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WESTERN WATER LAW & POLICY REPORTER™

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WESTERN WATER NEWS

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)

WASHINGTON'S 'STAY HOME STAY HEALTHY' STATUS AND ITS EFFECT ON WATER LAW AND POLICY IN THE STATE

The following tracks the impacts of recent Proclamations by Washington State's Governor and the impact they have had on water law in the state.

Background

In response to the worldwide spread of the COVID 19 virus, Washington's Governor Inslee proclaimed a State of Emergency in all counties in Washington on February 29, 2020 (Proclamation 20-05) eventually followed on March 23, 2020 by a further proclamation imposing a "Stay Home-Stay-Healthy Order," prohibiting gatherings and all non-essential businesses in Washington from conducting business except under remote work which does not involve engaging in in-person contact with clients (Proclamation 20-25).

As of the date of this writing, Governor Inslee has issued 46 Proclamations or amendments related to the COVID 19 experience, with a possible 47 on its way as this is being written.

As each state and region grapples with this situation, we are all seeing a dampening effect on productivity. But not all as ground to a standstill. Here's a list of what is still happening while we adjust to life during a global pandemic:

Court Dockets and Schedules

Washington Supreme Court facilities are closed to the public until at least May 5th. All civil jury trials have been suspended until after May 4th, all non-emergency civil maters are continued unless proceedings can be appropriately conducted by virtual means without in-person attendance. Anything of an emergency nature must be by telephone or video. The Supreme Court has reset its oral argument calendar for video only arguments to address necessary social distances. The first emergency oral argument in this video format occurred on April 23rd--an emergency hearing related to COVID 19 release of incarcerated parties. The rescheduled docket calendar will start up again May 5th and does have one water related case scheduled, *Center for Environmental Law & Policy v. Ecology* (previously discussed in February 2020 edition).

The three Divisions of the Court of Appeals are likewise on a limited schedule, with only a handful of cases being heard with oral arguments through June, the rest all scheduled without oral argument. No water cases appear on the dockets through June. Each of the trial courts have set similar limited calendars with rare in person hearings.

Department of E3cology

Washington's Water Resource Agency, the Department of Ecology (Ecology), is likewise closed to public visitors until the Stay Home Order is lifted. Public records requests are still being accepted but all staff is working remotely, making only electronic records available. Ecology already has a robust system for accepting public comments electronically.

Despite the Stay Home Order, Ecology has gone ahead with its "Water Trust, Banking, and Transfers Advisory Group" process. Ecology had scheduled a series of workshops following the Legislature's adjournment, to solicit input and develop agency recommendations around revisions to the state's water code

related to protecting water instream, and associated use of instream water for mitigation of new or future uses. There were many varied options presented during the 2020 Session. With in-person meetings now off the schedule, Ecology has pivoted to an online webinar format to maintain the previously set pace for coming back to the 2021 Legislature. The Advisory Group expects to meet six times between April and July. The format is designed to help inform Ecology on Ecology's recommendations for further legislation and to serve as a collective issue education for participants. Expect to hear more about this process in future editions.

Meetings of various Watershed Restoration and Enhancement Committees have also pivoted to this online format. Groups meeting under the Streamflow Restoration Act (Ch. 90.94 RCW) which are under statutory deadlines to complete watershed plans are now meeting online as well.

Conclusion and Implications

Shelter at home orders have an immediate impact on that state's residents and businesses. The impacts to the state's judicial system and regulatory bodies are, at first blush, less obvious—but nevertheless impact the working elements of water law and policy. (Jamie Morin)

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)

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)

CALIFORNIA DEPARTMENT OF WATER RESOURCES AWARDS $47 MILLION IN GRANTS FOR GROUNDWATER SUSTAINABILITY PROJECTS

The California Department of Water Resources (DWR) recently awarded $47 million in grant funding to more than fifty local agencies for sustainable groundwater planning projects. This funding will assist local agencies in their ongoing efforts to implement the Sustainable Groundwater Management Act (SGMA). Funding will be used for actions such as facilitating community outreach efforts, preparing feasibility studies for proposed Groundwater Sustainability Plan (GSP) projects and management actions to and installing monitoring wells to oversee and manage groundwater levels.

Background

SGMA provides a framework for long-term sustainable groundwater management across California. It requires local Groundwater Sustainability Agencies (GSA) to prepare and implement GSPs to sustainably manage their local groundwater basins within approximately twenty years, and beyond. GSPs must identify basin characteristics and supplies and must identify and implement projects and management actions to achieve their local sustainability goals.

DWR offers a number of grant and loan programs that support integrated water management activities. The Sustainable Groundwater Management Planning Grant Program (SGM Program) provides financial assistance for sustainable groundwater planning and projects. Acceptable projects may include the development and implementation of GSPs and more specifically, projects that provide investments to establish or improve groundwater recharge from surface water, storm water capture and diversions to basin recharge, recycled water projects, projects designed to prevent or mitigate groundwater contamination.

SGM Grant Program's Planning Grant—Round 3

DWR administered the SGM Grant Program's Planning Grant—Round 3 using funds authorized by Proposition 68 and Proposition 1. Of the total amount awarded, $46.25 million was funded by Proposition 68, while an additional $1.2 million came from Proposition 1 funds. An additional $1.6 million in Proposition 1 funds is being recommended conditioned upon future appropriation of grant funds available le in Fiscal Year 2021/2022. The grants were awarded to more than fifty local agencies to support projects for managing groundwater basins for long-term sustainability.

Projects supported by this round of funding include, for example:

- Installation of groundwater monitoring wells;

- Aerial electromagnetic surveys to map aquifer conditions to better assess groundwater quality and storage conditions and to identify opportunities for recharge;

- Preparation of basin and sub-basin GSPs, and implementation of those GSPs;
implementation of advanced metering infrastructure networks; and

- Evaluation of groundwater dependent ecosystems and surface water depletion.

The final list containing all award recipients and project proposals is posted on DWR's website (https://water.ca.gov/-/media/DWR-Website/Web-Pages/Work-With-Us/Grants-And-Loans/Sustainable-Groundwater/Files/Prop68_Planning-Final-Award-List_ay_20.pdf).

DWR will begin working with recipients immediately to develop and execute grant agreements.

Tentative Schedule for Additional Funding Opportunities

DWR anticipates launching a further competitive grant solicitation process to provide at least $88 million in additional grant funding in 2022 for GSP implementation and projects that address drought and investments in groundwater supplies. Additional details will be available at a later time, but the tentative schedule is as follows:

- Early 2021—Release Draft Proposal Solicitation Package;

•Mid- to Late 2021—Release Final Implementation Grant PSP and Open Grant Solicitation;

•Late 2021—Implementation Grant Solicitation Closes;

•Early 2022—Implementation Grant Award List, Award Letters Released.

Conclusion and Implications

One of the most challenging and often controversial aspects of GSPs is how the selected projects and management actions will be funded. Many of these projects and management actions range in the tens—or even hundreds—of millions of dollars. In many basins, local funding for projects of such scale is likely not feasible. At the same time, groundwater is a critical natural resource that requires careful management and long-term investment as part of California's water resilience portfolio, including at the local level. As noted in recent comments by DWR Director Karla Nemeth, "sustainable management of our groundwater basins is a critical aspect of making our communities more resilient." The availability of grant funds for GSAs and implementation of their GSPs is not just important, but vital to successfully achieving those objectives and to the overall success of SGMA implementation.
(Paula Hernandez, Derek R. Hoffman)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD TO CONSIDER REGULATORY COMPLIANCE EXTENSIONS DUE TO COVID-19

Social distancing restrictions implemented by the State of California and local government to slow the spread of the novel coronavirus COVID-19 have dramatically impacted all aspects of public and private life, most prominently through a shelter-in-place order requiring the general suspension of public activities not deemed "essential." In an effort to address the impact of such restrictions with respect to timely compliance with orders and regulations promulgated by the State Water Resources Control Board (SWRCB) and the nine California Regional Water Control Boards (RWQCBs) (collectively: the Water Boards) issued an initial statement in March 2020 to clarify their position for responsible entities. The statement, as subsequently revised, indicates that the Water Boards consider timely compliance to be an essential function of the responsible entity or community, exempt from state and local restrictions on activity, but also provides for a review process by which an entity may claim that compliance is inconsistent with an applicable restriction relating to COVID-19, suggesting that the Water Boards may grant extensions on a case-by-case basis.

The COVID-19 Pandemic

The proliferation of COVID-19 throughout the United States has prompted drastic measures from all levels of government aimed at reducing the spread of the virus and an overburdening of the health care system. In California, Executive Order N-33-20 (Executive Order) issued by Governor Newsom on March 19, 2020 imposed a mandate requiring all residents to shelter in place, and requiring business activities that cannot be performed remotely to be suspended, generally excepting only essential operations within one of the federal "critical infrastructure sectors" identified by the Cybersecurity and Infrastructure Security Agency (CISA) or additional sectors that may be designated by the Governor. While CISA has provided some guidance regarding these sectors and the essential workers needed to serve them, the guidance does not begin to address the myriad legal and practical issues facing individuals, businesses and public entities as a result of the restrictions. Consequently, many if not most individuals and organizations, including the Water Boards, must grapple with questions unique to their specific circumstances as they attempt to operate as normally as possible while complying with the Executive Order and other local restrictions relating to COVID-19.

Compliance with Water Board Regulations

While water and wastewater and certain governmental operations are identified by the CISA guidance as work that should continue during the pandemic response, the extent to which activities

necessary for compliance with orders and regulations promulgated by agencies like the Water Boards remains unclear. Absent specific guidance, the Water Boards cannot be certain whether orders and regulations may be enforced in light of restrictions imposed by the Executive Order and local authorities. The SWRCB posted an update on its website following the issuance of the Executive Order to clarify their own position on the matter, which explicitly states that:

> . . .timely compliance by the regulated community with all Water Board orders and requirements. . .is generally considered to be an essential function during the COVID-19 response.

The SWRCB's statement further explains that such orders and requirements include "regulations, permits, contractual obligations, primacy delegations, and funding conditions." According to the statement, the Water Boards regard the activities or governmental functions necessary for ensuring compliance with Water Board orders and regulations to be essential by extension.

SWRCB to Consider Extensions Due to COVID-19

Despite taking the position that compliance with Water Board requirements and related activities are exempt from the scope of COVID-19 restrictions, the statement issued by the SWRCB describes a process implying that extensions may be granted with respect to compliance deadlines upon review by the applicable Water Board. Specifically, the statement provides that a party subject to a Water Board requirement with which it cannot timely comply due to an inconsistency with COVID-19 restrictions must immediately notify the applicable Water Board by email, and the Water Board would endeavor to respond to the notice within 48 hours. While not expressly referencing extensions, the process specified by the Water Boards involves a review of and response to each particular notice regarding noncompliance due to COVID-19, suggesting that individual circumstances will be evaluated such that an extension may be granted as the applicable Water Board may deem appropriate.

The SWRCB's statement also outlines certain substantive requirements for notices submitted thereunder. Such notices must include: 1) the specific requirement that cannot be met by the responsible entity, 2) the COVID-19 guideline or directive that is inconsistent with timely compliance, 3) an explanation of why the responsible entity cannot comply and 4) any action that the entity intends to take in lieu of compliance. The statement provides that these notice requirements are subject to change, and more specific directions or procedures applicable to particular types of Water Board orders and requirements may be forthcoming. Material revisions to the Water Boards' statement have already been incorporated with respect to the substantive notice requirements, which initially applied only to notices relating to compliance with certain annual report filing requirements, but have since been extended to apply to notices relating to compliance with any Water Board requirement.

Conclusion and Implications

The State Water Resources Control Board and the Regional Water Quality Control Boards have attempted to provide clarity to responsible entities with its COVID-19 update, but creates some questions needing clarification. In particular, the Water Boards' statement is not explicit as to whether extensions would in fact be granted and what the length of such extensions may be. As such, the Water Boards have taken a position on extensions that is somewhat at odds with other prominent public agencies in the state that provided for automatic extensions on deadlines with respect to their own regulations and requirements in the wake of the Executive Order. Moreover, the SWRCB's statement does not address potential consequences that may be imposed for lack of timely compliance with a given requirement if a notice is submitted pursuant to the statement and the responsible party is not granted an extension. Ultimately, the statement clearly seeks to strike the balance of dealing with these unprecedented times while also obtaining important information from water right holders. Interested parties should monitor the Water Boards webpage for changes to the statement as the COVID-19 situation continues to unfold. (Wesley A. Miliband, Andrew D. Foley)

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 less 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 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 emergency officials until after 1 p.m., and failed to notify local officials at the Anne 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 LAND USE TAKINGS CLAIMS REMAINS INTACT

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

Editor's note: As takings claims are relevant to both land use and water law users, this decision will be important to practitioners to be familiar with.

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___,

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)

CALIFORNIA COURT OF APPEAL UPHOLDS COASTAL COMMISSION'S CERTIFICATION OF A LOCAL COASTAL PROGRAM FOR THE SANTA MONICA MOUNTAINS

Mountainlands Conservancy, LLC v. California Coastal Commission, _ __Cal.App.5th___, Case No. B287079 (2nd Dist. Apr. 1, 2020).

A group of landowners brought suit challenging the California Coastal Commission's certification of a local coastal program for the Santa Monica Mountains, which, among other things, prohibited new vineyards in the Santa Monica Mountains coastal zone. The Superior Court denied the petition, and the landowners appealed. The Court of Appeal for the Second Judicial District affirmed, finding that the Coastal Commission had followed proper procedures and that its actions with respect to vineyards were supported by substantial evidence in the record.

Factual and Procedural Background

In early 2014, Los Angeles County (County) initiated a process to amend the land use plan for the Santa Monica Mountains coastal zone and to adopt an implementation plan for the area. Compared to the previous plan (which was certified by the Coastal Commission in 1986), the County explained that agricultural uses would be restricted: while vineyards and crop areas already in existence would be allowed to continue, further establishment of such uses would be prohibited. Another significant difference

involved critical habitat—the updated land use plan would designate considerably more habitat as critical.

Following action by the County board of supervisors, the program was submitted to the Coastal Commission. In advance of a public hearing, the Coastal Commission released a staff report recommending denial of the land use plan amendment as submitted, but approval subject to certain modifications. These included, among other things, clarifications to the provisions regarding agricultural uses, adding that existing uses may not be expanded. They also included a new policy stating that existing crop-based agricultural uses on lands suitable for agricultural use shall not be converted to non-agricultural use unless certain requirements are met. The staff report also addressed Coastal Act, §§ 30241 and 30242, which pertain to agricultural uses, and found that they generally did not apply and that, overall, areas suitable for agricultural uses within the plan area were limited.

In response, the plaintiffs (three limited liability companies that own land within the Santa Monica Mountains coastal zone) submitted comments challenging staff's findings in connection with §§ 30241 and 30242, in particular the conclusion that the vast majority of land in the Santa Monica Mountains was unsuitable for agricultural use. The Coastal Commission then issued an addendum to its staff report, recommending a modification to allow new agricultural uses meeting certain criteria: 1) the uses are limited to specific areas on natural slopes of 3:1 or less steep, or areas currently in agricultural use; 2) new vineyards are prohibited; and 3) organic or biodynamic farming practices are followed. Staff also removed the prohibition on expanding agricultural uses and recommended that existing uses may be expanded with the same three criteria. The staff report justified the prohibition on new vineyards due to a number of identified adverse impacts, including increased erosion, use of pesticides, large amounts of water use, their invasive nature, and adverse impacts on scenic views.

Plaintiffs responded, stating that: they had not been given them enough time to respond; even as revised, the proposed plan raised substantial issues with the Coastal Act; and the plan would still exclude new agricultural uses from the vast majority of the plan area, particularly because new agriculture would be allowed only within certain habitat areas, which were limited in designation. They also challenged the justification to prohibit new vineyards, in connection with which they submitted a UCLA study.

At its public hearing, the Coastal Commission adopted the land use plan with the modifications suggested by staff. A few months later, it also approved the County's proposed local implementation plan, with modifications. It then issued a resolution adopting the local coastal program, consisting of the land use plan and the implementation plan. Final certification by the Commission took place in October 2014, after which it became final.

At the Superior Court

Plaintiffs then filed a petition for writ of mandate seeking to set aside the Coastal Commission's actions. The Superior Court denied the petition, issuing two rulings. In its first ruling, the court: rejected them claim that the addendum to the staff report was required to be distributed at least seven days before the public hearing; found the Coastal Commission was not required to hold a separate hearing on matters deemed by plaintiffs to raise "substantial issues"; and determined that the Commission's findings in connection with Coastal Act §§ 30241 and 30242 were supported by substantial evidence.

In a second ruling, the court addressed the question of whether the ban on vineyards was supported by substantial evidence. The court found that there was substantial evidence that vineyards are harmful to the Santa Monica Mountains ecology because they require clearing and scarification, increase erosion and sedimentation, require pesticide use, and constitute an invasive monoculture. Further, the court found, of these harms, many are inherent to the nature of viticulture, and there is no evidence that they could be mitigated. The court then entered judgment and plaintiffs appealed.

The Court of Appeal's Decision

Plaintiffs raised numerous issues on appeal, which the Court of Appeal addressed in turn, as follows.

Holding of a Separate Hearing

The Court of Appeal first addressed the claim that the Coastal Commission was required to hold a separate hearing pursuant to Coastal Act § 30512, which generally requires the Coastal Commission to determine, after a public hearing, whether the land

use plan of a proposed local coastal program "raises no substantial issue as to conformity with" Coastal Act policies. If the plan does raise a substantial issue, the Commission must identify the issues and hold at least one public hearing on the matters identified. The Coastal Commission, on the other hand, contended that it properly proceeded under § 30514, which pertains to amendments to certified local coastal programs and does not have the same requirement. The Court of Appeal agreed with the Coastal Commission, finding that the commission properly proceeded under § 30514 and therefore was not required to make the "substantial issue" determination otherwise required by § 30512.

Coastal Act Sections 30241 and 30242

The Court of Appeal next addressed the claim that the Coastal Commission failed to proceed in the manner required by law because it supposedly made a blanket determination that the Santa Monica Mountains are not suitable for agriculture. In particular, plaintiffs argued that Coastal Act §§ 30241 and 30242 contemplate a determination of the feasibility of agriculture in relation to a specific parcel of property, on a case-by-case basis.

In rejecting these claims, the Court of Appeal first found that plaintiffs did not cite any authority for their "case-by-case" claim. Instead, it agreed with the Coastal Commission that the point of a local coastal program is to allow local governments to do area-wide planning in conformity with the policies of the Coastal Act. Specifically in regards to §§ 30241 and 30242, the Court of Appeal found that these sections likewise do not "contemplate" a case-by-case or parcel-by-parcel determination of the feasibility of agriculture, and that the Commission's finding that the majority of land in the Santa Monica Mountains was unsuitable for agricultural use was supported by substantial evidence.

Fair Trial Issues

The Court of Appeal next addressed plaintiffs' claim that the public hearing was unfair and denied them due process because the Coastal Commission gave them less than 24-hours' notice of a "new" land use plan (in an addendum to a staff report) that would completely ban vineyards. The Court of Appeal first found that the addendum, which was issued the day before the public hearing, complied with the pertinent regulations, as did the earlier staff report. The Court further observed that nothing about the proposed modifications included in the addendum (which themselves were made in response to public comment) altered the land use plan's original objective, that is, to restrict agricultural uses. The modification merely eased the categorical restriction on new agriculture. While plaintiffs claimed they had no time to refute the prohibition of new vineyards, that item never changed from the original staff report. Moreover, the Court observed, plaintiffs in fact responded to the supposedly "new" ban, both in writing and at the hearing.

Substantial Evidence Issues

Finally, the Court of Appeal addressed plaintiffs' claim that the decision to specifically prohibit new vineyards was not supported by substantial evidence. The court disagreed, finding that there was evidence that vineyards cause particular environmental harm, including testimony from the Coastal Commission's staff ecologist. By contrast, the court found, evidence cited by plaintiffs only spoke to the suitability of lands for vineyards and did nothing to counter the evidence of environmental harm caused by vineyards. In fact, the Court of Appeal found, there was nothing in the record that countered the evidence that vineyards are harmful to the ecosystem and coastal resources.

Conclusion and Implications

The case is significant because it involves a substantive discussion of local coastal programs and related Chapter 3 policies under the Coastal Act. The decision is available online at: https://www.courts.ca.gov/opinions/documents/B287079.PDF
(James Purvis)

NEW MEXICO COURT OF APPEALS AFFIRMS DENIAL OF PETITION FOR WRIT TO COMPEL THE STATE ENGINEER TO COMPLY WITH DUTY FOR ACCOUNTING OF MIDDLE RIO GRANDE CONSERVANCY'S DISTRICT'S WATER USE

WildEarth Guardians v. Blaine, Case No. A-1-CA-37737 (N.M. App. Apr. 15, 2020).

On April 15, 2020, the New Mexico Court of Appeals affirmed the District Court of Santa Fe's denial of environmental group WildEarth Guardians' Petition for Writ of *Mandamus*. Petitioner WildEarth Guardians sought to compel New Mexico's State Engineer to comply with his alleged non-discretionary duty to provide an accounting of Middle Rio Grande Valley water uses. The Court of Appeals concluded that a *mandamus* action is not appropriate under the facts. The Court of Appeals previously issued a notice of proposed summary disposition affirming the District Court's order. Petitioner filed a memorandum in opposition.

Background

On March 21, 2016, WildEarth Guardians filed a lawsuit, pled as an Alternative Writ of *Mandamus*, in state District Court in Santa Fe, NM contending that the Middle Rio Grande Conservancy District (MRGCD) has failed to prove that it is putting water to beneficial use in accordance with its permits. A First Amended Verified Petition For Writ of *Mandamus* was filed on March 29, 2016. *See*, Verified Petition for Alternative Writ of *Mandamus*, *WildEarth Guardians v. Blaine*, Case No. D-101-CV-2016-00734 (N.M. First Jud. Dist. March 21, 2016). The lawsuit followed on the heels of federal water managers' warnings that the long-term available Rio Grande water supply is increasingly uncertain due to climate change and competition among users. Other factors affecting diminished flows include diminishing snowpack, less precipitation and warmer temperatures. Experts predict that climate change, coupled with population growth, will result in a regional water shortage of 675,000 acre-feet per year or more than 600 gallons per day.

The MRGCD extends for 160 river miles with approximately 1,200 miles of ditches. Many of these ditches follow the same gradient as the ancient Indian Pueblo ditches that existed before the Spanish conquest. The system has been upgraded and is steadily moving toward increased efficiency. Water use in the valley consists primarily of diversionary irrigation use, and has existed as such since the first diversions by ancient Pueblo farmers, and continues with their descendants to this day. Because of the importance of the Rio Grande to this historic irrigation mission, the erratic flow of the Rio Grande has been fully appropriated since prior to the turn of the last century.

For this reason, it is understandable that an environmental group like WildEarth Guardians, whose mission, in part, is helping endangered species in the Middle Rio Grande Valley, would seek to acquire water rights for those species. However, the difficulty in doing so is compounded by the fact that the Rio Grande, like all western rivers, is erratic in its flow depending entirely on snowpack for the success of each irrigation season. The irrigators and the species have adapted to the Rio Grande's flow variability. There is no fixed amount of water in beneficial use every year, and, as a result, there is no "surplus" water that can be made available every year for species as was demanded by WildEarth Guardians in this litigation.

Climate Change and Water Supply

Like most western states, New Mexico lacks abundant water resources, and climate change models forecast that, if current trends continue, New Mexico will have less water than ever before. Most of New Mexico's water is derived from mountain snowpack melt and runoff. Climate change is forecast to decrease the amount of the snowpacks, leading to less water from runoff. Higher temperatures will also mean that snow melts earlier, impacting the start and end of the agricultural and irrigation seasons for many crops. Additionally, earlier melt of the snowpacks will decrease available water due to accelerated evaporation. If there is less runoff, water systems with little or no storage capacity will almost certainly experience shortages in the summer months. Experts remain uncertain whether overall precipitation will increase or decrease; the answer to this question depends on the climate change model used. But, it is gener-

ally expected that New Mexico, like many regions throughout the United States, will see more episodes of extreme heat, drought, more intense storms, and increased flash flooding.

The Court of Appeals' Decision

The Petition

WildEarth Guardians' lawsuit requested the court to compel the New Mexico State Engineer to either set a deadline for the MRGCD to prove its actual water use or cancel the MRGCD's water permits. The Permits, Nos. 1690 and 0620, were issued in 1930 and 1931, respectively. WildEarth Guardians contends that the MRGCD's failure to file a Proof of Beneficial Use form renders the Permits void. The suit states that the U.S. Bureau of Reclamation and the MRGCD are the real parties in interest, but does not join either party. WildEarth Guardians argues that:

> . . .[n]either the statutes nor regulations governing water appropriation provide the State Engineer with the discretion to allow a permit holder to divert water in perpetuity without providing proof of beneficial use. First Amended Verified Petition for Alternative Writ of *Mandamus*, *WildEarth Guardians v. Blaine*, Case No. D-101-CV-2016-00734 (N.M. First Jud. Dist. April 1, 2016) (First Amended Petition) at 21.

The Answer

In its Answer to the Alternative Writ of *Mandamus*, the State Engineer argued *mandamus* is not available pursuant to NMSA 1978, § 44-2-4 because the actions ordered by WildEarth Guardian's Writ are discretionary and non-ministerial. State Engineer's Answer to Alternative Writ of *Mandamus*, *WildEarth Guardians v. Blaine*, Case No. D-101-CV-2016-00734 (N.M. First Jud. Dist. May 9, 2016) at 7.

July 2019 Notice of Proposed Disposition

On July 12, 2019, the Court of Appeals issued a Notice of Proposed Disposition of Summary Affirmance of the lower court's dismissal of the WildEarth Guardians' Petition. *See*, Notice Proposed Summary Disposition, *WildEarth Guardians v. Blaine*, Case No. A-1-CA-37737 (July 12, 2019) (Proposed Disposition). In its Opposition to the Notice, the WildEarth Guardians contended its Petition met the requirements for a Writ of *Mandamus* and that the Court of Appeals applied an incorrect standard of review. Petitioner argued the standard of review should be *de novo* rather than whether the District Court abused its discretion. In its Proposed Disposition, the Court of Appeals relied on *Brantley Farms v. Carlsbad Irrigation Dist.*, 1998-NMCA-23, 124 N.M. 698, for its conclusion that "[T]he exercise of discretionary power or the performance of a discretionary duty cannot be controlled by mandamus." *See*, Proposed Disposition at 6.

WildEarth Guardians alleged that the MRGCD should be forced by the State Engineer to file a proof of its beneficial use. The MRGCD indicated initially that it was not obligated to do so because the Conservancy Act provided a different mechanism for achieving that same result. However, the District Court concluded that the WEG could not encroach upon discretion of the New Mexico State Engineer and his choice as to whether the MRGCD should file such proof of beneficial use and dismissed WildEarth Guardians' Petition for a Writ of *Mandamus*.

Dismissal of the Appeal

The Court of Appeals agreed in dismissing the appeal. *See*, Mem. Op. ¶ 5:

> Petitioner offers a plausible interpretation of the specific regulatory provision at issue; however, that is not the only possible interpretation. As described in the notice of proposed summary disposition, the relevant statutory and regulatory provisions are susceptible to one or more alternative interpretations which would permit the Office of the State Engineer to elect among a variety of options, apparently at his discretion.

Two Applications for Water

WildEarth Guardians also filed two applications with the Office of the State Engineer to appropriate any water the MRGCD is not putting to beneficial use. Such water would be committed to a storage pool in Abiquiu Reservoir for environmental purposes. WildEarth Guardians entered into an agreement with the Albuquerque Bernalillo County Water Utility Authority in 2013 allowing WildEarth Guardians

to store up to 30,000 acre-feet of water in Abiquiu Reservoir for environmental purposes. The lawsuit also contends that:

> . . .[t]he State Engineer's failure to perform his nondiscretionary duties under state law harms Guardians and its members because they have not been able to take advantage of the opportunity for environmental storage to protect their interests in the Rio Grande given that 'there is no unappropriated surface water. 19.26.2.12(F)(1)(e) NMAC; *see also*, *Carangelo v. Albuquerque-Bernalillo Cty.* Water Util. Auth., 2014-NMCA-032, ¶ 49, 320 P.3d 492, 507 (noting "[i]t cannot be ignored that the Rio Grande Basin is fully appropriated and has been for some time."); First Amended Petition at ¶8.

Conclusion and Implications

WildEarth Guardian's attempt to compel the MRGCD to file the proof of beneficial use was well intended, but inconsistent with the reality of the erratic flow in western rivers. There is no base flow on top of which rides surplus water for species. These rivers, reliant exclusively on snowpack, run dry almost every year when the snowpack is insufficient. But, the principle of coordinated management of irrigation use by Pueblos and non-Indian irrigators, release of water from storage reservoirs to protect species and increased efficiency are all goals that are being pursued in the Middle Rio Grande Valley, and ideally, will lead to the results sought by WildEarth Guardians. (Christina J. Bruff)

OREGON SUPREME COURT AFFIRMS REMAND OF WETLANDS FILL PERMIT TO OREGON DEPARTMENT OF STATE LANDS BASED ON STATUTORY MANDATE REGARDING PUBLIC NEED FOR THE WATER

Citizens for Responsible Development in The Dalles v. Wal-Mart Stores, Inc., 366 Or. 272, 274, (Or. 2020).

In *Citizens for Responsible Development in The Dalles v. Wal-Mart Stores, Inc.*, the issue of whether a wetlands fill permit issued by a state agency required remand back to the agency for further consideration. The Court of Appeals found that remand was appropriate based on case precedent. The Supreme Court of Oregon agreed on remand, but found that it was appropriate based on that recent legislative mandate was the justification.

Background

The *Citizens for Responsible Development in The Dalles* case arises from Walmart's proposed construction of a store on a 66-acre site in The Dalles. The construction requires a removal-fill permit from the Oregon Department of State Lands (DSL or the Department) because the site includes approximately two acres of wetlands. After DSL granted Walmart the permit, a citizen group protested it and litigation ensued. The Oregon Supreme Court examined case precedent *and* legislative mandate to answer the inquiry if remand by the DSL was an appropriate remedy. The Court of Appeals had thought case precedent was the key to remand while the Supreme Court found the legislative mandate the key to remand.

In 2018, the Oregon Court of Appeals reversed and remanded DSL's decision to issue Walmart's removal-fill permit. *See, Citizens for Responsible Development in The Dalles v. Wal-Mart Stores, Inc.*, 295 Or. App. 310 (2018). The Oregon Supreme Court recently affirmed the Court of Appeals' decision. However, the Supreme Court analyzed the relevant caselaw differently, taking the opportunity to clarify its ruling in *Morse v. Oregon Division of State Lands*, 285 Or. 197 (1979) in light of subsequent legislative amendments to the removal-fill statute.

Oregon's Removal-Fill Statute

The case turns on the interpretation of ORS § 196.825, which sets out the criteria under which the Department issues a removal-fill permit. It provides in part:

> (1) The Director of the Department of State Lands shall issue a permit applied for under ORS 196.815

if the director determines that the project described in the application:

(a) Is consistent with the protection, conservation and best use of the water resources of this state as specified in ORS 196.600 to 196.905; and

(b) Would not unreasonably interfere with the paramount policy of this state to preserve the use of its waters *for navigation, fishing and public recreation*. . . .

(3) In determining whether to issue a permit, the director shall consider all of the following:

(a) The public need for the proposed fill or removal and the social, economic or other public benefits likely to result from the proposed fill or removal. When the applicant for a permit is a public body, the director may accept and rely upon the public body's findings as to local public need and local public benefit.

Procedural Posture

DSL issued Walmart a removal-fill permit with required mitigation. DSL's findings included that:

. . .the record is inconclusive with regard to whether the project, for which the fill or removal is proposed, will address a public need. . .[and]. . .[l]ikewise, the record is inconclusive regarding the social, economic or other public benefits that may result from the proposed project.

Citizens for Responsible Development in The Dalles protested the permit and requested a contested case hearing. Citizens for Responsible Development argued DSL had no authority to issue the permit because the record was inconclusive as to whether the proposed project addressed a public need. The Administrative Law Judge issued a proposed order granting the permit, and the Department issued the final order granting it.

Citizens for Responsible Development appealed, and the Court of Appeals reversed and remanded. The Court of Appeals relied on *Morse*, which interpreted a prior version of the removal-fill statute, in holding that that ORS § 196.825 requires DSL to find a public need for a proposed project in order to grant a removal-fill permit.

The Supreme Court granted DSL's petition for review.

The Supreme Court's Decision

The Supreme Court:

. . .agree[d] with the Court of Appeals that the current fill statute incorporates *Morse*'s core conclusion: DSL's statutory obligation to determine whether a proposed project 'unreasonably interferes' with the state's 'paramount policy' requires it to weigh any interference against—the now-expanded categories of—public benefit.

However, the Supreme Court concluded that:

the Court of Appeals overstate[d] the holding of *Morse* and understate[d] the significance of subsequent legislative amendments.

The Court of Appeals' decision suggested:

that ORS 196.825 conditions the issuance of *every* [removal-fill] permit on a finding that the proposed project will serve a 'public need.' (Emphasis added).

On the contrary, the Supreme Court found that:

. . .[the] *Morse* [decision] required DSL to determine and weigh the 'public need' for a fill project *only if* the proposed fill would 'interfere with' the state's 'paramount policy' of preserving its waters for the specified public purposes. (Emphasis added).

The Supreme Court agreed with the Court of Appeals' decision to reverse and remand to DSL, explaining that:

. . .[b]ecause DSL found that all categories of public benefit from the project were 'inconclusive' but failed to find that the project would not 'interfere' with the state's 'paramount policy,' the record does not support its determination that the project will not 'unreasonably interfere.'

Conclusion and Implications

Sometimes, getting the correct remedy in a case isn't the end of the story. This case presented a useful opportunity for the Oregon Supreme Court to clarify its 40-year-old *Morse v. Oregon Division of State Land* analysis in light of subsequent statutory changes. Legislative history aficionados may find the Supreme Court's thorough opinion worth a read.
(Alex Shasteen)

Western Water Law & Policy Reporter
Argent Communications Group
P.O. Box 1135
Batavia, IL 60510-1135

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