and the lack of ordinances prohibiting sewage discharges but dismissed two duplicative claims of failing to develop a storm sewer map as required by the NPDES permit and failing to submit a list of sewage disposal sights connected to the system. The court reasoned that diligent prosecution is presumed and a plaintiff is required to show that the government's action fails to result in compliance of the applicable standard. The court found that because Cox did not explain how the Proposed Consent Decree failed to enforce the county's obligation to address the alleged CWA violations, the complaint did not satisfy the burden of providing non-diligence. Therefore, the claims that overlapped with the state claim were dismissed.

Standing

The court next addressed Franklin County's standing argument. Standing under Article III of the U.S. Constitution requires a plaintiff to suffer an injury in fact, which is traceable to the defendant's challenged action, and it must be likely that a favorable decision will redress the harm. The County alleged that the impermissible levels of sewage found by the dry-weather screenings from Sharon Township were non-redressable past violations. They further asserted that Cox had no injury in fact with respect to the violations outside of the Sharon Township since he owns no property in these locations. The County also argued that all of the harms within the Sharon Township are considered past violations as all of the dry-weather screenings occurred prior to 2012. The County reasoned that since there is no more recent screening, all violations were in the past.

The District Court rejected the County's argument and determined the violations are not wholly past because the complaint asserted that the harms are ongoing starting from the date of the screenings. Since the dry-weather screenings showed that a harm occurred in the past and this result did not conflict with the assertion that the harm continued, the date of these dry-whether screenings did not make the harm no longer redressable. Instead, following the water quality standards and reducing pollution would cure the issues which remained in Sharon Township.

The court also determined that injury in fact could be shown by a harm that impacts the plaintiff's aesthetic enjoyment of the land. Here, the complaint alleged that Cox volunteers to preserve many of the rivers and streams included in the Franklin County NPDES permit. Due to his actions and the interest he has in protecting the river, Cox suffered an injury in fact as his use of the waterways are negatively impacted by the defendant's actions.

Statute of Limitations

Finally, the court addressed Franklin County's statute of limitations arguments. The County argued that most of the dry-weather screenings should not be included in the complaint because they occurred more than five years before the Notice of Intent to sue, which means the statute of limitations had run. The court determined this to be irrelevant since the screenings show that the ham is continuous and no remedy has been implemented. Due to the continuous nature of the harm, it was immaterial when these screenings occurred.

Conclusion and Implications

This case is another example of the application of the diligent prosecution bar to commencing a citizen suit. This case also shows that allegations of past violations in a Notice of Intent to sue and in a complaint are not necessarily fatal to a citizen suit action if the violations are also alleged to be ongoing. (Anya Kwan, Rebecca Andrews)

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