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FEATURE ARTICLE

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 delivering 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?

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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WESTERN WATER NEWS

IS IDAHO A PRIOR APPROPRIATION STATE? THE DEBATE CONTINUES

Ask ten law students studying for the Idaho bar examination whether Idaho water law is governed by the prior appropriation doctrine and chances most of them will quickly answer "yes." Ask ten Idaho water lawyers, and the response from all ten would be "yes" no matter their level of experience. But the issue remains: Is Idaho a prior appropriation state?

Idaho Code Section 42-1101

First enacted by the Territorial Legislature in 1887, and untouched since then (other than recodifications in 1909 and 1919), Idaho Code § 42-1101—Rights of Landowners to water—provides in its entirety:

> All persons, companies and corporations owning or claiming any lands situated on the banks or in the vicinity of any stream, are entitled to the use of the waters of such stream for the purpose of irrigating the land so held or claimed.

Though Idaho common law abolished the riparian rights doctrine as early as 1890, followed by subsequent statutory enactments and amendments consistent with the prior appropriation doctrine, Idaho Code § 42-1101 still remains. Perhaps, many Idaho water lawyers know of its existence and simply ignore it. Maybe others do not know of its existence because they would have no reason to look for it in support of making a riparian rights-based argument. It is there nonetheless, and its existence is fueling a claim to a riparian right of water use some 130 years after the doctrine's abrogation.

Idaho's Early Days as a Hybrid Jurisdiction

While the prior appropriation doctrine is well-settled and very well engrained today (save the outlier argument I have recently encountered), there was a time when Idaho recognized riparian rights consistent with Idaho Code § 42-1101. There was even a period of time where the riparian rights and prior appropriation doctrine coexisted, though one relying on riparian rights to use water was subordinate to the priority-based (and protected) right of another on the same stream established under the prior appropriation doctrine.

So far as the Idaho Supreme Court is concerned, the riparian rights doctrine was at least subordinate to formal appropriations of water (if not dead altogether) as early as 1890. *Drake v. Earhart*, 2 Idaho 750, 23 P. 541 (1890):

> This doctrine of riparian proprietorship in water as against prior appropriation has been very often discussed, and nearly always decided the same way by almost every appellate court between Mexico and the British possessions, and from the shores of the Pacific to the eastern slope of the Rocky Mountains, as well as by the Supreme Court of the United States . . . While there are questions growing out of the water laws and rights not fully adjudicated, this phantom of riparian rights, based upon facts like those in this case, has been so often decided adversely to such claim, and in favor of the prior appropriation, that the maxim, 'First in time, first in right,' should be considered the settled law here. Whether or not it is a beneficent rule, it is the lineal descendant of the law of necessity . . . The use of water to which [new inhabitants] had been accustomed, and the laws concerning it, had no application here [in Idaho and the west]. The demand for water they found greater than the supply, as is the unfortunate fact still all over this arid region. Instead of attempting to divide it among all, thus making it unprofitable to any, or instead of applying the common-law riparian doctrine, to which they had been accustomed, they disregarded the traditions of the past, and established as the only rule suitable to their situation that of prior appropriation. Drake, 2 Idaho at 753-754.

To the extent *Drake* could be read as leaving the door open to some version of the riparian rights doctrine in Idaho, that door was quickly closed in 1908 and 1909. *See, Taylor v. Hulett*, 15 Idaho 265, 271, 97 P. 37, 39 (1908) ("[T]he riparian doctrine of the common law has been abrogated in both Idaho and Wyoming, and the rule of 'first in time is first in right' is recognized and enforced in both states."); *Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho 484, 491, 101 P. 1059, 1062 (1909) ("A riparian proprietor in the state of Idaho has no right in or claim to the waters of a stream flowing by or through his lands that he can successfully assert as being prior or superior to the rights and claims of one who has appropriated or diverted the water of the stream and is applying it to a beneficial use. To this extent, therefore, the common-law doctrine of riparian rights is in conflict with the constitution and statutes of this state and has been abrogated thereby.").

Over time Idaho evolved further, doing away with the "constitutional method" of appropriation (the diversion and beneficial use of water under priority) in favor of a mandatory administrative-based application process governed by the Idaho Department of Water Resources. *See*, *e.g.*, Idaho Code §§ 42-103, 42-201(2), and 42-202, and *Idaho Power Co. v. Idaho Dep't of Water Res.*, 151 Idaho 266, 274, 255 P.3d 1152, 1160 (2011) (confirming Idaho's mandatory administrative application for water right permit process as the sole means of appropriating surface water beginning in 1971 short of *de minimis* domestic appropriations otherwise exempt from the permit process under Idaho Code Section 42-111).

Idaho Department of Water Resources

Finally, and to the extent there is any remaining confusion over the existence of the riparian rights doctrine in Idaho, the Idaho Department of Water Resources plainly states:

> You may also have heard of something called 'riparian rights.' In some states, an owner of land has the right to make 'reasonable use' of ground water underneath [his or] her land, or water naturally flowing on, through, or along the borders of [his or] her land. A riparian right to make use of the water is not limited by priority date and it cannot be lost by non-use. Idaho law does not recognize a 'riparian right' to divert and use water. A water right under the law of the state of Idaho can be established only by appropriation, and once established, it can be lost if not used. *A Water Users Information Guide—Idaho Water Rights A Primer* (Rev. July 2015).

Conclusion and Implications

There was a time and place for riparian rights in Idaho—no matter how brief that time. That we are left arguing over the doctrine in 2020 is surprising (putting is mildly). Beware the antiquated remnants lurking in your state code—might be best to get them repealed when you come across them.
(Andrew J. Waldera)

REGULATORY DEVELOPMENTS

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD ADOPTS PERMANENT MONTHLY WATER USE REPORTING REQUIREMENTS

Building upon its emergency regulations imposed during the incredible drought years of 20142017, the California State Water Resources Control Board (SWRCB) recently made permanent regulations mandating urban water suppliers to track and report monthly water usage.

Background

During California's recent historic drought, the SWRCB adopted emergency regulations that required California's largest water suppliers—those with more than 3,000 connections or supplying more than 3,000 acre-feet of water annually—to track and report monthly water usage. These urban water suppliers collectively represent the state's 400 largest water suppliers and serve approximately 90 percent of the state's population. The regulations were put into effect generally from July 2014 through November 2017, in an effort to maximize water conservation throughout the state. Many considered those efforts largely successful. Between June 2015 and March 2017 California's urban water suppliers collectively conserved 22.5 percent water use compared to prior years, enough to supply approximately one-third state's population for one year.

In late 2017, the SWRCB modified the reporting mandates and generally transitioned toward voluntary reporting. Notwithstanding that transition, more than 75 percent of water suppliers have continued to report their monthly water usage voluntarily. In May 2018, the Governor signed into law water efficiency legislation that authorized the SWRCB to issue permanent mandatory monthly water use requirements on a non-emergency basis.

Monthly Reporting Requirements

The new SWRCB regulation requires water suppliers to report residential water use, total potable water production, measures implemented to encourage water conservation and local enforcement actions. Specifically, the regulation requires reporting of the following:

- The urban water supplier's public water system identification number(s);
- The urban water supplier's volume of total potable water production, including water provided by a wholesaler, in the preceding calendar month;
- The population served by the urban water supplier during the reporting period;
- The percent residential use that occurred during the reporting period;
- The water shortage response action levels.

The SWRCB considers these measures as part of the state's long-term plan to prepare California for future droughts. The regulation increases transparency and access to important and timely water data, and in a format consistent with reporting provided since 2014.

In adopting the regulation, the Chairman of the SWRCB stated:

> As we continue to see, the quality, timeliness, and gathering of data are critical to managing California's water in the 21st century. Urban monthly water use data have driven enduring, widespread, public awareness and understanding of water use, conservation and efficiency in our state.

The regulation now moves to the Office of Administrative Law for review and is expected to take effect October 1, 2020.

Conclusion and Implications

The recently adopted regulation will likely assist policy makers in making important and better-informed water resources management decisions

moving forward. It will also help water managers and Californians working together to monitor statewide and local water usage conditions and improve effectiveness in responding to future water shortage challenges. Though reporting is once again mandatory, with more than 75 percent of water suppliers already voluntarily reporting water usage during the past three years, many are observing what appears to be a post-drought culture change among stakeholders who have taken greater ownership and responsibility in achieving water conservation. This recent move could potentially strengthen that dynamic and continue to yield increased conservation results. For more information, *see:* https://www.waterboards.ca.gov/press_room/press_releases/2020/pr04212020_swrcb_adopts_water_conserv_rpt_req.pdf
(Chris Carrillo, Derek R. Hoffman)

OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY PROPOSES TO APPROVE WATER QUALITY CERTIFICATION FOR THE STATE UNIVERSITY'S PACWAVE SOUTH WAVE ENERGY FACILITY

On April 28, 2020, the Oregon Department of Environmental Quality (DEQ) issued for public comment a proposed federal Clean Water Act (CWA) § 401 Water Quality Certification for Oregon State University's PacWave South wave energy test site. DEQ accepted public comments through June 3, 2020.

PacWave South Hydrokinetic Project

The PacWave South project is designed to provide a facility for offshore wave energy developers to test their designs without the significant expense and time commitment associated with individualized permitting processes. The project is funded by a $35 million grant from the U.S. Department of Energy and a $3.8 million grant from the state of Oregon.

The facility will be located in 213-256 feet of water and will feature 20 wave energy converters in four berths, allowing for the testing of four different wave energy technologies simultaneously. The facility will have a total maximum output of 20 MW. Testing of most types of wave energy converters will be permitted at PacWave South, including point adsorbers, attenuators, oscillating water columns, and hybrid devices.

The testing array will be located about seven miles offshore, near Newport, Oregon. PacWave South will be located a few miles from PacWave North, a test site Oregon State University (OSU) established in 2012. PacWave North is located in state waters and operates with a streamlined permitting process, but unlike PacWave South, it is not connected to the electrical grid. PacWave South will feature five undersea cables connected to a landfall site at the Driftwood Beach State Recreation Site near Seal Rock. PacWave South will interconnect with the Central Lincoln People's Utility District distribution system.

The Permitting Process

On May 31, 2019, OSU applied for a 25-year license from the Federal Energy Regulatory Commission (FERC) to construct and operate PacWave South. On September 9, 2019, OSU applied to the U.S. Army Corps of Engineers (Corps) for a CWA § 404 removal-fill permit to discharge material to waters of the state during construction. That application also constituted an application to DEQ for § 401 Water Quality Certification relating to the § 404 permit. However, the FERC license application triggered review under § 401 as well. Due to the longer duration of the FERC license, DEQ determined that additional conditions were necessary to ensure compliance with water quality standards for the duration of the FERC license.

Water Quality Certification

The CWA directs states to adopt water quality standards for waters within the state. Water quality standards consist of a designated use or uses for the water body, numeric and narrative water quality criteria for the waterbody, and an antidegradation policy. These standards are enforced through § 401 of the CWA, which applies when an applicant seeks a federal permit for an activity that may result in

any discharge into navigable waters. The state must certify that the applicant has provided "reasonable assurance" that water quality standards will be met.

DEQ's Proposed Certification with Conditions

Under Oregon's Territorial Sea Plan, Oregon's regulatory responsibility for administering state law extends to Oregon's Territorial Sea, which includes the waters and seabed extending three geographical miles seaward from the coastline. Because the test site will be about six miles offshore, the only project action proposed within Oregon's Territorial Sea is the installation of the five subsea cables, which will be installed one to two meters below the seafloor. At landfall, the cables will enter conduits installed by horizontal directional drilling.

DEQ found that PacWave South provided reasonable assurance that the project will meet water quality standards. DEQ proposes to issue PacWave South's certification with routine conditions, such as a requirement to obtain from DEQ a National Pollutant Discharge Elimination System 1200-C construction stormwater permit for any disturbances of more than one acre. PacWave South will also be required to follow best management practices to ensure protection of water quality.

Conclusion and Implications

If the remainder of the permitting process for PacWave South proceeds smoothly, construction could begin as early as late summer 2020 with undersea cable installation in 2022. The project could be a big step forward in assessing the commercial viability of new wave energy technologies, but its success will depend on wave-energy developers contracting with OSU to use the facility.
(Alexa Shasteen)

LAWSUITS FILED OR PENDING

CALIFORNIA OBTAINS TEMPORARY HALT TO CURRENT FEDERAL CENTRAL VALLEY PROJECT OPERATIONS TO PROTECT STEELHEAD

On April 21, the State of California filed a preliminary injunction in the U.S. District Court for the Eastern District of California requesting that the District Court enjoin the U.S. Bureau of Reclamation's current operation of the federal Central Valley Project (CVP). The court granted the preliminary injunction in part on May 12 to protect steelhead populations through May 31, 2020. Current CVP operations were evaluated by recently adopted Biological Opinions that determined the Bureau's proposed CVP operations would not jeopardize the existence of legally protected species. California legally challenged those Biological Opinions as violating state and federal law. Therefore, California requested in its preliminary injunction that the CVP be operated pursuant to Biological Opinions adopted in 2009 until the merits of its underlying challenge to the recently adopted Biological Opinions was resolved. The 2009 Biological Opinions concluded that CVP operations, as then proposed, would jeopardize the existence of protected species, and provided reasonable and prudent alternatives for CVP operations that would not jeopardize protected species. [*California Natural Resources Agency v. Ross*, Case No. 1:20-cv-00426 (E.D. Cal.).]

Background

The federally operated Central Valley Project, which is operated by the U.S. Bureau of Reclamation (Bureau) in conjunction with the California State Water Project (SWP), is the nation's largest water conveyance network. The CVP and SWP move water from Northern California through the Sacramento-San Joaquin Delta (Delta) south through the Central Valley and into southern California.

The CVP is operated pursuant to federally adopted Biological Opinions which are issued by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS). A Biological Opinion indicates whether a proposed federal action, such as the operation of the CVP, will likely jeopardize the continued existence of flora and fauna protected by the federal Endangered Species Act (ESA) or adversely modify designated critical habitat. The ESA establishes liability for the "taking" of listed species, unless a permit or authorization for incidentally taking species is obtained. If a Biological Opinion determines that a proposed action would jeopardize the existence of a protected species, the Biological Opinion is deemed to be a "jeopardy" opinion. If not, a Biological Opinion is deemed a "no jeopardy" opinion. For jeopardy opinions, the federal agency responsible for the project must comply with reasonable and prudent alternatives identified in a Biological Opinion to avoid liability under the ESA. Even for "no jeopardy" opinions, a federal agency may operate a project pursuant to a reasonable and prudent measures. Separate from the ESA, California has also enacted environmental protections for species of *flora* and *fauna* through the California Endangered Species Act (CESA).

In late 2019, FWS and NMFS each issued no jeopardy Biological Opinions for proposed CVP operations, determining that the long-term operation of the CVP was not likely to threaten the continued existence of endangered species listed under the ESA. In reaching these conclusions, FWS and NMFS considered funding, habitat restoration, and rearing measures for endangered species proposed as part of CVP operations. These Biological Opinions replaced those issued in 2009 for CVP and State Water Project operations, which were "jeopardy" opinions and imposed reasonable and prudent alternatives for operating the CVP. Additionally, while FWS and NFMS were preparing the new Biological Opinions, the Bureau adopted an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA) for the long-term operation of the CVP, as identified in a Biological Assessment that the Bureau prepared under NEPA.

Concerned about the potential impacts CVP operations may have on endangered species, California filed suit in February 2020, alleging that the Biologi-

cal Opinions violated the federal ESA, CESA, and the federal Administrative Procedure Act (APA). California's lawsuit also included alleged violations of NEPA, namely, that the Bureau's EIS failed to take a "hard look" at the environmental consequences of its proposed action, as required by NEPA.

The District Court's Ruling

The purpose of a preliminary injunction is to preserve the relative position of the parties until the merits of a lawsuit can be resolved. California's preliminary injunction sought to halt CVP operations pursuant to the recently adopted Biological Opinions—which California legally challenged under state and federal law—and asked the court to order that the Bureau operate the CVP in accordance with the 2009 Biological Opinions until the court resolved the merits of California's claims. To obtain a preliminary injunction, California was required to show that it: 1) was likely to succeed on the merits; 2) would likely suffer irreparable harm if the preliminary injunction was not granted; (3) prevailed in a balancing of the equities; and 4) showed that the injunction is in the public interest.

Likelihood of Success on the Merits

First, California contended that it was likely to prevail on the merits of its claims, because the Bureau's operation of the CVP violated the ESA and CESA. In particular, California argued that the 2019 Biological Opinions failed to include sufficiently detailed "guardrails" for federal operations or definite measures to enhance a species' health. Accordingly, California argued that the "no jeopardy" conclusion in both Biological Opinions was unsupported, and therefore was arbitrary and capricious under the APA.

Similarly, California argued that CESA, which is state law, applied to the Bureau because federal statutes require that the Bureau comply with state water laws. In particular, California contended that CESA applied to the use of water in California as it affects species, including pursuant to permits issued by the California State Water Resources Control Board for the operation of the CVP. Because CVP operations under the Biological Opinions impact species protected by CESA, California argued that the Bureau was "taking" protected species without authorization and was therefore violating CESA.

Finally, California argued that the Bureau was violating NEPA because its EIS failed to take a "hard look" at the environmental consequences of its proposed action. Specifically, California alleged that the Bureau's EIS was "tainted" by the inclusion of protective measures that are disallowed by NEPA, such as conservation hatchery programs assessed by the EIS. California also contended that the Bureau did not adequately analyze the impact on salmonid species during high flow events that would correspond with higher pumping rates by the CVP, because it did not model the impact of maximum pumping rates during such events and assumed that such pumping would only occur for limited periods of time during certain years. Finally, California argued that the Bureau's EIS did not provide for mitigation measures on species impacts from CVP operations, as required by NEPA. For instance, California asserted that the Bureau only proposed to monitor longfin smelt populations during certain operational stages, which did not itself qualify as a mitigation measure. For these and related reasons, California argued that the Bureau's EIS violated NEPA, and that California would prevail on this claim for purposes of obtaining a preliminary injunction.

Irreparable Harm

To satisfy the second prong of the preliminary injunction requirements, California argued that it would suffer irreparable harm, primarily in the form of increased mortality of endangered species and the loss of their habitat. In particular, California cautioned that Delta smelt, longfin smelt, and Central Valley steelhead would suffer population and habitat declines as a result of CVP operations, particularly during dry years. For instance, under critically dry conditions in the Delta, California warned that Delta smelt habitat would be reduced, including rearing habitat, and that the already reduced Delta smelt population would be further imperiled. Similarly, longfin smelt and Central Valley steelhead could be increasingly entrained by CVP operations given greater water exports from the Delta under current CVP operations, thus leading to greater population declines that, according to California, might not be remedied. Accordingly, California contended that it had satisfied the irreparable harm standard required to obtain a preliminary injunction.

Balancing the Equities and the Public Interest

California also argued that the balance of the equities and the public interest support issuing a preliminary injunction. California argued that current CVP operations will result in permanent environmental harms, and thus tipped the balance of the equities as well as the public interest in favor of its position. Because environmental impacts could be permanent—such as the extinction of the Delta smelt—and would otherwise be significant, California contended that any economic harm incurred by defendants in the lawsuit could not outweigh the equities and public interest favoring California's position.

Conclusion and Implications

On May 12, the court granted California's preliminary injunction in part, and denied the remainder as moot. Specifically, the court enjoined current CVP export operations in the South Delta and reinstated a specific action with the reasonable and prudent alternative from the 2009 NMFS Biological Opinion from May 12 through May 31, 2020, on the ground that operations carried out pursuant to current CVP operations would irreparably harm threatened Central Valley steelhead. Because the remainder of California's motion was denied as moot, the impact of the court's order was limited to the month of May, and the limited injunction would not apply to the duration of California's underlying lawsuit. Whether the State of California or other parties will file further applications for preliminary injunction during the pendency of the action is not yet known. Plaintiffs motion for preliminary injunction is available online *at*: https://oag.ca.gov/system/files/attachments/press-docs/Memorandum%20in%20support%20of%20Preliminary%20Injunction.pdf.
(Miles Krieger, Steve Anderson)

ENVIRONMENTAL GROUPS FILE SUIT IN CALIFORNIA CHALLENGING STATE WATER PROJECT APPROVAL

On April 29, 2020, the Sierra Club, the Center for Biological Diversity, the Planning and Conservation League and Restore the Delta (collectively: plaintiffs) filed an action in the California Superior Court seeking to overturn the California Department of Water Resources (DWR) approval of the long-term operation of the State Water Project (SWP), following DWR's March 27, 2020 certification of the final Environmental Impact Report (EIR). Plaintiffs specifically base their allegations regarding the insufficiency of environmental review on the California Environmental Quality Act (CEQA), the Delta Reform Act and the public trust doctrine. If the court rules in favor of the plaintiffs, DWR will likely be required to undertake substantial efforts to correct the alleged noncompliance, and could influence environmental review proceedings presently being conducted for the One-Tunnel Delta Conveyance Project (Tunnel Project) intended to expand SWP capacity. [*Sierra Club, et al. v. California Department of Water Resources*, filed April 29, 2020 (S.F. Super. Ct.).]

Background

The State Water Project is an extensive system of infrastructure including 700 miles of canals and aqueducts, along with dams, pumping stations and power plants that collectively operate to redistribute water from the high Sierra Nevada for use around the state. The massive undertaking dates to the late 1950s and was conceived primarily to address rapidly-increasing demands for water required by growing population centers in Southern California lacking the more abundant resources found further north. An estimated 2.9 million acre-feet of water is delivered by the SWP annually, with 70 percent used for urban and industrial purposes in Southern California and the Bay Area and the remaining 30 percent of SWP water largely dedicated to agricultural use in the Central Valley. DWR reportedly estimates that 27 million Californians rely on SWP water.

The SWP is operated by DWR in conjunction with the federal Central Valley Project (CVP) overseen by the U.S. Bureau of Reclamation since the 1930s. The CVP serves as another major provider of water to the Central Valley. The SWP partially overlaps with the CVP, sharing some of the canals, aqueducts and pump plants within the CVP.

Environmental Concerns

Long-standing environmental concerns regarding the SWP center on the reduction of freshwater flows into the San Francisco Bay-Delta (Delta), which some organizations or state agencies state poses a major threat to wildlife in those ecosystems. According to plaintiffs' petition to the court, adverse impacts include:

> . . .reduced flows, increased salinity levels, worsened water quality, reduced food supply, increased harmful algal blooms, harm to endangered and threatened fish species, and adverse modification of their designed critical habitat.

A statement from the Center for Biological Diversity issued in connection with the lawsuit claims the SWP has "devastated" most of the Delta's native fish populations. Plaintiffs and other environmental interests now fear a significant exacerbation of SWP harms due to the planned Tunnel Project, which is expected to increase the amount of replenishing water diverted from Delta ecosystems by expanding SWP capacity.

Notably, plaintiffs' lawsuit comes despite DWR having taken what some say are novel actions in connection with the environmental review of the SWP, seeking to avoid traditional reliance on federal environmental policy and reflecting the state's broader divergence with the federal administration with respect to environmental policy. In particular, the EIR was for SWP long-term operation was prepared in connection with DWR's now-approved application for an incidental intake permit (ITP) from the California Department of Fish and Wildlife (CDFW) regarding compliance of the long-term operation with California Endangered Species Act (CESA). That decision marks a significant deviation from the historical practice of obtaining CESA consistency determinations from CDFW that relied upon federal Biological Opinions regarding the operation of CVP and SWP, the most recent of which have been heavily scrutinized.

Plaintiffs' Claims

In light of the anticipated effects of the SWP long-term operation on Delta ecosystems, plaintiffs allege that DWR could not have properly certified an EIR that concluded "the proposed project does not result in significant effects, thus the need to lessen does not exist." Plaintiffs detail a number of alleged substantive and procedural insufficiencies of the EIR under CEQA. Chief among them is DWR's alleged failure to disclose impacts associated with the Tunnel Project. Plaintiffs' view the Tunnel Project as "part and parcel" with SWP long-term operation, such that one cannot be sufficiently reviewed for CEQA purposes without encompassing the other.

In addition to CEQA, plaintiffs claim DWR's approval of the long-term operations violated the Delta Reform Act's "coequal goals" mandate, requiring a balance of the goal of achieving a more reliable state water supply with protecting the environment. They further allege DWR's approval of the EIR ignores the constitutional principle of reasonable use and the public trust doctrine. The petition asks the court to vacate approval of the long-term operation plan for the Project, the related Findings (defined herein) and the certification of the EIR, and require DWR to revise the Findings according to law.

Conclusion and Implications

The court finding in favor of the plaintiffs would represent a notable setback for the state's current plans to solidify the future operations of the SWP. In addition to the effort and complications that may be associated with a new environmental review, a judgment for the plaintiffs could further impact ongoing review for the Tunnel Project, to the extent the court agrees with plaintiffs' assertion that adequate review of SWP long-term operation and the Tunnel Project cannot occur independently. Along with the separate battles being fought regarding the recently-approved ITP and likelihood of challenges to the Tunnel Project environmental review, the lawsuit exemplifies the primary environmental complaints leveled against the SWP and demonstrates the complexity of the state effort to proceed with long-term plans, and even more so as long as federal and state administration take contrary positions. The lawsuit is available online at: https://www.courthousenews.com/wp-content/uploads/2020/04/CalifStateWaterProject-COMPLAINT.pdf.

(Wesley A. Miliband, Andrew D. Foley)

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)

JUDICIAL DEVELOPMENTS

DISTRICT COURT FINDS NATIONWIDE PERMIT FOR KEYSTONE XL PIPELINE AND OTHER PIPELINE AND UTILITY PROJECTS VIOLATES 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)

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

Legal Issued 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 (ACQ) 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 (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 (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 rulemaking authority. Ecology appealed 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 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, 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)

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