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FEATURE ARTICLE

COASTAL PROPERTY AND 'MANAGED RETREAT'—A SENSIBLE AND TEMPERED CLIMATE MITIGATION STRATEGY OR A SACRIFICIAL ABANDONMENT?

by David C. Smith, Esq.

It is your California dream home—beach-front access and 180-degree ocean views. Or maybe you have a home on the Great Lakes, along the Mississippi River or the Texas Gulf? However, due to being included in a "hazards" overlay zone, you are unable to secure homeowners' insurance at any reasonable cost and no title company will extend full coverage title insurance. And the "hazard" at issue is universally recognized to be decades away, and some question if it will ever materialize. Nonetheless, enactments of local elected officials and regulators are tanking the value and insurability of your single greatest asset. And when you propose to build structures that engineers certify will protect your home decades into the future, regulators refuse to allow it.

This hypothetical scenario is proving not quite so "hypothetical" as "managed retreat" becomes an increasing focus of attention for both the public at large and regulatory officials. Climate change modeling and hazard projections increasingly fuel debates over appropriate mitigation and adaptation measures to combat the future threat of rising seas. And the threat is not just for the wealthy in exclusive enclaves like Malibu or distant third-world countries. The threat may be most dire for the already vulnerable among us, such as disadvantaged communities living in mobile home units in the very shadow of Silicon Valley tech giants. Advocates fear redlining practices from banks and others due to projected vulnerabilities will destine such communities to the fate of New Orleans' Ninth Ward in the wake of Hurricane Katrina.

Background

So, what is "managed retreat"? A reporter for *National Public Radio* (NPR) covered a conference on managed retreat in New York in June 2019. He described it this way:

> So it's a technical term, a political term. And it is essentially like a formal acknowledgement that there are places in the U.S. and around the world—not just the East Coast, I should say - that are going to be, if they aren't already, at such huge levels of risk from climate change that it just won't make sense for those places to remain.
>
> And that can be, you know, communities at risk of increased wildfire heat. But primarily, what we're talking about at this conference—it's focused on the impacts on coastal zones—cities by the sea, oceanside towns that are going to be inundated or see more flooding as sea levels rise. It just won't make sense for those places to remain.

What does that mean? And who gets to decide that an existing home or community should no longer "remain"? And what are the consequences for those potentially displaced? All of these critical considerations remain open and unresolved as the promotion of, opposition to, and debate over managed retreat escalates.

Managed Retreat Is Not a New Concept

Managed retreat is not a new concept. In 2011, the Bay Conservation and Development Commission (BCDC), the San Francisco Bay equivalent of and state predecessor to the California Coastal Commission, adopted climate-change-related amendments to

its governing document, the Bay Plan. The approval came only after months of highly contentious debate, including whether lowlying areas, communities, infrastructure, and even tech campus were potentially subject to abandonment to rising seas. For many, this was their first exposure to the term "managed retreat" and the potential for government-sanctioned abandonment of private property as an actual regulatory concept.

In March 2017, the scientific journal *Nature Climate Change* (NCC) published an analysis and proposed model evaluating approaches to and consequences of managed retreat. It noted that the United Nation's International Panel on Climate Change (IPCC) included managed retreat "as an alternative to coastal protection" in its First Assessment Report in 1990. According to the NCC piece:

> Retreat' is used to capture the philosophy of moving away from the coast rather than fortifying it in place. 'Managed retreat,' on the other hand, derives from coastal engineering and has been defined as 'the application of coastal zone management and mitigation tools designed to move existing and planned development out of the path of eroding coastlines and coastal hazards. . . .' We identify two defining features of managed retreat in coastal and other settings. First, it is a deliberate intervention intended to manage natural hazard risk, requiring an implementing or enabling party. Second, it involves the abandonment of land or relocation of assets. We use those characteristics to define managed retreat as the strategic relocation of structures or abandonment of land to manage natural hazard risk.

As managed retreat becomes more broadly recognized and understood, as well as advocated for inclusion in broad regulatory policies addressing the future of California's precious coastline, the owners of potentially vulnerable properties are beginning to realize that others, not themselves, have already begun debating "strategic relocation of structures or abandonment" of that individual's privately owned property (including, frequently, their home) "to manage natural hazard risk." And many of them are not at all happy about it.

Del Mar, California Rejects Managed Retreat

At the present time in California, there is no greater battleground debate over managed retreat than in San Diego County's smallest city, Del Mar, and its ongoing conflict with the Coastal Commission. At issue is the Coastal Commission's refusal to certify Del Mar's Local Coastal Program (LCP) for the City's own regulation of development and other activities in the Coastal Zone. Under the California Coastal Act (Pub. Resources Code §. 30000 *et seq.*), the Coastal Commission has ultimate authority over regulation of the Coastal Zone. However, cities within the Coastal Zone may adopt programs for local implementation of the Coastal Act's requirements through an LCP, though the LCP must be periodically certified by the Coastal Commission itself. Specified approvals by a city pursuant to an LCP may be appealed up to the Coastal Commission itself.

According to the *San Diego Union Tribune*, the consistent approach of the Coastal Commission in reviewing LCP certifications throughout the state includes:

> . . .[a] slow and calculated retreat . . . . The strategy includes warning property owners and prospective buyers of the possibility they could be flooded, prohibiting new or additional development in threatened areas and in some cases providing financial assistance to people who need to relocate out of harm's way.

Del Mar has long opposed the concept of managed retreat. With beach-front properties regularly valued at over $10 million, Del Mar has argued that codifying managed retreat today could have a devastating impact on property values and insurability of these properties. Further, the City points out that residential neighborhoods behind the beach-front properties are even more low-lying than the beach properties themselves, so allowing the front line of homes along the beach to be abandoned ensures loss of the next neighborhoods as well. Instead, the City has adopted a long-term adaptation strategy whereby regular replenishment of sand on the beach and seawalls are the primary defense mechanisms against rising seas.

Del Mar is in the midst of seeking certification of its LCP and has resisted what it characterizes as the Coastal Commission's insistence that the LCP include managed retreat as a mitigation measure for

future Coastal Development Permits (CDP) issued under the LCP. And the dispute has been pending for nearly four and a half years.

Most recently, as outlined in a staff report dated September 27, 2019, the Coastal Commission staff recommended denial of certification of Del Mar's proposed LCP unless the City agreed to 25 proposed changes. These included provisions relating to bluff setbacks, waiver of any future right to build structure protections against sea level rise, and addressing potential implications of regulations posing the risk of liability for an unconstitutional "taking" of property. Coastal Commission staff stated that it viewed the proposed amendments as standard for LCPs in an era addressing future sea level rise; fully consistent with the City's proposed adaptation plan that accompanied, though does not have the regulatory authority of, the LCP itself; and never expressly required managed retreat.

At its City Council meeting on October 7, 2019, Del Mar unanimously rejected in summary fashion all proposed 25 amendments by the Coastal Commission. The City stated that the proposed amendments were the Coastal Commission's attempt to "back door" managed retreat into the LCP.

The Coastal Commission hearing on the LCP and staff's recommendation regarding the 25 proposed amendments was just over a week later on October 16, 2019. While staff expressed great surprise and frustration with the City's summary dismissal of the proposed amendments after four years of discussion and negotiation, Coastal Commission staff ultimately agreed to postpone the hearing so that additional negotiation could take place.

The Lindstroms; Encinitas, California; and the Coastal Commission

Unfortunately for Del Mar, Coastal Commission staff was likely bolstered in their confidence in the negotiations in light of a sweeping victory they received from the California Court of Appeal's Fourth District Court on September 19, 2019, just over a week before Coastal Commission staff issued their staff report recommending denial of Del Mar's proposed LCP without the 25 amendments. In *Lindstrom v. Coastal Commission*, 40 Cal.App.5th 73 (Sept. 19, 2019), four conditions imposed by the Coastal Commission on an individual CDP for a single-family residence on an ocean-front bluff in the City of Encinitas were nearly universally upheld. And these four permit conditions strikingly mirror the types of policies the Coastal Commission is looking to integrate into LCPs statewide in order to confront sea level rise.

The Lindstrom's saga is a testament not only to the substantive requirements individual permit applicants and jurisdictions seeking LCP certification should expect, but the complex, time-consuming, and expensive process entailed in challenging such requirements. The Lindstrom's first applied for their CDP in 2012, and the court of appeal ruling was not issued until seven years later.

Background

The Lindstroms owned a 6,776 square foot lot on bluffs 70 feet above the ocean in the city of Encinitas, California. In 2012, they applied to Encinitas for entitlements, including a CDP under Encinitas' LCP, to construct a two-story 3,553 square foot home. "The seaward side of the structure would be set back 40 feet from the edge of the bluff."

One of the common requirements for CDP applications, whether under a certified LCP or from the Coastal Commission itself, is for thorough geotechnical analysis demonstrating that the approved structure will remain secure from erosion or other hazards for at least, typically, 75 years and that the new structure will not require additional structural protection such as a sea wall in the future. Encinitas' code was no exception:

The City's LCP requires that permit applications for development in the Coastal Bluff Overlay Zone, where the Lot is located, be accompanied by a geotechnical report prepared by "a certified engineering geologist." (Encinitas Mun. Code, Ch. 30.34, § 30.34.020D.)

> The review/report shall certify that the development proposed will have no adverse [e]ffect on the stability of the bluff, will not endanger life or property, and that any proposed structure or facility is expected to be reasonably safe from failure and erosion over its lifetime without having to propose any shore or bluff stabilization to protect the structure in the future. (Encinitas Mun. Code, § 30.34.020D.)

The City's LCP lists certain aspects of bluff stability that the geotechnical report shall consider.[] It

further states that:

> . . .[t]he report shall also express a professional opinion as to whether the project can be designed or located so that it will neither be subject to nor contribute to significant geologic instability throughout the life span of the project. (Encinitas Mun. Code, § 30.34.020D.11, 1st par.)

The geotechnical analysis under this requirement became a major point of contention between the Lindstroms and the Coastal Commission as to a condition relating to the required setback of the new structure from the bluff's ocean-ward edge.

Encinitas, through its Planning Commission, certified the project as consistent with its LCP and approved the new residence.

> As one of the conditions for the permit, the City required the Lindstroms to provide a letter stating that 'the building as designed could be removed in the event of endangerment, and the property owner agreed to participate in any comprehensive plan adopted by the City to address coastal bluff recessions and shoreline erosion problems in the City.'

The Court of Appeal further explained:

> This condition was required pursuant to the portion of the City's LCP concerning the Coastal Bluff Overlay Zone, which states, 'Any new construction shall be specifically designed and constructed such that it could be removed in the event of endangerment and the property owner shall agree to participate in any comprehensive plan adopted by the City to address coastal bluff recession and shoreline erosion problems in the City. (Encinitas Mun. Code, § 30.34.020B.1.a.)

Two sitting members of the Coastal Commission appealed Encinitas' approval of the Lindstrom's new home. (The Coastal Act makes express provision for two Coastal Commission members to appeal decisions under local LCPs to the full Coastal Commission for review.)

As relevant here, one ground of the commissioners' appeals was that the City's approval 'appears inconsistent with the policies of the LCP relating to the requirement that new development be sited in a safe location that will not require shoreline protection in the future.'

The appeal came before the Coastal Commission on July 13, 2016. The Coastal Commission approved the construction of the Lindstrom's home, but added four additional conditions to Encinitas' approval, "including that the structure be set back 60 to 62 feet from the edge of the bluff," as opposed to the 40 feet required by Encinitas. The four exact conditions required by the Coastal Commission were:

- A setback from the bluff 20 feet further than that required by Encinitas:
[1.a] The foundation of the proposed home and the proposed basement and shoring beams shall be located no less than 60 to 62 ft. feet [sic] landward of the existing upper bluff edge on the northern and southern portions of the site, respectively.

- Waiver of any right to construct protective structures in the future:
[3.a] By acceptance of this Permit, the applicants agree, on behalf of themselves and all successors and assigns, that no bluff or shoreline protective device(s) shall ever be constructed to protect the development approved pursuant to Coastal Development Permit No. A-6-ENC-13-0210 including, but not limited to, the residence and foundation in the event that the development is threatened with damage or destruction from waves, erosion, storm conditions, bluff retreat, landslides, or other natural hazards in the future. By acceptance of this Permit, the applicants hereby waive, on behalf of themselves and all successors and assigns, any rights to construct such devices that may exist under Public Resources Code § 30235.

- Confirmation they will remove the residence and foundation if ordered to do so:
[3.b] By acceptance of this Permit, the applicants further agree, on behalf of themselves and all successors and assigns, that the landowner shall remove the development authorized by this Permit, including the residence and foundation, if any government agency has ordered that the structures

are not to be occupied due to any of the hazards identified above. In the event that portions of the development fall to the beach before they are removed, the landowner shall remove all recoverable debris associated with the development from the beach and ocean and lawfully dispose of the material in an approved disposal site. Such removal shall require a coastal development permit.

•Obtain and comply with a new geotechnical study under specified conditions:
[3.c] In the event the edge of the bluff recedes to within 10 feet of the principal residence but no government agency has ordered that the structures not be occupied, a geotechnical investigation shall be prepared by a licensed coastal engineer and geologist retained by the applicants, that addresses whether any portions of the residence are threatened by wave, erosion, storm conditions, or other natural hazards. The report shall identify all those immediate or potential future measures that could stabilize the principal residence without shore or bluff protection, including but not limited to removal or relocation of portions of the residence. The report shall be submitted to the Executive Director and the appropriate local government official. If the geotechnical report concludes that the residence or any portion of the residence is unsafe for occupancy, the permittee shall, within 90 days of submitting the report, apply for a coastal development permit amendment to remedy the hazard, which shall include removal of the threatened portion of the structure.

There are at least two immediately noteworthy aspects of the additional conditions imposed by the Coastal Commission. First, as to the length of the setback from the bluff, a veritable battle-of-the-experts broke out before the Coastal Commission. Over the course of processing the entitlements, the Lindstroms retained two different geotechnical firms that had different methodologies but both placed the setback at less than the City's codified mandatory minimum of 40 feet. When the question came before the Coastal Commission, the staff geologist—not an engineer—took the two methodologies and, rather than embracing the merits of one over the other, he added the two distances together for a single sum distance. There was expert testimony that this approach was baseless and nonsensical. The two methodologies were distinct approaches to coming up with a single distance, not a single compound analysis. There was no professional justification for adding one on top of the other for, effectively, a double distance. But that is exactly how the Coastal Commission got to 60 to 62 feet of setback.

The other notable attribute is the Coastal Commission's reference to and forced waiver of Public Resources Code § 30235 in condition 3.a. That statute provides an express right in the Coastal Act to defend imperiled properties with structural protections. However, it is now the position of the Coastal Commission that the section's protections apply, if at all, only to existing structures and that proposed new structures may be conditioned on waiver of that statutory right. The Lindstroms argued both that this violated the Coastal Act and that it was an unconstitutional taking of property without compensation.

At the Trial Court

The Lindstroms filed suit challenging all four conditions.

The trial court ruled that the Coastal Commission abused its discretion as to conditions 1.a (60- to 62foot setback) and 3.a (waiver of any future right to build structural protection) as contrary to the language of Encinitas' LCP and the Coastal Act. The trial court upheld conditions 3.b (removal of residence upon order of a government agency) and 3.c (obtain and adhere to a new geotechnical report).

Both the Lindstroms and the Coastal Commission appealed their respective losses.

The Court of Appeal's Decision

As to condition 1.a—quite incredibly, frankly, given the record—the Fourth District Court of Appeal found the Coastal Commission's methodology of requiring both distances summed together to a total of 60 to 62 feet as reasonable.

As to condition 3.a, the court held that the Coastal Commission has full authority to require waiver of future structure protections to new construction.

As to condition 3.b, the court disallowed it, but only on a minor and easily fixable drafting error to clarify that the only hazards that could implicate vacating and removing the structures had to be hazards within the purview of Coastal Commission authority.

And finally, as to condition 3.c, the court held that the Coastal Commission with within its authority to require preparation of and adherence to a new geotechnical study upon specified future circumstances.

The most important point as to this sweeping victory for the Coastal Commission, of which the court may or may not have been aware, was that the precedential implications of this ruling go far beyond the conditions to this or any other future permit. Indeed, the four substantive provisions at the heart of the respective conditions actually track some of they foundational strategies the Coastal Commission is seeking to integrate system wide through the LCP programs. Namely, those four strategies are:

> Mandatory minimum setbacks; Waiver of any right to future structural shoreline protections; Future removal and disposal of the structures and foundations under specified circumstances; and Automatic mandates under specified circumstances for the preparation of technical studies that could themselves require removal of structures.

Conclusion and Implications

Harkening back to *NPR's* coverage of the managed retreat conference in New York in 2019, the reporter was asked if there was any semblance of good news emerging from the apparent chaos surrounding the politics of managed retreat. As with many dynamics in the world today, one thing seemed clear—things are changing:

> I mean, there's a lot of excitement that the conversation is happening. I've heard more than one person say that it's about time we start tackling this. But I also wanted to steal a quote that one of the presenters stole from Oliver Smith, a Marine Corps general who served in World War II and the Korean War, where, in a battle, he said—he famously said, *you know, we're not retreating; we're just advancing in a different direction.*

And, look; climate change is going to make us have to change direction. And there's a lot of hope at this conference that as we rebuild communities, as we rethink them, there's an opportunity to do that in a way that doesn't have some of the inequalities and segregation that our current systems have. (*Emphasis* added.)

I don't think the residents of Del Mar would agree.

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EASTERN WATER NEWS

INSURANCE COMPANIES SHIFT CLIMATE CHANGE RISKS TO THE TAXPAYER

Earlier this year, Ohio Senator Sherrod Brown and five other Democratic senators asked Fannie Mae and Freddie Mac to report on how they were preparing for climate change. This request comes as the financial world, and financial regulators, have begun to recognize the threat posed by global warming, and questions are arising about how major portions of the United States' economy will adjust to the challenges posed by climate change. It also comes as the head of BlackRock, the world's largest investment firm, argues that climate change is already causing a fundamental reshaping of finance.

Background

Fannie Mae and Freddie Mac back roughly half of the country's $10 trillion mortgage market,meaning their proposed response to climate change will prove crucial to homeowners and to the economy as a whole The senators' letter argued that if the United States is underprepared, climate change could have "particularly devastating impacts on the individuals and communities who can lease afford it." (https://www.banking.senate.gov/imo/media/doc/Fanine percent20Freddie percent20Letters percent20Climate percent20Risks.pdf)

As investors, bankers, and regulators accept that they must rethink how to operate for a changing world, some insurance companies and lenders are responding by reducing their risks to flooding, wildfires, and other natural disasters. This shift is likely to place a larger burden on state and federal governments, and ultimately to shift that burden to taxpayers when disaster strikes.

As losses from hurricanes, wildfires, floods and tornadoes balloon, insurance companies have started a retreat from risky areas, leaving homeowners in large swaths of California, Florida and Texas to rely on subsidized state programs, which struggle to remain financially viable. Simultaneously, mortgage lenders making loans to homebuyers in high-risk areas are increasingly selling those riskier loans to Fannie Mae and Freddie Mac, which pool the country's mortgages into salable financial assets. If government-backed insurance programs and mortgages fail, it could result in demand for billions of dollars of taxpayer money for bailouts.

Shifting the Risk

The sale of loans to Fannie Mae and Freddie Mac in no way mitigates the risk those loans pose. Instead, the result is to shift the risk away from private insurers and towards the public sector. Experts suggest that leaving these risks unaddressed could create an economic ripple resembling the subprime mortgage crisis of 2007—but this time, fueled by a changing climate that may be much harder to get under control.

This may be much closer than we expect if drastic action is not taken. A working paper published by the National Bureau of Economic Research found that homes at risk of flooding in the United States are currently overvalued by an estimated $34 billion, pointing to a potential real estate bubble caused by climate threats. (https://www.nber.org/papers/w26807) A research paper by McKinsey suggests that coastal homes in Florida could lose 15 to 35 percent of value by 2050. (https://www.mckinsey.com/industries/electric-power-and-natural-gas/our-insights/why-and-how-utilities-should-start-to-manage-climate-change-risk)

In Miami-Dade County, an analysis by Jupiter Intelligence, a firm that models climate risks, found that the loss of mortgage value could increase by 25 percent by 2050. (https://jupiterintel.com/wp-content/uploads/2020/01/Jupiter-SpecialReport-Jan2020-DelugeofRisk.pdf)

A Wake-Up Call

None of these concerns are newly emergent. Insurance companies have been studying the potential effects of climate change-related risks since the 1970s. But only in the last fifteen years have these risks begun to develop into actual losses. In 2005, insurers suffered record losses from hurricanes Rita, Katrina,

and Wilson, paying out nearly $60 billion in claims as a result of the three hurricanes. It was a wake-up call for the insurance industry.

Insurance payouts have reached new heights since then, with each year bringing an onslaught of hurricanes, floods, and wildfires. In the last decade, payouts tied to natural disasters have averaged $31 billion a year, compared to an average of $19 billion the previous decade. Insurers paid $105 billion in disaster-related claims in 2017, when hurricanes Harvey, Maria and Irma battered Texas, Puerto Rico, and Florida. These costs have already pushed some insurance companies to financial ruin. After Hurricane Katrina, Poe Financial, the fourth-largest insurer in Florida, declared bankruptcy, and after the Camp Fire devastated northern California, Merced Property and Casualty Company was liquidated to pay out insurance claims.

These increased risks have led insurance companies to rethink their policies, both in terms of where they offer coverage and how much they are willing to offer. In many coastal and wildfire-prone regions, insurers are retreating, finding that the potential losses outweigh the gains too dramatically to continue business in those areas. In cases where the industry is willing to offer policies, premiums are rising. California homeowners living in areas at high risk for wildfires, for example, have seen their premiums rise by as much as 500 percent.

Turning to the State for Solutions

When premiums skyrocket, homeowners who need insurance are increasingly turning to subsidized, state-backed programs. Typically called FAIR—or Fair Access to Insurance Requirement plans—about 30 states have an insurance program of last resort for homeowners unable to find insurance on the private market. These programs have ballooned in recent years. In 1990, FAIR programs held roughly 780,000 insurance policies. By 2014, that figure had grown to over 2.1 million. Demand for these programs is also driven by the fact that most of them offer cheaper, subsidized rates, with private reinsurance money and government funding covering the growing gap between revenue from premiums and losses from payouts.

The Texas Windstorm Insurance Association, for example, is the insurer of last resort for 14 coastal Texas counties, providing windstorm insurance to people who cannot find it on the private market. The program has grown from about 50,000 policies in the 1970s and 1980s to about 250,000 in the last decade. A 2018 report from a state auditing agency in the wake of Hurricane Harvey found that the program is "broke, in debt, and facing a shrinking revenue pool." (https://www.texasobserver.org/audit-says-state-windstorm-insurance-program-is-failing-again/)

Things are similar in California. In the ten counties with the highest risk of wildfires, the number of FAIR policies jumped 177 percent between 2015 and 2018. In an attempt to provide more stability for homeowners in the wake of wildfire (and to stem the growth of publicly subsidized insurance at the same time), the state insurance commissioner recently banned insurance companies from refusing to renew policies in wildfire-prone areas for a year.

Conclusion and Implications

Shifting risks related to climate change onto FAIR programs does not bode well for taxpayers. For an insurance program to work, a diverse mix of policies is necessary. Premium payments from low-risk policies are used to support the claims arising from higher-risk policies. Too many high-risks in a pool raises the odds that the program is unable to pay out claims when the next disaster hits. When that happens, taxpayers are left holding the bill.

When insurance companies are permitted to retreat from high-risk areas, that means increased profits for privately held corporations, and increased risk for taxpayers, especially in the areas most likely to be devastated by climate disasters as the effects of global warming worsen in years to come.
(Jordan Ferguson)

NEWS FROM THE WEST

In this month's News from the West we report on a decision out of Nevada—the most arid state in the nation—addressing a plan to move more water into the Las Vegas area. We also report on the adoption of a new policy, at the regulatory level in California, regarding protection and sustainability of the striped bass—an important species to the state's fishing industry.

Nevada State District Court Orders the Denial of Southern Nevada Water Authority's Groundwater Applications for Las Vegas Pipeline

Southern Nevada Water Authority's efforts to import eastern Nevada groundwater to Las Vegas suffered another setback recently, with the state District Court in White Pine County ordering that all of SNWA's water permit applications be denied. The District Court's March 9, 2020 order (2020 Order) follows up on its 2018 order that remanded to the Nevada State Engineer for further proceedings (the Remand Order). On remand, the State Engineer held a hearing and issued a ruling in compliance with the court's directives (2018 Ruling), but which contended that the Remand Order was "legally improper and conflicted with longstanding policy that the State Engineer followed to consistently manage the waters of the state." Ruling #6446, p.8 n. 41. [*White Pine County and Consolidated Cases, et al. v. Nevada State Engineer*, Case No. CV-1204049 (Mar. 9, 2020).]

Background

SNWA's efforts include applications to appropriate water from various basins in eastern Nevada, which would be transported by pipeline to serve the Las Vegas metropolitan area.

SNWA's predecessor initially filed applications in 1989, and the State Engineer held the first hearing in 2006. The State Engineer then issued permits for approximately 75,000 acre-feet of groundwater from four basins. On appeal, however, the Nevada Supreme Court vacated the permits and remanded to the State Engineer to re-open the protest period and re-notice the applications due to the passage of time between filing of the initial applications and the hearings. *See, Great Basin Water Network v. Taylor*, 126 Nev. 187, 234 P.3d 912 (2010).

After re-opening the protest period, in 2011, the State Engineer held a hearing on all applications in the four basins. In 2012, the State Engineer issued various rulings that granted in part and denied in part SNWA's applications, issuing permits for approximately 83,000 acre-feet (collectively: 2012 Rulings). The permits were subject to certain conditions, including compliance with monitoring, management and mitigation plans (3M Plans).

Certain protestants appealed the 2012 Rulings to the Seventh Judicial District Court of Nevada. In 2013, the District Court issued an order (Remand Order) that vacated the permits and remanded to the State Engineer to:

- Add Millard and Juab counties in Utah to the 3M Plans because of the effect of Nevada pumping on Utah water basins;

- Recalculate the amount of water available in Spring Valley based on evapotranspiration rates to ensure that the basin will reach equilibrium between discharge and recharge within a reasonable time;

- Define standards, thresholds or triggers to ensure that mitigation of unreasonable effects of pumping is neither arbitrary nor capricious;

- Recalculate the appropriations from three basins to avoid over-appropriation or conflicts with existing rights in down-gradient basins.

Beyond these issues, the District Court did "not disturb the findings" of the State Engineer.

The State Engineer appealed the Remand Order, which the Nevada Supreme Court dismissed for lack of jurisdiction, holding that because the District Court remanded to the State Engineer for further fact finding, the Remand Order was not final or appealable. Alternatively, to overcome the jurisdictional hurdle, the State Engineer and SNWA filed petitions for writ of mandamus, which the Nevada Supreme Court denied, concluding that an adequate legal remedy existed; namely, a petition for judicial review

once a final District Court decision issues.

Thereafter, the State Engineer proceeded to comply with the Remand Order, holding another administrative hearing in September and October 2017 that was limited to the four remand issues. Ten months later, the State Engineer issued Ruling #6446 to address the issues specified in the Remand Order (2018 Ruling). In the 2018 Ruling, the State Engineer preliminarily noted his "misgivings regarding aspects of the Remand Order," which he sought to address through the appeal and writ petition. Specifically, the State Engineer contended that the Remand Order was:

> . . .legally improper and conflicted with long-standing policy that the State Engineer followed to consistently manage the waters of the state.

For that reason, although the State Engineer stated he was complying with the requirements of the Remand Order, he expressly preserved "any right to challenge" it. Ruling #6446 at pp. 8-9.

The Court's Decision and the 2020 Order

The 2020 Order is the result of SNWA's petition for judicial review of the 2018 Ruling. The court stayed the course with the Remand Order that, to determine the groundwater available for appropriation, the State Engineer must use an evapotranspiration (ET) capture approach as a proxy for a basin's perennial yield. The court also adhered to its earlier conclusion that the water SNWA sought to appropriate was already appropriated in down-gradient basins. Additionally, the court agreed with the State Engineer that the pumping proposed by SNWA threatened the environmental and cultural resources in the Swamp Cedar Area of Cultural and Environmental Concern (ACEC). Ultimately, the 2020 Order required that all of SNWA's applications in Spring, Cave, Delamar and Dry Lake Valleys be denied.

Perennial Yield Versus ET Capture

The State Engineer manages groundwater in Nevada by requiring that withdrawals from each hydrographic basin not exceed the basin's perennial yield. Perennial yield is the maximum amount of groundwater that can be salvaged each year from a basin over the long term without depleting the groundwater reservoir. *Pyramid Lake Paiute Tribe v. Ricci*, 126 Nev. 521, 524, 245 P.3d 1145, 1147 (2019). Citing a report from the State Engineer's office, the court noted that:

> . . .[p]erennial yield is limited to the maximum amount of natural discharge that can be salvaged for beneficial use. The perennial yield cannot be more than the natural recharge to a groundwater basin and in some cases is less.

Appropriations that exceed the perennial yield result in over appropriation and groundwater mining. *State Eng'r v. Morris*, 107 Nev. 699, 703, 819 P.2d 203, 206 (1991).

When groundwater pumping occurs, the State Engineer requires that the aquifer must reach a new balance between recharge and discharge within a reasonable period of time. This is referred to as "steady state." In the SNWA case, the State Engineer took the position that Nevada law does not require that post-development equilibrium be achieved within a defined period of time.

In its applications, SNWA proposed a well field with 15 points of diversion. SNWA's expert agreed that the system would not reach equilibrium after 200 years of pumping with the well configuration identified in the applications because it "was not designed to capture ET." Ruling #6446 at p.17.

In the 2018 Ruling, the State Engineer criticized the Remand Order as being a "new ET capture rule" that did not exist previously in Nevada law. Ruling #6446, p. 20. According to the State Engineer, re-calculation of the amount of ET capture in the Spring Valley basin to determine the time it will take for the basin to reach a new equilibrium, as required by the Remand Order, is "antithetical to the doctrine of prior appropriation and to the prevailing policy which encourages the maximum beneficial use of the state's waters." Ruling #6446, p. 20. The State Engineer thought the Remand Order "disproportionately favor[ed] water applicants adjacent to areas of natural discharge" and was akin to riparianism, which is not recognized in Nevada. Based on the confines of the Remand Order, however, the State Engineer denied SNWA's applications in Spring Valley.

In its review the 2018 Ruling, the court accused the State Engineer himself of conflating ET capture

and perennial yield when considering SNWA's applications. The court declared:

> Illogically, the Engineer has concluded that sustainability and beneficial use are mutually exclusive. Actually, sustainability and maximum beneficial use are two sides of the same coin. One cannot exist without the other. . . .This is not a case of the court substituting its judgment for that of the current Engineer. . . .This is a case of the court agreeing with the Engineer's practice before the Engineer's [sic], for no logical, lawful or rational reason for [sic] changing the definitions of perennial yield. 2020 Order at p.11

The court deemed the State Engineer to have:

> . . .unilaterally change[d] the interpretation [of perennial yield] mid-case—with no rational reason and without any substantial evidence as to why the change is necessary. 2020 Order at p.11.

The court concluded this was "contrary to Nevada law and arbitrary and capricious." 2020 Order at p.11.

Rejecting the State Engineer's comparison to riparianism, the court declared "The brutal fact is that Las Vegas is over 300 miles from the [basins from which SNWA seeks to appropriate water]. Neither the [State Engineer] not this Court can change geography." 2020 Order at p.13. An applicant who seeks to make an inter-basin transfer, the court articulated, must expect different obstacles than "a rancher who lives atop the reservoir." Id. Based on the well configuration in the applications, the court concurred that the Spring Valley applications had to be denied because groundwater withdrawals might never reach a new equilibrium.

Conflicts with Downgradient Appropriations

In the Remand Order, the court directed the State Engineer to ensure that SNWA presented substantial evidence that its applications in Cave, Dry Lake and Delamar Valleys ('the CDD Basins") would not conflict with existing rights in downgradient basins that are already fully appropriated. The CDD Basins are part of series of interconnected groundwater basins known as the White River Flow System. The court concluded that even if it would take a long time for a conflict to manifest itself, well beyond what the State Engineer deems to be a reasonable planning horizon, NRS 533.370 nevertheless required the applications in the CDD Basins to be denied.

On remand, the State Engineer felt compelled by the Remand Order to deny the applications, even though up-gradient pumping would eventually be balanced by a reduction in down-gradient ET. The court affirmed this decision, concluding that because when the lower gradient basins were fully appropriated, the State Engineer's award of all the natural recharge, minus previous appropriations and uncaptured ET, constituted a conflict with existing rights.

Swamp Cedar Area of Critical Environmental Concerns

In a big win for the Confederated Goshute, Duckwater and Ely Tribes, the court concluded that the monitoring, management and mitigation plan ("3M Plan") proposed by SNWA failed to adequately mitigate against impacts to the Swamp Cedar Area of Critical Environmental Concern. As noted by the court, a SNWA witness admitted during cross examination that 100% extinction of the swamp cedars was possible before any mitigation would be required under the 3M Plan. The court therefore concluded that the public interest warranted denial of the two applications that posed the greatest threat to the swamp cedars.

Conclusion and Implications

In light of the Remand Order, the 2020 Order comes as no surprise. What is notable, however, is the tone taken by the court and the State Engineer in their respective decisions. The State Engineer's 2018 Ruling pulled no punches as to what the State Engineer thought of the Remand Order. The court's 2020 Order similarly spared the State Engineer any condescension. The sparing match between the court and administrative agency, while somewhat unusual, has taken on a tenor that matches the public dialogue and political divisiveness surrounding the pipeline project as a whole.

Next stop for the long-running battle over the Las Vegas pipeline is the Nevada Supreme Court. Although at least one SNWA board member stated publicly he did not believe SNWA should appeal, the State Engineer likely will. The state's highest court

will then need to navigate the political maelstrom and decide whether the District Court correctly interpreted the law and afforded the State Engineer the appropriate level of deference owed to an agency. (Debbie Leonard)

California Fish and Game Commission Adopts New Striped Bass Policy for Delta

In late February 2020, the California Fish and Game Commission voted unanimously to adopt an amended striped bass policy for the Sacramento-San Joaquin Delta. Striped bass are non-native species that have established a presence in the Delta beginning in the late 1800s. The new policy eliminates a specific population objective for striped bass, but also states a commitment to sustaining the striped bass fishery within the Delta.

Background

Striped bass were introduced into the Sacramento-San Joaquin Delta (Delta) in the late 1800s. Commercial fishing of striped bass was outlawed in 1935. Between the mid- 1970s and 1990s, populations of the non-native striped bass in the Delta plummeted from over 2 million fish (estimated) to less than 700,000. To improve the population, in 1981 the California Legislature established the Striped Bass Management Program. However, the program was eliminated in the early 2000s. According to a Senate Floor Analysis for a pertinent bill from 2003:

> Striped bass populations have been steadily increasing. In fact, they have reached a point where predatory striped bass, an introduced species, are becoming a problem in recovering certain native species of fish. (Senate Floor Analysis, SB 692 (2003), p. 2.)

Indeed, trawl survey data indicate that striped bass populations have substantially increased in the last ten years, though they are still not near the abundance levels seen in the 1970s and prior years. Some estimates put the number of striped bass in the Delta at or below 300,000.

In 1996, the California Fish and Game Commission (Commission) adopted a striped bass policy that set a long-term population restoration goal of 3 million adult striped bass within the Delta. The Commission set a five to ten year goal of 1.1 million adults, reflective of the striped bass population in 1980. The Commission identified several means of achieving its population targets, including helping to maintain, restore, and improve habitat, pen-rearing fish salvaged from water project fish screens, and artificial propagation. Additionally, Commission regulations continued to provide for a take limit of two striped bass, with a general 18-inch length limit, unless an exception applies. (CCR, tit. 14, § 5.75.)

In 2016, the Commission received a regulation change petition from a local interest group called the Coalition for a Sustainable Delta, among others, requesting an increase in the bag limit and a reduction of the minimum size limit from striped bass in the Delta. According to the petition, the purpose of the regulatory change would be to reduce predation by striped bass, as well as black bass, on fish native to the Delta and listed as threatened or endangered under the federal or California Endangered Species Acts. These threatened or endangered species include winter-run and spring-run chinook salmon, Central Valley steelhead, and Delta smelt. Negative impacts on threatened or endangered species can, according to the petition, affect water deliveries from the Delta to local water users as well as water users elsewhere in the state.

Despite the petition later being withdrawn, the Commission requested that the Wildlife Resource Committee (WRC), operating within the Commission, begin reviewing the existing striped bass policy adopted in 1996. More broadly, an effort to review existing policy and to potentially adopt a new policy concerning fisheries management in the Delta has been in progress since 2017. Following public stakeholder meetings and discussions, including with representatives from the Coalition for a Sustainable Delta, an initial draft fisheries policy emerged that became the subject of stakeholder and Commission discussion leading up to the Commission adopting its newest striped bass policy.

Policy Options

In early 2020, the Commission held a meeting with the California Department of Fish and Wildlife and stakeholder groups representing fishing and water interests to discuss three striped bass policy options that were presented to the Commission in December 2019. The three options were comprised of two

stakeholder options and one Commission staff option. According to the Commission, discussion focused primarily on whether a specific numeric population target for striped bass was appropriately included in a revised striped bass policy. Ultimately, the Commission voted unanimously to adopt an amended policy that did not include a specific numeric target, and instead aimed to "monitor and manage" the striped bass fishery in the Delta.

Points of Agreement

Prior to the Commission's adoption of the revised striped bass policy, the Commission and sport fishing industry stakeholders reached several points of agreement related to the importance of a striped bass fishery in the Delta. In particular, stakeholders and the Commission agreed that a new policy should include ensuring a robust recreational fishery or maintaining/increasing striped bass recreational angling opportunities. However, stakeholders and the Commission also agreed that the 1996 policy's objective of achieving a striped bass population of 3 million was likely unrealistic given the current state of the Delta, and that pen-rearing and artificial propagation would likely be unsuccessful in light of past efforts using those methods, which were not successful in reversing fish declines. Moreover, pen-rearing is not a practice employed by the Department of Fish and Wildlife in inland waters. Nonetheless, stakeholders and the Commission agreed that activities designed to support striped bass, such as habitat improvement, controlling invasive aquatic vegetation, improving water quality, reducing striped bass loss, and monitoring populations of striped bass should be included in the policy.

Point of Disagreement—Numeric Target

The primary point of disagreement between the Commission and stakeholders was setting a numeric target for the striped bass population in the Delta. From the Commission's perspective, identifying a specific numeric target would not lead to a different result compared to striped bass population numbers over the past few decades, when a specific numeric target was in place. Instead, according to the Commission, the striped bass population in the Delta would depend on management actions aligned with policy-based guidelines, as well as third party and stakeholder relationships. Generally, the Commission adopted the view that many Department of Fish and Wildlife projects that help restore the Delta ecosystem also benefit striped bass, including by focusing on benefits to native species. Accordingly, given limited resources available to the Department of Fish and Wildlife, the Commission contended that resources should be devoted to native species, as opposed to restoring numerically defined striped bass populations in the Delta.

Fishing industry stakeholders advocated for specific numeric targets, typically around 1 million striped bass in the Delta. Many stakeholders contended that a specific numeric population figure would help make the Commission's policy concrete and measurable. Additionally, academic support was offered for maintaining striped bass populations in the Delta due to the bass' long-term presence in the Delta, despite its introduction as a non-native species. In particular, striped bass populations can be used to evaluate the health of the estuarine ecosystem of the Delta, because the bass spend each of their life stages within the Delta and typically parallel salmon and smelt population increases or declines. Nonetheless, the Commission adopted a policy that does not provide a specific population target, but does commit to maintaining the striped bass fishery in the Delta.

Conclusion and Implications

Without a specific numeric population figure for striped bass in the Delta, some stakeholders may believe the Commission's policy could lead to a decline in striped bass populations. At the same time, however, if the Commission is correct that general improvements to Delta ecosystems and habitat that benefit other species may also benefit the striped bass, the species could experience some level of stability or even increase. Only time will tell how the Commission's new striped bass policy will affect population numbers in the Delta. The Striped Bass Policy is available online at: https://fgc.ca.gov/About/Policies/Fisheries#StripedBass.
(Miles B. H. Krieger, Steve Anderson)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

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

Civil Enforcement Actions and Settlements—Water Quality

•February 27, 2020—The EPA has reached settlements with three Massachusetts construction companies, which ensures they will come into compliance with stormwater regulations to reduce pollution from runoff. Under the settlements, the three companies will also pay fines and follow the terms of their permits for discharging stormwater. Martelli Construction Co., developer for the Greenwood II site under construction in Holden, paid $8,400 to resolve claims it failed to comply with its stormwater permit. According to EPA, the company failed to stabilize slopes, protect stockpiles from erosion, and establish and maintain controls on its perimeter. Wall Street Development Corp., which operates the Boyden Estates site under construction in Walpole, agreed to pay a $7,020 penalty for failing to get a stormwater permit, as required under the Clean Water Act. Comfort Homes, Inc., a developer at the Wheeler Village site under construction in Dracut, agreed to pay $7,800 to resolve claims that the company failed to document inspections required by its permit. Dirt and sediment carried off construction sites can damage aquatic habitat, contribute to algal blooms and physically clog streams and pipes. EPA's stormwater permit for construction sites requires sites bigger than an acre to take steps to minimize discharges of sediment. These settlements are the latest in a series of enforcement actions taken by EPA New England to address stormwater violations from industrial facilities and construction sites around New England. These cases stem from inspections by EPA New England in the spring of 2019 at all three sites.

•February 27, 2020 - The EPA announced that Dyno Nobel, Inc. (Dyno Nobel) has reached a settlement with the United States to address violations of the Clean Water Act and the Resource Conservation and Recovery Act at Dyno Nobel's explosives manufacturing facility in Carthage, Missouri and its ammonium nitrate facility in Louisiana, Missouri. As part of the settlement, Dyno Nobel has agreed to make extensive improvements to those facilities that will prevent future releases and discharges of explosives, nitrogen, and other pollutants, ultimately reducing pollution levels in Center Creek (adjoining the Carthage facility) and the Mississippi River (adjoining the Louisiana facility). The controls embodied in the settlement will result in the reduction of over 3,800,000 pounds per year of nitrogen, nearly 257,000 pounds per year of heavy metals such as zinc, aluminum and iron, nearly 187,000 pounds per year of oxygen demanding material and 103,500 pounds per year of suspended solids entering Missouri waterways. Dyno Nobel will also pay a civil penalty of $2,900,000 to the United States. The settlement resolves water pollution and hazardous waste claims brought by the United States in a lawsuit filed in April 2019. In that lawsuit, the United States alleged that Dyno Nobel violated the Clean Water Act at both facilities by discharging pollutants such as ammonia, nitrate, pH, Total Suspended Solids, Biochemical Oxygen Demand, E. coli, and Nitroglycerin into Center Creek and the Mississippi River in amounts that exceeded the facilities' permitted limits; failing to properly sample and monitor discharges; and failing to appropriately manage stormwater. Additionally, Dyno Nobel violated the Clean Water Act by discharging wastewater at the Carthage facility into Center Creek that included unauthorized explosives and zinc in toxic levels. The United States also alleged that Dyno Nobel violated the Resource Conservation and Recovery Act by disposing of hazardous waste (including explosives) at both facilities without a permit, and at the Carthage facility, by failing to meet requirements for the generation and transporta-

tion of hazardous waste. The consent decree requires Dyno Nobel to develop and revise pollution controls at both facilities to prevent unauthorized discharges of pollutants, and to investigate sources of contamination.

•March 4, 2020 - Two Massachusetts companies have agreed to come into compliance with federal regulations meant to prevent oil pollution under settlement with the EPA. The companies have both created oil spill prevention plans, helping ensure that the environment in the communities where they operate is better protected from damaging oil spills. Under to the agreements with EPA, the companies—Lawrence Lynch Corp. of Falmouth and Fed Corp. of Dedham—will each pay $3,000 penalties. The companies also agreed to quickly correct violations of the Oil Pollution Prevention regulations under the federal Clean Water Act. These companies have oil storage capacity in quantities large enough that they are required by the federal regulations to put in place Spill Prevention, Control and Countermeasure plans to prevent spills and to minimize damage from oil spills. Federal oil spill prevention, control, and countermeasure rules provide requirements for businesses that store oil and prevent oil discharges that can affect nearby water resources. The cases include the following: 1) Lawrence Lynch Corp. agreed to pay a $3,000 penalty and address violations of the Oil Pollution Prevention regulations at its asphalt and paving manufacturing facility. The company agreed to submit an amended spill prevention plan that addresses deficiencies identified in a September 2019 inspection by EPA. The plan will include a schedule that includes constructing any necessary containment, such as asphalt cement tanks. 2) Fed Corp. agreed to pay a $3,000 penalty and correct violations of the Oil Pollution Prevention regulations by preparing a spill prevention plan that it then submitted to EPA in August 2019. Fed Corp. is a general contractor with a focus on underground utility installation, site preparation, and roadway construction for public agencies and municipalities in Massachusetts.

•March 9, 2020 - The EPA will take enforcement actions on the Big Island to bring about the closure of a dozen pollution-causing large-capacity cesspools (LCCs) and charge $144,696 in fines. Under the Safe Drinking Water Act, EPA banned large-capacity cesspools in 2005. EPA inspectors identified multi-unit residential buildings illegally discharging wastewater into eleven cesspools in Kealakekua, Hawaii. The cesspools will be replaced with compliant systems. The owner, K. Oue, Limited, has agreed to pay a $88,545 penalty and close all eleven LCCs. In addition, in Kailua-Kona the Group Investments LLC failed to close a cesspool at a building that the company owns and leases to tenants Sherwin Williams and B. Hayman Co. Services. The LCC will be replaced with a compliant system. Group Investments has agreed to pay a $56,151 penalty and close the LCC. Since 2005's LCC ban, more than 3,400 of the cesspools have been closed statewide; however, many hundreds remain in operation. Cesspools collect and discharge untreated raw sewage into the ground, where disease-causing pathogens and harmful chemicals can contaminate groundwater, streams and the ocean. Groundwater provides 95 percent of all domestic water in Hawaii, where cesspools are used more widely than in any other state. In 2017, the State of Hawaii passed Act 125, which requires the replacement of all cesspools by 2050. It is estimated that there are approximately 90,000 cesspools in Hawaii.

•March 13, 2020—Federal officials announced a civil settlement with Plains All American Pipeline L.P. and Plains Pipeline L.P. (Plains) arising out of Plains' violations of the federal pipeline safety laws and liability for the May 19, 2015, discharge of approximately 2,934 barrels of crude oil from Plains' Line 901 immediately north of Refugio State Beach, located near Santa Barbara, California. The discharge was caused by Plains' failure to address external corrosion and have adequate control-room procedures in place, and was further exacerbated by Plains' failure to respond properly to the release. The crude oil discharge resulted in the oiling of Refugio State Beach, the Pacific Ocean, and other shorelines and beaches, resulted in beach and fishing closures and adversely impacted natural resources such as birds, fish, marine mammals and shoreline and subtidal habitat. The United States worked closely with co-plaintiff the state of California, and both the United States and California are signatories to the complaint and the consent decree. The complaint seeks injunctive relief, penalties, natural resource damages and assessment costs, and response costs for the United States,

on behalf of the U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration; the U.S. Environmental Protection Agency; the U.S. Department of the Interior; the Department of Commerce, National Oceanic and Atmospheric Administration and the U.S. Coast Guard. The United States' claims are under the federal pipeline safety laws, the Clean Water Act, and the Oil Pollution Act of 1990. The settlement requires Plains to implement injunctive relief to improve Plains' nationwide pipeline system and bring it into compliance with the federal pipeline safety laws, in addition to addressing unique threats and modifying operations that caused the Line 901 oil spill; pay $24 million in penalties; pay $22.325 million in natural resource damages, and $10 million for reimbursed natural resource damage assessment costs; and pay $4.26 million for reimbursed Coast Guard clean-up costs. Excluding the value of the required injunctive relief changes to Plains' national operations, the settlement in conjunction with reimbursed costs is valued in excess of $60 million.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•March 10, 2020 - The EPA announced a settlement with Wilbur-Ellis for the improper storage, labeling and containment of bulk agricultural pesticides at its facilities in Willows, Helm and El Nido, California, and Farmington, New Mexico. The firm, a pesticide re-packager and distributor, has corrected all identified compliance issues and agreed to a systematic evaluation of the company's overall compliance system and subsequent firmwide implementation of improvements to its management systems, and stopped repackaging pesticides altogether at three of the four facilities. In addition, the company will pay $73,372 in civil penalties. The violations were discovered through a series of inspections conducted by the Navajo Nation Environmental Protection Agency and the California Department of Pesticide Regulation from 2016 to 2018. Based on those inspection findings, EPA asserted Wilbur-Ellis had committed 14 violations under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), which regulates the safe distribution, sale and use of pesticides in the U.S. The company failed to properly label pesticides and violated pesticide containment regulations at four of the company's facilities. Based on information gathered during the inspections, the EPA determined that Wilbur-Ellis held pesticides for sale in bulk containers with misbranded labeling that failed to include directions for use and/or net contents, failed to maintain required recordkeeping for repackaged pesticides, failed to keep a containment pad and secondary containment unit liquid-tight, failed to have an appropriate holding capacity for its containment pad and a secondary containment unit, and failed to anchor or elevate bulk stationary pesticide containers. Each of these violations increases the risk of a pesticide release. California accounts for a quarter of all agricultural pesticides used each year in the U.S., and more than half of that amount is applied in the San Joaquin Valley alone. The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) authorizes EPA to review and register pesticides for specified uses, to regulate safe storage and disposal of pesticides, and to conduct inspections and enforce pesticide requirements. FIFRA regulations help safeguard the public by ensuring that pesticides are used, stored and disposed of safely, and that pesticide containers are adequately cleaned. Pesticide registrants and refillers (*i.e.*, those that repackage pesticides into refillable containers) must comply with the regulations, while consumers are required to follow the label instructions for proper use and disposal.

Indictments, Convictions, and Sentencing

•February 26, 2020 - Unix Line PTE Ltd., a Singapore-based shipping company, pleaded guilty in federal court to a violation of the Act to Prevent Pollution from Ships. Assistant Attorney General Jeffrey Bossert Clark of the Justice Department's Environment and Natural Resources Division, U.S. Attorney David L. Anderson of the Northern District of California and U.S. Coast Guard Investigative Service Special Agent in Charge Kelly S. Hoyle made the announcement. In pleading guilty, Unix Line admitted that its crew members onboard the Zao Galaxy, a 16,408 gross-ton, ocean-going motor tanker, knowingly failed to record in the vessel's oil record book the overboard discharge of oily bilge water without the use of required pollution-prevention equipment, during the vessel's voyage from the Philippines to Richmond, California. According to the plea agreement, Unix Line is the operator of the Zao Galaxy, which set sail from the Philippines on Jan. 21, 2019, heading toward Richmond, California,

carrying a cargo of palm oil. On Feb. 11, 2019, the Zao Galaxy arrived in Richmond, where it underwent a U.S. Coast Guard inspection and examination. Examiners discovered that during the voyage, a Unix Line-affiliated ship officer directed crew members to discharge oily bilge water overboard, using a configuration of drums, flexible pipes, and flanges to bypass the vessel's oil water separator. The discharges were knowingly not recorded in the Zao Galaxy's oil record book. Unix Line's sentencing hearing is scheduled for March 20 before U.S. District Court Judge Jon S. Tigar in Oakland, California. Senior Trial Attorney Kenneth Nelson of the Environmental Crimes Section, with the assistance of Kay Konopaske and Katie Turner, Assistant U.S. Attorney Katherine Lloyd-Lovett and Special Assistant U.S. Attorney Andrew Briggs of the Northern District of California are prosecuting the case. The prosecution is the result of a year-long investigation by the Coast Guard Investigative Service and the Investigations Division of Coast Guard Sector San Francisco.
(Andre Monette)

JUDICIAL DEVELOPMENTS

D.C. CIRCUIT FINDS CERCLA COST RECOVERY CLAIM AGAINST THE FEDERAL GOVERNMENT FAILS DUE TO PREVIOUS CLEAN WATER ACT CONSENT DECREE

Government of Guam v. United States of America, ___F.3d___, Case No. 19-5131 (D.C. Cir. Feb. 14, 2020).

On February 14, 2020, the D.C. Circuit Court of Appeals determined that the government of Guam was unable to recover money from the U.S. Navy under the cost recovery sections in the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The court determined that CERCLA § 107(a) was inapplicable because a previous Consent Decree (Consent Decree) resulting from a federal Clean Water Act (CWA) claim resolved some of the liability. Since the liability had been resolved, only § 113(f)(3)(B) was a viable means of recovery; however, recovery was impermissible because the statute of limitations for this section had run.

Factual and Procedural Background

Between 1903 and 1950, the United States treated Guam as a US Naval ship—the "USS Guam"—and maintained military rule over the island. In the 1940s, the Navy constructed and began operating a landfill, called the Ordot Dump, where municipal and military waste was disposed. In the 1950s the United States began forming a civilian government, but even after relinquishing sovereignty, the Navy used the Ordot Dump for the disposal of munitions and chemicals, allegedly including Dichlorodiphenyltrichloroethane—DDT—and Agent Orange, throughout the Korean and Vietnam wars. Despite the dump's extensive use for both military and civilian needs, there were few environmental safeguards implemented. It was unlined at the bottom and uncapped on top which allowed the rain to mix with the chemicals and contaminate the soil and ground water.

Starting in 1986, the U.S. Environmental Protection Agency (EPA) repeatedly ordered Guam to contain the environmental impacts at Ordot Dump. In 2002, the EPA sued Guam under the CWA asserting that Guam violated the Act when water flowed from the Ordot Dump into the Lonfit River without a permit. To avoid litigation, Guam and the EPA entered into a Consent Decree in 2004, which required Guam to pay a civil penalty, close the dump, and install a cover over the dump.

In 2017, Guam initiated an action under CERCLA, asserting that the Navy was responsible for the Ordot Dump's contamination, and seeking to recover costs caused by closing the land fill and cleaning the area. Guam brought two causes of action: a CERCLA § 107(a) "cost recovery" claim seeking "removal and remediation costs" related to the landfill, and, alternatively, a § 113(f) "contribution" action.

The U.S. moved to dismiss the claims, arguing, first, that the 2004 Consent Decree resolved the United States' liability for a response action, and therefore Guam had to proceed under § 113 rather than § 107. Second, the United States argued that because CERCLA § 113 "imposes a three-year statute of limitations on contribution claims" that runs from a consent decree's entry, Guam was time-barred by the three-year statute of limitations from pursuing a § 113 contribution claim.

The U.S. District Court found that the § 107(a) claim was not barred by the Decree because it did not sufficiently resolve the liability of the Ordot Dump and denied the motion to dismiss. The United States sought interlocutory appeal of the district court's order.

The D.C. Circuit's Decision

Two CERCLA sections are at issue in this case: § 107(a) and § 113(f)(3)(B). Section 107(a) provides a cost recovery action with a six-year statute of limitations that is permissible if liability has not been resolved. Section 113(f)(3)(B) provides a contribution action available to recover paid funds from a nonparty as a result of a § 107(a) action, settlement,

or other contribution action with a three-year statute of limitations.

Cost Recovery and Contribution Claims Are Mutually Exclusive

The court first considered whether CERCLA §§ 107(a) and 113(f)(3)(B) were mutually exclusive. That is, if a party incurs costs pursuant to a settlement and therefore has a cause of action under § 113, is it precluded from seeking cost-recovery under § 107? The court reasoned that the purpose of § 113(f)(3)(B) is to allow private parties to seek contribution after they have settled their liability with the government. Allowing recoupment of costs through a § 107 cost-recovery claim would render § 113(f)(3)(B) superfluous.

Triggering Section 113(f)(3)(B) Through a Non-CERCLA Claim

The court next considered whether the 2004 Consent Decree resolved Guam's liability for a response action within the meaning of § 113(f)(3)(B), thus triggering Guam's right to seek contribution and precluding it from seeking cost-recovery under § 107. In order to trigger CERCLA § 113(f)(3)(B), a party must resolve its liability to the United States or a state for some or all of a response action or for some or all of the costs of such action in a judicially approved settlement. Guam argued the 2004 Consent Decree could not qualify as a settlement under CERCLA because it settled an action brought by EPA under the CWA, not CERCLA.

The court determined that § 113(f)(3)(B) did not require a CERCLA specific settlement. Because other subsections in § 113 specifically required a CERCLA claim and 113(f)(3)(B) does not, this implied that Congress did not intend to place this restriction on the subsection when drafting CERCLA.

Consent Decree Resolves Liability

After determining that a settlement agreement under the CWA could trigger 113(f)(3)(B), the court examined the terms of the 2004 Consent Decree. The court determined that the ordinary meaning of the phrase "resolved its liability" meant that the liability must be decided in part by the agreement with the EPA. The Consent Decree required Guam to take actions against further contamination, which constituted a response action.

Guam unsuccessfully argued that the Consent Decree did not resolve liability in this context for multiple reasons. First, Guam argued that the Consent Decree did not resolve liability because it explicitly reserved the right to pursue other claims against Guam that arose from the circumstances. The court determined that complete resolution was not necessary as 113(f)(3)(B) only required some response action, which was present when Guam agreed to work to cover the Ordot Dump in the Consent Decree.

Second, Guam argued that the Consent Decree did not trigger § 113(f)(3)(B) because liability under the decree due to ongoing performance requirements. The court rejected this argument, reasoning that such a position would produce the absurd result that Guam's cause of action under § 113 would not accrue until after the statute of limitations ran. Because this created a timing inconsistency that was impossible to resolve, the court found that Congress could not have intended for the liability to accrue only after performance had been completed.

Third, Guam argued that the disclaimer in the Consent Decree, which asserted there was no "finding or admission of liability," prevented the liability from being resolved as required by § 113(f)(3)(B). Here, the court determined that disclaimer did not overcome the substantive portions of the Consent Decree. Because the Consent Decree caused Guam to assume obligations consistent with finding liability, this was sufficient action to trigger § 113(f)(3)(B).

Fourth, Guam argued that the Consent Decree was outside of CERCLA because the document was only about violations to the CWA and "non-CERCLA pollutant discharges only." The court determined this to be irrelevant because the instructions regarding the cover asserted that the system was designed to "eliminate discharges of untreated leachate" which was an action specifically identified in CERCLA as a remedial action.

Finally, Guam argued that denying § 107(a) recovery violated the due process clause by not providing notice that the Consent Decree also triggered CERCLA. Since this argument was not raised originally in the District Court, the Circuit Court found that it was forfeited.

Conclusion and Implications

This case brought the D.C. Circuit in line with the Third, Seventh, and Ninth Circuit Courts who have ruled that § 107(a) and 113(f)(3)(B) are mutually exclusive. This case also shows that CERCLA § 113(f)(3)(B) can be triggered by actions taken by the EPA under other statutes and is triggered as soon as the settlement, not the performance, occurs. Lastly, any disclaimers or rights to take other actions reserved in a Consent Decree do not necessarily prevent § 113(f)(3)(B) from being triggered.

https://www.cadc.uscourts.gov/internet/opinions.nsf/36DBD6063D08111F8525850E00580F44/$file/19-5131-1828593.pdf

(Anya Kwan, Rebecca Andrews)

DISTRICT COURT HOLDS CLEAN WATER ACT CITIZEN SUIT ALLEGING STORMWATER DISCHARGES INTO SAN FRANCISCO BAY SURVIVES MOTION TO DISMISS

Eden Environmental Citizen's Group, LLC v. American Custom Marble, Inc., ___F.Supp.3d___, Case No. 19-CV-03424-EMC (N.D. Cal. Feb. 13, 2020).

The U.S. District Court for the Northern District of California denied defendants' motion to dismiss Eden Environmental Citizens Group's (Eden) federal Clean Water Act (CWA) complaint on the grounds of standing and personal jurisdiction. However, the court granted defendants' motion to dismiss Eden's fifth, sixth, and seventh causes for failure to implement Best Available and Best Conventional Treatment Technologies, discharges of contaminated stormwater, and failure to properly train employees, respectively. The court allowed Eden to amend its complaint to cure pleading deficiencies within 30 days because the court dismissed these causes of action without prejudice.

Background

Eden is an environmental membership group organized to protect and preserve California's waterways. Eden's mission is implemented by enforcing provisions of the CWA by seeking redress from environmental harms caused by industrial dischargers. Eden brought suit against American Custom Marble (ACM) and Patricia A. Sharp, ACM's corporate secretary and the facility's legally responsible person (collectively Defendants) for violations of the CWA. In its complaint, Eden alleged that ACM stores industrial materials in an outdoor location where the materials are vulnerable to storms and wind. As a result of this storage, Eden alleged that stormwater containing ACM's industrial materials discharged from ACM's facility into waters of the United States that drain to San Francisco Bay.

Eden filed a complaint against ACM and Ms. Sharp for violations of the CWA. Eden gave ACM proper notice, but Eden did not explicitly give notice to Ms. Sharp in her personal capacity. ACM moved to dismiss, arguing that: 1) Eden lacked standing, 2) the court lacked personal jurisdiction over Ms. Sharp because Eden failed to give her proper notice, and 3) Eden failed to state facts that support a cause of action.

The District Court's Decision

Standing

The court began by analyzing whether Eden had organizational standing. An organization may assert standing to sue on behalf of its members where: 1) its members would otherwise have standing to sue on their own, 2) the interests it seeks to protect are relevant to the organization's purposes, and 3) neither the claim nor the relief require the participation of the individual members. Here, the court found that Eden had sufficiently alleged organizational standing. Even though Eden had not included any facts about its members in its complaint, Eden cured this pleading deficiency by submitting a declaration from one of its members claiming the member used and enjoyed the watershed at issue and claiming the member had

suffered harm as a result of the discharges.

The court next analyzed whether Eden had standing to bring claims predating Eden's existence, given that Eden was formed in 2018. The court determined that the key inquiry was whether Eden's harmed member would have standing to bring suit for the violations of the CWA in his own right, even if those violations predated Eden. The court found that Eden's member would in fact have standing in his own right because he had lived in the area for the full amount of time allowed by the statute of limitations. Therefore, Eden had standing to sue on its member's behalf for violations before Eden's existence.

Personal Jurisdiction over Ms. Sharp

The court next analyzed whether it had personal jurisdiction over Ms. Sharp even though Eden did not give her notice of the violations in her personal capacity. Responsible corporate officers can be held personally liable under the CWA. However, the CWA requires that a plaintiff give prior notice to alleged violators before filing a complaint.

Defendants argued Eden failed to give any CWA notice to Ms. Sharp in her personal capacity, therefore Eden could not sue Ms. Sharp. However, Eden addressed its notice to "Officers, Directors, Property Owners and/or Facility Managers of ACM," which gave Ms. Sharp notice she could be sued in her personal capacity because of her position. Eden also served notice to Ms. Sharp at her home, and noted that Ms. Sharp should be on notice of her personal liability because she is the ACM facility's "legally responsible person." The court took these facts into consideration and determined Ms. Sharp had fair notice. Ms. Sharp had not alleged that she was prejudiced by Eden's imperfect notice, therefore the court denied the motion to dismiss for lack of personal jurisdiction.

Failure to State a Cause of Action

Finally, the court analyzed whether Eden had adequately stated its causes of action to survive a Rule 12(b)(6) motion. To overcome a Rule 12(b)(6) motion, a plaintiff's factual allegations in the complaint must suggest the claim has a plausible chance of success. A plaintiff cannot simply recite elements of a cause of action; the complaint must contain sufficient allegations of underlying fact to give fair notice to the defendant.

The court found that Eden's fifth, sixth, and seventh causes of action were deficient under Rule 12(b)(6). Eden only alleged its fifth and seventh causes of action in general terms, and the court decided Eden merely recited the elements of a cause of action. The court stated that it needed more information from Eden to uphold the fifth and seventh causes of action. The court found Eden's sixth cause of action deficient because it alleged an unspecified number of discharges. The sixth cause of action stated that an unlawful discharge occurred in every rain event presumably from the beginning of the statute of limitations to the filing of the lawsuit. The court stated that ACM was entitled to know how many violations were being alleged and how Eden identified "rain events" that would count as discharges under the CWA. Accordingly, the court dismissed Eden's fifth, sixth, and seventh causes of action under Rule 12(b)(6) with leave to amend.

Conclusion and Implications

This case establishes that organizations have standing to sue on behalf of their members when their members have standing to sue in their own capacity, even if the members' injuries predate the existence of the organization. This case also establishes that a defendant must show they have suffered prejudice from a plaintiff's imperfect CWA notice in order to succeed in dismissing a lawsuit under the CWA. Practically, this case allows Eden's lawsuit against Defendants to continue forward. Eden may amend its complaint within 30 days to cure its deficient pleadings for the fifth, sixth, and seventh causes of action. For more information, *see*:

https://www.govinfo.gov/content/pkg/USCOURTS-cand-3_19-cv-03424/pdf/USCOURTS-cand-3_19-cv-03424-1.pdf

(William Shepherd, Rebecca Andrews)

DISTRICT COURT FINDS, IN THE FACE OF OIL POLLUTION ACT CLAIM, THAT THE U.S. COAST GUARD'S PLANS FOR 'WORST CASE DISCHARGES' IN THE GREAT LAKES, ADEQUATE AND SURVIVE SUMMARY JUDGMENT

Environmental Law & Policy Center, et al., v. U.S. Coast Guard, ___F.Supp.3d___, Case No. 18-12626 (E.D. MI Mar. 16, 2020).

On August 22, 2018, plaintiffs, Environmental Law & Policy Center (ELPC) and National Wildlife Federation (NWF), filed a complaint against defendants, United States Coast Guard and Rear Admiral Joanna M. Nunan in her official capacity as Coast Guard District Commander. Plaintiffs alleged that the Coast Guard's Northern Michigan Area Contingency Plan (NMACP), certified by the Ninth Coast Guard District Commander, Rear Admiral June E. Ryan, on June 6, 2017, is inadequate to respond to a worst-case discharge and that defendants wrongfully approved the NMACP in violation of the Administrative Procedure Act (APA) and the Oil Pollution Act of 1990 (OPA). The U.S. District Court for the Eastern District of Michigan denied ELPC's and NWF's motion for summary judgment and granted defendants' motion for summary judgment.

Background

The Straits of Mackinac connecting Lakes Superior. Huron and Michigan are among the most treacherous navigable waters plied by large vessels. Two prominent environmental groups brought a complaint in 2018 against the U.S. Coast Guard alleging that the "worst case scenario" planning of the Coast Guard was legally deficient under the federal Oil Pollution Act amendments to the Clean Water Act in 1990.

The Environmental Law & Policy Center and National Wildlife Federation asserted that the Coast Guard approved a plan that failed to respond to the worst-case discharge scenario to the extent required by law. The OPA requires the area contingency planning "be adequate to remove a worst-case discharge [of oil] from a vessel, offshore facility or onshore facility operating in or near the area.'" 33 USC § 1321(i)(4)(C). They alleged the failures involved lack of consideration of the need for ice-breaking vessels to reach an oil spill in the Straits of Mackinac, and the plan allegedly also failed to consider wave heights.

The "Worst-Case Discharge" is a defined term: "The largest foreseeable discharge in adverse weather conditions." The plan in question, known as the Northern Michigan Area Contingency Plan (NMACP) is fairly complex, including response activity arising in at least two states and internationally. According to the NMACP, the Worst-Case Discharge would be a large Canadian tanker vessel with over three-million-gallon capacity spilling its load from the Canadian side of Lake Superior. Another potential WCD would be a break in an Enbridge Energy oil pipeline just five miles west of the famous Mackinac Bridge, with discharge direct to the Straits.

The NMACP challenged was adopted in 2017. It is a 217-page document. It provides details that should occur in a coordinated response from state, federal and 20 local county governments. Actual exercises were staged and held to assist in making judgments on what should be done under several scenarios. In addition to reviews of exercises held, the plan record included interviews with experienced responders, some of whom discussed problems that exist if wave heights are higher than three or four feet. The Coast Guard's own review of the NMACP indicated some degree of deficiency in planning and logistics

The District Court's Decision

The complaint was filed in the Eastern District of Michigan federal court, Northern Division and heard by US District Judge Tomas Ludington. The court's decision includes a careful recital of the criteria for the courts in reviewing the record of an agency. The arguments of the plaintiffs are reviewed, including assertions that the record laced investigation of the availability of ice-breaking vessels, and that the record itself sowed that wave height could defeat clean-up efforts.

The Coast Guard in turn urged the court to consider the record as a whole. They had done a serious and thoughtful job of identifying and evaluat-

ing response techniques. They admitted there could be delays in achieving the desired success level in conditions where ice was thick or waves were high, but they also noted that the law does not require immediacy, but only that it: "be adequate to remove a worst-case discharge, and to mitigate or prevent a substantial threat of a discharge."

Plaintiffs insisted that they had caselaw support, but in his analysis, Judge Ludington found that the Coast Guard's analysis and adoption of a plan complied with the APA and the OPA. The Coast Guard indicated that the plaintiffs overstated facts, in that the presence of thick ice was one of the elements of "severe adverse weather" as a matter of standard practice. They had thus considered ice and ice breakers. And the record expressly cited difficulties that exist from high waves.

Conclusion and Implications

The ruling came down March 16, 2020 upholding the Coast Guard's decision and consideration as being consistent with the law and not arbitrary or capricious. In a nutshell, the District Court found plaintiffs were focused on arguing the law requires a perfect plan with complete immediate success. Since the law itself requires only "adequacy to remove" a spill, the Coast Guard's record showed it had made its decisions reasonably and consistently with the law. The District Court's decision is available online at: https://www.leagle.com/decision/infdco20200316f67.
(Harvey M. Sheldon)

COURT OF FEDERAL CLAIMS REJECTS 'TAKINGS' CLAIMS RELATED TO HURRICANE HARVEY DOWNSTREAM FLOODING CASES

In re Downstream Addicks and Barker (Texas) Flood-Control Reservoir,
___F.Supp.3d___, Case No. 17-9002 (Fed. Cl. Feb. 18, 2020).

The U.S. Court of Federal Claims dismissed U.S. Constitutional Fifth Amendment takings claims related to "Hurricane Harvey" for failure to state a claim upon which relief could be granted. The ruling comes as a result of the court's determination that the Fifth Amendment only protects legally recognized property rights created by states or the federal government.

Factual and Procedural Background

This litigation was brought by residents of Harris County, Texas (plaintiffs). Plaintiffs suffered from flooding that damaged their property during Hurricane Harvey in 2017. Plaintiffs alleged that economic and emotional damages occurred as a result from imperfect flood control from two dams created by the U.S. Army Corps of Engineers (Corps or federal government) to mitigate against floods in their area.

The Corps created the Barker Dam and Addicks Dam between February of 1942 and December of 1948, respectively. The dams' reservoirs provided flood protection along the Buffalo Bayou. Plaintiffs acquired their respective properties between 1976 and 2015. All properties fell within the Buffalo Bayou watershed and all properties were built after the erection of the dams.

On August 25, 2017, Hurricane Harvey made landfall on the coast of Texas. To mitigate against downstream flooding, the Corps closed the flood gates on both the Addicks and Barker dams. By August 28, the volume of water in the reservoirs exceeded capacity and the Corps began releasing waters downstream. Despite the controlled releases, uncontrolled water was reported to be flowing around the north end of the Addicks Dam.

In September of 2017, property owners began to file claims with the court. Plaintiffs alleged that the flooding caused by Hurricane Harvey and the dams was an unconstitutional taking of their property. The claims were consolidated and then bifurcated into an Upstream Sub-Docket and a Downstream Sub-Docket. The federal government filed a motion to dismiss under Rule 12(b)(6) of the United States Court of Federal Claims for failure to state a claim upon which relief could be granted. The federal government alleged that the government cannot take a property interest that plaintiffs do not possess.

The Court of Federal Claims Decision

The Takings Clause of the Fifth Amendment protects against private property being taken for the public without just compensation. Accordingly, courts implement a two-step analysis of takings claims. First, a court determines whether plaintiffs possess a valid interest in the property affected by the government action. If the court determines that the plaintiffs do have a property right, then it must decide whether the governmental action at issue constituted a violation of the property right.

The Court of Federal Claims referenced that for a Fifth Amendment takings claim to succeed, plaintiffs must first establish a compensable property interest. For a property right to be recognized, it must have a legal backing, such as a state or federal law protecting the interest.

State Recognized Property Rights

The Court of Federal Claims reviewed over 150 years of Texas flood-related decisions and determined that the State of Texas has never recognized perfect flood control in the wake of an "act of God," such as a hurricane, as a protected property interest. In fact, the court determined that Texas had specifically excluded the right to perfect flood control when the occurrence was an act of God.

Under Texas law an act of God is the result of an event that was "so unusual that it could not have been reasonably expected or provided against." Here, the court determined that Hurricane Harvey was an event that occurred only every 200 years, and that the Houston area could not have reasonably expected or provided against its damages. Therefore, the federal government could not be held responsible for plaintiff's injury because Texas law specifically limits liability in takings and tort contexts when the operator of a water control structure fails to perfectly mitigate against flooding caused by an act of God.

The court then looked to the Texas state Constitution, which specifically enumerates that police power is an exception to takings liability and that property is owned subject to the pre-existing limits of the state's police power. The court highlighted the fact that Texas courts have consistently recognized efforts by the state to mitigate against flooding as a legitimate use of police power.

The court also looked to the Texas Supreme Court's holding that governments cannot be expected to insure against every misfortune on the theory that they could have done more. The reasoning behind that conclusion was the fact that extending takings liability on such instance would encourage governments to do nothing to prevent flooding instead of trying to address the problem.

Finally, under Texas case law when an individual purchases real property, the individual acquires that property subject to the property's pre-existing conditions and limitations. The court noted that each of the plaintiffs in this case acquired their property after the construction of the Addicks and Barker dams. Therefore, plaintiffs acquired their property subject to the right of the Corps and federal government to engage in flood mitigation.

Federally Recognized Property Rights

Because the court did not find a property right recognized by the State of Texas, it examined whether federal law provides plaintiffs with protected property interest. Plaintiffs advanced two legal theories to allege that federal law recognized their property rights. First, plaintiffs alleged that because their property only experienced minimal flooding before Hurricane Harvey, they had a reasonable investment-backed expectation that they would always remain free from flooding. Second, plaintiffs alleged that because the water ran through the Corp's reservoir, it was the Corps' water and not flood water.

First, the Court of Federal Claims determined that plaintiffs did not have a reasonable expectation to be free from flooding simply because the federal government erected a dam to mitigate floods. The court determined that:

> . . .an unintended benefit could not create a vested property interest, and that '[i]n certain limited circumstances, the [federal government] can eliminate or withdraw certain unintended benefits resulting from federal projects without rendering compensation under the Fifth Amendment.'

The court highlighted the notion that government projects rarely provide an individual with a property interest because government projects are intended to benefit the community as a whole.

Second, the court determined that the Flood Control Act of 1928 (FCA) defines water impounded behind dams because of a natural disaster as flood waters. Additionally, the court determined that the FCA does not confer owners a vested right in perfect flood control simply for owning property that benefits from a flood control system. The court determined that when the federal fovernment undertakes efforts to mitigate against flooding, it does not become liable for a taking because the efforts failed.

The court concluded that there exists no cognizable property interest in perfect flood control against waters resulting from an act of God. The court refused to extend liability to the federal government because it failed to protect against waters outside of its control. Therefore, the court granted the federal government's motion to dismiss for failure to state a claim upon which relief could be granted.

Conclusion and Implications

The court's decision closely tracked state law and federal law in an attempt to harmonize its decision. In the end, the Court of Federal Claims found that the failure of a federal flood control project to control flood waters may not constitute a Fifth Amendment taking without a state-created property right to be free from the type of flooding at issue. The implication of that analysis would suggest that a different result might be possible on the same or similar fact in another state. In February 2020 we reported on the court's decision in the "upstream" portion of the flooding event. *See*: 30 *Envtl Liab Enforcement & Penalties Rptr* 74. The court' decision is available online at: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2017cv9002-203-0.
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