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# EASTERN WATER LAW™

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FEATURE ARTICLES

# THE SUPREME COURT MANDATES MORE WORK FOR THE ENVIRONMENTAL PROTECTION AGENCY IN *COUNTY OF MAUI* GROUNDWATER DECISION

*By Harvey M. Sheldon, Esq.*

*Editor's Note: The recent Supreme Court's decision in County of Maui was important and subject to interpretation in addressing NPDES permitting under the Clean Water Act, when a pollutant enters a groundwater point source to waters of the United States. Due to the significance of the decision, we have included* ***two*** *Feature Articles on the decision—presenting two very different perspectives.*

In April 2020 the United States Supreme Court handed down its opinion in *County of Maui v. Hawaii Wildlife Foundation et al*, ___U.S.___, 140 S. Ct. 1462, Case No.18-260, (April 23, 2020). Justice Breyer wrote the majority opinion, with Justice Kavanaugh concurring. There were two dissenting opinions; one was by Justice Thomas, and the other was written by Justice Alito.

## Background

The issue in the case is whether the federal Clean Water Act national permitting program for point sources [the National Pollutant Discharge Elimination System (NPDES)] requires a permit when there is an indirect discharge from a point source to traditional waters by way of groundwater. The majority of six justices held that in circumstances where a discharge to groundwater has the functional equivalence of a direct point source discharge to receiving waters, a permit is needed. This article gives further particulars of the opinion and discusses its reasoning and possible consequences.

The case was seen by many as a test of the Court's new justices on issues of environmental protection. In fact, it is a case that made it to the U.S. Supreme Court after more than 45 years of experience with the Clean Water Act in which the U.S. Environmental Protection Agency (EPA) did not deem the NPDES program to include discharges to the groundwater. Your author recalls dealing with state legislatures in the Midwest when they were asked to adopt state program laws that would qualify them to administer the NPDES program, and the directions from EPA headquarters were clear: inclusion of groundwater within the scope of a given state's legislation was optional, not required. As even the majority opinion in the *Maui* case indicates, Congress made clear that it was preserving the states' jurisdiction over its own waters, especially groundwaters.

## Factual Backgroun

In *Maui* the County sewage authority had for decades discharged partially treated sewage down a well to groundwater hundreds of feet down. That groundwater would regularly and naturally discharge to the ocean roughly a half mile away, after some days in the earth. Pollution from the Maui treatment plant was clearly identified in the ocean itself, offshore.

## The Split Among the Circuit Courts of Appeals

The majority opinion, authored by Justice Breyer, in the *Maui* case makes the intent of Congress to restore the nation's waters its principle reason for criticizing and discarding the decades of precedent by which only "pipes..culverts..and other discrete conveyances", *i.e.* defined "point sources" that directly discharge to waters of the United States require a permit.

The Supreme Court had accepted the case because the Circuit Courts of Appeals were split on the central question.

The Fourth Circuit Court of Appeals had held permits to be required where a "direct hydrological connection" was shown to exist between the discharge point and the eventually receiving water body.

The Sixth Circuit Court of Appeals held that no permit is required unless the discharge from the point source is direct and immediate to the receiving water.

The Ninth Circuit Court of Appeals, from which the Supreme Court decision directly flowed from, had held that permits are required whenever a pollutant is fairly traceable and as such is the functional equivalent of a direct discharge.

### The Majority Opinion

The majority indicates that in its view the restriction of permit requirements to actual direct and immediate discharges to surface waters is too simplistic a formula to fulfill the statutory mandate. The Supreme Court majority opinion goes on to critique some recent pronouncements of the EPA on the subject, and declines to afford the EPA any deference under the *Chevron* doctrine. First, it says, under the EPA and County of Maui sponsored definition means cases will occur where people are evading the law and polluting by simply moving their discharges a few feet from the water, and that this is a huge unacceptable loophole. Then the majority adds what it poses as its linguistic *coup de grace,* in the form of an extensive explication of the meaning of the word "from." The majority indicates that word includes both where something has previously been and where it is most immediately observed—like a traveler coming from overseas, stopping overnight at a hotel, and now emerging from a taxi cab. The traveler can be said to come "from" all three places. *Voila!* With those strokes of itinerant analysis, what many of us used to think was the literal meaning of the statute has been called into question. In concluding its analysis, the majority cites Justice Scalia for noting that the word "immediate" is not in the permit requirement respecting a discharge. *Rapanos v. United States,* 547 U. S. 715 at 743, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006).

The actual holding of the majority opinion deserves explicit repetition, because it does narrow the holding of the Ninth Circuit in *Maui*.

The majority indicates:

> We hold that the statute requires a permit when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge. We think this phrase best captures, in broad terms, those circumstances in which Congress intended to require a federal permit. That is, an addition falls within the statutory requirement that it be "from any point source" when a point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means.

It seems that the second sentence of the holding may turn out to be key to the future interpretation of the court's meaning. By requiring "the same result," the opinion may open itself to considering the actual impact of a given discharge based on its strength and effect on the receiving waters. In a sense, the groundwater acts as a sort of "mixing zone", where what matters is what the intensity and effect of pollution is at the edges, where the polluted groundwaters meet the waters of the United States. The idea is not to judge the discharge except when it has a significant impact, and then, only on its actual impact at the edge of the mixing zone. (Under this approach, whether the impact on groundwater is itself a problem depends on state law and its treatment of groundwater.) Not everyone will agree with that interpretation, however, and a lot of debate and litigation seems certain.

### The Concurring and Dissenting Opinions

The concurring opinion of Justice Kavanaugh and the dissents deserve some comment as well. Justice Kavanaugh likely surprised some people by voting in the majority. His opinion wraps itself in the flag of Justice Scalia's plurality opinion in *Rapanos v. United States, supra.* In that opinion, Justice Kavanaugh indicates, the revered conservative jurist indicated that a NPDES permit was required when intermittent waters or upstream waters are the point of discharge, because the discharges reach the regulated waters.

Justice Thomas' dissent, in which Justice Gorsuch concurred, states that the court is departing from the plain and readily enforceable, plain meaning of the law. To do so is not warranted by any perceived gaps in the regime of regulation. Justice Alito provides a

more complete critique of the analysis the Court's majority uses in its holding to show that while seemingly technical, it is deficient in providing any concrete guidance for either the EPA or those courts that will deal with issues case by case down the road.

### Conclusion and Implications

In your author's view the majority opinion is an unhappy departure from traditional views on what the plain meaning of a statute is. If you suppose that the majority had ruled the other way, it seems to me that the states would have stepped up to the plate and made their own decisions on what to do about situations like Maui County, with some following the path of tightening rules, much like what happened when the Supreme Court restricted the scope of federal wetlands law years ago. Here, however, the Court majority paid little heed to: (1.) the fact that people in important committees stated on the floor of their respective houses of Congress at the time of adoption that Clean Water act was not intended to mandate groundwater permitting or otherwise preempt state regulation there, (2.) the 40-plus years of successful implementation of a regime where groundwater was not an NPDES "water" under federal law, accompanied by groundwater protection and preservation programs from other legislation, and (3.) the cost of the creation of an unfunded Court-sponsored mandate that an executive branch agency on a lean budget now engage in a lot of decision and rulemaking under a law that is not designed for the subject matter.

Perhaps the arguments of the County and the EPA were inartful, or perhaps the two conservatives among the majority simply and truly believe that buying something locally is the same as buying it from overseas. Whatever the reason, the result augurs well for the economic fortunes of environmental litigators in the next few years, while the ruling itself makes it appear that gray is a new shade of green.

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**Harvey M. Sheldon** is a Partner at Hinshaw & Culbertson LLP, resident in the firm's Chicago, Illinois office.

Harvey has extensive experience in the field of environmental law, including counseling, litigation, mediation and other dispute resolution and facilitation services. He has handled issues and litigation involving the Clean Air Act, Resource Conservation and Recovery Act, Clean Water Act, Superfund, and other important environmental laws and regulations. He has appeared in both federal and state trial courts and in courts of appeals in environmental and other matters civil and criminal.

Harvey sits on the Editorial Board of the *Eastern Water Law & Policy Reporter.*

# U.S. SUPREME COURT ISSUES *COUNTY OF MAUI* DECISION—FINDS 'FUNCTIONALLY EQUIVALENT' TEST GUIDES THE INQUIRY WHETHER AN NPDES PERMIT IS REQUIRED FOR GROUNDWATER POINT SOURCES THAT LINK TO WATERS OF THE U.S.

*By Travis Brooks, Esq.*

On April 23, in *County of Maui v. Hawaii Wildlife Fund,* the U.S. Supreme Court provided an answer to a question that long divided lower courts interpreting the federal Clean Water Act (CWA). There has never been any doubt that the CWA requires National Pollutant Discharge Elimination System permits (NPDES) for discharges of pollutants from point sources into waters of the United States (WOTUS). There has also never been any doubt that the CWA does *not* require a NPDES for discharges of pollutants from point sources into groundwater—states are primarily responsible to regulate such discharges. However, until recently, it was unclear if NPDES permits are required for discharges of pollutants from point sources that enter into groundwater and then migrate into WOTUS.

## Background

In a 6-3 decision, the Supreme Court answered this question with a reasonable, but possibly difficult to apply "sometimes." The decision, authored by Justice Breyer can be distilled into what seems like a straightforward rule:

> . . .we conclude that the [CWA provisions requiring a NPDES permit] require a permit if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from a point source into navigable waters.

However, determining just what the "functional equivalent of a direct discharge" is under the Court's decision will likely vex courts, practitioners, and the regulated community for some time. To determine what discharges are "functionally equivalent" to a direct discharge into WOTUS, the Court created a murky test that depends on the application of at least seven, and maybe more, factors with little clear direction provided as to how to apply those factors. Ultimately it will be up to courts and perhaps the U.S. Environmental Protection Agency (EPA) to further hone and implement the Court's decision.

## The Clean Water Act

In 1972, Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." The CWA had ambitious goals to eliminate the discharge of pollutants into navigable waters by 1985, and to ensure water quality in national waters so that all were "fishable" and "swimmable" by 1983. Although these goals were not met, federal and state efforts to improve nationwide water quality under the CWA continue. The CWA defines "navigable waters" as WOTUS, which can otherwise be understood as all "jurisdictional waters" over which the federal government has power to regulate under the CWA. Just what constitutes WOTUS subject to CWA regulation has itself been subject to much dispute, with the EPA promulgating multiple definitions of regulated waters in the last decade alone.

The CWA embodies the idea of a federal-state partnership where the federal government sets the agenda and standards for water pollution abatement, while states are primarily responsible to carry out day-to-day implementation and enforcement activities. Moreover, while the CWA gives the federal government power to regulate discharges into WOTUS, states have generally been left to regulate and control discharges of pollution into groundwater.

In its relevant part, the CWA prohibits: "any addition of any pollutant to navigable waters from any point source" without a permit. The CWA defines the term "pollutant" broadly, as including a wide range of deposited materials including sewage, dredged materials, solid waste, chemical equipment, rock, dirt, sand, and so on. Point sources are defined as "any discernible, confined and discrete conveyance… from which pollutants are or may be discharged." As an example, these include "any container, pipe, ditch, channel, tunnel, conduit, or well." "Discharge of pollutant" is

defined as "any addition of any pollutant to navigable waters [including navigable streams, rivers, the ocean or coastal waters] from any point source."

In the years preceding the *County of Maui* decision, lower federal courts were divided on one crucial point—how pollution discharges from a point source into groundwater that eventually reach WOTUS should be regulated. Leading up to the decision, courts had adopted three different methods of interpreting when discharges from point sources into groundwater discharge into navigable waters thus requiring a NPDES permit: 1) pollutants are added to navigable waters, thus requiring a NPDES permit only if they are discharged directly from a point source into jurisdictional waters, (*i.e.*, never when added into groundwater first), 2) pollutants are regulated where there is a direct hydrological connection between groundwater pollution and jurisdictional waters (*i.e.*, sometimes when added into groundwater first), and 3) pollutants into groundwater are regulated whenever a discharge of pollution into jurisdictional waters can be traced to what came out of a point source (*i.e.*, often when added into groundwater first). This split of authorities teed up the issue for the Court in *County of Maui*.

### Factual and Procedural History of *County of Maui*

In the 1970s, the County of Maui (County) constructed the Lahaina Wastewater Reclamation Facility. The facility collects sewage from the surrounding area, partially treats it, and then pumps the treated water into four wells 200 or more feet below ground level. Very much of this partially treated water, or approximately 4 million gallons a day, enters a groundwater aquifer and then makes its way, over approximately half a mile or so, to the ocean.

In 2012, a number of environmental groups brought a citizen CWA lawsuit alleging that the County was discharging a pollutant into navigable waters (*i.e.* the Pacific Ocean) without having first obtained a NPDES permit. The U.S. District Court for Hawaii reviewed a detailed study of discharges from the sewer facility and found that a considerable amount of tainted water, pumped into the facility's wells, ended up into the ocean. Ultimately the District Court sided with the environmental groups, holding that because "the path [from the facility] to the ocean is clearly ascertainable…," the discharge into the wells was "functionally one into a navigable water." The District Court then granted summary judgment in favor of the environmental groups.

The County appealed the decision to the Ninth Circuit Court of Appeals, which affirmed the District Court, but articulated a *slightly different* standard for determining when a NPDES permit is required for discharges into groundwater. Under this standard, a NPDES permit is required when "pollutants are *fairly* traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into navigable water." The Ninth Circuit did not undergo any type of analysis of determining when, if ever, the connection of a point source and a navigable water is too tenuous or remote to give rise to liability, thus creating a very broad extension of the CWA's applicability.

The County petitioned for *certiorari* and the U.S. Supreme Court granted the petition.

### The U.S. Supreme Court's Decision

The majority's 6-3 decision authored by Justice Breyer began by noting that the key question presented in the case concerned the statutory word "from." Breyer noted that at bottom, the parties disagreed "dramatically about the scope of the word 'from'" in the context of the CWA.

On one hand, the County argued that in order for a pollutant to be placed in national waters "from a point source," a point source must place pollutants directly into WOTUS without passing through intermediate conveyance such as groundwater or isolated surface water. On the other hand, the environmental groups argued that the permitting requirement applies as long as a pollutant is "fairly traceable" to a point source, even if it traveled for a significant amount of time over a significant distance through groundwater to reach WOTUS.

### The Majority Rejects the County and U.S. Solicitor General's Highly Restrictive Interpretation of the Clean Water Act

The County and the Solicitor General for the United States argued for a clear, "bright-line" test for point source pollution. Essentially in order to be liable, a point source must be "the means of deliver-

ing pollutants to a navigable water." Therefore, if "at least one nonpoint source (*e.g.*, unconfined rainwater runoff or groundwater" exists between the point source and the jurisdictional water, then the permit requirement does not apply. Put another way, a pollutant is "from" a point source, only if a point source is the last conveyance that conducted the pollutant to jurisdictional waters.

It is interesting to note that before supporting the County's arguments, the federal administration originally supported parts of the environmental group's arguments at the District Court level. Thus before the case reached the Supreme Court, the EPA maintained that the CWA's permitting requirement applies whenever discharges migrate into Waters of the United States with a "direct hydrological connection" to surface water. However, after seeking public comments in 2018 on whether it should change its interpretation, the EPA essentially "did a 180," issuing an interpretive statement in April of 2019 that "the best, if not the only" interpretation of the CWA was to exclude all releases of pollutants into groundwater from the NPDES requirement.

The majority took issue with this interpretation, and found that it would create a giant loophole in the CWA's regulations on point source pollution. To accept the County and the Solicitor General's interpretation of the CWA, a NPDES permit would not be required if there was any amount of groundwater between the end of a polluting pipe and jurisdictional waters. As the majority noted:

> . . .[i]f that is the correct interpretation of the [CWA], then why could not the pipe's owner, seeking to avoid the permit requirement, simply move the pipe back, perhaps only a few yards, so that the pollution must travel through at least some groundwater before reaching the sea?

### What About *Chevron* Deference?

Neither the EPA nor the Solicitor general asked the court to apply *Chevron* deference to the EPA's interpretation of the EPA. In any event, the Court noted that though it will typically pay "particular attention to an agency's views" when interpreting a statute that the agency enforces, the Court simply would not follow the EPA's proposed interpretation which would create a loophole that would effectively eviscerate the basic purposes of the CWA. In other words: "to follow EPA's reading would open up a loophole allowing easy evasion of the statutory provision's basic purposes. Such an interpretation is neither persuasive nor reasonable."

### Did Congress Intend to Exclude Discharges into Groundwater?

The Court looked to the structure of the CWA as a further basis to reject the County and Solicitor General's interpretation. Just because the CWA does not subject all pollution into groundwater to its permitting requirement, this *does not* indicate a clear congressional intent to exclude all discharges into groundwater from the CWA's permit requirement. If Congress intended to exclude all discharges into groundwater from the NPDES permitting requirement, it could have easily excluded point source pollution into groundwater as an one of the enumerated exemptions to permitting requirements, it did not do so. Moreover, the CWA expressly includes "wells" in its definition of "point source." As the court noted, in instances where wells were regulated point sources, such wells "most ordinarily would discharge pollutants through groundwater."

### The Majority Rejects the Very Broad Reading of the CWA Argued by the Environmental Groups

Regarding the broad interpretation of the CWA pushed by the environmental groups, the Court noted that with modern science the CWA could have unreasonably wide reach. Under this interpretation, the EPA could likely assert permitting authority over the release of pollutants "many years after the release of pollutants that reach navigable waters many years after their release….and in highly diluted forms." In the Court's view, Congress did not intend to require point source permitting if subject pollution was merely traceable to a point source. This could create circumstances where a permit was required in:

> . . .bizarre circumstances, such as for pollutants carried to navigable waters on a bird's feathers or,. . . .the 100-year migration of pollutants through 250 miles of groundwater to a river.

The environmental groups sought to address concerns that their standards extended the CWA permit

requirement too broadly by proposing a "proximate cause" basis for determining when a permit is required. Under this test a polluter would be required to secure a permit that polluter's discharge from a point source proximately caused a resulting discharge into jurisdictional waters. The Court rejected the environmental groups' proposed proximate cause test noting that proximate cause derives from general tort law and is based primarily on its own policy considerations that would not significantly narrow the environmental groups broad reading of the CWA .

Perhaps most important, the Court noted that the environmental groups' broad reading of the CWA would essentially override Congress' clear intention to leave substantial authority and responsibility to the states to regulate groundwater and nonpoint source pollution. States, with federal encouragement, have already developed methods of regulating nonpoint source and groundwater pollution through water quality standards and otherwise. The environmental groups' interpretation of the CWA also conflicted with the legislative history related to CWA's adoption, which clearly indicated that Congress rejected an extension of the EPA's authority to regulate all discharges into groundwater.

### The Court Adopts a Reasonable, Albeit Murky, Middle Ground Interpretation of the CWA

Finding problems with both of the above interpretations, the Court's majority landed at a third option that amounts to a reasonable, albeit murky middle ground. Justice Breyer fairly thoroughly examined the meaning of the word "from" within the context of the CWA with reference to everyday use of the word in how we refer to immigrants and travelers from Europe and even how meat drippings from a pan or cutting board into gravy. Ultimately, the standard the Court adopted was "significantly broader" than the "total exclusion of all discharges through groundwater" pushed by the County and the Solicitor General, but also meaningfully more narrow than that pushed by the environmental groups.

As noted above, the Court described its rule as follows:

> . . .[w]e hold that the [CWA] requires a permit when there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*.

This means that the addition of a pollutant falls within the CWA's regulation:

> When a point source directly deposits pollutants into navigable waters or when the discharge reaches the same result through roughly similar means.

The majority opinion makes clear that "time and distance" will typically be the most important factors when determining whether a discharge into groundwater or another receptor is the "functional equivalent" of a discharge into jurisdictional waters.

Justice Breyer noted that there were some difficulties in applying its rule because it does not provide a clear direction to courts and agencies as to how to deal with "middle instances" where the facts do not clearly indicate a discharge is or is not "functionally equivalent" to a direct discharge. However Justice Breyer noted that "there are too many potentially relevant factors applicable to factually different case for the Court now to use more specific language."

The majority then provided a non-exclusive list of seven factors that may be relevant depending on the circumstances of a particular case:

- Transit time of the pollutant;
- Distance traveled;
- The nature of the material through which the pollutant travels;
- The extent to which the pollutant is diluted or chemically changed as it travels;
- The amount of pollutant entering the navigable waters relative to the amount of pollutant that leaves the point source;
- The manner by or area in which the pollutant enters the navigable waters, and;
- The degree to which the pollution has maintained a specific identity.

Importantly, the Supreme Court's opinion did *not* provide much guidance as to how to balance and apply the above factors except that "[t]ime and distance

will be the most important factors in most cases, but not necessarily every case."

Ultimately, the majority opinion reflects a concern that a rule categorically excluding application of the CWA in instances where point sources pollute groundwater, would result in potentially widespread evasion of CWA permitting requirements. If the Court were to adopt the County's interpretation of the CWA, what would stop polluters from simply adjusting their point source pipes so that they drained onto the beach or other area so that it enters groundwater instead of directly into WOTUS, thus averting federal regulation? On the other hand, accepting the environmental group's broad interpretation of the CWA would expand the NPDES permitting program to many, if not most instances where point source pollution enters groundwater. This would clearly upset the framework of federal *and* state regulation of water pollution depending on where it is deposited.

Ultimately, the opinion reflects a practical view of the CWA and its incorporation of the word "from" with reference to point sources and jurisdictional waters. Here, although most sewage treatment facilities in the country that discharge effluent into jurisdictional waters require a NPDES permit up to CWA standards, the County was effectively adding 4 million gallons a day of pollutants into the Pacific Ocean without a NPDES permit. In the Court's view, those additions of such pollutants into waters of the United States that look and feel like the addition of pollutants into waters of the United States, even if they must pass through some groundwater over a short distance and time to get there, must require an NPDES permit. The wells below the Lahaina Wastewater Reclamation Facility were one of those instances.

### Justice Thomas' Dissent

Justice Thomas penned a dissent to the opinion to which Justice Gorsuch joined. Justice Alito filed his own dissent. Both dissenting opinions included their own esoteric arguments about the meaning of the word "from," but ultimately came down to the justices' restrictive reading of federal regulatory authority under the CWA and an emphasis on the CWA's intent to leave regulation of groundwater pollution to the states.

The Thomas and Gorsuch dissent focused on the CWA's use of the word "addition" to reference the regulated pollutants "from" a point source into navigable waters. After reviewing various definitions of the word "addition" which Thomas noted means to "augment" or "increase" or to "join or unite," Thomas concluded that "[t]he inclusion of the term 'addition' to the CEWA indicates that the statute excludes anything other than a direct discharge."

In other words, the only point source pollution that requires an NPDES permit is that pollution that discharges *directly* from the point source to Waters of the United States. Justice Thomas also highlighted the uncertainty that the Court's functional equivalent test would create, with seven non-exhaustive factors, and no clear rule when or how to apply them. Moreover, Thomas was persuaded by CWA's underlying state and federal delegation of authority.

### Justice Alito's Dissent

Justice Alito posited a similar position to Justice Thomas, stating that the CWA only required NPDES permits for direct additions of pollutants into federal waters. However, Alito pointed out that given the CWA's broad definition of a "point source" which includes ditches and channels, and any "discernable, confined and discrete conveyance… from which pollution may be discharged," a shortened pipe that added pollution to a beach, would then likely enter into some discrete channel on the beach that would meet the definition of a "point source" subject to regulation under the CWA. This reading of the CWA in Justice Alito's opinion was more manageable and ready for uniform application throughout the country than the one promulgated by the Court. Justice Alito also referenced the CWA's delegation of state and federal authority to regulate different types of pollution. He also took issue what he thought was an overly complicated and less workable standard enunciated by the majority.

### Conclusion and Implications

What do we make of all this? If courts, practitioners, or the regulated community were looking for a clear answer as to which discharges from point sources that migrate through groundwater into WOTUS require an NPDES permit, the *County of Maui* decision likely left them disappointed. There is no question the fact-dependent and purpose driven test enunciated by the Court will result in some uncertainty as the decision is refined and clarified by

lower courts. However, as the Supreme Court noted, the "functionally equivalent" test is not altogether different than the standard the EPA has tried to apply for more than 30 years by seeking to require NPDES permits for "some (but not all) discharges through groundwater." Ultimately, the Court's decision may have been the most appropriate "middle-ground" interpretation of CWA language that is fundamentally ambiguous and difficult to apply in the real world.

Time will tell whether or not the EPA tries to add some clarity to the Supreme Court's standard by adopting a rule defining "functional equivalency." In this regard, the results of the 2020 presidential election may have a meaningful impact on the way the "functionally equivalent" test is formulated and applied.

In any event, the regulated community should consider the implications of this decision. If entities own facilities that deposit pollutants into groundwater or other areas that may ultimately reach Waters of the U.S., such entities should consider whether it makes sense to pre-emptively seek an National Pollutant Discharge Elimination System permit and thus avoid liability concerns going forward.

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**Travis Brooks** is an associate at Miller Starr Regalia, Walnut Creek, California. Travis represents private and public entity clients in a wide range of land use and environmental matters throughout the State of California. Travis sits on the Editorial Board of the *California Land Use Law & Policy Reporter*.

## EASTERN WATER NEWS

# COLORADO FILES SUIT AGAINST THE FEDERAL GOVERNMENT OVER NEW WATERS OF THE U.S. RULE

On May 22, 2020, the State of Colorado filed an action against multiple federal agencies seeking declaratory and injunctive relief. The case names the U.S. Environmental Protection Agency (EPA), Andrew Wheeler, in his official capacity as Administrator of the EPA, the U.S. Army Corps of Engineers (Corps) and R.D. James, in his official capacity as Assistant Secretary of the Army for Civil Works, as defendants. In a press release, Colorado Attorney General Phil Weiser said that the lawsuit was necessary "to protect Colorado's streams and wetlands from a dangerous federal rule that would leave them vulnerable to pollution under the Clean Water Act." [*The State of Colorado v. U.S. Environmental Protection Agency, et al.*, Case No. 1:20-cv-01461 (D. Colo).]

### Background

The federal Clean Water Act, passed in 1972, works to prevent and control pollution in "navigable waters." The exact meaning of that term has formed the basis of significant rulemaking and litigation surrounding these "waters of the United States" (WOTUS). The U.S. Supreme Court last ruled on this issue in 2006 with Justice Scalia, writing for a four-justice plurality, stating that WOTUS cannot be found to include "occasional," "intermittent," or "ephemeral" flows. *Rapanos v. United States*, 547 U.S. 715 (2006).

However, in 2015, the Obama administration enacted the Clean Water Rule (2015 Rule) clarifying the definition of WOTUS and specifying that wetlands and ephemeral streams (i.e., those that flow only after precipitation) are include as navigable waters and therefore subject to EPA regulation. For ephemeral streams, the 2015 Rule provided that if the stream had a bed, bank, and high-water mark, that was sufficient evidence of a navigable water to garner WOTUS protections. The test for wetlands, as laid out in the 2015 Rule, stated that wetlands were considered WOTUS if they were within 100 feet, or within the 100-year floodplain, of a navigable waterway. This wetlands standard was based in part on the "significant nexus" test that Justice Kennedy delivered in a concurring opinion in *Rapanos*.

Only one month after entering office, President Trump announced a plan to "repeal and replace" the 2015 Rule. The Trump administration's new WOTUS rule was released as a proposed rule in December 2018, and finalized on April 21, 2020 ("2020 Rule"). 85 Fed. Reg. 22,250 (Apr. 21, 2020) (to be codified at 40 C.F.R. pts. 110, 112, 116, 117, 120, 122, 230, 232, 300, 302, and 401)

### The 2020 Rule

The 2020 Rule reduced the scope of federal oversight that was present in the 2015 Rule. "Under the previous administration, the WOTUS Rule was one of the most egregious examples of federal overreach I've seen in my lifetime," Congressman Paul Gosar said in a press release. "The [2015] Rule gave unprecedented power to bureaucrats in D.C. at the expense of farmers, ranches, small business owners, and all Americans."

Specifically, the 2020 Rule removed ephemeral streams from WOTUS, providing that "features that only contain water in direct response to rainfall; many ditches, including most farm and roadside ditches; prior converted cropland; farm and stockwatering ponds; and wastewater treatment systems" are no longer included. Regarding wetlands, they are now only included if there is a "meaningful connection" to other WOTUS, such as having regular surface water interaction. These exclusions (12 categories in total) greatly reduced the scope of WOTUS to levels before the implementation of the 2015 Rule.

### Colorado's Response

On April 21, 2020, the day the final 2020 Rule was published, Phil Weiser released a statement saying:

> . . .[t]he federal government's final Waters of the United States rule is too limited and excludes a significant percentage of Colorado's waters from

> Clean Water Act protections. The final rule threatens to create unacceptable impacts to the state's ability to protect our precious state water resources, and, in the absence of extraordinary state efforts to fill the gaps left by the federal government, will harm Colorado's economy and water quality.

The last part of the statement was in direct response to the Trump administration's position that any states that took issue with the 2020 Rule were free to enact their own protections.

One month after the release of the 2020 Rule, Colorado made good on its promise to take legal action by filing suit in federal district court in Denver. The complaint specifically asks for the 2020 Rule to be set:

> . . .aside, and require the government to develop a definition [of WOTUS] that respects controlling law, is grounded in sound science, and reflects a reasonable economic analysis.

The complaint specifically attacks the removal of certain wetlands and ephemeral streams, claiming a "significant portion" of Colorado's waters are now without federal protection.

## The Significant Nexus Test

One of the main thrusts of Colorado's complaint is the 2020 Rule's abandonment of the significant nexus test. As mentioned above, this test was first created by Justice Kennedy in his *Rapanos* concurring opinion. Since then, federal agencies have always used this test when making WOTUS determinations. Shortly after *Rapanos*, the EPA issued guidance documents (2008 Guidance) indicating that EPA would assert jurisdiction over:

> . . .traditional navigable waters and the adjacent wetlands, relatively permanent nonnavigable tributaries of traditional navigable waters and wetlands that abut them, nonnavigable tributaries that are not relatively permanent if they have a significant nexus with a traditional navigable water, and wetlands adjacent to nonnavigable tributaries that are not relatively permanent if they have a significant nexus with a traditional navigable water.

The significant nexus test, under the 2008 Guidance, relied on the ecological relationship between waters and analyzed physical proximity as well as shared hydrological and biological characteristics. Colorado's complaint argues that the EPA's abandonment of this test, seemingly without scientific support, is contrary to both the Administrative Procedure Act and the Clean Water Act.

## Addressing a 'Typical Year'

Colorado's complaint also takes issue with the new analysis of wetlands under the 2020 Rule. Under the 2020 Rule, wetlands must either abut or have direct hydrological surface connection to another WOTUS in a "typical year." A "typical year" is then defined as when precipitation and other variables are within the normal range for the geographic area as measured on a 30-year rolling basis. Colorado argues that the 2020 Rule does not explain how data on precipitation and the other variables will be gathered, how the normal periodic range will be determined, or how the applicable geographic range will be mapped. Because the 2020 Rule is lacking in this basic information, Colorado claims, it was unable provide meaningful comment on the Rule, and even now does not know whether large numbers of waters within the state are subject to federal jurisdiction.

## 'Connectivity Report'

Colorado then devotes a significant portion of its complaint to the position that the 2020 Rule is entirely lacking in legal, factual, and scientific support. Although the majority of those claims are inherently factual and therefore cannot be resolved until a full fact-finding inquiry takes place, Colorado's general point is that the 2020 Rule is at odds with the Clean Water Act's main purpose "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." The complaint specifically attacks the EPA's seeming ignoring of the "Connectivity Report," a document prepared by EPA and the Corps prior to the 2015 Rule, which concluded that a wetland does not need to abut or have direct service connection to a navigable water for there to be a significant nexus between the two waters.

### Impacts to Colorado's Resources, Economy and Water Quality

The final section of the complaint analyzes the 2020 Rule's potential impacts on Colorado's resources, economy, and water quality. The complaint notes that the state is the headwaters of the Colorado, which provides water to millions of Americans in seven states, and that Colorado's fishing industry alone is responsible for $2.4 billion and 17,000 jobs within the state every year. The complaint claims that, while Colorado does have its own water quality standards and regulations that are more stringent than the federal government, it does not have the resources to fully monitor and implement these standards and therefore necessarily must rely on the EPA and Corps for assistance in protecting the waters. Additionally, there are certain permitting programs (such as Section 404) that are only through the EPA and Corps, and therefore Colorado must rely on the agencies for monitoring, permitting, and enforcement.

### Conclusion and Implications

Colorado's complaint seeks both declaratory and injunctive relief and asks the Court to: 1) declare the 2020 Rule unlawful; 2) vacate and set aside the 2020 Rule in its entirety; 3) issue an injunction preventing the implementation of the 2020 Rule and; 4) remand the matter to the EPA and Corps with instructions to issue a new rule. Phil Weiser said the 2020 Rule "shirks the federal government's responsibility to implement [the Clean Water Act] and thrusts on Colorado the responsibility of protecting water quality with limited warning and no support to do so." John Putnam, Environmental Programs Direct for the Colorado Department of Public Health and Environment agreed, stating that Colorado needed "to challenge [the 2020 Rule] to avoid a bigger problem for our economy at a time when our state is already hurting from COVID-19."

EPA and the Corps' response will be due in mid-June, and will set the stage for how this case will play out in the federal courts. Given the nature of the issue, and the history of litigation surrounding WOTUS, it is likely that other states will file similar complaints in the near future. One possible outcome would be the consolidation of the cases, and then an eventual hearing before the US Supreme Court. If President Trump is reelected in November, this seems a probable outcome. If, however, Joe Biden is elected, it is likely to see the EPA and Corps revert to the 2015 Rule, or something similar, especially since it was enacted during his vice presidency. The Attorney General's press release on the lawsuit is available online at: https://coag.gov/press-releases/5-22-20/. The lawsuit is available online at: https://coag.gov/app/uploads/2020/05/WOTUS-Complaint-5-22-20.pdf. (John Sittler, Paul Noto)

# NEWS FROM THE WEST

In this issue of News from the West we report on two state court decisions. The first decision is out of the Utah Supreme Court, which addressed the obligation of a city water authority to supply water to an outlying property held in trust. The second decision is out of the Court of Appeals of Washington where the court addressed the workings of the state's Annual Consumptive Quantity Act in light of a change application for water rights.

## Utah Supreme Court Finds State Constitution Did Not Contemplate Treating Trust Held Land in Unincorporated Part of Salt Lake County to be an Inhabitant of Salt Lake City Entitling it to Water Delivery

*Salt Lake City Corp. v. Haik*, 2020 UT 29 (Ut. 2020).

The Utah Supreme Court held, on May 18, 2020, that at the time of ratification of the Utah Constitution, the voters would not contemplated that an owner of undeveloped land located in a canyon community would be deemed an inhabitant of Salt Lake City entitled to the equal treatment and delivery of water akin to the residents of Salt Lake City.

### Background

This ruling is the latest in a long-term saga involving Salt Lake City and Metropolitan Water District of Salt Lake and Sandy (collectively: City) and the owners of several lots in the Albion Basin, near Alta Ski Area, located in Little Cottonwood Canyon (Canyon). The Canyon is located approximately ten miles south of the City, but contains one of the few reliable fresh water sources for the City's municipal water needs. Consequently, the City has exercised extra-territorial jurisdiction to protect the watershed of this source of water. However, the City also provides municipal water service to the Town of Alta and a number of homes within the Albion Basin.

Mark C. Haik and Pearl Raty, as Trustee of the Pearl Raty Trust (Trust), are the owners of lots in Albion Basin. These parties, in response to a petition to quiet title filed against it in 2014, asserted as a counter claim that article XI, § 6 of the Utah Constitution, asserting that this provision "obligates the City to supply their properties with water." 2020 UT ¶ 3. However, this particular decision involves only the rights of the Trust as to its particular lot. Mr. Haik brought an identical claim in the U.S. District Court and Tenth Circuit As such his claim was barred by res judicata. See, Haik v. Salt Lake City Corp., 567 F. App'x 621, 629-631 (10th Cir. 2014).

The Trust's counterclaim rests on that, although the Albion Basin subdivision is not part of Salt Lake City proper, it falls within the city's approved water-service area. 2020 UT ¶ 4. The City, pursuant to an approved change application is able to deliver 50 gallons per day to the existing cabins in the Albion Basin, but will not deliver the 400 gallons per day required by the Salt Lake Valley Board of Health in order for the Trust to obtain a building permit. Id. The City asserts that its current infrastructure does not extend far enough to deliver the 400 gallons per day to the Basin. However, the Trust assets that it "stands ready willing and able to finance the costs of extending the system." Id at ¶ 5.

### At the U.S. District Court

The District Court dismissed the Trust's counterclaim based upon its interpretation of article XI, § 6 and its understanding of the term "inhabitant." The District Court applied a common sense meaning of the term inhabitant as "someone residing within the corporate boundaries of a city." Id. at ¶ 6. Since the Trust's property is long located with the City's corporate boundaries, the District Court determined that the Trust was not an "inhabitant" entitled to service. The District Court also concluded that the Trust is not an inhabitant of Salt Lake City because it "merely holds undeveloped property within territory over which the City asserts water rights and extra-territorial jurisdiction." Id. "At best," the District Court explained, the Trust "wants to build on the property so others can inhabit it." Id.

### At the Tenth Circuit Court of Appeals

The Trust appealed this decision and the Tenth Circuit Court of Appeals affirmed. In so doing, the Court of Appeals held that, because the Trust's lot is "beyond the limits" of Salt Lake City, forcing the city to provide its lot with water "would cut directly against that section's purpose." Id. at ¶ 7. The Su-

preme Court granted certiorari to determine whether the Court of Appeals erroneously interpreted article XI, § 6 of the Utah Constitution.

### Legal Issues Raised

Article XI, § 6 provides, in relevant part, that:

> . . .[n]o municipal corporation, shall direction or indirectly, lease, sell alien, or dispose of any waterworks, water rights, or sources of water supply now, or hereafter to be owned or controlled by it.

Article XI, § 6 goes on to state:

> . . .all such waterworks, water rights and sources of water supply now owned or hereafter acquired by any municipal corporation, shall be preserved, maintained and operated by it for supplying its inhabitants with water at reasonable charges.

The Trust argues that this provision obligates the City to supply water to its lot. The validity of this argument rests upon the interpretation of the term "inhabitants" in the phrase "supplying inhabitants with water." Id at ¶ 10. The Trust asserts that it is an inhabitant, and entitled to water service, by virtue of its lot falling within the approved water-service area of the City. Id. The Tenth Circuit rejected this argument adopting the interpretation that an inhabitant is "someone residing within the corporate boundaries of a city."

The Trust disputes this interpretation, asserting that Trust argues, the Court of Appeals should have adopted an "originalist analysis to determine what the word "inhabitants" meant to the Utahns who ratified our constitution in 1896." Id at ¶ 11. Under this analysis the Trust asserts, that the "original understanding of article XI, § 6 obligated cities to supply water to any property within their approved water-service area—even those properties falling outside of a city's corporate boundaries." Id.

The Utah Constitution should be interpreted so as "to ascertain and give power to the meaning of the text as it was understood by the people who validly enacted it as constitutional law." Id. at ¶ 12. And while there is "no magic formula" for this determination, "prior case law guides us to analyze [a provision's] text, historical evidence of the state of the law when it was drafted, and Utah's particular traditions at the time of drafting." Id.

### The Utah Supreme Court's Decision

Pursuant to these marching orders, the Court made four findings and concluded that:

- The Trust is Not an Inhabitant of Salt Lake City Under the Plain Language of Article XI, Section 6;
- The Proceedings of the Utah Constitutional Convention Indicate That the Public Would Not Have Considered the Trust to be an Inhabitant of Salt Lake City at the Time of Ratification;
- The 1898 Utah Code Also Indicates That Those Who Ratified Our Constitution Would Not Have Considered the Trust an Inhabitant of Salt Lake City;
- The Legal Understanding of "Inhabitant" at the Time of Ratification Did Not Include Entities Like the Trust.

The majority of the Court's analysis on these topics is straightforward and largely self-evident under traditional rules of statutory interpretation. However, the analysis involves a large amount of historical information and is an excellent analysis of the constitution convention as it relates to article XI, § 6. Notwithstanding, the Courts' analysis concerning the status of whether a legal entity, such as the Trust, could be an inhabitant is illuminating.

### Interpreting the Utah Constitution

When interpreting the Utah Constitution, we also examine the backdrop of "legal presuppositions and understandings" against which it was drafted. Id. at ¶ 40, citing Richards v. Cox, 2019 UT 57, ¶ 13, 450 P.3d 1074. The Court surveyed case law from adjacent states to see how the term inhabitant was treated. It found that most had adopted a common sense interpretation similar to that of a resident. But even when courts found that the words "inhabitant" and "resident" were "not synonymous or convertible," they did so because "inhabitant" connoted a more permanent relationship with a specific place

than "resident." Id. at ¶ 42, citing Field v. Adreon, 7 Md. 209, 212 (1854); see also Schmoll v. Schenck,, 82 N.E. 805, 808 concluding that "the definition of the word 'inhabitant'" under the Indiana statute in question is "a true, fixed place, from which one has no present intention of moving"). Notably, the Court determined that none of the courts surveyed at the time of Utah's statehood would have considered an entity such as a trust to be an inhabitant.

Eloquently, the Court concluded its analysis as follows:

> When we look to the historical record, we hope that it resembles a Norman Rockwell painting—a poignant, straightforward, and easy to interpret representation—rather than a Jackson Pollock where we find ourselves staring at the canvas in hopes of finding some unifying theme. This case strikes us as a Rockwell. Neither the plain language of article XI, section 6 nor the significant historical evidence before us supports the Trust's claim that it would have been considered an inhabitant of Salt Lake City in 1896. Id. at ¶ 44.

### Conclusion and Implications

This case falls upon the outer rim of water rights and water law, but contains the following truism the term inhabitants, at the time of ratification, does not encompass any person who owned property in a city's approved water-service area. Rather, the Court applied a narrow interpretation, common at the time, that an inhabitant is akin to a resident of a city. As such, the simple act of owning undeveloped land, especially outside of city boundaries, cannot give rise to the protections that are afforded to actual occupying inhabitants or residents of the city. The Utah Supreme Court's opinion is available online at: http://www.utcourts.gov/opinions/view.html?court=supopin&opinion=Salt Lake City Corp. v. Haik20200518_20190091_29.pdf.
(Jonathan Clyde)

## Washington Court of Appeals Rules in Application of Annual Consumptive Quantity Statue

*Loyal Pig, LLC and Columbia-Snake River Irrigators Association v. State of Washington, et al.*, Case No. 36525-5-III (Wash.App. Div. III, May 5, 2020).

The Washington State Court of Appeals was tasked with addressing the state's annual consumptive quantity statue. The court ultimately followed a strict statutory interpretation policy.

### Background

Loyal Pig's water right was originally issued in 1970. The court's opinion does not provide many details about the attributes of the underlaying right. In 2014, Loyal Pig's predecessor applied to change the point of diversion and place of use of a portion of the water right through the Franklin County Water Conservancy Board, presumably to add addition acres under irrigation. At that time, the ACQ test was conducted, which limited the amount of water that could be applied to the new location. The period of review for this first change was 2009 to 2013. The court notes that the first change reduced the quantity of water available for diversion after the change.

In 2017, Loyal Pig applied again to the Franklin County Water Conservancy Board to change the same water right, again adding additional acreage. In the 2017 review, the Board applied the ACQ analysis from the 2014 change approval, rather than using the new period of review of 2012 to 2016. There is not discussion in the record as to whether the analysis would have been different. The Department of Ecology reversed the Board's decision, presumably requiring the applicant to return to the Board to conduct an updated ACQ analysis. Instead the applicant appealed Ecology's ruling to the Pollution Control Hearing's Board.

The Pollution Control Hearings Board ruled in favor of Ecology. Loyal Pig appealed to Benton County Superior Court, which ruled that Ecology could not require a second ACQ test within the five-year relinquishment period and that Ecology abused its rule-making authority. Ecology appeal the Superior Court ruling to the Court of Appeals.

### The No Injury Standard to Changes to Essential Attributes of a Water Rights

In changing the attributes of a vested water right, most western states apply a no injury rule, which generally means that the changed use cannot put other water users in worse position that they would have otherwise been. Washington likewise applies a no injury standard to changes to the essential attributes of a water right:

> That the right [right to the use of water which has been applied to a beneficial use in the state] may be transferred to another or to others and become appurtenant to any other land or place of use without loss of priority of right theretofore established if such change can be made without detriment or injury to existing rights. Rev. Code Wash. § 90.03.380(1).

In the context of changes which may otherwise result in the expansion of water use from historic practice, Washington applies an additional quantification beyond noninjury, known as an Annual Consumptive Quantity or "ACQ" Test. If a proposed change will enable irrigation of additional acreage or the addition of new uses, the change must not increase in the annual consumptive quantity of water used under the water right.

The statutory test requires establishing "the estimated or actual annual amount of water diverted pursuant to the water right," which is then:

> . . .reduced by the estimated annual amount of return flows, averaged over the two years of greatest use within the most recent five-year period of continuous beneficial use of the water right. Rev. Code Wash. § 90.03.380(1).

## The Court of Appeal's Decision

Is a second ACQ analysis required if a subsequent change application follows within five years of the previous approval? Loyal Pig argued that the second application of the ACQ essentially effects a relinquishment on the volume of water available under the changed water right. RCW 90.14.140 provides a five-year window in which to use water. Non use of water for more than five years must meet the criteria provided by the statute to be considered protected from relinquishment. The key is that the criteria for nonuse only apply after the five years. The excuses allow for a reduction in use by the water right holder due to drought, temporary reduction in water need, and the rotation of crops, among other reasons. Loyal Pig argued that the five-year period protecting the water from nonuse should apply irrespective of the provisions of the change statute, RCW 90.03.380.

In response, the Department of Ecology argued that the explicit language of RCW 90.03.380(1) requires review of the ACQ in the context of this water right change even though a previous change approval had already conducted such a review.

Agreeing with Loyal Pig's argument that a strict interpretation of 90.03.380(1) places an irrigator at risk of premature relinquishment or reduction of its water right, the Court of Appeals nevertheless ruled in favor of such a strict reading. When looking to the legislative intent, the court found it must assume that when the language of a statute is clear, that the legislature meant the statute as written. Since the specific statute does not provide exceptions for application of the ACQ when it would otherwise apply, but other provisions of the water code do modify the application of ACQ, that ACQ applies.

## Conclusion and Implications

While we wait for a legislative solution, which as a category of solutions tend to take in inordinate amount of time and often further complicate matters, it is worthy of note that the number of potential change applications which would be affected by this case could be extensive given the Court further statement that "90.03.380 impliedly grants Ecology the right to limit the extent of the change to the current annual consumptive quantity, which would be lower than the initial water right." Presumably, this means that in cases where the ACQ clearly applies (addition of acreages or uses), that ACQ must be applied; but also where changes would not strictly require an ACQ analysis (such as change which do not add acreage or uses), that Ecology may be able to limit the extent of the change to the annual consumptive quantity at their discretion.

Any petition for review by the Washington Supreme Court must be filed within 30 days of the Court of Appeals final decision.
(Jamie Morin)

## 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 very few items to report on this month, with Clean Water Act enforcement actions taking the biggest hit as a result of the virus. We will continue to monitor Clean Water Act enforcement actions as they resume throughout the nation.*

• April 24, 2020—The EPA issued a Stop Sale, Use or Removal Order (SSURO) to Seal Shield, LLC (Seal Shield) in Orlando, Florida, requiring the company to immediately halt the sale/distribution of unregistered pesticides and a misbranded pesticide device. The SSURO is being issued to Seal Shield because it is selling products to hospitals and other healthcare providers using public health claims for protection against viruses and reduction of microbial growth leading to hospital acquired infections. In order for Seal Shield to make these claims, the products would need to be registered under Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). These products include, but are not limited to, computer external equipment, mobile devices and TV accessories. The SSURO further requires Seal Shield to stop the sale and distribution of the pesticide device ElectroClave UV Disinfection/Device Manager, because Seal Shield has made false or misleading claims that the device kills pathogens and is effective against the novel coronavirus, SARS-CoV-2, the cause of COVID-19. Under FIFRA, products that claim to kill or repel bacteria or viruses on surfaces are considered pesticides and must be registered by EPA prior to distribution or sale. Public health claims can only be made for products that have been properly tested and are registered with EPA. The agency will not register a pesticide until it has been determined that it will not pose an unreasonable risk when used according to the label directions. Products not registered by EPA may be harmful to human health, cause adverse health effects, and may not be effective against the spread of viruses or other pathogens. While pesticide devices are not required to be registered, any efficacy claims made about devices must be supported by reliable scientific studies.

• April 27, 2020 - EPA announced a settlement with ProBuild Company LLC, for failing to comply with federal lead-based paint requirements. The firm, based in Dallas, Texas, will pay a $48,060 penalty for residential remodeling work in San Diego, California. The subcontractors hired to perform the work failed to comply with the Renovation, Repair and Painting (RRP) Rule, which requires them to take steps to protect the public from exposure to lead. The violations pertained to work performed by ProBuild Company LLC and its subcontractors at multiple homes in the San Diego area. An EPA inspection found that ProBuild did not ensure the subcontractors it hired were EPA-certified to perform such work in pre-1978 housing where lead-based paint is assumed to be present. The company also failed to keep records indicating compliance with lead-safe work practices, failed to actually comply with some of those work practices, failed to provide owners with the required "Renovate Right" pamphlet, and failed to ensure that a certified renovator was involved in the lead-based paint renovations. Although the federal government banned consumer use of lead-containing paint in 1978, it is still present in millions of older homes, sometimes under layers of new paint. The Renovation, Repair and Painting Rule was created to protect the public from lead-based paint hazards that occur during repair or remodeling activities in homes and child-occupied facilities, such as schools, that were built before 1978. The rule requires that individuals performing renovations be properly trained and certified and follow lead-safe work practices.
(Andre Monette)

## JUDICIAL DEVELOPMENTS

# U.S. SUPREME COURT FINDS STATE LAW CLAIMS FOR OILFIELD CLEANUP RESTORATION PLAN MORE STRINGENT THAN A CERCLA PLAN MAY REQUIRE EPA APPROVAL

*Atlantic Richfield Co. v. Christian et.al.*, ___U.S.___, 140 S.Ct. 1335 (April 20, 2020).

The U.S. Supreme Court determined that the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or the Act) did not strip Montana courts of jurisdiction over landowners' state law tort claims for restoration damages against Atlantic Richfield Company (ARCO). The Court, however, also determined the landowners were potentially responsible parties (PRPs) under CERCLA. As a result, the Act required the landowners to seek U.S. Environmental Protection Agency (EPA) approval for their desired restoration plan.

### Factual and Procedural Background

For nearly a century, the Anaconda Copper Smelter in Butte, Montana contaminated an area of over 300 square miles with arsenic and lead. For 35 years, the EPA worked with the owner and defendant, Atlantic Richfield Company (ARCO) to implement a cleanup plan under the Act. To date, ARCO estimates that it has spent roughly $450 million to remediate more than 800 residential and commercial properties in accordance with the approved cleanup plan.

In 2008, a group of 98 landowners sued ARCO in Montana state court under common law tort claims of nuisance, trespass and strict liability, seeking restoration damages that went beyond EPA's cleanup plan. For example, the landowners sought a maximum soil contamination level of 15 parts per million of arsenic, rather than the 250 parts per million level set by EPA, to excavate soil within residential yards to a depth of two feet rather than EPA's chosen depth of one, and to capture and treat shallow groundwater, a plan EPA rejected as costly and unnecessary to secure safe drinking water. The estimated cost for the additional measures was $50 to $58 million.

ARCO argued that CERCLA stripped the Montana courts of jurisdiction over the landowners' state law claim for restoration damages. The Montana Supreme Court held that the landowners' plan was not a challenge to the EPAs cleanup plan because it, "would not stop, delay, or change the work EPA is doing." It reasoned the landowners were:

> . . .simply asking to be allowed to present their own plan to restore their own private property to a jury of twelve Montanans who will then assess the merits of that plan.

The Montana Supreme Court also held that the landowners were not PRPs prohibited from taking remedial action without EPA approval under § 122(e)(6) of the Act. It reasoned that the landowners were not Potential Responsible Parties, because they had never been treated as PRPs for any purpose—by either the EPA or ARCO during the entire 30 years since the Copper Smelt was designated as a Superfund site, and that the six-year statute of limitations for a claim against the landowners had run.

Atlantic Richfield petitioned the U.S. Supreme Court for review.

### The U.S. Supreme Court's Decision

Before the High Court was whether CERCLA stripped the Montana state courts of jurisdiction over the landowners' claim for more stringent restoration damages and, if not, whether the Act required the landowners to seek EPA approval of their restoration plan.

#### Jurisdictional Inquiry

The Court considered and rejected two arguments regarding jurisdiction. First, the Court rejected the landowners' argument that the Court lacked jurisdiction to review the Montana Supreme Court's decision.

The U.S. Supreme Court is authorized to review final judgments or decrees rendered by the highest court of a state. To qualify as final, a state court judgment must be an effective determination of the litigation and not merely an interlocutory or intermediate step. The landowners argued the Court lacked jurisdiction because the Montana Supreme Court's decision was a writ of supervisory control, which allowed the case to proceed to trial, but trial had not taken place. The U.S. Supreme Court rejected this argument, noting that Supreme Court precedent provides that a writ of supervisory control issued by the Montana Supreme Court is a final judgement within the Court's jurisdiction.

Second, the Court considered Atlantic Richfield's argument that CERCLA § 113 stripped Montana courts of jurisdiction over the landowners' lawsuit. Section 113(b) of the Act provides that U.S. District Courts have exclusive original jurisdiction over all controversies arising under the Act. The Court rejected this argument, explaining that this case does not "arise under" the Act as the term is used in CERCLA § 113(b). Instead, landowners' common law claims for nuisance, trespass and strict liability arose under Montana law. Thus, CERCLA did not deprive Montana state courts of jurisdiction over those claims.

## EPA Approval

The U.S. Supreme Court next considered whether CERCLA required the landowners to seek EPA approval of their restoration plan. Section 122(e)(6) of the Act requires PRPs to obtain EPA approval of a restoration plan that is inconsistent with an approved plan. Section 107(a) of the Act lists four classes of PRPs.

The first category includes any "owner" of a "facility." "Facility" includes:

> . . .any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located.

The Court determined that arsenic and lead are hazardous substances, and that because they have come to be located on the landowners' properties, the landowners are PRPs. As a result, under § 122(e)(6), EPA must approve of the landowners' more stringent restoration plan.

## The Opinions of Justices Alito, Gorsuch and Thomas

Justices Alito, Gorsuch, and Thomas concurred in part and dissented in part. Justice Alito concurred with the Court's majority holding that it has jurisdiction to decide the case and that the landowners are PRPs under § 122 (e)(6) of the Act. However, he was unwilling to join the Court's holding that state courts have jurisdiction to entertain "challenges" to EPA-approved plans under CERCLA.

Justices Gorsuch and Thomas concurred with the Court's holding that the Court has jurisdiction to decide the case, but dissented with the Court's holding that the landowners were PRPs under the Act.

## Conclusion and Implications

The U.S. Supreme Court's decision introduces the possibility for property owners impacted by CERCLA Superfund sites to sue under common law state tort claims to implement a more stringent restoration plan than the plan approved by EPA. Further, the Court's interpretation of the Act makes it possible that the property owners could also PRPs, thereby requiring EPA approval prior to bringing such state law claims, if hazardous substances from a Superfund site have "come to be located" on their property. The High Court's opinion is available online at: https://www.supremecourt.gov/opinions/19pdf/17-1498_8mjp.pdf. (Nathalie Camarena, Rebecca Andrews)

# DISTRICT COURT FINDS NATIONWIDE PERMIT FOR KEYSTONE XL PIPELINE, AND OTHER PIPELINE AND UTILITY PROJECTS, VIOLATE THE ENDANGERED SPECIES ACT

*Northern Plains Resource Council v. U.S. Army Corps of Engineers*,
___F.Supp.3d___, Case No. CV-19-44-GF-BMM (D. Mt. Apr. 15, 2020, *amended* order May 11, 2020).

The U.S. District Court for the District of Montana recently declared that the U.S. Army Corps of Engineers (Corps) violated the federal Endangered Species Act (ESA) when it reissued Nationwide Permit 12 (NWP 12), a streamlined general permit used to approve the Keystone XL pipeline and other pipelines and utility projects pursuant to § 404(e) of the federal Clean Water Act. On April 15, 2020, the court determined the Corps did not properly evaluate NWP 12 under the ESA when it determined that reissuance of the permit would have no effect on listed species or critical habitat. Further, the Corps' decision not to initiate formal programmatic consultation with the U.S. Fish and Wildlife Service and National Marine Fisheries Service (the Services) in reissuing NWP 12 was also "arbitrary and capricious in violation of the Corps' obligations under the ESA." The court's order completely vacated the NWP 12 permit. In a subsequent order dated May 11, 2020, the court narrowed the *vacatur* to apply only to projects for the construction of new oil and gas pipelines, but not routine maintenance, inspection, and repair activities on existing projects. Thus, the court's order "prohibit[s] the Corps from relying on NWP 12 for those projects that likely pose the greatest threat to listed species."

## Factual and Procedural Background

Plaintiffs include six environmental organizations that sued the Corps alleging violations of the Endangered Species Act, the National Environmental Policy Act (NEPA), and the federal Clean Water Act (CWA) following its reissuance of NWP 12 in 2017. The Corps issued NWP 12 for the first time in 1977.

Section 404 of the CWA requires any party seeking to construct a project that will discharge dredged or fill material into jurisdictional waters to obtain a permit. The Corps oversees the permitting process and issues both individual permits and general nationwide permits to streamline the process. The discharge may not result in the loss of greater than one-half acre of jurisdictional waters for each single and complete project. For linear projects like pipelines that cross waterbodies several times, each crossing represents a single and complete project. Projects that meet NWP 12's conditions may proceed without further interaction with the Corps.

Under § 7(a)(2) of the ESA, the Corps is required to ensure any action it authorizes, funds, or carries out, is not likely to jeopardize the continued existence of any listed species or destroy or adversely modify designated critical habitat. The Corps must determine "at the earliest possible time" whether its action "may affect" listed species and critical habitat. If the action "may affect" listed species or critical habitat, the Corps must initiate formal consultation with the Services. No consultation is required if the Corps determines that a proposed action is not likely to adversely affect any listed species or critical habitat. Formal consultation begins with the Corps' written request for consultation under ESA § 7(a)(2) and concludes with the Services' issuance of a Biological Opinion whether the Corps' action likely would jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

On January 6, 2017 the Corps published its final decision reissuing NWP 12 and other nationwide permits. The Corps determined that NWP 12 would result in "no more than minimal individual and cumulative adverse effects on the aquatic environment" under the CWA, and that NWP 12 complied with both the ESA and NEPA. The Corps did not consult with the Services based on its "no effect" determination, as the ESA does not require consultation if the proposed action is determined to not likely adversely affect any listed species or critical habitat.

Following the Corps' final decision, Plaintiffs challenged the Corps' determination not to initiate programmatic consultation with the Services under ESA § 7(a)(2) to obtain a Biological Opinion.

### The District Court's Decision

The court considered plaintiffs' claim that the Corps acted arbitrarily and capriciously in reaching its "no effect" determination, and that the Corps should have initiated programmatic consultation with the Services when it reissued NWP 12. The court analyzed whether the Corps "considered the relevant factors and articulated a rational connection between the facts found and the choice made."

### Reissuance of the Nationwide Permit Impacted Listed Species and Habitat

First, the court determined "resounding evidence" existed that the Corps' reissuance of NWP "may effect" listed species and their habitat. The court quoted statements by the Corps itself in its final determination documents acknowledging the many risks of authorized discharges by NWP 12. The Corps noted that activities authorized by past versions of NWP 12 "have resulted in direct and indirect impacts to wetlands, streams, and other aquatic resources" including "permanent losses of aquatic resource functions and services." Further, the Corps acknowledged that utility line construction "*will* fragment terrestrial and aquatic ecosystems" and that fill and excavation activities cause wetland degradation and losses. The court concluded that "[t]he types of discharges that NWP 12 authorizes 'may affect' listed species and critical habitat, as evidenced in the Corps' own Decision Document." Thus, under the ESA's low threshold for § 7(a)(2) consultation, "[t]he Corps should have initiated Section 7(a)(2) consultation before it reissued NWP 12 in 2017." The court also cited plaintiffs' expert declarations which demonstrated that reissuance of NWP 12 may affect endangered species, including pallid sturgeon populations in Nebraska and Montana, and the endangered American burying beetle. The declarations added to the "resounding evidence" in support of the conclusion that the Corps' actions "may affect" listed species or critical habitat.

### Circumvention of the Consultation Process

Next, the court addressed the Corps' argument that it was authorized to circumvent § 7(a)(2) consultation requirements for programmatic consultation with the Services by relying on project-level review or General Condition 18, which provides that a nationwide permit does not authorize an activity that is "likely to directly or indirectly jeopardize the continued existence of a" listed species or that "will directly or indirectly destroy or adversely modify the critical habitat of such species." The court noted that a federal court previously concluded that the Corps should have consulted with the Services when it reissued NWP 12 in 2002. Further, the Corps had a history of consultation when it reissued NWP 12 in 2007 and 2012.

The court concluded that the Corps could not circumvent the consultation requirements of the ESA by relying on project-level review because "[p]rogrammatic review of NWP 12 in its entirety . . . provides the only way to avoid piecemeal destruction of species and habitat." By contrast, project-level review, "by itself, cannot ensure that the discharges authorized by NWP 12 will not jeopardize listed species or adversely modify critical habitat." Similarly, General Condition 18, "fails to ensure that the Corps fulfills *its* obligations under ESA Section 7(a)(2) because it delegates the Corps' initial effect determination to non-federal permittees." Thus, the Corps could not delegate its duty to determine whether NWP authorized activities will affect listed species or critical habitat.

### Conclusion and Implications

In the end, the District Court concluded that the Corps' "no effect" determination and resulting decision to forego programmatic consultation "proves arbitrary and capricious in violation of the Corps' obligations under the ESA." The court vacated NWP 12 and enjoined the Corps from authorizing activities thereunder. In its amended order, the court limited the scope of its order to the construction of new oil and gas pipelines.

This case emphasizes the low threshold for § 7(a)(2) consultation for any activity that "may affect" listed species and critical habitat, and the need to comply with the ESA's procedural consultation requirements. The District Court's decision is available online at: https://ecf.mtd.uscourts.gov/doc1/11112687968.

(Patrick Skahan, Rebecca Andrews)

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

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