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FEATURE ARTICLE

U.S. EPA AND THE CORPS RELEASE WOTUS RULE THAT CLOSELY ADHERES TO JUSTICE SCALIA'S *RAPANOS* OPINION

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 regulations 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 federal 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)

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

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EASTERN WATER NEWS

ENVIRONMENTAL GROUP WILDEARTH GUARDIANS FILE ESA PETITION TO PROTECT RIO GRANDE SHINER

On January 21, 2020 the environmental group WildEarth Guardians filed a Petition with the U.S. Fish and Wildlife Service (FWS) urging the agency to protect the Rio Grande shiner (Shiner) under the federal Endangered Species Act. 16 U.S.C. § 1531 *et seq*. (ESA) The Shiner is a freshwater fish only found in the Rio Grande and Pecos Rivers. WildEarth Guardians contends that water mismanagement of the Rio Grande resulting in artificial flow regimes that interrupt river channels and fragment habitat has imperiled the Shiner. The environmental group's Petition seeks to have the Shiner listed as "endangered" under the ESA.

Background

The Rio Grande Shiner is a small freshwater minnow native to the Rio Grande and Pecos rivers. WildEarth Guardians allege that the Shiner will not survive into the next century absent significant changes in management of the Rio Grande. The group points out that similar species of native fish, the phantom shiner and the Rio Grande bluntnose shiner, have become extinct in the past century. According to the Petition, the Shiner's current population is both small and isolated placing it at increased risk for extinction. When an aquatic species' population becomes fragmented, genetic diversity is lost along with the species' ability to readily adapt to altered riverine conditions.

Listings under the Endangered Species Act

Under the ESA, a species is listed as either endangered or threatened depending upon its status and degree of threat it faces. The FWS adheres to a legal rulemaking process to adopt regulations to protect a species. The agency has developed a priority system that is designed to direct the FWS' efforts toward the species that are in greatest need of protection.

The WildEarth Guardians Petition

The Petition filed by WildEarth Guardians is a formal request to list the Shiner. In accordance with the ESA, the FWS is required to make and publish specific findings on the Petition. As noted in the Petition, the FWS:

> . . .must evaluate whether a species is threatened or endangered as a result of any of the five listing factors set forth in 16 U.S.C. § 1533(a)(1): A. The present or threatened destruction, modification or curtailment of its habitat or range; B. Overutilization for commercial, recreational, scientific or educational purposes; C. Disease or predation; D. The inadequacy of existing regulatory mechanisms; or E. Other natural or man-made factors affecting its continued existence. Petition at 2.

The FWS must make listing determinations "solely on the basis of the best available scientific and commercial information regarding a species' status." 16 U.S.C. § 1533(b)(1)(A); 50 C.F.R. § 424.11(b). As the noted in the Petition:

> . . .[r]eliance upon the best scientific data, as opposed to requiring absolute scientific certainty, 'is in keeping with congressional intent' that an agency 'take preventive measures' before a species is 'conclusively' headed for extinction. *Center for Biological Diversity v. Lohn*, 296 F. Supp.2d 1223, 1236 (W.D. Wash.2003).

According to WildEarth Guardians, "the [S]hiner's range and abundance has noticeably diminished in the Rio Grande since the 1950s." Petition at 6. The Petition analyzes the above listing factors A, C, D and E with particular attention paid to Factor A, the present or threatened destruction, modification, or curtailment of habitat or range. WildEarth Guardians contends that:

> . . .dams, dewatering, channelization, and other human interference have changed the nature of the Rio Grande and Pecos Rivers such that uninterrupted stretches of river with wide channels and periodic flooding—prime habitat for the

shiner—have been replaced with deep, quick-flowing channels, stagnant reservoirs, and dry river beds unsuitable for the shiner's survival. Id.

What Follows the Petition

Within 90 days of receipt of a Petition for Listing, the FWS is required to make a finding as to whether there is "substantial information" indicating that the petitioned listing action is warranted. If this preliminary finding is warranted, then the FWS undertakes a status review of the species, usually over the course of a 12-month period. A proposed rule may then be published prompting a 60-day comment period. Upon request, a hearing may be held and then a final rule is promulgated or withdrawn.

Conclusion and Implications

WildEarth Guardians' latest Petition highlights the dwindling population and plight of the Rio Grande Shiner. Studies confirm that habitat modification, fragmentation and destruction are the primary causes of loss of freshwater aquatic biodiversity. The Petition requests that the Shiner be listed as endangered and requests that the FWS develop a recovery plan. The Petition is available online at: https://pdf.wildearth-guardians.org/site/DocServer/Rio-Grande-Shiner-Petition-final.pdf
(Christina J. Bruff)

NEWS FROM THE WEST

In this month's News from the West, first, we cover bills pending in the Colorado Legislature that relate to water rights and supply. Lastly, we cover efforts by the Nevada State Engineer to use modern day algorithms along with historical data to determine the extent of water rights water allocations. Historical data had been the primary, if not the sole methodology in the past. The decision has been received with mixed reviews.

2020 Colorado Water-Related Bills

The Colorado General Assembly, which began its session on January 8, has a slate of water-related bills up for review. The various bills, some of which have already passed one of the chambers, cover the full range of Colorado water issues including anti-speculation, instream flow sources and regulation, water planning, and demand management. Colorado voters recently passed Proposition DD—to legalize sports betting with the majority of the proceeds going to Colorado's Water Plan—so it is expected we will see several bills addressing the end goals for that new revenue.

What follows is a summary of select water bills.

Senate Bill 20-24 Demand Management Programs

This bill, a bipartisan effort between sponsors Don Coram (R) and Kerry Donovan (D), would require public input if and when tahe state were to develop a water demand management program. Demand management programs are those in which the state or other local water authority pays water users to not use water. In a best-case scenario, the water users are still financially stable, and there is extra water in the stream available to bank in reservoirs (in Colorado's case, Lake Powell) for drier years. The Colorado program could bank up to 500,000 acre-feet.

Senate Bill 19-212, enacted last year, appropriated $1.7 million for use in the development of a statewide demand management program. That bill, in turn, was spurred by the 2019 passage of the drought contingency plans adopted by all Colorado River Upper Basin states. Among other expenditures, the Colorado Water Conservation Board was directed to use that money for "stakeholder outreach and technical analysis."

As part of that stakeholder outreach, newly introduced SB 20-24 requires that the public involvement mirror that of the comment provisions incorporated in the Colorado Water Plan. Specifically, C.R.S. § 37-98-102, controlling the Colorado Water Plan, requires "involvement of the public and… opportunities for public comment before adopting any final or significantly amended plan." That language is then incorporated, verbatim, into the new statute provision of SB 20-24, ensuring public input and advisement before any statewide demand management program is implemented. That public involvement would

also explicitly include consultation with the Basin Roundtables, which are stakeholder interest groups representing each of Colorado's nine sub-basins.

Interestingly, this bill did not make it out of the Senate Agricultural and Natural Resources Committee, as it was defeated on January 30 at Senator Coram's request. He later said that he never intended the bill to pass as it isn't yet necessary but that, "[t]he bill has created the reaction we wanted." Between the passage of the Drought Contingency Plan last year and now SB 20-24, it is safe to say that Colorado legislators are now fully aware of the eventual need for a demand management plan as well as the complicated legal and legislative framework such a plan will require.

House Bill 20-1095 Water Elements in Local Master Plans

In the same vein as demand management programs and water conservation, HB 20-1095 would authorize local governments to include Colorado Water Plan goals and policies in their local master plans. The bill, co-sponsored by Democrats Rep. Jeni James Arndt and Sen. Jeff Bridges, was approved by the House Rural Affairs and Agriculture Committee on February 3 and was passed by the full House on February 12. Inherent in the need for the bill, according to Representative Arndt, is the Colorado Water Plan's projection of a 560,000 acre-foot municipal and industrial water supply gap by 2050. Proponents of HB 1095 argue that it is critical that master plans take into account water issues so that new development doesn't outpace supply. Opponents, chiefly Republicans as the vote was generally along party lines, argued that local master plans are not the most effective means to achieve these objectives. The Senate Agriculture and Natural Resources Committee referred the bill, unamended, to Senate Appropriations on February 20.

Instream Flows—HB 20-1157 and HB 20-1037

The Colorado House is currently debating two bills concerning instream flows. Instream flows, or ISFs, are water rights, controlled by the Colorado Water Conservation Board (CWCB), that leave water in the stream for the protection and benefit of the natural environment. HB 1037 would add a category of water rights that could be used as an ISF, while HB 1157 would expand the number of years for which a loaned water right may be used for ISF purposes.

House Bill 1037 passed the House unanimously on January 29 and is now before the Senate Agriculture and Natural Resources Committee. The bill would authorize the CWCB to acquire water rights currently decreed for augmentation use, and use that water as an ISF without going through a change of use proceeding. Augmentation water is frequently utilized by all manner of Colorado water users to replace their out-of-priority diversions to allow them to keep diverting when their water right would normally be called out. This bill would simply make it easier for the CWCB to acquire and operate ISFs by removing one step from the process and allowing augmentation water rights to immediately be used for instream flow purposes.

House Bill 1157 passed the House on February 21. The bill is sponsored by a bipartisan team of legislators including Reps. Dylan Roberts (D) and Perry Will (R). Sen. Kerry Donovan (D), the majority whip, is also a sponsor of the bill. HB 1157 expands the CWCB's loan program to allow the CWCB to more frequently utilized loaned water rights for instream flow purposes. The program, as currently operated, allows water rights owners to loan their right to the CWCB for a ten-year term, of which the CWCB make exercise that loan in any three out of those ten years to use as an ISF. Under the new proposal, the CWCB could exercise the loan up to 5 out of the ten years, but no more than three consecutive years, and the loan could be renewed for two additional ten-year periods.

The proposed loan would be reviewed by the Colorado State Engineer and there will be a period of time allowed for comments by interested parties. Specifically, the loan must not cause injury to other vested or conditionally decreed water rights, decreed exchanges of water, or undecreed existing exchanges of water that were administratively approved before the date that the loan application was filed. The state engineer's decision may then be appealed to a water judge.

Anti-Speculation—SB 20-48

The final water-centric bill currently before the General Assembly is sponsored by many of the same legislators in the above bills including Rep. Roberts and Sens. Donovan and Coram. This bi-partisan bill

passed the Senate on January 29 and is currently before the House Rural Affairs and Agricultural Committee.

SB 20-48 is intended to eventually strengthen Colorado's anti-speculation laws through the creation of a working group specifically tasked with analyzing the existing statutes. Although the Colorado Constitution explicitly prevents speculation, it is understood that water, specifically agricultural water, is often purchased by out-of-state entities with the intention to put it to a different use sometime in the future. In the face of a hotter and drier future for the Colorado River Basin, it is only more likely that speculators will look to Colorado water to turn a profit. The bill would require the executive director of the Colorado Department of Natural Resources, currently Dan Gibbs, to assemble a working group to analyze the current laws and provide a report to the water resource review committee by August 15, 2021 outlining recommended changes to strengthen the current laws. As it stands, speculation is evidenced by lack of a specific plan and intent to divert and place water to beneficial use; or by a lack of vested interests, or reasonable expectation of such, in the lands or facilities to be served by the appropriation of water.

Conclusion and Implications

It is clear from the various bills put forth in the 2020 legislative session that the Colorado General Assembly recognizes the growing water supply and demand problems within Colorado. The bills, many with bipartisan support, all share the same common themes of protecting Colorado's water, both for appropriation and for the environment, throughout the coming decades. These plans, particularly when combined with the additional money generated through sports betting via Proposition DD, provide a framework for the General Assembly to continue to work towards the goals specified in the Colorado Water Plan.
(John Sittler, Paul Noto)

Nevada State Engineer Uses Modern-Day Methodology to Determine Historical Water Duties in Adjudications

In establishing the pre-statutory water duty for irrigation in two recent adjudications, the Nevada State Engineer deviated from a century of judicial decrees to use, for the first time, current consumptive use estimates from a 2010 study conducted by the Nevada Division of Water Resources. Although the study indicates that this data is "more representative of expected future conditions than prior periods," and the State Engineer acknowledged that the amount of water granted in an adjudication should represent historical usage, the State Engineer nevertheless used this modern data as a basis for fixing water duties for vested rights. By doing so, the State Engineer has called into question what information should be referenced in the adjudication process.

Nevada's Adjudication Process

Like other Western states, Nevada recognizes water rights that vested prior to the enactment of the State's statutory water law. The statute specifically provides that "[n]othing contained in this chapter shall impair the vested right of any person to the use of water…." NRS 533.085. To determine the relative pre-statutory rights to use water from a source, the State Engineer conducts a general adjudication. An adjudication is a forensic inquiry of historical uses, involving field investigations, review of old records, interviews with those who have personal knowledge of long-time ranch operations, surveying and mapping of pre-statutory points of diversion and places of use.

The claimant files its claims of pre-statutory use with the State Engineer, who issues a preliminary order of determination and provides the opportunity for the filing of objections. The State Engineer then holds a hearing on objections and issues a final order of determination, which gets filed in the district court for the county in which the water source is located.

The state District Court hears exceptions to the final order and may consider additional evidence, after which it enters a final decree. Numerous Nevada water sources have been adjudicated in this manner. There are also federal decrees that adjudicate the respective rights to waters of several interstate rivers that flow into Nevada.

Duty Determinations in Nevada Water Decrees

A decree must fix the duty of water for each manner of use. Duty is the measure of water that is reasonably required on any given tract of land to maximize

production without creating waste. Duty is generally measured in acre-feet per acre.

Historically, when determining such duties, the State Engineer has accounted for numerous parameters, which include: 1) wetting of the ditch that conveys the water; 2) ditch bank storage; 3) evaporative losses; 4) hydraulic head to push the water across the field; 5) secondary artificial ground water recharge; 6) plant consumption; 7) tail water/return flow; and 8) leaching of salts from the soil. In considering these parameters, courts issuing decrees have considered soil type, slope of the land, season and climate, type of crop and the method of irrigation used. The variability in conditions makes it difficult for courts to apply standard duties.

The location of measurement affects which of these parameters must be accounted for in the decreed duty. Some decrees, for example for the Truckee River, measure the duty at the field after transportation losses. Other decrees, for example for the Carson River, measure duties at both the diversion from the river to the canal and the point of delivery to the land, depending on the location of the land being served. The duties set in the Franktown Creek decree account for considerable sub-irrigation conditions. Depending on the type of culture and the location of measurement, duties can be highly variable from decree to decree.

Nevada State Engineer's Efforts to Gather Consumptive Use Data

In 2010, the Nevada Division of Water Resources issued a report entitled *Evapotranspiration and Net Irrigation Water Requirements for Nevada* (2010 Report). The 2010 Report estimated crop evapotranspiration and net irrigation water requirements for various crop types for each hydrographic basin in Nevada. Net irrigation water requirements (NIWR) is:

> . . .the amount of water necessary to supplement rainfall in a given region to grow a full yield of an irrigated crop under pristine crop conditions and a full supply of water without waste, or non-beneficial use, of water. Diamond Valley Adjudication, *Final Order of Determination* (Jan. 31, 2020).

The estimates were derived from the most recent 30 years of weather data where available. In basins that lacked weather stations, spatial interpolation was used to derive evapotranspiration (ET) and NIWR estimates. The objective of the 2010 Report was to update estimates of actual ET and NIWR statewide, which could assist resource agencies to evaluate irrigation development, transfers of irrigation water to municipal uses and litigation of water right applications and protests.

Use of NIWR to Establish Historical Water Duties

When determining the duty of a post-statutory permitted irrigation right, the State Engineer has an obligation to consider the local irrigation requirements; the duty established by local court decree "or by experimental work in such area"; the growing season, type of culture, and reasonable transportation losses"; and "any other pertinent data deemed necessary to arrive at the reasonable duty of water." NRS 533.070(2). Other than the obligation not to impair vested rights, there is no similar guideline for the State Engineer to set the allowable duty of a pre-statutory water appropriation.

In two recent adjudications, the State Engineer employed NIWR as the basis of establishing the water duties associated with vested rights. In the Diamond Valley adjudication, the State Engineer took 2.5 acre-feet per acre (the NIWR for alfalfa estimated in the 2010 Report) and added 0.5 acre-foot per acre for "conveyance losses" to come up with a 3.0 acre-feet per acre duty for all harvest crops. In the Cold Spring adjudication, the State Engineer took the NIWR value estimated in the 2010 Report and added 10 percent "transportation loss" to establish a 3.5 acre-feet per acre duty for harvest crops.

The orders in each adjudication are silent as to how the conveyance/transportation loss number was arrived at. The State Engineer also did not explain whether the various parameters that go into a duty are accounted for in this conveyance/transportation loss number. Nevertheless, in both adjudications, the State Engineer asserted that "[t]he amount of water herein granted in this adjudication represents the historical use prior to the statutory water law from the water sources."

Incongruously, these duties are lower than those that are allowed in the oldest water permits for each basin. For example, the earliest post-statutory permits issued in Diamond Valley establish a 4 acre-feet per

acre duty for irrigation. In Cold Spring Valley, the earliest post-statutory permit allows 4.53 acre-feet per acre of harvest crop. This leads to the odd result that the earlier priority vested rights have a lower duty than later priority statutory permits.

Conclusion and Implications

Using recent data to estimate historical use is fraught with challenges. While current estimates of NIWR may be an appropriate starting point for determining the consumptive use component of a water duty, there are numerous other parameters that must be considered. Modern irrigation practices are more efficient than those employed by early settlers. Because an adjudication should look at the practices that were in place at the time the water was first diverted and placed to beneficial use, a more thorough discussion of historical conveyances and application methods may be warranted to determine whether NIWR plus the conveyance loss set by the State Engineer accurately reflects what was done in the past. Without this exercise, there is no assurance that vested rights have not been impaired.
(Debbie Leonard)

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, 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)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

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

Due to the recent federal government shut down, many of the agencies who report on Clean Water Act civil and criminal enforcement actions have been silent resulting in a smaller than usual number of summaries below.

Civil Enforcement Actions and Settlements—Water Quality

•January 22, 2020 - A Lincoln County, Missouri, limestone quarry owner has agreed to settle a civil enforcement action with the EPA for alleged violations of the federal Clean Water Act (CWA). According to EPA, Magruder Limestone Inc. filled in more than 1,200 feet of a stream without first obtaining a permit, as required under the CWA. The Missouri Department of Natural Resources (MDNR) initially identified the alleged violation and reported it to the U.S. Army Corps of Engineers (Corps). EPA, MDNR and the Corps conducted a site visit at the Magruder Limestone Inc. property in September 2018 and confirmed that the company used earth-moving equipment to place dirt and other material into a tributary of Barley Branch. Barley Branch is a tributary of the Mississippi River. As part of the settlement, the company agreed to pay an $80,000 civil penalty and submit a plan to EPA to restore portions of the affected stream. The penalty settlement with Magruder Limestone Inc. is subject to a public comment period before it becomes final.

•February 10, 2020 - The EPA has finalized a settlement with Airtech International, Inc. over Clean Water Act violations at its facility in Huntington Beach. Airtech International is a large-scale manufacturer of materials used in the aerospace, automotive, marine, and wind energy industries. The agreement requires the company to pay a $95,208 penalty for unauthorized industrial stormwater discharges between December 2014 and January 2019. Airtech International will also conduct five beach cleanup events and complete a habitat restoration project as part of the settlement. EPA partnered with the Santa Ana Regional Water Quality Control Board to inspect Airtech International's facility in 2018 and found the company failed to obtain a stormwater discharge permit from the California State Water Resources Control Board. Stormwater runoff from Airtech International discharges into Bolsa Chica Channel, which flows into the Bolsa Chica Ecological Reserve before entering the Pacific Ocean. EPA also found the facility failed to use best management practices—such as routinely sweeping paved surfaces and covering areas where potential sources of pollution are stored—to reduce or eliminate pollutants in stormwater runoff. As part of the agreement, Airtech International will spend over $66,000 in 2020 to complete a Supplemental Environmental Project (SEP) to support restoration of the local marine environment. The SEP will include five beach cleanup events within Huntington Beach, an initiative to replenish native Olympia oyster shells in the Upper Newport Bay and a replanting of eelgrass to improve sustainability. Stormwater runoff from composite tooling production facilities can include plastic resin pellets, oil, grease, and scrap metal. Federal regulations require that certain industrial facilities obtain National Pollutant Discharge Elimination System (NPDES) permits to control the discharge of pollutants in stormwater runoff into nearby water bodies. These facilities must develop and implement stormwater pollution prevention plans to prevent runoff from washing harmful pollutants into local water bodies.

•February 10, 2020 - The EPA has announced that the owners of three Maine metal recycling facilities have agreed to come into compliance with stormwater regulations and will pay a fine to resolve claims that they violated federal clean water laws and state permits at three Maine locations. The proposed

settlement is subject to a 30-day public comment period. Three closely-related companies - Grimmel Industries, Inc., Grimmel Industries, L.L.C., and Kennebec Scrap Iron, Inc - agreed to comply with their industrial stormwater permits and to pay $250,000 to resolve the claims involving facilities in Topsham, Lewiston, and Oakland. The facilities are involved in sorting, shredding, storing, and transferring processed scrap metal for recycling. State and federal EPA inspections revealed numerous violations of state industrial stormwater permit requirements and of federal oil spill prevention regulations. The Consent Decree will require Grimmel to comply with all stormwater permit requirements, including submission of and compliance with adequate stormwater plans and proper maintenance, monitoring, and sampling. The Topsham Facility is on the site of a 20-acre former paper mill beside the Androscoggin River, and stormwater from industrial activity there flows into the river. Stormwater from the three-acre Lewiston facility eventually drains into a culvert running under a road, empties into Hart Brook, and then flows into the Androscoggin River less than a mile away. Stormwater from the Oakland Facility, located on 11 acres in a wooded area, flows into two streams that are tributaries to Messalonskee Stream. EPA's investigation concluded that the companies did not have adequate stormwater pollution prevention plans or best management practices and failed to do proper monitoring, sampling, inspections, and training. At the Topsham and Lewiston Facilities, they also violated oil spill prevention planning requirements.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•February 10, 2020—The EPA announced that Citgo Petroleum Corp. and Oxy USA have agreed to investigate and address hazardous waste releases at the former Cities Service Refinery, 2500 E. Chicago Ave., East Chicago, Indiana. EPA's administrative orders on consent under the federal Resource Conservation and Recovery Act require the companies to determine the nature and extent of hazardous waste releases at the former refinery and tank terminal and clean up any releases that may pose a risk to human health or the environment. Since 1929, the former Cities Service Refinery site has gone through multiple owners and operational configurations. The northern portion of the site is the currently active Citgo petroleum terminal. The southern portion of the site remains vacant after refinery activities ceased in 1972, and the above-ground structures were razed in the 1980s.

•February 12, 2020 - Under an agreement with the EPA Clean Harbors of Connecticut, Inc., has agreed to pay $58,338 to settle two counts of allegedly violating federal PCB regulations at the company's Bristol, Connecticut facility. Clean Harbors, which provides hazardous and non-hazardous waste management services, is now operating in compliance with federal laws regulating toxic chemicals at the Bristol facility. The case stems from a self-reported incident of non-compliance, pursuant to federal Resource Conservation and Recovery Act permit. It involved improper manifesting of PCB remediation waste resulting from a transformer spill as non-hazardous and improper disposal at a facility in New York based on field screening testing alone. Federal PCB regulations include prohibitions of and requirements for the use, disposal, storage and marking of PCBs and items that have come in contact with PCBs. The regulations are meant to reduce the potential for harm and to track PCBs from use to disposal. The violations at the Clean Harbors facility were significant given the quantity and concentrations of PCBs involved.

•February 13, 2020 - The EPA, along with the Justice Department, announced the release of the Butte Priority Soils Operable Unit (BPSOU) consent decree. This document provides the framework for the continued cleanup of mining-related contamination to protect public health and the environment in Butte and Walkerville, Montana. The consent decree requires Atlantic Richfield to undertake or finance over $150 million in cleanup actions, provide financial assurances for future cleanup actions, and provide enhanced community benefits through the implementation of end land use plans along the Silver Bow Creek Corridor. Additionally, EPA Region 8 is releasing an amendment to the 2006 Record of Decision for the BPSOU that will expand cleanup efforts. The amendment will require the removal of contaminated tailings at the Northside and Diggings East Tailings areas as well as contaminated sediment and additional floodplain contamination from Silver Bow and Blacktail Creeks. The amendment will also require the treatment of more contaminated storm water before it flows into the creeks, and the capture

and treatment of additional contaminated groundwater. Once executed by the parties and entered by the court, the consent decree will implement this amended remedy. The release of the consent decree will provide the commissioners of Butte Silver Bow County—who must approve the document before it can be submitted to the court—an opportunity to consider the document in a public forum. This process allows Butte Silver Bow County to inform and educate the public and the county commissioners about the content of the consent decree. Once that process concludes, the county commissioners will vote on whether to approve the document.

Indictments, Convictions, and Sentencing

•February 10, 2020 - Bernhard Schulte Shipmanagement (Singapore) PTE LTD. (Bernhard), a vessel operating company, pleaded guilty in federal court to one count of maintaining false and incomplete records relating to the discharge of bilge waste from the tank vessel Topaz Express, a felony violation of the Act to Prevent Pollution from Ships. U.S. District Judge Derrick K. Watson of the District of Hawaii accepted the guilty plea. Chief Engineer Skenda Reddy and vessel Second Engineer Padmanaban Samirajan previously pled guilty to their involvement in the offense. Under the terms of the plea agreement, Bernhard will pay a total fine of $1,750,000 and serve a 4-year term of probation. This is the largest fine ever imposed in the District of Hawaii for this type of offense. Bernhard further must implement a robust Environmental Compliance Plan, which applies to all 38 vessels operated by the company that call on U.S. ports. According to court documents and information presented in court, the defendants illegally dumped bilge waste from the Topaz Express directly into the ocean, without properly processing it through pollution prevention equipment. The defendants admitted that these illegal discharges were not recorded in the vessel's oil record book as required by law. Specifically, on three separate occasions between May and July 2019, Bernhard, acting through Chief Engineer Skenda Reddy and Second Engineer Padmanaban Samirajan, its employees, used a portable pneumatic pump and hose to bypass the ship's pollution prevention equipment and discharge bilge waste directly into the ocean. They then failed to record the improper overboard discharges in the vessel's oil record book. Additionally, during the U.S. Coast Guard's inspection of the Topaz Express, Reddy destroyed paper sounding sheets and altered a copy of the vessel's electronic sounding log, in an effort to conceal how much bilge waste had been discharged overboard without being processed through the vessel's pollution prevention equipment.
(Andre Monette)

JUDICIAL DEVELOPMENTS

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

Menominee Indian Tribe of Wisconsin v. U.S. EPAand 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 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 HOLDS PRIOR VOLUNTARY CONSULTATION UNDER THE ENDANGERED SPECIES ACT DOES NOT BIND THE CORPS OF ENGINEERS TO FUTURE CONSULTATION

WildEarth Guardians v. U.S. Army Corps of Engineers, ___F.3d___, Case No. 18-2153 (10th Cir. Jan. 17, 2020).

For a decade, the U.S. Army Corps of Engineers (Corps) operated dams on the Rio Grande consistent with a Biological Opinion aimed at protecting two listed species reliant on the river's habitat. On expiration of that opinion, however, the Corps was justified in withdrawing from any further consultation with the Fish and Wildlife Service, as the authorizing statutes for the Corps' operation of the dams did not grant any discretion over their operation.

Background

The Rio Grande flows from Colorado, through New Mexico and Texas, and into the Gulf of Mexico. In 1939, the three states entered into the Rio Grande Compact to apportion their various claims to the river's flows, but, as is more usual than not in the West, "there is not enough water to meet all the competing needs of vegetation, wildlife, and human inhabitants."

The Middle Rio Grande Conservancy, located in central New Mexico:

> . . .was 'formed to consolidate water rights and irrigation systems, and to rehabilitate the existing irrigation systems in the Valley.' *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1104 (10th Cir. 2010).

In 1948 and 1960, Congress adopted Flood Control Acts establishing the Middle Rio Grande Conservancy District Project, and authorizing the Army Corps of Engineers and U.S. Bureau of Reclamation (Bureau) to "rehabilitate, construct, maintain, and operate dams and other devices on the Rio Grande," including the Jemez Canyon, the Abiquiu, the Cochiti and the Galisteo Dams. The 1948 Act provided that "all reservoirs constructed as part of the project shall be operated solely for flood control except as

otherwise required by the Rio Grande Compact," (Pub. L. No. 81-858, 62 Stat. 1171, 1179 (1948)), and the 1960 Act similarly restricted operation of the facilities it authorized to "flood and sediment control." Pub. L. No. 86-645, 74 Stat. 480, 493 (1960). The 1960 Act, in particular, specifies "water outflow, water releases, water storage, and general operations" of the Cochiti and Galisteo Dams.

Separately, the U.S. Fish and Wildlife Service (FWS) listed as endangered, under the federal Endangered Species Act (ESA), two species dependent on Rio Grande habitat: the Rio Grande Silvery Minnow, listed in 1994 (59 Fed. Reg. 36,988 (July 20, 1994)), and the Southwestern Willow Flycatcher, listed in 1995 (60 Fed. Reg. 10,694 (Feb. 27, 1995)). Beginning in the mid-1990s, the Corps and Bureau consulted with FWS regarding endangered species issues in the Middle Rio Grande, and:

> . . .in 2003, FWS issued a Biological Opinion discussing the agencies' effects on the minnow and flycatcher in the Middle Rio Grande. The Biological Opinion included a reasonable and prudent alternative to protect the minnow and flycatcher.

The opinion did not distinguish between the activities or jurisdiction of the Corps and the Bureau.

> Congress directed compliance with the Biological Opinion until the opinion expired in 2013, noting that compliance satisfied agency obligations with respect to the Endangered Species Act.

When the expiration of the 2003 Biological Opinion was approaching, the Corps initiated consultation with the FWS, seeking an opinion directed solely at its own activities, as opposed to those of BOR. FWS declined to issue a separate, Corps-specific opinion. As a result:

> [T]he Corps withdrew from consultation to re-evaluate its own statutory obligations and determine whether its actions were discretionary such that it could implement alternatives to protect the minnow and flycatcher. The Corps sought to clearly identify what actions the Corps—rather than Reclamation—had control over. As a result of this reevaluation, the Corps determined its actions in the Middle Rio Grande were not discretionary, and it was bound by the requirements of the 1960 Flood Control Act.

An environmental advocacy group challenged this decision; the district court concluded the Corps lacked discretionary authority over actions that could affect the listed species.

The Tenth Circuit's Decision

Section 7(a)(2) of the Endangered Species Act requires federal agencies to consult with other federal agencies to:

> . . .insure that any action authorized, funded, or carried out by such agency. . .is not likely to jeopardize the continued existence of any endangered species or threatened species. 16 U.S.C. § 1536(a)(2).

A section 7 consultation is only required, however, when a federal agency contemplates an action "in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. The result of a section 7 consultation is FWS' issuance of a Biological Opinion "setting forth the [FWS] Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat" (16 U.S.C. § 1536(b)(3)(A)), and including "'reasonable and prudent alternatives' for the federal agency to implement. The agency can either terminate the planned action, implement the alternative, or seek an exemption." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 652 (2007).

Did Corps Operation of Projects Trigger ESQ Consultation Requirements?

The Tenth Circuit identified "[t]he sole question" before it as "whether the agency has discretion to act such that it must formally consult with FWS under § 7(a)(2)"—specifically, "whether the Corps has the discretion to operate its projects in the Middle Rio Grande such that the consultation requirements of the ESA are triggered."

The 1948 Act's operative language provides that the projects it authorized:

> . . .*shall be operated solely for flood control* except as otherwise required by the Rio Grande Compact, and at all times all project works shall be

operated in conformity with the Rio Grande Compact as it is administered by the Rio Grande Compact Commission. Stat. at 1179.

The 1960 Act provides that the project it authorized:

> . . .will be done as the interests of *flood and sediment control* may dictate … and *no departure from the foregoing operation schedule will be made except with the advice and consent of the Rio Grande Compact Commission*. 74 Stat. at 493. (Emphasis added by the court.)

The Tenth Circuit concluded "[t]he Corps is not able to operate the Middle Rio Grande projects as it pleases—rather, it is given explicit instructions from Congress and told to follow the instructions," with limited exceptions applying only in specifically defined circumstances.

> [T]he fact that the [Rio Grande] Compact Commission can authorize deviations from some operational requirements does not create discretion on the part of the Corps to consult with FWS. Because the Corps lacks discretion to operate the projects outside of flood control purposes, requiring consultation under these circumstances would effectively add another statutory requirement.

The Compact Commission's previous acquiescence in voluntary deviations from the statutes' mandatory operational commands, consistent with the 2003 Biological Opinion:

> . . .[is] not indicative of whether the Corps' previous operations aimed at the minnow and flycatcher are actually discretionary. These deviations were authorized by the Compact Commission—one of the statutorily enumerated exceptions to the Corps' otherwise strict operating instructions.

Thus, the Tenth Circuit affirmed the decision of the U.S. District Court.

Conclusion and Implications

Prior cooperation among federal agencies to protect natural resources creates no reliance interest held by third-party environmental advocates, where that cooperation is not compelled by statutory language. The Circuit Court of Appeals' decision is available online at: https://www.ca10.uscourts.gov/opinions/18/18-2153.pdf
(Deborah Quick)

WHEN WILL A STATE TAKING ACTION BAR A CLEAN WATER ACT CITIZEN SUIT?—TWO FEDERAL DISTRICT COURTS DECIDE

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); *Stringer v Town of Jonesboro*, ___ F.Supp.3d___, Case No. (W.D. La. Feb. 3, 2020).

Two recently decided cases deal with the federal Clean Water Act's citizen suit provisions and whether the suit can withstand dismissal on account of the defense that a state is diligently pursuing an enforcement action.

Cox v. Board of County Commissioners

As the Court in *Cox v. Board of County* Commissioners explained, 33 U.S.C. § 1365 governs citizen suits under the federal Clean Water Act (CWA); ***§ 1365(a)(1)*** generally provides that a citizen "may commence a civil action on his own behalf" against a person who either violates an effluent standard or limitation set forth in the CWA or violates an order issued by the U.S. Environmental Protection Agency (EPA) administrator.

However, no action may be commenced:

> . . .if the Administrator [of the EPA] or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order. § 1365 (b)(1)(B).

A second limitation is found in § 1319(g)(6), and in relevant part states that a *violation*:

> . . .with respect to which a State has commenced and is diligently prosecuting an action

> under a State law comparable to this subsection...shall not be the subject of a civil penalty action under...*section 1365* of this title. 33 U.S.C. § 1319(g)(6)(A)(ii).

The civil penalty limitation in § 1319(g)(6)(A) is itself subject to an exception, which is set forth in § 1319(g)(6)(B):

> The limitations contained in subparagraph (A) on civil penalty actions under *section 1365* of this title shall not apply with respect to any violation for which (i) A civil action under section 1365(a)(1) of this title has been filed prior to commencement of an action under this subsection, or (ii) Notice of an alleged violation of section 1365(a)(1) of this title has been given in accordance with section 1365(b)(1)(A) of this title prior to commencement to an action under this subsection and an action under section 1365(a)(1) of this title with respect to such alleged violation is filed before the 120th day after the date on which such notice is given.

Background

In *Cox v Board of County Commissioners*, the plaintiff, Mr. Cox, began experiencing foul sewage-like odors at his new home in Franklin County, Ohio soon after he moved there. After investigation, he determined that the storm sewers near his home were contaminated with sanitary sewage that was unlawfully being fed into them, and this foul soup would discharge to a nearby waterway. He gave notice that he would commence a citizen suit against the county for several violations of the National Pollutant Discharge Elimination System (NPDES) permit and program that governed the storm sewers.

Thereafter the State of Ohio filed suit and achieved a judgment under which Franklin County made a number of promises as to the storm sewers. Mr. Cox had nevertheless filed a federal district court suit pursuant to the notice he had served. The County sought dismissal of the federal suit on the basis of the State's diligent prosecution of the State case.

The District Court's Decision

The opinion in *Cox* proceeds to parse through and compare the multiple counts in the federal complaint with the judgment order the State achieved. Despite the earnest effort of the County to the contrary, the Court finds that several of the eight counts in the federal citizen suit complaint state claims that are not addressed or remedied in the state order. The key points of decision being that the only actions barred are those that actually overlap with a government action, citing, *e.g. Frilling v. Village of Anna,* 924 F.Supp. 821, 836 (S.D. Ohio 1996) ("[C]itizen suits are barred only if they are based on the very same standards, limitations, or orders for which the State has brought a civil enforcement action, and only if the State seeks to require compliance with the same.")

Stringer v. Town of Jonesboro

In contrast with the *Cox* decision, a court in Louisiana has ratified a magistrate's dismissal of a complaint that alleged a town's raw sewage was being discharged to waters of the United states in violation of the Clean Water Act. The citizen suit was dismissed because the magistrate found that a State Health Department action in which a $3000 fine had been levied was for the same essential violations in the citizen's complaint.

Conclusion and Implications

One wonders whether a multi-count Clean Water Act complaint that went into allegations of multiple violations, ala *Cox*, might have fared better in the Louisiana court. In such a situation, with the law's multiple requirements for treatment minimums, permits and maintenance of systems might have been less easily dismissed. The Louisiana court relied on the flexibility of methods to achieve required goals inherent in federalism to say that the state penalty took care of the problem, especially since Jonesboro is a small town.
(Harvey M. Sheldon)

CHALLENGE TO OIL POLLUTION ACT DEBT COLLECTION PROCEEDING DISMISSED BY THE DISTRICT COURT FOR IMPROPER VENUE

Water Quality Insurance Syndicate v. National Pollution Funds Center, ___F.Supp.3d___, Case No. 19 Civ. 6344 (S.D. N.Y. Jan. 27, 2020).

The U.S. District Court for the Southern District of New York recently dismissed a challenge to a debt incurred under the Oil Pollution Act because plaintiff filed the complaint in an improper venue. The ruling comes as a result of the court taking into consideration the specific venue provision in the Oil Pollution Act.

Factual and Procedural Background

The Water Quality Insurance Syndicate (WQIS) is a maritime insurer indebted to the United States and its National Pollution Funds Center (NPFC) for $57,243.39 in liabilities. The NPFC imposed liability on WQIS and Starr Indemnity and Liability Co. as Genesis Marine, LLC's (Genesis) pollution liability insurers.

Under the federal Oil Pollution Act (OPA), the federal government may impose a fine on corporations whose oil-carrying barges pose a substantial threat of discharge of oil. Here, the United States Coast Guard retrieved two barges owned by Genesis that ran aground in the Mississippi River in 2014. WQIS became liable for the fine amount after the United States Coast Guard determined that Genesis posed a substantial threat of discharge of oil under the OPA.

A 2018 trial in the District Court for the Southern District of New York (SDNY) did not find that Genesis' barges posed a substantial threat of discharge. Before the trial court issued a written decision, the NPFC informed WQIS that the Coast Guard had determined the barges posed a substantial risk of discharge. WQIS asked the NPFC to withdraw its demand for payment, leading the NPFC to open an administrative review. The review reaffirmed the NPFC's determination, leading WQIS to respond with the SDNY's affirmance that there was no substantial risk of discharge. Instead of reopening the administrative review, the NPFC referred the debt to the U.S. Department of Treasury.

WQIS filed a complaint in the SDNY, claiming that under the Administrative Procedure Act (APA), the NPFC was acting in an arbitrary and capricious manner by seeking to impose the debt because the NPFC failed to consider the SDNY's 2018 trial determination.

The NPFC moved to dismiss the action improper venue.

The District Court's Decision

OPA Venue Provision

The OPA creates a comprehensive federal plan for handling oil spill responses, including a system for prescribing reimbursement for cleanup costs. Accordingly, the OPA establishes the Oil Spill Liability Trust Find, available to pay oil-spill removal costs incurred by federal authorities. The OPA tasks the NPFC with adjudicating claims to the fund to determine uncompensated removal costs, including responses to substantial threats of a discharge from an oil vessel. If a claim becomes delinquent, the NPFC may refer unpaid debt to the Treasury Department for debt collection.

The OPA states that venue "shall be any district" in which the damages occurred, where defendant designates an agent for service, or where the defendant resides. The venue provision also states that the NPFC resides in the District of Columbia. The provision does not provide for venue based on the residence of the party challenging a debt imposed by the NPFC. Therefore, the provision limited the venue to either the location of the damage in the Eastern District of Missouri, or the District of Columbia where the NPFC resides.

OPA and APA Venue Conflicts

First, WQIS argued that the general venue provision of the APA allowed it to bring an action in the SDNY. The court rejected this argument, reasoning that Congress enacted the APA to provide a

general authorization for review of agency action in the district courts" and did not intend that general grant of jurisdiction to duplicate any special statutory procedures relating to specific agencies. The court determined that the general venue provision in the APA was not as specific as the one provided in the OPA and found that the OPA mandated an exclusive source of venue for OPA claims. The court also determined that Congress intended to restrict venues to specific districts where the discharge occurred or where the defendant resided. Therefore, because the OPA had a specific venue provision to deal with this matter, the APA did not apply.

WQIS next argued that it was not seeking damages from the NPFC under the OPA so the OPA did not apply. The court dismissed this argument on the grounds that the OPA applies to all controversies arising under the act. Accordingly, WQIS's bid for relief of debt owed to NPFC is an action arising out of the OPA.

WQIS then argued that because it is liable for Genesis' debt, and because it is found in the SDNY, that it is appropriate to use that district as the venue. The court found that WQIS is the plaintiff in this matter and that under the OPA, the venue is not determined by where the plaintiff resides.

Finally, WQIS argued that NPFC can be found in the SDNY if the co-defendant United States had assigned the United States Attorney for the District as an agent for the serving process. The court determined that even if the United States is implicated in the matter, the established venue remains where the NPFC resides because the issue arose from the OPA.

WQIS did not ask the court to transfer the case to an appropriate venue if it were to find that the SDNY was an inappropriate venue. Additionally, WQIS did not indicate a preference between the Eastern District of Missouri or the District of Columbia. Therefore, the court dismissed WQIS's case without prejudice with a one-week window to file to transfer the case to an appropriate venue.

Conclusion and Implications

This case clarifies the appropriate venue for OPA claims. While the APA contains a venue provision for the review of agency actions to district courts in general, the statutory requirement that OPA claims be tried in specific venues controls the issue. Parties bringing OPA claims must bring the claim to a venue permitted by the OPA.
(Marco Ornelas, Rebecca Andrews)

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