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EASTERN WATER LAW™

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Publisher's Note:

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EASTERN WATER NEWS

U.S. GEOLOGICAL SURVEY RELEASES STUDY SUGGESTING COLORADO RIVER STREAMFLOW REDUCTIONS ARE ASSOCIATED WITH ATMOSPHERIC WARMING

In March 2020, the U.S. Geological Survey (USGS) released a study seeking to explain the physical mechanism behind the correlation between temperature increase and reduced streamflow in the Upper Colorado River Basin. Using a new model and satellite-based observations, the study found that melting snowfall caused by atmospheric warming was the driving force behind streamflow reduction in the Colorado River. The study was able to project a streamflow reduction rate of about 5 percent for every degree of temperature increase. Such information may be useful in developing management programs that account for potential reductions in Colorado River streamflow in the future.

Background

Approximately 1,450-miles-long, the Colorado River is one of the principal water sources in the Western United States. The Colorado River drains an expansive watershed that encompasses parts of seven U.S. states and two Mexican states. The river and its tributaries are controlled by an extensive system of dams, reservoirs, and aqueducts, which in most years divert its entire flow for agriculture, irrigation, and domestic water. The Upper Colorado River Basin (Upper Basin) accounts for approximately 90 percent of the water flowing in the river. Water from the Upper Basin is currently used for services provided to approximately 40 million people and supports economic activity in the United States Southwest, estimated at $1.4 trillion each year.

Water in the Upper Basin originates as precipitation and snowmelt in the Rocky and Wasatch Mountains. Due to year-to-year differences in precipitation and snowmelt, the natural water supply of the Upper Basin is highly variable. Since the early 1900s, water demand in the Upper Basin has increased while water supply has, on average, decreased. The Upper Basin is susceptible to long-term drought, demonstrated by the impacts of the ongoing drought that began in 2000. While previous studies have generally established a link between global temperature increase and streamflow reduction in the Upper Basin, with varying estimates of its impact, the USGS's recent study incorporates more than two-decades worth of satellite imagery and information that other studies have not significantly incorporated.

The USGS Study

The recent study conducted by the U.S. Geological Survey used a new model and updated satellite-based observations to explain the mechanism behind flow reduction and shortages in the Upper Basin. The primary focus of this study was to measure surface net radiation rather than focusing only on temperature measurements to explain flow reduction. Surface albedo, also known as reflectivity, determines the amount of solar radiation that is absorbed by land surface, which can drive the process of evapotranspiration. Evapotranspiration is the sum of evaporation and plant transpiration from the Earth's land and ocean surface to the atmosphere. This process accounts for the movement of water to the air from sources such as the soil, canopy interception, and waterbodies. As a result, an increase in evapotranspiration increases the movement of water to the air and reduces the amount of water remaining in waterbodies.

The USGS study revealed that the reduction of snow cover largely accounted for the decrease of streamflow in the Upper Basin. Surface albedo is highly sensitive to snow cover, which is an efficient reflector of solar radiation. As temperatures rise, more precipitation falls as rain instead of snow, and what snow does fall melts earlier in the year. The loss of snow exposes the land to increased solar radiation. The absorbed radiative energy is dissipated by further heating of the lower atmosphere and increased evaporative cooling. The increased evaporation consumes water that would otherwise run off into the river, reducing the amount of streamflow. This results in

a chain reaction, where the increase in temperature starts a process which ultimately leads to a further increase in temperature.

Due to the reduced snow cover, streamflow in the Upper Basin is decreasing by about 5 percent per degree Fahrenheit as a consequence of atmospheric warming, causing a 20 percent reduction over the past century. There is the possibility that precipitation levels may change as a result of climate change, but this remains highly uncertain. While increased precipitation may partially offset the impacts of atmospheric warming, precipitation decreases would likely exacerbate warming impacts. Until now, the inability to identify a physical mechanism that accounts for the sensitivity of streamflow to atmospheric warming has made the translation of climate-change temperature projections into flow projections highly uncertain. The identification of these physical mechanisms may enable more robust projections of future streamflow, which in turn may allow for more precise planning and management of Upper Basin water resources.

Conclusion and Implications

Because Colorado River water supplies millions of people, businesses, and farms with water, the projected future reduction of Colorado River streamflow due to atmospheric warming poses a significant concern. The Upper Basin continues to experience streamflow reductions that may increase over time. However, the identification of the physical mechanisms behind streamflow reduction, as well as the corresponding reduction rate of 5 percent per degree Fahrenheit, may help future planning by water agencies, industry, and agricultural interests in the future. The U.S. Geological Survey study is available online at: *Colorado River Flow Dwindles as Warming-Driven Loss of Reflective Snow Energizes Evaporation*, available at https://www.usgs.gov/center-news/colorado-river-flow-dwindles-warming-driven-loss-reflective-snow-energizes-evaporation?qt-news_science_products=1#qt-news_science_products
(Geremy Holm, Steve Anderson)

NEWS FROM THE WEST

In this month's News from the West, we first provide an update on efforts by the Greater Las Vegas Area to obtain groundwater from outlying areas. Las Vegas is heavily dependent on Colorado River water and that source is not just fully appropriated, but showing signs of dwindling.

We also report on the issuance of an Incidental Take Permit for smelt and salmonid species, issued by the California Department of Fish and Wildlife, under the state's Endangered Species Act, to the California Department of Water Resources, for long-term operations of the State Water Project.

Southern Nevada Water Authority Does Not Appeal Denial of Groundwater Applications for Las Vegas Pipeline

The Las Vegas metropolitan area relies largely on Colorado River water to serve its needs. Starting in 1989, Southern Nevada Water Authority (SNWA) filed applications to import groundwater from numerous eastern Nevada basins to support increasing demands. In the ensuing decades, contested administrative proceedings and wide-reaching litigation pitted environmental groups, Native American tribes and farmers against the state's municipal power center. In the face of a denial by the Nevada State Engineer and the courts, to SNWA's applications to import water from outlying groundwater basins, the authority has apparently decided not to appeal those denials.

Background

For over 30 years, various issues bounced back and forth between the State Engineer, the Nevada state District Court and the Nevada Supreme Court. As recently reported here, in March, the District Court in White Pine County issued an order that required all of SNWA's applications in Spring, Cave, Delamar and Dry Lake Valleys to be denied (2020 Order). "Nevada District Court Orders the Denial of Southern Nevada Water Authority's Groundwater Applications for Las Vegas Pipeline," 24 *Western Water L. & Pol'y Rptr*, 179, (April 2020). That order revealed heightened tensions between the court and the State Engineer regarding the level of deference owed

the state's top water manager under Nevada's water statutes to determine whether water was available for appropriation.

As it turns out, that matter will not be resolved because the appeal deadline passed without SNWA or the State Engineer filing appeals to the Nevada Supreme Court. Absent an appeal, SNWA has foregone any opportunity to pursue these specific applications—which south 84,000 acre-feet per year—in the future.

The Prospect of SNWA's Importation Plans

In addition to the applications in Delamar, Dry Lake, Cave and Spring Valleys denied in the 2020 Order, SNWA also has permitted rights to 21,000 acre-feet per year in five hydrographic basins and applications for another 162,000 acre-feet per year in three others. Because of these water holdings, SNWA's decision to not appeal the 2020 Order does not necessarily jettison the 300-mile-long pipeline project.

But it remains unclear whether water importation will remain on SNWA's radar. In a statement regarding its decision not to appeal, SNWA said:

> After the current pandemic passes and normal operations are restored, SNWA management will present an update to its 50-year Water Resources Plan for its Board of Directors to consider that focuses on strengthening beneficial partnerships with other Colorado River states as well as further advancing Southern Nevada's world-recognized water conservation efforts.

This suggests that SNWA may have litigation fatigue and wants to turn its attention to enhancing existing sources rather than pursuing new ones. In its 2019 Water Resource Plan, the importation of eastern Nevada groundwater was just one component of SNWA's future water resource portfolio. Other potential sources identified by SNWA included desalination and augmentation/increased efficiencies of Colorado and Virgin River water.

SNWA is engaged with other Colorado River Basin states and water users, the U.S. Bureau of Reclamation and Mexico to actively explore and investigate potential seawater and brackish water desalination projects. SNWA also has agreed with other Colorado River Basin states to suspend development of Virgin River water rights that it owns in exchange for the development of an additional 75,000 acre-feet per year of Colorado River supply for Nevada. These types of collaborative efforts among Colorado River users appear to be where SNWA plans to focus its attention.

Conclusion and Implications

For anyone who has been observing the epic fight over SNWA's pipeline project, it is hard to imagine that the agency responsible for serving Southern Nevada's urban water needs plans to walk away from its water importation efforts completely. Although its board members may not now have the desire to press on with the applications in Delamar, Dry Lake, Cave and Spring Valleys, SNWA has given no indication that it is withdrawing its pending applications in other basins or disposing of the eastern Nevada ranches and associated water rights it already owns.

Political winds shift, drought conditions may worsen and relationships with other Colorado Basin states may sour. As a result, we likely have not seen the end of the SNWA's desire to tap rural groundwater sources to quench the thirst of Las Vegas and its environs. (Debbie Leonard)

California Department of Fish and Wildlife Issues Incidental Take Permit for Long-Term Operations of the State Water Project

On March 31, 2020, the California Department of Fish & Wildlife (CDFW) issued an Incidental Take Permit (ITP) to the California Department of Water Resources (DWR) under the California Endangered Species Act (CESA) for the long-term operations of the State Water Project (SWP). The permit, which is intended to minimize impacts to Delta smelt, longfin smelt, and winter and spring-run chinook salmon (Covered Species) from SWP operations, has attracted controversy from both the environmental community and water agencies with an interest in SWP operations.

Background

The CESA prohibits any person or public agency from taking species listed as threatened or endangered by the California Fish and Game Commission. Fish & Game Code § 2080. CDFW, however, can authorize take of listed species by issuing an ITP if the take

is "incidental to an otherwise lawful activity," the impacts of the take are minimized and fully mitigated, the necessary mitigation measures are fully funded by the applicant, and the taking will not jeopardize the continued existence of the species at issue. *Id.* at § 2081.

The SWP is operated by DWR conveys an average of 2.9 million acre-feet of water per year to communities and farms throughout California. TP at p. 2. Like the federal Central Valley Project (CVP), the SWP operates a large pumping plant in the Sacramento-San Joaquin River Delta. *Id.* at p. 3. The operations of both projects have caused take of the Covered Species in the past and likely will do so in the future.

Historically, the SWP and CVP have coordinated their operations, and DWR obtained incidental take coverage for SWP operations under CESA by securing a consistency determination from CDFW based on federal Biological Opinions. In 2019, however, DWR announced that it would seek an ITP for SWP operations that did not rely on the federal process for analyzing the effects of coordinated CVP and SWP operations under section 7 of the federal Endangered Species Act.

DWR Applies for and Receives ITP from CDFW

DWR thus prepared a draft Environmental Impact Report (DEIR) analyzing the effects of its proposed operations under the California Environmental Quality Act (CEQA) and submitted its ITP application to CDFW. The operations described in the ITP application, however, differed from the proposed project analyzed in the DEIR. (DWR, Final Environmental Impact Report for Long-Term Operation of the California State Water Project (FEIR) at I-1 (Mar. 27, 2019).

After submitting the application, DWR worked with CDFW staff to refine Alternative 2b in the DEIR, which CDFW had indicated was more likely to be acceptable under the CESA than the proposed project analyzed in the DEIR. *See id.* On March 27, 2020, DWR certified the FEIR, selected refined Alternative 2b as the environmentally superior alternative, and issued a notice of determination stating that DWR would implement refined Alternative 2b. CDFW issued the ITP four days later.

Overview of the ITP

The ITP authorizes incidental take of Delta smelt, longfin smelt, and winter and spring-run chinook salmon from SWP operations subject to a host of conditions of approval. For example, the ITP requires DWR to "reduce the maximum seven-day average diversion rate" at the Barker Slough Pumping Plant to less than 60 cubic feet per second (cfs) between January and June of dry and critical water years when larval longfin and Delta smelt are present, with the possibility of further reductions based on recommendations provided by the Smelt Monitoring Team. ITP at 98. The ITP also requires DWR to spend more than $300 million on habitat mitigation projects to benefit the Covered Species. *Id.* at 127. All told, the ITP contains 86 pages of conditions DWR must meet to maintain incidental take coverage for the operations of the ITP. *See id.*at 50-136.

Among the conditions are requirements for additional outflow from the Delta. For example, Condition of Approval 8.17 requires DWR to curtail SWP exports to protect Delta outflows from April 1 to May 31. *Id.* at 102-104. Although DWR may increase exports by up to 150,000 acre-feet beyond what would otherwise be allowed under Condition of Approval 8.17 with written permission from CDFW, the excess exports must be accounted for and redeployed for CDFW's use in the next year, unless the next year is critical. *Id.* at 105. Thus, DWR's compliance with the ITP is expected to decrease the availability of SWP supplies while passing the increased costs associated with operating to the ITP to SWP Contractors. *Id.*at 134 (All costs of the Project, including the costs of mitigation and monitoring activities required by this ITP shall be. . .charged to SWP Contractors.)

Conclusion and Implications

The issuance of the ITP has been met with controversy from many corners of California's water community. Many environmental interest groups have suggested that the ITP is insufficiently protective of the Covered Species, while agricultural and water agency stakeholders have expressed concerns about the interaction between the operations of the SWP under the ITP and CVP operations under new Biological Opinions issued by the U.S. Fish & Wildlife Service and the National Marine Fisheries Service,

as well as the potential that the ITP will interfere with potential voluntary agreements to implement Bay-Delta Water Quality Control Plan Update. The Metropolitan Water District of Southern California's board of directors has already voted to sue the state over the ITP, and other stakeholders are likely to challenge the ITP as well.
(Sam Bivins, Meredith Nikkel)

REGULATORY DEVELOPMENTS

U.S. BUREAU OF RECLAMATION RELEASES KLAMATH RIVER PROJECT INTERIM PLAN, WHICH PROVIDES ADDITIONAL WATER FOR ENDANGERED SPECIES

In late March 2020, the U.S. Bureau of Reclamation (Bureau) released a proposed Interim Plan to operate the Klamath River Project for a three-year period, with up to an additional 40,000 acre-feet per year made available for the benefit of endangered species and their critical habitats. The Interim Plan would govern the project's operations while the Bureau, the National Marine Fisheries Service (NMFS), and the U.S. Fish and Wildlife Service (FWS) complete consultation on the Bureau's proposed longer-term operations plan. The Bureau's long-term operations plan is the subject of a federal Endangered Species Act lawsuit filed by the Yurok Tribe and environmental groups.

Background

The Klamath River Project (Project) is located in Klamath County, Oregon, and Siskiyou and Modoc counties in California. The Project, which is operated by the Bureau of Reclamation, supplies irrigation water for approximately 230,000 acres of farmed land. Project water is stored and released from three reservoirs: Upper Klamath Lake, Clear Lake, and Gerber Reservoir. Additional water is available to the Project from the Klamath and Lost rivers, which is delivered through a network of diversion structures, canals, and pumps. Approximately 200,000 acres are served from Upper Klamath Lake and the Klamath River, and 30,000 acres are served from the Lost River, Clear Lake, and Gerber Reservoir. Several federally endangered species, such as coho salmon, and their critical habitats are dependent on the waters of the Klamath River.

The federal Endangered Species Act imposes requirements for protection of endangered and threatened species and their ecosystems, and makes endangered species protection a governmental priority. For marine and anadromous species (like salmon), the Secretary of Commerce, acting through the National Marine Fisheries Service, may list any species, subspecies, or geographically isolated populations of species as endangered or threatened. In addition to listing a species as endangered or threatened, the Secretary of the Interior must also designate "critical habitat" for each species, to the maximum extent prudent and determinable. For species other than marine or anadromous species, such as for terrestrial species, the Secretary, acting through Fish and Wildlife Service (FWS) may list and otherwise regulate the take of such species.

The Biological Opinions

At its most basic level, a Biological Opinion (BiOp)evaluates whether an agency action is likely to either jeopardize the continued existence of a listed species or result in the destruction or adverse modification of such species' designated critical habitat. Opinions concluding that the proposed action is likely to jeopardize a species' continued existence or adversely modify its critical habitat are called "jeopardy opinions," and must suggest "reasonable and prudent alternatives" that the Secretary believes will minimize the subject action's adverse effects. However, "no jeopardy" opinions do not require reasonable and prudent alternatives, but may still set forth reasonable and prudent measures that the action agency must follow if it is to obtain "incidental take" coverage, i.*e.* legal protection for incidentally taking a protected species.

On March 29, 2019, the National Martine Fisheries Service and the U.S. Fish and Wildlife Service (collectively: the Services) submitted to the Bureau their coordinated Biological Opinions evaluating the Bureau's 2018 Biological Assessment for proposed operations of the project, as modified (2018 Operations Plan). In evaluating the Bureau's 2018 Operations Plan, the Services each prepared Biological Opinions in 2019, concluding that the 2018 Operations Plan would not jeopardize the continued existence of Southern Oregon/Northern California

Coast (SONCC) coho salmon, Southern Resident killer whale (SRKW), and Lost River sucker (LRS) and shortnose suckers (SNS), nor would it destroy or adversely modify their designated critical habitat.

Subsequently, the Bureau analyzed the 2018 Operations Plan under the National Environmental Policy Act (NEPA), resulting in an Environmental Assessment (EA) and Finding of No Significant Impact (FONSI), which was finalized on April 1, 2019. Thereafter, the Bureau began operating the Project pursuant to both Services BiOps and the EA. However, in late summer 2019, Earth Justice on behalf of the Yurok Tribe, Pacific Coast Federation of Fishermen's Associations, and Institute for Fisheries Resources filed a lawsuit, Case No. 3:19-cv-04405-WHO, in the U.S. District Court for the Northern District of California, challenging, among other things, the "no jeopardy" and "no adverse modification" conclusions in NMFS' BiOp, as well as the Bureau's associated EA.

In August 2019, it was discovered that "computer modeling input files" used to evaluate the amount of available habitat for SONCC coho fry in the Bureau's 2018 Operations Plan and NMFS' 2019 BiOp, contained erroneous information related to the BiOp's "Weighted Usable Area habitat curves" for SONCC coho salmon. Accordingly, the files revealed effects of the 2018 Operations Plan on listed species or their critical habitats that were not previously considered in the BiOp or EA. In particular, the Bureau has expressed concerns related to the amount of habitat available for juvenile coho salmon, in addition to disease mitigation as had previously been the focal point of the Bureau's consultation with NMFS. The Bureau requested re-initiation of formal consultation with both Services on November 13, 2019.

Prior to the Bureau's request to reinitiate consultation with the Services, plaintiffs in the federal lawsuit filed a motion seeking a preliminary injunction to force the Project to operate under a 2012 operations plan in compliance with a corresponding BiOp from 2013, and which would require the Bureau to increase Klamath River flows to address coho salmon disease and habitat concerns. In late January, plaintiffs modified their motion for preliminary injunction, requesting an additional 50,000 acre-feet (AF) of water allocated for Klamath River flows for the benefit of endangered species and their critical habitats.

The New Environmental Assessment and the Proposed Action Alternative

On February 7, 2020, as part of the reinitiated consultation process, the Bureau transmitted a new Environmental Assessment to both Services for Project operations from April 1, 2020, through March 31, 2024. However, the Bureau and the Services subsequently agreed that additional time would be required to complete the consultations. Accordingly, the Bureau proposes to operate the Project pursuant to the Interim Plan for the period of April 2020 to March 2023 while the Bureau and the Services continue the formal consultation process. Litigation over the 2018 Operations Plan and NMFS' 2019 BiOp will be stayed pending the consultation process, provided the Project is operated in accordance with the Interim Plan.

The Interim Plan constitutes the Bureau's Environmental Assessment for Project operations during the three-year period to which it applies, and analyzes two water management approaches: A No-Action Alternative, and a Proposed Action Alternative. The EA adopts the "Proposed Action Alternative."

The Proposed Action Alternative consists of water supply and water management approaches for Upper Klamath Lake, and the Klamath and Lost rivers. These approaches attempt to replicate natural hydrologic conditions observed in the Upper Klamath Basin. The EA reflects the Bureau's effort to comply with the ESA, while also maintaining reliable water deliveries to agricultural water users during the agricultural season. The Proposed Action Alternative generally includes: 1) storing waters of the Klamath and Lost rivers; 2) operating the Project to deliver water for irrigation purposes subject to water availability; and 3) maintaining conditions in Upper Klamath Lake and the Klamath River that comply with ESA requirements.

Under the Proposed Action Alternative, Project operations conducted after the agricultural season would be oriented toward filling Upper Klamath Lake during the fall/winter in order to bolster the ecologic benefit of the volumes available for the Environmental Water Account, which includes habitat and disease mitigation flows. The Proposed Action Alternative provides an additional 40,000 acre-feet of water for the Environmental Water Account, which is 20,000 acre-feet more than a proposed but rejected

alternative in the 2018 Operations Plan and 10,000 acre-feet less than the amount plaintiffs requested in their motion for preliminary injunction.

Notably, 17,000 acre-feet of the additional water for the Environmental Water Account would come from Upper Klamath Lake, while the rest would be supplied by other Project facilities. As analyzed in the EA, Upper Klamath Lake levels are not anticipated to decline significantly due to the additional water releases. In particular, the Proposed Action Alternative would maintain Upper Klamath Lake levels deemed to be protective of ESA-listed suckers, because it includes spring and annual Upper Klamath Lake minimums deemed important to sucker spawning and survival. The remaining 23,000 acre-feet from the Project's other supplies would be largely consistent with what the Bureau proposed in its 2018 Operations Plan. Following the winter months, when Upper Klamath Lake increases would be stored for the benefit of species and habitat, the Project would be operated to provide the Project's irrigation supply during the following spring/summer operational period.

Conclusion and Implications

While parties on both sides of the litigation involving the 2018 Operations Plans and NMFS' 2019 Biological Opinion generally perceive the Interim Plan as an acceptable compromise during the Bureau of Reclamation and the Services' continuing consultation process, it is unclear what longer-term operations plan will be developed. Potentially, the three-year Interim Plan may influence longer-term project operations by providing a test case weighing additional Environmental Water Account supplies with irrigation supplies and needs. It also remains to be seen whether there will be any deviation from the Interim Plan operations and whether plaintiffs will challenge any such deviations for purposes of lifting the stay on litigation. Finally, whether increased flows from the Environmental Water Account will provide the hoped-for ecological benefits remains to be seen, and could play an important role in future negotiations. For more information, *see:*

U.S. Bureau of Reclamation, *Environmental Assessment—Klamath Project Operating Procedures 2020-2023*, available at: https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=42944
(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. Due to COVID-19, there were significantly fewer items to report on this month.

Civil Enforcement Actions and Settlements—Water Quality

•April 9, 2020 - EPA has finalized an administrative order on consent with Sheffield Ranch Corp. and Fred Wacker resolving alleged violations of the Clean Water Act related to unpermitted construction, bank stabilization and discharges to the Yellowstone River near Hathaway in Rosebud County, Montana. In June 2018, Montana Fish, Wildlife and Parks notified the U.S. Army Corps of Engineers (Corps) that a segment of the Yellowstone River's bank had been stabilized without a multi-agency permit required to do work in Montana's waterways. Upon receipt of an application from Sheffield Ranch, submitted after the bank stabilization work had been completed, the Corps inspected the site and observed that material for bank stabilization had been placed in and along approximately 200 linear feet of the Yellowstone River without authorization from the Corps. The Corps referred the matter to EPA for enforcement. Under the terms of the order, Sheffield Ranch and Mr. Wacker have agreed to submit and implement a restoration plan to remedy the impacts of the unauthorized activities and ensure the long-term stability of the riverbank. Sheffield Ranch and Mr. Wacker have also agreed to purchase 838.4 mitigation credits from the Lower Middle Yellowstone Mitigation Bank. Mitigation banking is a means to offset the ecological loss of a project constructed in waters of the U.S. by the restoration, creation, enhancement or preservation of wetlands, streams or other waters at a location other than the project site. In this case, the purchase of credits will contribute to the restoration and enhancement of a portion of approximately 63 acres of wetlands and over 45,000 linear feet of streams, securing additional actions to protect habitat along the river. The portions of the Yellowstone River disturbed by the unauthorized activities provide numerous functions and values including aquatic and wildlife habitat, runoff conveyance, groundwater recharge, recreation and aesthetics. The river also is habitat for pallid sturgeon, an endangered species. Placement of dredged or fill material into the Yellowstone River can have adverse impacts on fish and wildlife habitat and the plants and insects they rely on as food sources.

•April 16, 2020 – EPA announced that Roubin & Janeiro, Inc., owner of an asphalt manufacturing facility in Washington, D.C., has agreed to several actions to protect the Anacostia River from polluted stormwater runoff. In an Administrative Compliance Order on Consent, EPA cited the company for failing to take required measures to reduce pollution discharges including failing to minimize exposure of material storage areas to stormwater runoff, failing to properly store solid waste debris, failing to minimize potential for leaks and spills, and failing to prepare an adequate site map in the facility's Stormwater Pollution Prevention Plan. EPA's action was based on information from a joint inspection by EPA and the D.C. Department of Energy and the Environment (DOEE). Under the consent order, the company will implement measures to reduce polluted runoff including: construction of aggregate containment structures; construction of a vehicle pollutant containment structure; updating the site map and stormwater pollution prevention training protocol; updating site inspection schedules and processes; and updating its pollution prevention plan. These actions are designed to minimize the flow of asphalt manufacturing related stormwater pollutants to the Anacostia River. EPA coordinated with DOEE in determining the appropriate stormwater pollution prevention measures. In

agreeing to the consent order, the company neither admitted nor denied the factual allegations or liability for the alleged violations. Uncontrolled storm water runoff from industrial and construction sites often contains oil and grease, chemicals, nutrients and oxygen-demanding compounds and other pollutants. The Clean Water Act requires owners of certain industrial and construction operations to obtain a permit before discharging storm water runoff into waterways. These permits include pollution-reducing "best management practices," such as spill prevention safeguards, material storage and coverage requirements, runoff reduction measures, and employee training.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•April 2, 2020 - EPA has settled with Triangle Oil, Inc., for violations of EPA's Spill Prevention, Control, and Countermeasure (SPCC) requirements at its bulk fuel storage facility near John Day, Oregon. SPCC rules help protect our waters from discharges from facilities storing and handling petroleum fuels and other oils. The Triangle Oil facility, with storage capacity of just over 75,000 gallons, is located within 400 feet of Canyon Creek and one mile from the John Day River, a Columbia River tributary. By signing the Consent Agreement and Final Order (CAFO), Triangle Oil, Inc., agrees to pay a $27,000 penalty. SPCC rules help prevent oil discharges into navigable waters or adjoining shorelines. Preventing uncontrolled releases at bulk petroleum storage facilities reduces safety risks to workers, the community and the environment. The CAFO resolves alleged violations that were documented during the 2015 inspection, including:

•Uncontrolled and unmonitored site drainage.

•Lack of adequate secondary containment for piping, transfer areas, bulk storage and other containers.

•Inadequate tank integrity program.

•Limited availability of required facility records covering inspection and personnel training records and documentation of buried piping inspection. EPA's SPCC program and rules are central to the Agency's oil spill prevention operations.

•April 15, 2020 - EPA announced that Tangier Oil Company, Inc. has agreed to take actions to reduce the risks of spills of fuel oils into the Chesapeake Bay. These actions will address the company's alleged environmental violations at a fuel storage distribution facility that the company operates in the Tangier Harbor in Virginia. The Tangier Oil facility, which transfers oil to and from docked vessels, has an aboveground oil storage capacity of 150,360 gallons -- including six 20,000-gallon and three 10,000-gallon storage tanks for diesel fuel, gasoline, and kerosene. EPA's Administrative Order on Consent with the company addresses violations of the Clean Water Act's Spill Prevention, Control, and Countermeasure (SPCC) and the Facility Response Plan (FRP) requirements. The alleged violations included:

Failure to have secondary containment around bulk storage tanks that is adequate to contain oil leaks;

•Failure to comply with inspection requirements;

•Failure to develop and implement oil spill preparedness and response training; and,

•Failure to develop and fully implement a program of facility response drills and exercises.

In entering into this consent order, the Tangier Oil Company neither admitted or denied these violations but agreed to take actions on a specified timetable including: submitting a revised SPCC plan and FRP; remedying deficiencies in the facility's secondary containment; hiring an independent consultant to evaluate and remedy any deficiencies associated with the integrity of oil storage tanks/equipment; and implementing mandatory employee training, drills and exercises.

•April 16, 2020 – In a settlement with the EPA, Texas-based Raven Power LLC recently paid a $105,000 penalty for allegedly failing to timely report a 2017 release of a hazardous substance from the H.A. Wagner Generating Plant in Baltimore. EPA cited the company for violating two federal laws requiring immediate reporting of releases of hazardous substances – the Emergency Planning and Community Right-to-Know Act (EPCRA); and the Comprehensive Environmental Response, Compensation, and

Liability Act (CERCLA), also known as Superfund. EPCRA requires notification to the state and local emergency officials, and CERCLA requires notification to the National Response Center (NRC), the national point of contact for reporting oil and hazardous chemical spills. According to EPA, the company did not provide required immediate notices to federal, state and local emergency response officials immediately after facility personnel became aware at approximately 8 a.m., Sept. 11, 2017, of a release of approximately 1,126 pounds of sodium hypochlorite directly into the adjacent Patapsco River. EPA alleged that the company did not notify the NRC until 12:20 p.m., more than four hours after learning of the release, did not notify Maryland emergency officials until after 1 p.m., and failed to notify local officials at the Anne Arundel County Office of Emergency Management. EPA also cited the company for failing to provide required written follow-up notification to state and local officials.

Indictments, Convictions, and Sentencing

•March 21, 2020 - Unix Line PTE Ltd., a Singapore-based shipping company, was sentenced in federal court before U.S. District Court Judge Jon S. Tigar in Oakland, California, after previously pleading guilty to a violation of the Act to Prevent Pollution from Ships. Unix Line PTE Ltd. was sentenced to pay a fine of $1,650,000.00, placed on probation for a period of four years, and ordered to implement a comprehensive Environmental Compliance Plan as a special condition of probation. 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. On Oct. 24, 2019, Unix Line was indicted by a federal Grand Jury of obstruction of justice and a violation of the Act to Prevent Pollution from Ships. Under the plea agreement, Unix Line pled guilty to one count of a violation of the Act to Prevent Pollution from Ships. 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 when it was presented to the U.S. Coast Guard during the vessel's inspection.

•April 9, 2020 - Rong Sun, a/k/a Vicky Sun made her initial appearance on federal charges of illegally selling an unregistered pesticide, illegally importing the unregistered pesticide, and Rong Sun, a/k/a Vicky Sun made her initial appearance on federal charges of illegally selling an unregistered pesticide, illegally importing the unregistered pesticide, and mailing a prohibited article. Sun was charged with a criminal complaint filed by the U.S. Attorney's Office on April 8, 2020. According to U.S. Attorney Pak, the charges, and other information presented in court: The defendant allegedly sold an unregistered pesticide, Toamit Virus Shut Out, through eBay, claiming that it would help protect individuals from viruses. The pesticide was marketed as "Virus Shut Out" and "Stop The Virus." The eBay listing depicted the removal of viruses by wearing the "Virus Shut Out" and "Stop The Virus" product. Additionally, the listing stated that "its main ingredient is ClO2, which is a new generation of widely effective and powerful fungicide recognized internationally at present. Bacteria and viruses can be lifted up within one meter of the wearer's body, just like a portable air cleaner with its own protective cover." It also stated that "In extraordinary times, access to public places and confined spaces will be protected by one more layer and have one more layer of safety protection effect, thus reducing the risks and probability of infection and transmission. The listing further claimed that Toamit is "office and home essential during viral infections reduce transmission risk by 90 percent." The Federal Insecticide, Fungicide and Rodenticide Act, FIFRA, regulates the production, sale, distribution and use of pesticides in the United States. A pesticide is any substance intended for preventing, destroying, repelling, or mitigating any pest. The term "pest" includes viruses. Pesticides are required to be registered with the EPA. Toamit Virus Shut Out was not registered and it is illegal to distribute or sell unregistered pesticides. In

addition, Sun allegedly imported the pesticide from Japan, violating the anti-smuggling law and then sent it via U.S. Postal Service priority mail. (Andre Monette)

JUDICIAL DEVELOPMENTS

NINTH CIRCUIT MAKES CLEAR THAT THE ADMINISTRATIVE 'FINALITY' REQUIREMENT UNDER *WILLIAMSON COUNTY* FOR FEDERAL TAKINGS CLAIMS REMAINS INTACT

Pakdel v City and County of San Francisco, 952 F.3d 1157 (9th Cir. 2020).

In one of the first federal "takings" cases after last year's U.S. Supreme Court decision in *Knick v. Township of Scott*, Case No. 17-647, 588 U.S. ___ (2019), the U.S. Court of Appeals for the Ninth District, in a March 18, 2020 decision, made clear that the administrative "finality requirement" elaborated in the 1985 decision *Williamson County Regional Planning Commission v. Hamilton Back*, 473 U.S. 172 (1985), still remains in place. As part of this finality requirement, a prospective federal takings plaintiff must pursue the procedurally available avenues, within the timelines prescribed by local agencies, to seek relief from a challenged land use decision before bringing a federal action.

Factual and Procedural Background

Plaintiffs owned a tenancy-in-common interest in a multi-unit building in the City of San Francisco (City). Under a fairly common ownership arrangement in the city, several tenants-in-common share ownership over an entire building and then enter into agreements among themselves to give each owner an exclusive right to occupy a particular unit. Plaintiffs leased their tenant-in-common unit to a tenant but planned on occupying the unit upon their retirement.

Until recently, the City conducted a lottery to determine which tenant-in-common buildings could be converted into condominium units and the lottery faced a severe backlog. In 2013, to clear the backlog, the city temporarily suspended the lottery and replaced it with the Expedited Conversion Program (ECP) which allowed tenancy-in-common property to be converted into condominium property on the condition that its owner agreed to offer any existing tenants in affected units with lifetime leases within the converted property. The City also had procedures to request exemptions to the lifetime lease offer requirement.

Plaintiffs purchased their property in 2009. In 2015, plaintiffs, along with their co-owners, applied to convert the building into a condominium building under the ECP. While advancing through the application process, plaintiffs had several opportunities to seek a waiver from the lifetime lease requirement. They never did so and in January 2016, the San Francisco department of public works approved plaintiffs' "tentative conversion map." In November of 2016, plaintiffs signed an agreement with the city to offer a lifetime lease to their tenants and even offered their tenants such a lease. At the last minute, before signing executing the lifetime lease they offered to their tenant, tenants refused to sign the lease and instead sued the City in the U.S. District Court for the Northern District of California. Plaintiffs contend under various theories that the City's lifetime lease requirement violated the Takings Clause of the Fifth Amendment of the U.S. Constitution.

The *Knick v. Township of Scott* Decision

Plaintiffs case reached the U.S. District Court before the U.S. Supreme Court's decision in *Knick v. Township of Scott*. Before *Knick*, regulatory takings plaintiffs had to clear two hurdles in local and state venues before seeking relief in federal court. Such plaintiffs needed to: 1) obtain a final decision through whatever administrative procedures were available to challenge the alleged taking in the local jurisdiction (Finality Requirement), and 2) exhaust all state court remedies available to obtain compensation for regulatory takings (Exhaustion Requirement). The U.S. Supreme Court's decision in *Knick* eliminated the exhaustion requirement.

Because plaintiffs filed their lawsuit before the *Knick* decision, the U.S. District Court dismissed plaintiffs' suit for failure to exhaust all available state remedies to obtain compensation. Plaintiffs appealed to the Ninth Circuit.

The Ninth Circuit's Decision

The Ninth Circuit began by noting that constitutional challenges to local land use decisions are not considered by federal courts until the posture of such challenges are considered "ripe." Before *Knick*, a case needed to meet the two requirements above before it was "ripe" for federal review:

> First, under the finality requirement, a takings claim challenging the application of land-use regulations was not ripe until the government entity charged with implementing the regulations ha[d] reached a final decision regarding the application of the regulations to the property at issue… Second, under the state-litigation requirement, a claim was not ripe if the plaintiff did not seek compensation [for the alleged taking] through the procedures the State ha[d] provided for doing so.

The Ninth Circuit acknowledged that the U.S. Supreme Court's *Knick* decision removed the second requirement above, and as a result, plaintiffs' failure to seek just compensation in state court no longer barred them from brining their takings claim in federal court. The Court of Appeals then analyzed whether plaintiffs takings claims were ripe under the first pre-*Knick*, "finality" requirement.

Ripeness and the 'Finality' Requirement

First the court recognized that the *Knick* decision left the first or "finality" pre-*Knick* requirement intact. Plaintiffs did not argue this, but instead argued that they satisfied the "finality" requirement by refusing to sign the lifetime lease that it agreed with the City of San Francisco to sign, after failing to attempt to seek a waiver of the lifetime lease requirement through the procedures made available by the City. The court disagreed.

In doing so, the court analyzed the rationale behind the "finality" requirement that was articulated by the Supreme Court in the 1985 case *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*. As the court in *Williamson County* noted, the finality requirement exists in constitutional land use challenges because many of the factors essential to determining whether a taking has occurred (economic impact of the action, and extent to which it interferes with investment backed expectations):

> . . .simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land use question.

The finality requirement addresses the high degree of discretion that local land use boards have in granting variances from their general regulations with respect to individual properties. In light of this discretion, federal courts simply cannot "make a sound judgment about what use will be allowed by a local land use authority merely by asking whether a development proposal" facially conforms to the land use regulations at issue. As the court noted, a federal court cannot decide whether a regulation:

> . . .has gone too far until it knows how far the regulation goes which requires a final and authoritative determination of how the regulation will be applied to the property in question.

Applying 'Finality' under *Williamson County*

The court went on to articulate that the *Williamson County* "finality" rule requires a plaintiff:

> to meaningfully request and be denied a variance form the challenged regulation before bringing a regulatory takings claim…but the term variance is not definitive of talismatic; if other types or permits are available and could provide similar relief, they must be sought.

The court then analyzed the various avenues that the San Francisco department of public works made available to plaintiffs during the ECP application. Public works staff had discretion to authorize exceptions to the lifetime lease requirements. Plaintiffs could have sought an exception at the January 7, 2016 hearing on the ECP application's tentative map. The City also notified plaintiffs that before the City approved a final conversion map, plaintiffs could raise any objections to the conditions of the tentative conversion map approval, including the lifetime lease requirements. Plaintiffs also could have raised an objection to the lifetime lease requirement to the City board of supervisors and were notified of this in a

letter that followed initial approval of the conversion map. At each of these opportunities, plaintiffs failed to seek an exception to the lifetime lease requirement, until all available procedural methods had expired.

Plaintiffs nonetheless alleged that they met the finality requirement by refusing to execute the finality lease. The court disagreed. The "finality" requirement requires plaintiffs to timely avail themselves of the administrative avenues available to seek a variance or exception from a challenged land use regulation:

> Plaintiffs cannot make an end run around the finality requirement by sitting on their hands until every applicable deadline has expired before lodging a token exemption request that they know the relevant agency can no longer grant. . . .

The court also recognized that although there is no exhaustion requirement for actions brought under § 1983, in the land use takings context, a property owner's failure to seek a variance (or similar exception) through procedures made available by the local-land use authority, means that the authority had not reached a final decision.

Conclusion and Implications

The U.S. Supreme Court's recent decision in *Knick* was a boon for federal regulatory takings plaintiffs who want to avoid the need to pursue state court actions. However, the Ninth Circuit's decision in *Pakdel* makes clear that such plaintiffs still need to pursue the procedurally available avenues, within the timelines prescribed by local agencies, to seek relief from a challenged land use decision. *Williamson County's* finality requirement remains firmly intact, for now, within the Ninth Circuit. The court's decision is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2020/03/17/17-17504.pdf (Travis Brooks)

DISTRICT COURT HOLDS CAFO CITIZEN SUIT FAILS TO ESTABLISH 'IMMINENT AND ONGOING THREAT' UNDER RCRA AND THE CLEAN WATER ACT

Garrison v. New Fashion Pork, LLP, ___F.Supp.3d___,
Case No. 18-CV-3073-CJW-MAR (N.D. Iowa Mar. 27, 2020).

Recently the U.S. District Court for the Northern District of Iowa was faced with claims of water and soil contamination from runoff and manure spreading from a nearby confined animal feeding operation (CAFO). In the end, plaintiff was unable to establish any ongoing actions, thus failing in it's case under RCRA or the federal Clean Water Act.

Factual and Procedural Background

Defendants, New Fashion Pork, LLP, own and operate a confined animal feeding operation in Emmet County, Iowa on a piece of land known as the "Sanderson property." Plaintiff, Gordon Garrison, is an adjacent landowner. Plaintiff alleged that defendants' misapplication of hog manure to defendants' fields caused manure to runoff into water on the plaintiff's property constituting a violation of the federal Resource Conservation and Recovery Act (RCRA), the Clean Water Act (CWA), and Iowa statutes, regulations and common law.

The hog manure pit on the Sanderson property is customarily emptied by defendants every fall after the crop harvest is complete. To empty the pit, defendants fill a tanker truck with manure and then apply the manure directly into the soil and cover the manure with another layer of soil. Excess manure that is not applied to defendants' fields is sold as fertilizer to other farms.

Plaintiff alleged that, on two separate occasions, defendants improperly applied the manure to fields on the Sanderson property, causing the manure to run off the Sanderson property and into water on plaintiff's property. First in 2016, plaintiff observed defendants apply manure to the Sanderson property when the soil was saturated. Second, in the fall of 2018, defendants applied manure on top of frozen ground and snow. Because the ground at the Sanderson property was too frozen and snow-covered to inject the manure into the soil, the defendants got permission from the Iowa Department of Natural Resources (DNR)

to spray manure onto the frozen ground rather than inject it. However, in December 2018, the weather became unreasonably warm, which caused the manure to unfreeze and run off the Sanderson property.

Defendants moved for summary judgment on plaintiff's RCRA and CWA claims and requested the court to decline to exercise supplemental jurisdiction over plaintiff's remaining state law claims. The parties also filed separate motions to strike portions of and exclude certain expert testimony reports.

The District Court's Decision

Defendants' Motion for Summary Judgement of Plaintiff's Federal Claims

RCRA's citizen suit provision permits a private party to bring suit only upon a showing that the solid waste or hazardous waste at issue may present an imminent and substantial endangerment to health or the environment. The CWA similarly requires a Plaintiff to demonstrate an "imminent an ongoing threat." Thus, in order to prevail on its motion for summary judgement, Defendants were required to demonstrate that the hog manure spreading activity did not present an imminent and ongoing threat under the RCRA or CWA.

Defendant made two arguments in support of their motion. First, defendant argued that plaintiff could not show an ongoing violation because defendants did not apply the manure on the Sanderson property following the 2019 harvest, electing instead to dispose of the manure from the Sanderson property onto another property owned by the defendants. Second, defendants argued that plaintiff did not have sufficient evidence to meet the threshold "imminent and ongoing" requirement under the RCRA or CWA.

In response, plaintiff argued that defendants' decision to apply the manure to other fields and a statement from defendants' environmental manager that the lawsuit was "definitely a consideration" in defendant's decision to begin spreading manure elsewhere effectively served as an admission that defendants were creating an imminent and substantial endangerment. Second, that water test results show that defendants' repeated application of manure to the Sanderson field polluted plaintiff's property. Finally, plaintiff argued, that the manure was disposed of in violation of the RCRA's anti-dumping provision.

Defendants' Change in Manure Spreading Practice

In regards to defendants' first argument, the court reasoned that in order for the court to find that defendants' changed spreading practice showed there was no threat of future or imminent harm, there must be clear evidence demonstrating that the original spreading practice could not reasonably be expected to recur. Defendants had done nothing to show that they would not start applying manure to the Sanderson property after the lawsuit is resolved.

The court was also unpersuaded by plaintiff's argument that defendants' change in spreading practice demonstrated an imminent and ongoing threat, and constituted an admission of such a finding. First, the court held that the change in practice alone did not show an imminent and ongoing threat. Second, defendants' environmental manager's statement was not sufficient evidence.

Plaintiff's Physical Observations and Water Test Results

Turning to plaintiff's second argument, the court held that plaintiff's physical observations and water test results failed to establish a substantial endangerment to plaintiff's property. On the issue of physical observations, the plaintiff provided deposition testimony that Plaintiff once observed manure applied to saturated soil. The court determined that a single observation was insufficient to establish an imminent and ongoing threat. On the issue of water test results, the court determined that the results would need to show a pattern of periodic spikes of nitrate levels in the water correlating to defendants' emptying of the manure pit. Plaintiff's water samples, however did not indicate such a pattern. The court also found plaintiff's argument that it takes time for over applied manure to work its way through the soil, into the plaintiff's drainage system and into plaintiff's stream was unpersuasive. It held that plaintiff's second argument failed because the water tests did not establish a discernable pattern of violations, and further that, Plaintiff failed to provide sufficient evidence showing that the nitrate levels were caused by defendants' misapplication.

Open-Dumping and RCRA

Plaintiff also argued that Defendants' over ap-

plication of manure constituted "open dumping" in violation of RCRA. The court held that this argument also failed because the plaintiff failed to cite to any authority supporting its assertion that the open dumping prohibition was exempted from the threshold requirement under the citizen suit provision of the RCRA that the violation must be ongoing. Thus, the court determined the plaintiff waived this claim by failing to cite any supporting legal authority.

Remaining Claims

The court declined to exercise supplemental jurisdiction over plaintiff's remaining state law claims and dismissed them without prejudice. The court was also presented with the parties' motion to strike and exclude certain expert witness reports. The court determined the grant of defendants' summary judgement rendered this issue moot.

Conclusion and Implications

This case demonstrates that a single occurrence of a past violation is not sufficient to meet the "imminent and ongoing" threshold requirement under the RCRA or the CWA.
(Nathalie Camarena, Rebecca Andrews)

DISTRICT COURT GRANTS SUMMARY JUDGMENT ON PUBLIC NUISANCE CLAIMS RELATING TO PCB CONTAMINATION OF SAN DIEGO BAY

San Diego Unified Port District v. Monsanto Co.,
___F.Supp3d___, Case No. 3:15-CV-00578 (S.D. Cal. Mar. 26, 2020).

The U.S. District Court for the Southern District of California recently considered a series of motions for summary judgement challenging claims that a PCB manufacturer is liable under a public nuisance theory for costs to clean up PCB contamination the San Diego Bay (Bay). In *three separate decisions*, the U.S. District Court granted summary judgement against the City of San Diego, but upheld the San Diego Unified Port District claims for public nuisance and abatement remedies Trial is scheduled for fall 2020.

Factual and Procedural Background

Starting in the 1980s, the San Diego Regional Water Quality Control Board (RWQCB) issued several cleanup and abatement orders after finding elevated levels of Polychlorinated Biphenyls (PCBs) in sediments and fish living in the San Diego Bay (Bay). PCBs are a non-biodegradable, stable compounds originally manufactured to cool and insulate heavy-duty electrical equipment. Monsanto was the sole manufacturer of PCBs from the 1930s to 1979. PCBs are virtually indestructible, and once released into the environment, PCBs bind to soil and sediment, travel long distances, and remain pervasive in the environment for long periods of time. The RWQCB found PCBs bioaccumulated in Bay fish and may pose a serious risk to human health. Fish consumption advisories also warned women over 45 and children under the age of 18 should avoid consuming fish from the Bay due the risks of PCB contamination. Under the Port Act, the San Diego Unified Port District (Port District) has authority and powers to "protect, preserve, and enhance" the water quality and natural resources of the Bay. As a title holder and trustee to the Bay, the Port District incurred costs overseeing and funding sediment caps to remediate PCB-contaminated sites.

In one cleanup and abatement order for the Shipyard Sediment Site, the RWQCB named the City of San Diego (City) as one of the discharging parties responsible for remediation. The RWQCB found the City's municipal separate storm sewer system (MS4) discharged urban sediment and storm water contaminated with toxic substances, including PCBs, into the Bay. The City ultimately incurred approximately $17 million to investigate and cleanup PCBs in the Shipyard Sediment Site pursuant to a settlement of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and state law claims.

In 2015, the Port District and the City jointly initiated an action against Monsanto Company, Solutia Inc., and Pharmacia Corporation (collectively: Monsanto) alleging the PCBs in the Bay constituted a public nuisance. A nuisance, as applied here, is:

> . . .anything which is injurious to health…or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstruct the free passage or use, in the customary manner, of any navigable lake, or river, bay stream, canal, or basin. . . .

The City's amended complaint alleged a single cause of action that the continual presence of PCBs in the City's MS4 constituted a public nuisance and allowed the City to recover its remediation costs. The Port District also brought public nuisance, purpesture, and abatement claims against Monsanto for public nuisance related to PCB contamination in the Bay. The Port District alleged Monsanto knowingly promoted the use, sale, and improper disposal of PCBs, despite knowing PCBs posed an environmental and health risk.

On August 2, 2019, Monsanto filed motions for summary judgment against all claims brought by the Port District and the City. The Port District also filed a motion for summary judgment against Monsanto's affirmative defenses.

The District Court's Decision

As the moving party, Monsanto had the burden to show there was no genuine dispute of material fact and it was entitled to judgment as a matter of law. Monsanto could discharge its burden by showing an absence of evidence to support the Plaintiff's case. If so, the court then considered whether Plaintiffs' presented sufficient evidence to show a genuine issue for trial.

Public Nuisance and Evidenced of Physical Harm

The court first considered whether Monsanto was entitled to judgment on the City's claim for public nuisance by considering whether there was sufficient evidence showing the presence of PCBs injuriously affected the MS4. The court's order emphasized that to be a nuisance, the interference must be both substantial and unreasonable. Substantiality is the "real and appreciable invasion of the Plaintiff's interests" that is "definitely offensive, seriously annoying, or intolerable." Monsanto argued the City's claim for public nuisance failed because the City lacked evidence of the City's property, the MS4, incurring injury.

Though the court found evidence of PCBs in the MS4, evidence of physical harm to the MS4 was lacking. Nothing in the record indicated the MS4 was physical damaged or structurally altered due to the presence of PCBs. Further, the City did not claim PCBs caused physical damage to the MS4 or that retrofitting or repairs were necessary as a result. The court found the evidence did not show PCBs prevented the City from operating the MS4 as designed. The court then turned to the City for admissible evidence of substantial and unreasonable harm, but found no evidence that the presence of PCBs in the MS4 necessitated physical repairs, upgrades, or maintenance. As a result, the court concluded the City failed to establish the presence of PCBs caused "substantial and unreasonable" harm to the MS4.

Investigative and Remedial Costs as Damages

In addition, the court considered whether the City could claim its costs investigating and cleaning up the Bay as public nuisance damages. The City contended all investigation and cleanup costs were a direct result of PCB contamination in the MS4 owned by the City, but the court found the clean-up costs related to a list of pollutants from the MS4, not just PCBs. Without evidence to show costs incurred directly from PCBs, the Court concluded the City failed to establish a substantial connection between the investigation and cleanup costs incurred and the presence of PCBs in the Bay.

Port District Injury

Using the same standards applied to the City, the court reached a different conclusion about whether the PCBs caused "substantial and unreasonable" injury to the Port District. Under California law, pollution of water is a public nuisance, and the record was replete with specific facts from the RWQCB orders to support the conclusion that PCBs polluted the Bay. Monsanto argued the Port District could not claim injury for sediment caps they expressly approved. The court acknowledged that, while logically accurate, pollution of the Bay was the alleged nuisance, not the sediment caps.

The court was also persuaded by the Port District's evidence showing the PCB pollution interferes with the public health and the public's right to use the

Bay. Under California law, pollution in a body of water may be deemed a nuisance where it interferes with the public right to "wild game." Monsanto argued the PCB interference could not be substantial if fish populations in the Bay were thriving, but the court disagreed. Fish consumption advisories warning against PCBs directly supported the conclusion that PCBs caused substantial harm to human health and the use and enjoyment of the Bay. Thus, the court upheld the Port District's public nuisance claim and denied Monsanto's motion for summary judgment.

Purpesture Claim

The court then turned to the Port District's purpesture claim. Purpesture occurs where a party makes an unlawful physical encroachment, intrusion, or obstruction of a public land to "enclose or make several that which is common to many" on public land for personal gain. Monsanto moved for summary judgment because the PCBs did not prevent physical access to the Bay's resources. The court agreed. The court could not find any evidence that the PCBs provided Monsanto "exclusive use and dominion to the exclusion of the public" in the Bay. Thus, the court granted summary judgment to Monsanto as to the purpseture claim.

Equitable Cause of Action for an Abatement Fund

Finally, the court dismissed Monsanto's challenge that the Port District's equitable cause of action for an abatement fund was unripe. The court reasoned the injury—PCBs in the Bay—had already occurred, and trial could adjudicate whether abatement was a proper remedy without necessitating a final amount to be set.

Conclusion and Implications

This case represents one of many novel cases alleging a PCB manufacturer may be liable under a public nuisance theory for environmental cleanup costs decades after customers used its product. The U.S. District Court's analysis of the City of San Diego's public nuisance claim suggests monetary liability for site remediation under environmental hazardous waste statutes is alone insufficient to show a public nuisance has caused "substantial and unreasonable" harm. Instead, evidence of physical harm directly incurred to an MS4 from the public nuisance may be required.
(Rebecca Andrews)

NEW JERSEY APPELLATE COURT UPHOLDS BEST MANAGEMENT PRACTICES BASED STORMWATER DISCHARGE PERMIT UNDER THE CLEAN WATER ACT

Delaware Riverkeeper Network, et al. v. New Jersey Department of Environmental Protection, Case No. A-1821-17T3 (N.J. Super.Ct.App. Mar. 18, 2020).

The Superior Court of New Jersey, Appellate Division, recently upheld a municipal stormwater discharge permit that incorporated best management practices as effluent limitations.

Factual and Procedural Background

On November 9, 2017, the New Jersey Department of Environmental Protection (NJDEP) renewed a Tier A Municipal Separate Storm Sewer System (MS4) general permit [under the federal Clean Water Act], which became effective on January 1, 2018. The MS4 permit required best management practices as a form of effluent monitoring, but did not require permittees to directly monitor the mass and volume of pollutants in effluent. Shortly after the MS4 Permit became effective, environmental organizations (Appellants) filed suit. Appellants argued 1) the MS4 permit did not include effluent limits and monitoring as required by federal law; 2) the NJDEP's inclusion of best management practices (BMPs) rather than effluent limitations violated applicable law; 3) the permit requirements were not "clear, specific, and measurable," and did not provide for meaningful review; and 4) the NJDEP violated federal law by issuing a permit without public involvement.

The Appellate Court's Decision

New Jersey law limits the scope of review of an

administrative agency determination. Courts may not reverse the judgment of an administrative agency absent a finding that the decision was arbitrary, capricious, or unreasonable, or not supported by substantial credible evidence in the record as a whole. However, courts are not bound by an agency's determination of a statute or of a strictly legal issue.

Effluent Monitoring

Appellants first argued that the MS4 Permit was unlawful because it did not include effluent monitoring to measure the mass and volume pollutants or end-of-pipe numerical effluent monitoring, as required by federal regulations. The court rejected this argument, reasoning that the MS4 Permit required BMPs and specifies the monitoring necessary to ensure compliance with those BMPs. Citing to federal regulations, the court found that federal law did not require end-of-pipe numeric effluent monitoring. Instead, federal law provides that effluent monitoring can include, among other things,

> BMPs to control or abate the discharge of pollutants when . . . the practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the Clean Water Act.

The court upheld the MS4 Permit against this challenge because effluent limitations can take the form of BMPs.

Effluent Limits

Appellants next argued that the MS4 Permit was unlawful because it included BMPs in lieu of effluent limits. However, as the court explained, the overarching federal law for MS4s is broad and flexible and does not require numeric effluent limitations; BMPs are appropriate. The court further reasoned that NJDEP reviewed compliance evaluations, annual reports and certifications, supplemental questionnaires, input from outreach sessions, and municipal stormwater audits, and explained its reasons for choosing to implement BMPs rather than numeric effluent limitations. Accordingly, the inclusion of BMPs instead of effluent limits did not violate applicable law.

Monitoring to Assess Compliance

Appellants also argued that the MS4 Permit failed to specify monitoring requirements sufficient to assess compliance, in violation of applicable law. The court, however, pointed to several different monitoring requirements in the MS4 Permit. In determining whether the language was sufficiently "clear, specific, measureable and enforceable," as applicable law requires, the court explained that the EPA defines "clear, specific, measureable and enforceable" broadly, intentionally "giving Tier A municipalities some flexibility." Ultimately, the court concluded that the MS4 Permit contained sufficient monitoring requirements, and that the requirements were clear, specific, measureable and enforceable.

Public Involvement

Finally, Appellants claimed that the MS4 Permit was unlawful because it was issued without the public's involvement, as the law requires. The court reasoned that public involvement can take many forms, and includes, among other things, serving as a citizen representative or volunteer, or attending public hearings. With respect to the MS4 Permit, the court noted that it both provided for and encouraged public participation, and was lawfully approved.

Conclusion and Implications

This case affirms that best management practices can constitute effluent limitations under federal law when the best management practices are clear, specific, measurable, and enforceable. This case also provides an example of the deference afforded to administrative agencies in making decisions. The court's opinion is available online at: https://njcourts.gov/attorneys/assets/opinions/appellate/published/a1821-17a1889-17.pdf?c=34K

(Alexander Gura, Rebecca Andrews)

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