Volume 15, Number 6
July 2020

EASTERN WATER LAW™

& POLICY REPORTER

CONTENTS

Continued on next page

ARGENT COMMUNICATIONS GROUP

WWW.ARGENTCO.COM

Publisher's Note:

Accuracy is a fundamental of journalism which we take seriously. It is the policy of Argent Communications Group to promptly acknowledge errors. Inaccuracies should be called to our attention. As always, we welcome your comments and suggestions. Contact: Robert M. Schuster, Editor and Publisher; 530-852-7222; schuster@argentco.com.

WWW.ARGENTCO.COM

Subscription Rate: 1 year (11 issues) $845.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 1135, Batavia, IL 60510-1135; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc.: President, Gala Argent; Vice-President and Secretary, Robert M. Schuster, Esq.

EWL

FEATURE ARTICLE

CHALLENGING FEDERAL AGENCY RETREAT ON REMAND—WHEN DOES REGULATORY RELIEF CONSTITUTE FINAL AGENCY ACTION SUBJECT TO JUDICIAL REVIEW?

By Deborah Quick, Esq.

Editor's Note: While the subject matter of this case was the federal Clean Air Act, it's discussion on EPA "regulatory retreat" could equally apply to the federal Clean Water Act, therefore, we felt it's inclusion in the reporter would be highly valuable to water law practitioner.

Two U.S. Environmental Protection Agency (EPA) regulations adopted pursuant to the federal Clean Air Act (42 U.S.C. § 7401 *et seq.*, CAA) were successfully challenged, and the matters remanded to EPA for implementation by D.C. Circuit decisions. In both instances, EPA chose to regulatory retreat, sparking subsequent petitions for review. In separate decisions released on the same day the D.C. Circuit explored whether EPA's post-remand regulatory retreats were final actions subject to judicial review. [*Sierra Club v. EPA*, 955 F.3d 56 (D.C. Cir. Apr. 7, 2020); *NRDC v. Wheeler*, 955 F.3d 68 (D.C. Cir. 2020)]

The Significant Impact Levels Guidance

Sierra Club v. EPA, 955 F.3d 56 (D.C. Cir. Apr. 7, 2020)

The CAA's Prevention of Significant Deterioration (PSD) program requires major emitting facilities to obtain a permit "setting forth emission limitations" for a facility prior to construction. *See* 42 U.S.C. § 7475(a)(1), § 7470-79. Issuance of a PSD permit is dependent on the applicant demonstrating that new emissions from the proposed project:

> . . .will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, [or] (B) national ambient air quality standard in any air quality control region[.] 42 U.S.C. § 7475(a)(3). . . .The 'maximum allowable increase' of an air pollutant is a marginal level of increase above the defined baseline concentration and is known as the 'increment.' 75 Fed. Reg. 64,864, 64,868 (Oct. 20, 2010).

The states are charged with implementing the PSD program "in accordance with their [state implementation plans, or] SIPs and federal minimum standards, *see* 42 U.S.C. § 7410(a)(1)-(2), (1)" However, the CAA "authorizes EPA to promulgate regulations regarding the ambient air quality analysis required under the permit application review." *See* 42 U.S.C. § 7475(e)(3. EPA adopted regulations "outlining a set of values for states to use in determining what level of emissions does 'cause or contribute to' a violation under section 7475(a)(3)." *See* 40 C.F.R. § 51.165(b)(2); 52 Fed. Reg. 24,672, 24,713 (July 1, 1987).

These values are known as Significant Impact Levels" (SILs) when used as part of an air quality demonstration in a PSD permit application. *See* SILs Guidance at 9.

2010 regulations "incorporating PM2.5 values into [EPA's] preexisting table of significance values at 40 C.F.R. § 51.165(b)(2)" were challenged by the filing of a petition for review. EPA asked the D.C. Circuit "to vacate and remand the … regulations so EPA could address flaws it had recognized during the course of litigation. *See*, *Sierra Club v. EPA*, 705

F.3d 458, 463-64 (D.C. Cir. 2013)." In vacating the regulations, the D.C. Circuit Court stated that, on remand:

> . . .the EPA [might] promulgate regulations that do not include SILs or do include SILs that do not allow the construction or modification of a source to evade the requirement of the Act as do the SILs in the current rule. Id. at 464.

Subsequent to the 2010 remand, EPA "posted online and sought informal public comment on a new draft of guidance on the use of SILs," and then in 2018 issued the SILs Guidance at issue in this case, having revised it in response to comments received. EPA described its SILs Guidance:

> As the first of a two-step approach, explaining it hoped to 'first obtain experience with the application of these values in the permitting program before establishing a generally applicable rule.'

The Suspension of the Hydrofluorocarbons Rule

NRDC v. Wheeler, 955 F.3d 68 (D.C. Cir. Apr. 7, 2020)

In response to a 1990s amendment to the CAA requiring transition away from the use of ozone-depleting substances to "less harmful substitutes." Initially, many transitioned to hydrofluorocarbons (HFCs), which, subsequently have been established as "powerful greenhouse gases that contribute to climate change." 2015 EPA regulations "disallowing the use of HFCs as a substitute for ozone-depleting substances" were found partially invalid by the D.C. Circuit in *Mexichem Flour, Inc. v. EPA*, 866 F.3d 451 (D.C. Cir. 2017), to the extent those regulations purported to "force users who had already switched to HFCs to make a second switch to a different substitute." The D.C. Circuit "vacated the rule in part and remanded to the agency."

On remand, in 2018 EPA:

> . . .the agency decided to implement our decision by suspending the rule's listing of HFCs as unsafe substitutes in its entirety, meaning that even current users of ozone-depleting substances can now shift to HFCs. And EPA did so without going through notice-and-comment procedures.

The D.C. Circuit's Decisions

The CAA "provides for judicial review only of 'final action,' 42 U.S.C. § 7607(b)(1), a limitation coterminous with the concept of 'final agency action' in the Administrative Procedure Act, 5 U.S.C. § 704. *See Sierra Club v. EPA*, 873 F.3d 946, 951 (D.C. Cir. 2017)." Were EPA's responses on remand to the D.C. Circuit's prior decisions in both *Sierra Club v. EPA* and *NRDC v. Wheeler* "final actions" subject to judicial review?

Bennett v. Spear, 520 U.S. 154, (1997) articulates the "familiar two-prong test" for finality of agency actions. *U.S. Army Corps of Engineers v. Hawkes Co.*, ___U.S.___, 136 S. Ct. 1807 (2016), characterized it as "finality's touchstone." Under *Bennett*, the challenged agency action must both:

> [1]. . mark the consummation of the agency's decisionmaking process. . .[and is not]. . .of a merely tentative or interlocutory nature. . .[and] [2] be one by which rights or obligations have been determined, or from which legal consequences will flow. *Bennett*, 520 U.S. at 177-78 (citations and internal quotation marks omitted).

Each prong of the *Bennett* analysis "must be satisfied independently for agency action to be final[.]" *Soundboard Ass'n, v. FTC*, 888 F.3d 1261, 1267 (D.C. Cir 2018).

Applying *Bennett* Analysis to the Significant Impact Levels Guidance

Applying *Bennett* to the SILs Guidance at issue in *Sierra Club v. EPA*, the court focused on the second prong, whether EPA's issuance of the Guidance determined "rights or obligations," or from which "legal consequences" would flow. *Bennett*, 520 U.S. at 177-78.

Whether an agency action has "direct and appreciable legal consequences" under the second prong of *Bennett* is a "'pragmatic'" inquiry. *Hawkes*, 136 S. Ct. at 1815 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)).

> And as we recently emphasized, courts should 'make prong-two determinations based on the concrete consequences an agency action has or does not have as a result of the specific statutes and regulations that govern it. *Cal. Cmtys. Against Toxics v. EPA*, 934 F.3d [627] at 637 [(D.C. Cir. 2019)].

When deciding whether guidance statements meet prong two:

> . . .this Court has considered factors including: (1) 'the actual legal effect (or lack thereof) of the agency action in question on regulated entities'; (2) 'the agency's characterization of the guidance'; and (3) 'whether the agency has applied the guidance as if it were binding on regulated parties.' *National Mining Ass'n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014).

The D.C. Circuit described *Hawkes* as representing "a long line of cases illustrating a pragmatic approach to finality by focusing on how agency pronouncements actually affect regulated entities." For example, in citing *Sackett v. EPA*, 566 U.S. 120, 126 (2012), the agency action was final "because it exposed petitioners to double penalties in a future enforcement proceeding and limited their ability to obtain a certain type of permit" and in *Abbott Labs* noncompliance with the challenged agency action "risked 'serious criminal and civil penalties.'" In contrast, the D.C. Circuit held in *Valero Energy Corporation v. EPA*, 927 F.3d 532 (D.C. Cir. 2019) that challenged EPA guidance was not reviewable as final because it "imposed no obligations, prohibitions, or restrictions," and "put no party to the choice between costly compliance and the risk of a penalty of any sort," EPA admitted the guidance "had no independent legal authority," and, finally:

> The relevant statute provided regulated parties a mechanism by which to challenge any EPA action that was premised on the statutory interpretation that the guidance advanced. 927 F.3d at 536-39.

SILs Guidance Did Not Constitute Final Agency Action

the SILs Guidance imposes no obligations, prohibitions or restrictions on regulated entities, does not subject them to new penalties or enforcement risks, preserves the discretion of permitting authorities, requires any permitting decision relying on the Guidance be supported with a robust record, and does not prevent challenges to individual permitting decisions. The SILs Guidance is not sufficient to support a permitting decision—simply quoting the SILs Guidance is not enough to justify a permitting decision without more evidence in the record, including technical and legal documents. *See* SILs Guidance at 19. It is also not necessary for a permitting decision—permitting authorities are free to completely ignore it. *See* id. at 19-20. As such, we find the SILs Guidance does not result in "direct and appreciable legal consequences" as required under prong two of *Bennett*.

The D.C. Circuit denominated as "paramount" to its conclusion "the amount of discretion [state] permitting authorities retain" post-issuance of the Guidance:

> In *Catawba County*, this Court found an agency memo nonfinal where it did not 'impose binding duties on states or the agency. ... [but] merely clarifie[d] the states' duties under the [CAA] and explain[ed] the process EPA suggests,' noting those views were open to revision. 571 F.3d 20, 33-34 (D.C. Cir. 2009). . . .The SILs Guidance explicitly preserves state discretion regarding what degree of modeling or analysis may be necessary for each petition and does not require states to review their programs or take any proactive action in response.

Regarding *Bennet's* second prong as applied to *NRDC v. Wheeler*, no party disputed:

> . . .that, to the extent the 2018 Rule suspends the 2015 Rule's HFC listings, the 2018 Rule determines legal rights and obligations and carries legal consequences by giving regulated parties the legal right to replace ozone-depleting substances with HFCs.

Analysis under the *Mexichem* Decision

The court proceeded to analyze EPA's (and industry intervenors') argument that the court's own decision in *Mexichem*:

> . . .not the 2018 Rule, … suspended the 2015 Rule's HFC listings. According to that account,

> the 2018 Rule 'simply applies and implements' *Mexichem* and 'therefore has no independent legal consequences.'

The *Mexichem* holding:

> . . .rested on an understanding of EPA's statutory authority to regulate entities' replacement of ozone-depleting substances. We reasoned that an entity 'replaces' an ozone-depleting substance when it switches to a substitute substance, and that EPA's statutory authority thus extends only to regulating the initial switch.

As HCFs are not ozone-depleting, once an entity had transitioned from an ozone-depleting substance to HCFs, EPA had no statutory authority to compel a further transition from HCFs and therefore "EPA cannot permissibly apply the 2015 Rule's HCF listings to entities already using HCFs." However, the court:

> . . .made no suggestion. . .that EPA cannot apply the 2015 Rule to entities still using ozone-depleting substances, . . .[rather]. . .[f]our distinct times, we emphasized that we were vacating the 2015 Rule only 'to the extent' the Rule requires replacements of HFCs, *id.* at 454, 462, 464, confirming that we otherwise sought to leave the HFC listings intact.

The 2018 Rule, however, went further than the partial *vacatur* that concluded *Mexichem*:

> . . .by instituting a complete vacatur of the 2015 Rule's HFC listing. And vacating those listing has the effect of suspending regulatory requirements, which qualifies as determining legal rights and obligations and carrying legal consequences for purposes of the second finality prong.

The court rejected EPA's argument that the 2015 Rule's HFC listings did not "contain[] discrete, severable text that Mexichem could have struck to implement a partial vacatur."

It is a routine feature of severability doctrine that a court may invalidate only some applications even of indivisible text, so long as the "valid applications can be separated from invalid ones." *Fallon* et al., *Hart & Wechsler's: The Federal Courts and the Federal System* 170 (7th ed. 2015). As the Supreme Court has explained, when a court encounters statutory or regulatory text that is "invalid as applied to one state of facts and yet valid as applied to another," it should "try to limit the solution to the problem" by, for instance, enjoining the problematic applications "while leaving other applications in force." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–29, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006)

In *Mexichem*, the court sought to:

> . . .'limit the solution to the problem' by vacating the 2015 Rule's HFC listings only as applied to entities that EPA lacks authority to regulate (those who had already switched from ozone-depleting substances to HFCs), leaving the listings intact as applied to other entities (those who had not).

The court was not required "in any express severability analysis about the text of the 2015 Rule." EPA was obligated to 1) follow the Mexichem analysis in implementing the 2015 Rule, 2) sought rehearing with the goal of obtaining complete vacatur of the 2015 Rule, or 3) engage in notice-and-comment rulemaking post-remand in order to implement the 2018 Rule.

Conclusion and Implications

Even in retreat, agencies must pick their way carefully across the regulatory battlefield with a clear understanding of their permissible scope of action. In *Sierra Club*, the scope of remand allowed EPA the flexibility to execute a near-total retreat by way of issuing non-binding guidance following informal notice-and-comment. Without any enforceable commitment to ever adopt binding SILs, this regulatory retreat rests beyond judicial review. In *NRDC*, however, the agency failed to stay within the limited scope of the court's remand, thereby bringing itself once more within the D.C. Circuit Court of Appeals' jurisdiction.

Deborah Quick is Of Counsel at Morgan Lewis, resident in the firm's San Francisco office. Deborah represents clients in complex civil appeals, and in trial court litigation conducted in anticipation of possible appellate review. She also represents clients seeking land-use entitlements, compliance with environmental statutes like the California Environmental Quality Act and the National Environmental Policy Act, and in defending litigation entitlements that have been granted. Deborah sits on the Editorial Board of the *Eastern Water Law & Policy Reporter*.

EASTERN WATER NEWS

NEWS FROM THE WEST

This month, in News from the West, we address two events in two separate states that deal with water rights. In Colorado, we address the state Supreme Court's recent decision defining the concept of "imported water" and the ability to reuse that water to the point of "extinction." Lastly, we report on efforts in Nevada to establish the outer limits of the state's water rights regulatory authority at the office of the State Engineer.

Colorado Supreme Court Reaffirms Principles of Imported Water Use—Once Imported, It May Be Reused to Extinction

Santa Maria Reservoir Company v. Warner, 2020 CO 27, 461 P.3d 478 (Colo. 2020).

In an April 20, 2020 decision, the Colorado Supreme Court reaffirmed the definition of imported water in Colorado and confirmed the principles surrounding its use. Specifically, that water, once imported, can be successively used and reused to extinction, without causing injury to other water users in the basin of import. Although other users may take advantage of imported water return flows, they have no legal right to that water, and a court will not enforce any such "rights."

Background

Although the final analysis and holding of the Colorado Supreme Court is rather straightforward, the factual and procedural background is complex and a full understanding is necessary to comprehend the Supreme Court's ruling. This background includes the legal history of imported water in Colorado, the geographic and hydrologic history of the San Luis Valley, as well as the facts and procedural history of this case.

Legal Framework

In Colorado, water can be broadly separated into "native" and "imported" water. Native water, the vast majority, is water that is diverted from, used, and returned to the same stream or stream system. Imported water, by contrast, is water which is diverted from one stream system, but then pumped and used in a different stream system. Return flows and excess water from imported water physically cannot return to its basin or origin. Consequently, the law treats these two types of water very differently.

Native waters of a public stream are governed by prior appropriation. *City of Thornton v. Bijou Irr. Co.*, 926 P.2d 1, 65 (Colo. 1996). This is the standard "first in time, first in right" system in Colorado, and many other western states. Junior (*i.e.*, "newer") water rights cannot appropriate water to the extent it diminishes the amount of water available to more senior users. Colo. Const. art. 16, § 6. Prior appropriation entitles a user to *only* as much water as they actually *need*—surplus water must be returned to the stream from which it came to be available to downstream users in the form of "return flows." (Emphasis added) *Pulaski Irrigating Ditch Co. v. City of Trinidad*, 203 P. 681, 682 (Colo. 1922).

However, injury to downstream users is not a factor in water that has been imported to a stream system or watershed—"the ability of downstream users to divert imported water exists entirely at the sufferance of the importer." *Bijou*, 926 P.2d at 72. Instead of having to allow return flows to rejoin the stream system of origin, imported water users have the exclusive right to use and reuse that water to extinction. *Ripley v. Park Center Land & Water Co.*, 90 P. 75, 76-77 (Colo. 1907). Imported water is most commonly seen in the context of trans-basin diversions (such as pumping water across the continental divide to Colorado's Front Range), and this idea was first recognized in *Brighton Ditch Co. v. City of Englewood*, 237 P.2d 116 (Colo. 1951). "*Brighton Ditch* suggests an implicit recognition that an importer has a greater right to use the water for its own beneficial purposes than do appropriators of native water." *Bijou*¸ 926 P.2d at 66.

The imported water doctrine was then codified as part of the wide-reaching Water Right Determination and Administration Act of 1969, which provides:

> Whenever an appropriator has lawfully introduced foreign water into a stream system from an unconnected stream system, such appropriator may make a succession of uses of such water by exchange or otherwise to the extent that its volume can be distinguished from the volume of the stream into which it is introduced.= C.R.S. § 37-82-106(1).

In addition to the common sense principle that foreign water can be reused because, if not for the importer's efforts, it wouldn't be in the basin of use to begin with, there is also a significant policy interest in allowing successive reuse of imported water. By allowing importers to use and reuse that imported water, it helps to ensure that they don't divert more water from the basin of origin than is necessary. *Grand Valley Water Users Ass'n v. Busk-Ivanhoe, Inc.*, 386 P.3d 452, 465 (Colo. 2016) ("Importers of foreign water are accorded wide latitude as to the use and disposal of the water in the basin of import in order to allow the flexible and efficient use of foreign water and to minimize the amount of water imported.").

Finally, and perhaps most importantly for this case, changes of use related to imported water are not subject to the same strict "no-injury" standards normally applied in change cases. C.R.S. § 37-92-305(3); *City of Florence v. Bd. of Waterworks of Pueblo*, 793 P.2d 148, 154 (Colo. 1990) ("Because these actions involve foreign water…the general change of water right criteria…are inapplicable.").

Therefore, the only legal injury possible from a change to imported water rights is if the changes increases the historical amount, rate, or length of time of diversion so as to adversely affect junior priorities *in the basin of origin*.

Water Rights and Hydrologic Circumstances in the San Luis Valley

The rights in this case concern the San Luis Valley, a long, narrow valley in south-central Colorado that is bracketed by the San Juan Mountains to the west and the Sangre de Cristo Range to the east. The Rio Grande River enters the valley through the San Juan, before traveling southward down the valley and eventually into New Mexico. Water in the San Luis Valley, like most of rural Colorado, is primarily used for irrigation and other agricultural purposes.

The aptly-named Closed Basin (the basin of import in this case) is a watershed north of the Rio Grande that is separated from the river by both a topographic and hydraulic divide. That means that both surface water (as a result of the topographic divide) and groundwater (the hydraulic divide) in the Closed Basin flow away from the Rio Grande and toward the "sump," the low point in the Closed Basin. Critically, the hydraulic divide is constantly in flux, moving as a result of climatic conditions, as well as being affected by large-scale importation of water into the Closed Basin. Historic well pumping has had the effect of diminishing the hydraulic divide, meaning that well pumping in the Closed Basin, in certain areas, has led to depletions in the Rio Grande.

The issue became significant enough that, in 2004, the Colorado General Assembly adopted Senate Bill 04-222, later codified as C.R.S. § 37-92-501(4)(a)(I), which regulates the Closed Basin so as to "maintain a sustainable water supply in each aquifer system." To short-cut the convoluted history of this area, Rio Grande Water Conservation District then conducted a study on these issues, titled the "Engineering Report on San Luis Valley Groundwater Level Study" (the "Study"). The Study revealed that there was no longer a hydraulic divide north of the Rio Grande, meaning that well pumping in the Closed Basin was causing depletions to the Rio Grande. However, the Study also determined that a reduction in well pumping would likely lead to recovery of the aquifer and restoration of the hydraulic divide, thereby protecting the Rio Grande from further depletions. As part of the implementation of this plan, more water was needed to begin replacing injurious depletions. Therefore, in 2012, the Rio Grande Water Conservation District approached the Santa Maria Reservoir Company ("SMRC"), which owns two reservoirs, about leasing water to replace the depletions. However, the SMRC water was only decreed for irrigation—as a result SMRC applied for a change of use to include the replacement of depletions. That application became this case.

At the Water Court

In January 2013, SMRC submitted a change application for its water storage rights in its two reservoirs (Santa Maria and Continental) to add replacement of depletions as a beneficial use of that water. SMRC also asked, among other things, for the Water Court to confirm its right to fully consume, by first use, re-

use, and successive use, the water it delivers into the Closed Basin. Practically, the changed water would be released by SMRC from its reservoirs and allowed to flow into the Rio Grande River, without being diverted for irrigation use in the Closed Basin. Several parties, including Mr. Jim Warner, filed statements of opposition alleging that the change in use would injure them, primarily through the lack of return flows. SMRC eventually, by 2016, stipulated with all other opposers, through a term and condition of the proposed decree in which SMRC agreed to replicate accretions, including return flows, to the Rio Grande River (a small area of the changed water did not go to the Closed Basin but rather was connected to the Rio Grande River).

Warner on the other hand eventually took the case to trial before the Water Court, alleging that, as a flood irrigator in the Closed Basin, he needed groundwater levels to stay close enough to the surface to reduce ditch losses, and that SMRC's change would result in that exact outcome. At trial, SMRC introduced numerous witnesses, both expert and lay, that testified that Warner's water rights would not be injuriously affected by the change. Warner did not present any evidence to rebut that testimony.

Warner also argued that, because the hydraulic divide is no longer clearly established, the Closed Basin is not "unconnected" from the Rio Grande and therefore SMRC should not be entitled to use its imported water to extinction. To counter this argument, SMRC presented its expert who testified that the majority of the imported water would be within still unconnected Closed Basin and that, for the other area, the accretions to the Rio Grande would be replaced as mentioned in the stipulation term and condition. The expert also introduced groundwater maps showing that the water in Closed Basin was still moving towards the sump, *i.e.*, away from the Rio Grande. Essentially, the expert argued that the hydraulic divide was still in place. This evidence was unrebutted by Warner.

The Water Court, after the three-day trial, issued an opinion approving the change application and confirming that SMRC was entitled to fully consume all water imported into the Closed Basin. Regarding the Study, the court found that, although the hydraulic divide has retreated to very near the Rio Grande, it has not been established that the divide does not exist. After the issuance of the decree, Warner filed a Motion to Amend Judgment, arguing: 1) that the water delivered to the Closed Basin is not imported; 2) that the court should reduce SMRC's pumping to prevent injury; and 3) that the court should have conducted a historic consumptive use analysis on the changed water. Warned did not cite any legal authority in support of his claims. As a result, the Water Court denied the motion, finding that the first argument was unsupported by facts and law, the second was not properly before the court, and the third was incorrect because the court actually had conducted the historic consumptive use analysis. Therefore, at SMRC's request, the court found Warner's motion substantially groundless and frivolous and awarded SMRC attorney fees. Warner then appealed to the Colorado Supreme Court (in Colorado, Water Court appeals skip the Court of Appeals and go directly to the Supreme Court).

The Supreme Court's Decision

Perhaps surprisingly, given that extensive background, the Colorado Supreme Court's analysis of this case was straightforward and concise. As a general holding, the Supreme Court determined that SMRC had met its burden of proving no-injury through the change, and that Warner had offered no evidence to the contrary.

Analysis under the *Bijou* Decision

Regarding Warner's claim that the water delivered to the Closed Basin was not imported, the Court relied on its decision in *Bijou*, which held that if the water would not have reached the receiving stream system without the efforts of the importer and, once there would not naturally flow back to its original stream, then the two water systems are unconnected and the water is imported. *Bijou*, 926 P.2d at 81. It is undisputed that the water stored in the SMRC reservoirs (originally diverted from the Rio Grande system) would not naturally end up in the Closed Basin. As such, Warner has no right to maintenance of return flows from SMRC's historic irrigation use in the Closed Basin.

The Water Study and Alleged Lower Court Error

Warner's next argument attacked the fact-finding of the Water Court, which the Supreme Court

determined was not clearly erroneous (the standard of review). Specifically, Warner contrasted the study which indicated that the hydraulic divide no longer exists, with the Water Court's finding that "the divide was retreated to very near the Rio Grande and that the divide is not well-defined." However, no evidence at trial supported the conclusion that the divide no longer exists and more importantly, SMRC's expert showed groundwater mapping indicating that water was still flowing back into the Closed Basin, away from the Rio Grande. As the Water Court stated, even assuming "the hydraulic divide is poorly defined or very close to the Rio Grande," the evidence established that "water flowing north into the Closed Basin does not return to the Rio Grande."

At first glance, the study and the Water Court opinion do seem to be inapposite. However, the entire goal of the Rio Grande Water Conservation District was to re-establish and maintain the hydraulic divide. Therefore, almost a decade after Rio Grande Water Conservation District began implementing steps to address the issues in the San Luis Valley, the Water Court concluded that the unrebutted evidence showed that the hydraulic divide exists again.

The Court Finds a Hydraulic Divide between Closed Basin and Rio Grande

The Supreme Court found nothing clearly erroneous with that ruling of the Water Court, and even went a step further, declaring "[a]t this time, there is a hydraulic divide between the Closed Basin and the Rio Grande." The Rio Grande Water Conservation District's plan is achieving exactly what it is attempting to accomplish. That final fact directly contradicted Warner's final claim that SMRC's application undermines the General Assembly's efforts to manage water resources in the San Luis Valley. Instead of undermining the efforts, SMRC's application is in fact perfectly aligned with those goals.

Conclusion and Implications

Besides the convoluted history of the case and its issues, this case was actually rather straightforward. The delivery of water into the Closed Basin fits squarely within the legislative and case law definitions of imported water. Importers are allowed to successively use and reuse that water to extinction. And therefore, the change in use did not cause injury to Warner, but rather revealed that he had no legal right to the return flows that he had previously used.

This case did not introduce any new groundbreaking aspects of Colorado water law. The factual review of hydraulic divides, and their changing nature, will no doubt provide guidance to future water rights disputes, however the general principles of imported water were merely reaffirmed in this case. Imported water, particularly trans-basin water, is playing an ever-bigger role as Colorado grows, particularly on the Front Range. While it is possible that Colorado will eventually change how new imported water is treated, for now two principles have been affirmed: 1) if the water would not have been there without the importer, and will not flow back to the basin of origin, it is imported water; and 2) if the water is imported, the importer has the right to use and successively reuse that water to extinction, without causing injury to any other users in the basin of import. The Court's opinion is available online at: https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Opinions/2018/18SA244.pdf.
(John Sittler, Paul Noto)

Nevada State Engineer Engages in Proposed Major Rulemaking Effort

On June 24, 2020, the Nevada State Engineer held a workshop to solicit comments on proposed amendments to and adoption of regulations pertaining to Chapter 533 of the Nevada Administrative Code, which deals with matters within the scope of State Engineer's statutory authority. The proposed regulations are wide reaching, covering revisions to protest proceedings for water rights applications and creating extensive new procedures regarding applications for extensions of time. They also specify licensing requirements for professional water right surveyors. One hundred people participated in the hearing by video and telephone, including water lawyers, engineers, water rights consultants, permit holders and representatives from every stakeholder group in the State, including water purveyors, agriculture, mining and environmental interests.

Existing Water Regulations

Although Nevada Revised Statutes 532.120 gives the State Engineer broad authority to "make such reasonable rules and regulations as may be necessary

for the proper and orderly execution of the powers conferred by law," as a practical matter, the State Engineer has engaged in very little rulemaking. Existing regulations are largely limited to procedures and penalties for violations of water laws and permit requirements; procedures in protest hearings; and well drilling requirements. In the absence of regulations governing water use, there has been considerable litigation over the State Engineer's interpretation of Nevada water laws.

Impetus for Current Rulemaking Effort

In 2019, the Nevada Legislature passed AB 62, which directed the State Engineer to "adopt any regulation necessary to carry out the provisions" in Nevada Revised Statutes 533.380. That statute relates to extensions of time to perfect a water right. The bill was proposed by the State Engineer and, as introduced in the Legislature, sought to add specific requirements that a permit holder must satisfy in order to obtain an extension of time to file a proof of completion and proof of beneficial use. It also set a deadline by which such proof must be accomplished.

The bill received considerable pushback, particularly from municipal water purveyors who expressed that the limited time frame proposed in the bill unreasonably interfered with long-term water resource planning and forecasting. After legislative committee hearings and discussions with stakeholders indicated that the proposed statutory change was lacking traction, the State Engineer proposed an amendment to the bill that simply directed him to address the issue through a regulatory process.

Some debate occurred among legislators as to what that process should look like since the State Engineer is not subject to the Nevada Administrative Procedures Act. Ultimately, after the State Engineer explained that the agency conducts a public rulemaking process that includes hearings, workshops, meetings with stakeholders, the development of small business impact statements, and approval by the Legislative Commission, the Legislature did not impose any burden on the State Engineer to comply with formal rulemaking procedures to which other Nevada agencies are subjected.

In late 2019, the State Engineer held informal public workshops to walk through some of the concepts for the proposed regulations that were being considered. The State Engineer then issued notice of the proposed rule changes in June 2020.

Stakeholders' Concerns with the Proposed Regulations

The regulatory changes proposed by the State Engineer may far exceed the scope of AB 62. In addition to extensions of time to file proof of construction of works and proof of beneficial use, the proposed regulations update and amend the regulations governing procedures for hearings before the State Engineer and adopt regulations for the licensing of Nevada Licensed Water Right Surveyors. In total, the proposed regulations span 27 pages and constitute a significant rulemaking effort that could have profound impacts to water users.

With a condensed public comment period because the State Engineer seeks to quickly submit the proposed regulations to the Legislative Commission for formal rulemaking review, many commenters expressed that the process was too rushed. Some also complained that the State Engineer was taking on too much at once without adequate time to protect against unintended consequences. Numerous commenters suggested that the proposed regulations be limited to the legislative directive from AB 62 and address other matters in a subsequent rulemaking process.

Municipal Purveyors Concerned Regulations Might Interfere with Long-Term Planning

On the substance of the regulations, the vast majority of comments came from municipal water purveyors concerned that the proposed regulations could interfere with their long-term planning horizon for securing a sustainable water supply. By statute, upon issuance of a water permit, the maximum amount of time the State Engineer may set to file a proof of completion of the diversion works is five years from the date of approval. The deadline for filing the proof of beneficial use may not exceed ten years from the date of approval. Nev. Rev. Stat. 533.380(1)(a)-(b).

If the necessary proofs are not filed within those time frames, the permit holder must file an application for extension of time to prevent cancellation of the permit. The applicant must provide "proof and evidence" that it is proceeding in good faith and with "reasonable diligence" to perfect the application. The statute provides that:

> . . .the measure of reasonable diligence is the steady application of effort to perfect the application in a reasonably expedient and efficient manner under all the facts and circumstances.

The State Engineer may grant "any number of extensions" but no since extension of time can exceed 5 years. Nev. Rev. Stat. 533.380(3)-(6).

The proposed regulations set forth detailed requirements for the contents of an application for extension of time and create definitions for "steady application of effort" and "significant action" taken to perfect a water right. They also articulate criteria, in addition to those required by statute, that the State Engineer will consider when reviewing an application for extension of time.

Concerns over New Proposed Procedure for Protesting Application for Time Extension

Of particular concern to numerous commenters at the workshop was a proposed new procedure for protesting an application for extension of time. Currently, no formal process exists to object to the State Engineer continuing to grant extensions when a permit holder fails to timely perfect an appropriation. However, there has been litigation to challenge the State Engineer's serial approvals as being in violation of the anti-speculation doctrine. *See Sierra Pacific Industries v. Wilson, et al.*, 135 Nev. 105, 440 P.3d 37 (2019).

The regulations propose that where an applicant has requested and received ten or more years of extensions of time to perfect an appropriation, the State Engineer may publish notice of the application and allow interested persons to file a written verified protest against the granting of the application. The State Engineer must consider any protests and may hold a hearing and require the filing of additional evidence as deemed necessary "to gain a full understanding of the issues involved."

Numerous commenters deemed the ten-year period arbitrary and, often, is too short a window of time to effectuate water resource planning. Some noted that the proposed regulations fail to account for the planning, funding, and infrastructure challenges that municipal purveyors, rural governments and small water systems face with regard to ensuring adequate future water supplies, particularly in the "boom and bust" economic cycles that Nevada often experiences. Some questioned whether the time frame was antithetical to water conservation efforts. Questions were raised as to whether municipal purveyors should be treated differently than other water permit holders.

They also expressed concern that this new protest process for extension applications will mire permit holders and the State Engineer in litigation and further slow down the agency's ability to do its work. The proposed regulations, some observed, create onerous obligations on permit holders without getting to the heart of the issue, which is to prevent water speculation.

Conclusion and Implications

The tenor of the comments at the public workshop indicated widespread concern over the scope and pace of the State Engineer's regulatory process. It is unclear to what extent the State Engineer will heed these worries. Stakeholders will likely have more information in the coming months when the State Engineer issues a revised draft of the proposed regulations to submit to the Legislative Commission. The extensive proposed change in administrative regulations discussed in part, above, is available online at: http://water.nv.gov/documents/NDWR_Prop_Admin_Regs-Hearings_EOT_Water_Right_Surveyor_6-8-2020.pdf.
(Debbie Leonard)

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 and recent efforts by the Trump administration to relax enforcement actions, there were fewer less items to report on this month.

Civil Enforcement Actions and Settlements—Water Quality

•May 21, 2020—EPA has reached a $6,521,025 settlement with 145 parties to clean up contaminated groundwater at the Omega Chemical Corporation Superfund Site in Whittier, California. This latest EPA settlement, which is subject to a 30-day public comment period, has been concluded with parties that each sent one to three tons of waste to the Omega Chemical Corporation site. This Superfund site was formerly the location of a recycling company and is marked by extensive soil and groundwater contamination. The settlement is expected to provide funding for cleanup activities at the site and for the approximately four miles of contaminated groundwater that extends beyond the property line and reaches the cities of Whittier, Santa Fe Springs and Norwalk, California. As of April 2019, EPA had incurred more than $42 million in costs since 1999 for cleaning up the site. EPA has recovered more than $27 million from potentially responsible parties through a series of settlement agreements. The Omega Chemical Corporation was a refrigerant and solvent recycling facility, located at 12504 and 12512 East Whittier Blvd., that operated between 1976 and 1991. It handled drums and bulk loads of industrial waste solvents and chemicals that were processed to form commercial products. Subsurface soil and groundwater at and around the site have high concentrations of trichloroethylene (TCE), perchloroethylene (PCE), Freons and other contaminants. Consumption of high levels of TCE and PCE for extended periods of time can cause damage to the nervous system, liver and lungs and increase risk of cancer. The Omega location became a Superfund site in 1999, when it was added to the Superfund National Priorities List. Since that time EPA has overseen the removal of more than 2,700 drums as well as more than 12,500 pounds of contaminants from the soil and groundwater. This effort has included treatment of more than 30 million gallons of contaminated groundwater since 2009. In addition, since 2010 a soil vapor extraction system has operated to address potentially harmful vapor intrusion from the Omega Site.

•May 21, 2020—EPA announced a settlement with USS POSCO Industries under the Clean Water Act for violations of federal oil pollution prevention regulations. The metal products manufacturer has corrected the violations and agreed to pay a $31,770 penalty. USS POSCO Industries, which manufactures steel in Pittsburg, Calif., violated EPA's oil pollution prevention regulations by failing to update and recertify its Spill Prevention, Control and Countermeasure (SPCC) plan for its Pittsburg facility; failing to perform routine oil tank inspections; failing to have adequate sensors on tanks; and failing to remove accumulations of oil outside tanks and collection trenches.

•May 27, 2020—EPA has ordered the Indian Village Mobile Home Park public water system on the Torres Martinez Desert Cahuilla Indians Tribe's Reservation in California to comply with federal drinking water requirements. The water system serves 35 residents and is privately owned. The violations involve failure to comply with various monitoring and reporting requirements for disinfection byproducts, arsenic, lead and copper, total coliform, nitrates, and disinfection residuals. In addition, the water system failed to notify its customers of some of these monitoring violations and does not have a certified water operator. Under the terms of the agency's administrative order, the owner of the water system is required to develop a compliance plan within 45

days and will provide EPA with quarterly reports to document its progress. EPA will continue to oversee the system's efforts to follow Safe Drinking Water Act requirements and may levy civil penalties if it fails to meet the compliance provisions in the administrative order. The Torres Martinez Tribe has no direct control or ownership of the water system. EPA works closely with the Torres Martinez Tribe and has consulted their leadership about the violations.

•June 1, 2020—Under a settlement with EPA, the Hawai Department of Human Services (HDHS) has agreed to close all pollution-causing large-capacity cesspools (LCCs) that it owns and operates. EPA banned LCCs in 2005, under the federal Safe Drinking Water Act. Under the agreement, HDHS will close two illegal LCCs and conduct a compliance audit to review and close any remaining LCCs owned or leased by HDHS by April 2021. With this audit HDHS will confirm that all owned or leased properties are connected to a sanitary sewer system or operate a compliant septic system. HDHS will avoid penalties for any other LCCs found during the audit. This effort furthers EPA's goal of closing LCCs in Hawai'i while incentivizing voluntary disclosure of additional LCCs on HDHS properties. EPA discovered the two illegal large cesspools, which HDHS will shut down during a July 2018 inspection. The cesspools are connected to buildings at the Hawai'i Youth Correctional Facility (HYCF) in Kailua, Oahu. The HYCF property is operated by the Office of Youth Services, a subagency of HDHS. As part of the agreement, HDHS will connect the HYCF buildings to the municipal sewer system or a compliant septic system. HDHS will also pay a $128,000 penalty. EPA is authorized to issue compliance orders and/or assess penalties to violators of the Safe Drinking Water Act's LCC regulations. However, to encourage regulated entities to voluntarily discover, promptly disclose, and expeditiously close large-capacity cesspools, EPA is willing to forego enforcement actions and penalties. Since EPA's 2005 LCC ban, more than 3,400 large capacity cesspools have been closed statewide; however, it is estimated that there remain approximately 90,000 active cesspools in Hawai'i. Cesspools are used more widely in Hawai'i than in any other state. In 2017, the State of Hawaii passed Act 125, which requires the replacement of all cesspools, including smaller capacity cesspools that are not regulated by EPA, by 2050. Groundwater provides 95 percent of all domestic water in Hawai'i.

•June 2, 2020—EPA, the State of New Jersey Department of Environmental Protection (NJDEP) and the State of New Jersey Division of Law are announcing a proposed settlement with the Somerset Raritan Valley Sewerage Authority (SRVSA), which would resolve alleged violations of the Clean Air Act and state permitting requirements associated with sewage sludge incineration at SRVSA's wastewater facility in Bridgewater, New Jersey. Under the proposed settlement, SRVSA would pay $225,000 in penalties for the past violations. This amount will be divided evenly between EPA and the State of New Jersey. The settlement also requires SRVSA to comply with all outstanding requirements of the sewage sludge incineration regulations, including conducting a performance test and the submission of control and monitoring plans and other reports. SRVSA had operated two sewage sludge incinerators (SSI) at its Bridgewater facility. EPA found that SRVSA failed to demonstrate compliance with emission limits and failed to establish operating parameter limits that would be used to ensure compliance with emission limits for pollutants such as mercury. SRVSA also failed to satisfy performance testing requirements and submit required control and monitoring plans and reports, among other violations. New Jersey found the facility in violation of state requirements as well. In 2017 and 2018, SRVSA failed to operate components associated with one SSI unit in accordance with its operating permit, which is a violation of the New Jersey Air Pollution Control Act and its implementing regulations. The proposed settlement also includes a state-only, non-federal mitigation project. SRVSA has agreed to spend no less than $50,000 to implement a Project School Clean Sweeps Mercury Recovery Program to collect mercury thermometers and other mercury-containing equipment at five schools in Somerset and Middlesex Counties.

•June 15, 2020—EPA has taken enforcement actions in Kauai to close 16 pollution-causing large capacity cesspools (LCCs) and collect $55,182 in penalties. Under the Safe Drinking Water Act, EPA banned large capacity cesspools in 2005. In 2019, EPA inspectors found 15 LCCs associated with the Hale Kupuna Elderly Housing Complex

in Omao, Kauai. The owner of the housing complex, Kauai Housing Development Corporation (KHDC), confirmed that 14 of those LCCs serviced seven multi-unit residential buildings, and one LCC serviced a recreation center building. Under the EPA compliance order announced, KHDC has agreed to close the cesspools by no later than December 31, 2022. KHDC plans to replace the LCCs with a state-approved wastewater treatment system. At the Nukoli'i Beach Park Comfort Station, located on the windward side of Kauai, EPA inspectors found the restrooms discharged to an LCC. The owner, the Kauai Beach Resort Association, has agreed to pay a $55,182 penalty and close the LCC by January 31, 2021. Since 2005's federal LCC ban, more than 3,600 of the large capacity cesspools in Hawaii have been closed statewide; however, many hundreds remain in operation. Cesspools collect and discharge untreated raw sewage into the ground, where disease-causing pathogens and harmful chemicals can contaminate groundwater, streams and the ocean. Groundwater provides 95 percent of all domestic water in Hawaii, where cesspools are used more widely than in any other state. In 2017, the State of Hawaii passed Act 125, which requires the replacement of all cesspools by 2050.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•May 26, 2020—EPA has reached a settlement with BNSF Railway Company to resolve alleged violations of the federal Resource Conservation and Recovery Act (RCRA) at a facility owned by the company in Sioux City, Iowa. In the settlement, BNSF agreed to clean up an estimated 2 million pounds of broken cathode ray tube (CRT) glass, a hazardous waste, placed and stored there by a previous occupant. The Sioux City facility was acquired by BNSF in 2014. In 2017, EPA conducted an inspection of the site and determined that the accumulated, broken CRT glass at the site contained lead concentrations that exceeded federal limits. BNSF has submitted to EPA a work plan to remove, manage and dispose of the CRT glass, in accordance with federal law. Through a Consent Agreement and Final Order filed by EPA on May 21, the Agency approved the work plan. BNSF will have about four months to complete the cleanup. Cathode ray tubes are the glass video displays found in televisions and computer monitors. Mismanaged CRT glass is hazardous because it contains significant amounts of lead. Under RCRA, owners of facilities that process or store hazardous waste must obtain a permit issued by EPA or an authorized state. The Sioux City facility is one of six sites in Iowa and Nebraska where an estimated 16.9 million pounds of CRT glass were placed and stored by an individual named Aaron Rochester and his company, Recycletronics. Neither Rochester nor Recycletronics ever obtained a hazardous waste permit to store the CRT glass at the sites, which led to a criminal indictment for Rochester. He currently awaits trial and maintains he is financially unable to pay for the removal of the CRT glass.

•June 8, 2020—EPA and the Justice Department announce the lodging of a proposed consent decree in federal District Court that would require Atlantic Richfield to undertake or finance over $150 million of clean-up work at the Butte Priority Soils Operable Unit (BPSOU) site in Montana. This settlement agreement provides the framework for the continued cleanup of mining-related contamination, will protect public health and the environment, and provide enhanced community benefits through the implementation of park-like amenities along the Silver Bow Creek Corridor. The cleanup activities required under the consent decree include removal of contaminated tailings at the Northside and Diggings East Tailings areas along with contaminated sediments and additional floodplain contamination from Silver Bow and Blacktail Creeks. It also requires more extensive treatment of contaminated storm water before it flows into the creeks, and the capture and treatment of additional contaminated groundwater. Atlantic Richfield will provide financial assurances for future cleanup actions.

•June 16, 2020—EPA has reached a settlement with The Powder Shop Inc. to resolve alleged violations of the federal Resource Conservation and Recovery Act (RCRA). The Cedar Rapids, Iowa, business performs custom and industrial metal coating, metal sandblasting, and metal grit blasting. These activities generate waste that is considered hazardous by federal standards. EPA inspected The Powder Shop in May 2019 to determine the company's compliance with hazardous waste regulations intended to protect employees and the public. During

the inspection, EPA determined that the company failed to perform hazardous waste determinations on wastes that were, in fact, hazardous due to their ignitability and toxicity. Further, The Powder Shop failed to comply with hazardous waste generation and handling requirements; failed to implement required emergency preparedness procedures; and failed to properly label its used oil containers, one of which was found leaking at the facility. In response to the inspection findings, The Powder Shop took the necessary steps to return its facility to compliance. To settle the alleged violations, the company agreed to pay a civil penalty of $19,000.
(Andre Monette)

LAWSUITS FILED OR PENDING

FEDERAL WATER CONTRACTS IN CALIFORNIA APPROVED UNDER WATER INFRASTRUCTURE IMPROVEMENTS ACT CHALLENGED BY ENVIRONMENTAL GROUPS IN RECENT LAWSUIT

The U.S. Bureau of Reclamation (Bureau) finds itself in a legal battle over California's water as three environmental groups—the Center for Biological Diversity, Restore the Delta, and the Planning and Conservation League—have filed suit to challenge the Bureau's awarding of permanent federal water contracts to Central Valley Project (CVP) water users. On May 20, 2020, environmental groups filed suit in the U.S. District Court for the Eastern District of California, for Declaratory and Injunctive Relief. [*Center for Biological Diversity; Restore The Delta; and Planning and Conservation League v. United States Bureau of Reclamation; David Bernhardt in his official capacity as Secretary of the Interior; and United States Department of the Interior*, Case 1:20-at-00362 (E.D. Cal 2020).

Advanced Repayment Under the WIIN Act

Under § 4011 of the 2016 Water Infrastructure Improvements for the Nation Act (WIIN Act), water users contracted with the Bureau to receive water from the CVP may request that their water service contracts be converted to repayment contracts. This affords the Bureau's contractors the option of prepaying the remaining debts owed by the contractor for CVP construction costs. In doing so, water contractors gain the benefit of no longer being subjected to the limitations involved in such water service contracts—such as those imposed from the Reclamation Reform Act of 1982—in future water contracts with Reclamation and the federal government would receive funding to be used for water infrastructure improvements under the WIIN Act ahead of schedule.

The Federal Water Contracts at Issue

In filing suit against the Bureau, the Environmental Groups opposed the Trump administration's decision making 14 short-term renewable water contracts from the CVP permanent—with notable water world heavyweight Westlands Water District included among them. In addition to these 14 contracts which have already been approved on a permanent basis, the lawsuit also seeks to prevent Reclamation from approving the same for 26 other contracts currently in the process of conversion.

The principal claim of the lawsuit is that the Bureau's approval of these contracts without conducting an Environmental Impact Statement (EIS) or Environmental Assessment (EA) constitutes a violation of the National Environmental Policy Act (NEPA). In defense of the Bureau's actions, the assertion has been that the WIIN Act does not afford the Bureau discretion in converting water service contracts to repayment contracts.

The Environmental Groups, however, have claimed that while the WIIN Act may require the Bureau to convert contracts when requested, the Bureau still has discretion in establishing the terms and conditions of the converted contracts.

Citing potential impacts in approving these contracts without environmental review, the lawsuit continued that some of the effects could include: reducing freshwater flows and worsening already degraded Sacramento-San Joaquin Delta water quality; further endangering and destroying endangered and threatened fish species and critical habitat; reducing freshwater flows causing and worsening harmful algal blooms in the Delta; adverse impacts on public health and safety in the Delta region; and adverse impacts on agriculture in the Delta.

Conclusion and Implications

California's epic water disputes continue to rage on. If the Environmental Groups prove successful in the lawsuit, the Bureau of Reclamation could be in for a flood of NEPA review. With 40 contracts at issue in the lawsuit, a judgment in favor of the plaintiffs here could result in an order that Reclamation conduct the NEPA review for each contractor seeking conversion. Or perhaps a legislative solution of some sort arises. Time will tell.
(Wesley A. Miliband, Kristopher T. Strouse)

JUDICIAL DEVELOPMENTS

NINTH CIRCUIT REQUIRES U.S. FOREST SERVICE TO PREPARE EIS AFTER IT FINDS ENVIRONMENTAL ASSESSMENT PREPARED FOR RESTORATION PROJECT SEVERELY LACKING

Bark v. United States Forest Service, 958 F.3d 865 (9th Cir. 2020).

The U.S. Ninth Circuit Court of Appeals recently rejected an Environmental Assessment (EA) prepared by the U.S. Forest Service (USFS) that determined that an Environmental Impact Statement (EIS) was not required. Instead, the court found that an EIS must be prepared under the National Environmental Policy Act (NEPA). As the court noted, the EA did not substantively address multiple expert opinions and evidence that the Crystal Clear Restoration Project (CCR Project) near Mount Hood would have significant environmental impacts and be ineffective at reducing forest fire danger. The court also found that the EA failed to properly assess cumulative impacts from the CCR Project. Ultimately, the decision again highlights the need for agencies conducting environmental assessments under the NEPA to perform a full and defensible assessment of potential environmental impacts, before determining that an EIS is not required. This is especially true for projects that are "highly controversial."

Factual and Procedural Background

The USFS proposed the CCR, which involved the sale of timber affecting 11,742 acres in the Mt. Hood National Forest. The USFS claimed that the forest stands in the project area were overstocked as a result of past management practices. According to the USFS, overcrowded forests, where trees are closer together, are more susceptible to insects and disease and to high-intensity wildfires. The CCR Project would allow for logging at specific locations pursuant to a technique called "variable density thinning." This process would give the USFS flexibility in choosing which trees to cut thus allowing the USFS to create variation within an area of forest so that it "mimic[ed] a more natural structural stand diversity." The CCR Project would leave an average canopy of 35-60 percent in the affected project site, with a minimum of 30 percent where the forest is more than 20 years old.

The USFS conducted an Environmental Assessment under NEPA. The EA determined that the CCR Project had no significant effects and USFS issued a Finding of No Significant Impact (FONSI) and did not prepare an EIS.

BARK, a conservation organization, filed a complaint against the USFS, bringing claims under NEPA and the National Forest Management Act (NFMA). The NEPA claim alleged that the USFS did not undertake a proper analysis of the environmental impacts of the Project or of alternatives to the Project. The U.S. District Court granted summary judgment against BARK on all claims.

The Ninth Circuit's Decision

The Ninth Circuit Court began by noting that Circuit Courts will review a District Court's grant of summary judgment *de novo*. Under the federal Administrative Procedure Act, a Circuit Court can overturn an agency's conclusions when they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." An agency action is arbitrary and capricious if the agency:

> . . .relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. . .An agency's factual determinations must be supported by substantial evidence.

When reviewing an agency's finding that a project has no significant effects under NEPA, the court must determine whether the agency met NEPA's hard look

requirement that:

> . . .based its decision on a consideration of the relevant factors, and provided a convincing statement of reasons to explain why a project's impacts are insignificant.

The term "significant" includes "considerations of both the context and intensity of possible effects."

The court determined that based on the above principles, the USFS' decision not to prepare an EIS was arbitrary and capricious for two independent reasons: 1) the project's environmental effects were highly controversial and uncertain, meaning that an EIS must be prepared, and 2) the USFS failed to identify and meaningfully analyze the cumulative impacts of the project.

Project Effects Were Highly Controversial and Uncertain

The Ninth Circuit noted that the effects of the project were highly controversial and uncertain, thus requiring preparation of an EIS. Although the USFS claimed that the purpose of the project was to reduce the risk of wildfires and promote safe fire-suppression activities— BARK identified considerable evidence showing that "variable density thinning" will not achieve that purpose.

As the court noted, under NEPA, a project is:

> . . .highly controversial if there is a substantial dispute about the size, nature, or effect of the major Federal action rather than the existence of opposition to a use.
>
> A substantial dispute exists when evidence:
>
> . . .casts serious doubt upon the reasonableness of an agency's conclusions. . . .mere opposition alone is insufficient to support a finding of controversy."

The Risk of Fire

The USFS presented evidence that variable density thinning made treated areas more resilient to fire danger. However, substantial expert opinions were also presented by BARK that contradicted USFS claims regarding the effectiveness of the practice. BARK highlighted that it has become more commonly accepted that reducing fuels does not consistently prevent large forest fires, and seldom significantly reduces the outcomes of large fires. BARK also presented evidence that variable density thinning might exacerbate fire severity in some instances, and that a reduction in fuel does not necessarily suppress fire risk and intensity.

The court noted that the environmental analysis did not sufficiently address the opinions that were contrary to the USFS opinions regarding the variable density thinning program and merely incorporated conclusory statements such as "there are no negative effects to fuels from the Proposed Action treatments." Therefore, BARK showed that a substantial dispute existed about the effect of variable density thinning on fire suppression, even though the circuit court's role was not to assess the merits of variable density thinning. The court noted that while BARK pointed to numerous expert sources contradicting USFS theories as to the effectiveness of variable density thinning, the USFS merely reiterated its conclusions about vegetation management and did not meaningfully respond to the substantive research presented by BARK. Under NEPA, when one factor raises "substantial question" about whether an agency action will have a significant environmental effect, an EIS is warranted. Because the project was highly controversial and its effects uncertain, the court concluded that USFS's decision not to prepare an EIS was arbitrary and capricious.

Cumulative Impacts

The Ninth Circuit also noted that the USFS failed to identify and meaningfully analyze cumulative impacts of the CCR Project. Under NEPA, a cumulative impact is the:

> . . .impact on the environment which results from the incremental impact of the action where added to other past, present, and reasonably foreseeable future actions regardless of what agency. . .undertakes such other actions.

The court noted that although the USFS EA attempted to analyze the cumulative effects of the CCR Project by including a table listing other projects, the cumulative impacts analysis was insufficient because it included no meaningful analysis of any of the iden-

tified projects. The court found glaring shortcomings in the USFS' cumulative impacts analysis as it simply listed other projects without including any information about any of the projects listed beyond naming them. Nonetheless, the USFS EA concluded that there were no direct or indirect effects that would cumulate from the project, and that the project would have a beneficial effect on forest stands by moving them towards a more resilient condition. As the court noted, "[t]hese are the kind of conclusory statements, based on vague and uncertain analysis that are insufficient to satisfy NEPA's requirements."

The court went on to highlight other parts of the USFS analysis that relied on conclusory assertions that the Project has "no cumulative effects," such as where it listed effects that may occur with relation to specific sub-topics such as fuels management, transportation resources and soil productivity.

Ultimately the court determined that there was nothing in the EA that could constitute "quantified or detailed information" about the cumulative effects of the project. This meant that the EA created substantial questions about whether the Project would have a cumulatively significant environmental impact, requiring an EIS.

Conclusion and Implications

Reviewing the case *de* novo, the Ninth Circuit's decision highlights the importance for agencies preparing Environmental Assessments of performing full and defensible analyses that takes a hard look at a project's potential environmental impacts before determining that an EIS is not necessary. This is *especially true* where controversy surrounds such projects. (Travis Brooks)

SECOND CIRCUIT HOLDS ACCUMULATION OF PERFLUOROOCTANOIC ACID IN BLOOD FROM DISCHARGES INTO GROUNDWATER MAY MEET PERSONAL INJURY THRESHOLD IN NEW YORK

Benoit, et al. v. Saint-Gobain Performance Plastics Corp., et al., ___F.3d___, Case No. 17-3941 (2nd Cir. May 18, 2020).

The U.S. Court of Appeals for the Second Circuit ruled that plaintiffs pled a cognizable claim for medical monitoring costs allegedly caused by the release of perfluorooctanoic acid (PFOA) from Saint-Gobain Performance Plastics Corporation and other defendants. The court found that the plaintiffs' allegation that PFOA accumulated in their blood was a sufficient injury that allowed the action to survive a motion to dismiss, even though the plaintiffs had not manifested symptoms of a physical disease caused by the PFOA accumulation.

Factual and Procedural Background

Plaintiffs are residents of the Village of Hoosick Falls, New York (Village). Defendants have owned and operated a manufacturing facility located in the near vicinity of the Village for a number of years. As a part of its manufacturing process, defendants applied a solution containing PFOA to the fabrics produced by the defendants. PFOA is a chemical used to make fabrics that repel oil, stains, grease, and water. PFOA can persist in the environment, particularly in water, for many years, and it is readily absorbed after consumption, accumulating in the blood stream. It is alleged that the leftover PFOA solution was then released into floor drains where it eventually migrated into the groundwater, contaminating local wells and drinking water.

In 2014 and 2015, the Village tested the local water supply and discovered PFOA in municipal wells at levels up to 662 parts per trillion (ppt), in private wells up to 412 ppt, and in groundwater near the facility up to 18,000 ppt. In late 2015, the U.S. Environmental Protection Agency (EPA) recommended that an alternative water source be provided to Village residents until PFOA levels subsided, and it advised residents not to drink, or cook with the water. In 2016, the EPA issued advisory findings stating that PFOA concentrations in drinking water greater than

70 ppt are harmful to human health.

In 2016, the plaintiffs brought claims in the U.S. District Court for the Northern District of New York for negligence, strict liability, trespass and nuisance arising from the defendants' PFOA releases into the groundwater. A significant number of the plaintiffs alleged that PFOA had accumulated in their blood, which increased their risk of health problems later in life. As a result, the plaintiffs sought damages covering the costs they would incur to test, monitor, and remediate the effects of their PFOA exposure. In response, the Defendants moved to dismiss, stating that the plaintiffs had failed to allege a tort under New York law because recovery for future harm is barred where there is no present physical injury, arguing that the mere accumulation of PFOA in the blood did not constitute an injury.

The District Court denied the motion to dismiss the claims for medical monitoring on both the personal injury and property damage grounds and certified its decision for interlocutory appeal. The Second Circuit then granted defendants' petition for leave to appeal.

The Second Circuit's Decision

The threshold issue before the Circuit Court of Appeals was whether the accumulation of PFOA in the blood, without a current physical manifestation of disease, could qualify as an injury under New York law. To recover under a theory of either negligence or strict liability under New York law, a plaintiff must prove that there was an injury to person or property. New York courts have consistently found that medical monitoring is an element of damages that may be recovered only after a physical injury has been proven. In other words, medical monitoring is only available as a form of remedy for an existing tort. There is no independent action for medical monitoring.

Nevertheless, another line of decisions addressed the topic of what constitutes an "injury for the purposes of tort law" and concluded that the presence of a toxin in a person's body constitutes a physical injury sufficient to proceed on a claim for medical monitoring.

Meeting the Physical Injury Requirement for Personal Injury Claims

In light of these cases, the Second Circuit held that, under New York law, an action for personal injury cannot be maintained absent an allegation of any physical injury. However, to meet the physical injury requirement, it is sufficient to allege either: (1) there is a clinically demonstrable presence of toxins in the plaintiffs' body, or (2) there is some physical manifestation of toxin contamination. As a result, because the plaintiffs alleged that they were exposed to PFOA through the defendants' releases and those releases caused a buildup of PFOA in their blood, the Second Circuit concluded that the plaintiffs pled physical injuries under New York law sufficient to allow them to seek the costs of medical monitoring.

Medical Monitoring Relief

The Second Circuit also briefly analyzed whether a plaintiff with no cognizable claim for personal injury could seek medical monitoring as a part of a claim for property damage. Due to the lack of certainty in prior cases regarding this topic, the Second Circuit concluded that the District Court's ruling on the availability of medical monitoring relief for a property damage claim fell outside of the court's review jurisdiction. Ultimately, the Second Circuit left open the question of whether, in a claim for medical monitoring costs, the injury threshold could be satisfied by pleading an injury to property alone.

Conclusion and Implications

This decision stands for the proposition that heightened levels of PFOA in the blood can satisfy the physical injury requirement for the purposes of surviving a motion to dismiss under New York law. As a result, more plaintiffs may be able to survive a motion to dismiss if they can show accumulated levels of toxins within their blood, potentially allowing more actions to proceed to the trial stage. The court's decision is available online at: https://www.ca2.uscourts.gov/decisions/isysquery/7b765558-8f7f-42bc-b257-b1c3a9e40fc5/5/doc/17-3491_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/7b765558-8f7f-42bc-b257-b1c3a9e40fc5/5/hilite/.

(Geremy Holm, Rebecca Andrews)

DISTRICT COURT HOLDS EPA HAS AN ONGOING NONDISCRETIONARY DUTY UNDER THE CLEAN WATER ACT TO UPDATE THE NATIONAL CONTINGENCY PLAN

Earth Island Institute, et al., v. Andrew R. Wheeler, et al.,
___F.Supp.3d___, Case No. 20-CV-00670-WHO (N.D. Cal. June 2, 2020).

On June 2, 2020, the U.S. District Court for the Northern District of California denied defendants Andrew Wheeler and the U.S. Environmental Protection Agency's (collectively: EPA) motion to dismiss plaintiffs' cause of action for violation of the federal Clean Water Act (CWA). On an issue of first impression, the court considered whether the CWA imposes a nondiscretionary duty on EPA to update or amend the National Contingency Plan (NCP), a plan for responding to oil and hazardous substance contamination that was last updated over 25 years ago. District Court Judge William H. Orrick determined EPA's duty to update is nondiscretionary, such that the environmental plaintiffs could bring a cause of action pursuant to the CWA's citizen-suit provision. The court also denied the American Petroleum Institute's motion to intervene, ruling that the lawsuit concerned EPA's procedure, but not any substantive decision.

Procedural Background

Plaintiffs Earth Island et al., (plaintiffs) sued EPA on January 30, 2020, alleging causes of action under the CWA and the Administrative Procedure Act (APA), claiming that the current NCP is "obsolete and dangerous." Plaintiffs alleged that because the current plan permits the use of chemical dispersants proven harmful to humans and the environment, EPA is required under the CWA to amend or update the plan. Plaintiffs further alleged that EPA violated its duties under the APA to conclude a matter presented to it within a reasonable time. EPA filed a motion to dismiss, and the American Petroleum Institute filed a motion to intervene, which EPA did not oppose. Plaintiffs opposed both motions.

The District Court's Decision

The CWA requires the President to prepare and publish a National Contingency Plan for removal of oil and hazardous substances and to minimize damage from oil and hazardous substance discharges, including containment, dispersal, and removal of oil and hazardous substances. The CWA also provides that the NCP "may, from time to time, as the President deems advisable" be revised or otherwise amended.

Under the CWA's citizen suit provision, a citizen may bring suit against the EPA where there is alleged a failure to perform any act or duty which is not discretionary. To state a claim for relief, the citizen suit must allege "a nondiscretionary duty that is 'readily-ascertainable' and not 'only [ ] the product of a set of inferences based on the overall statutory scheme.'"

Mandatory Duty

The court first considered EPA's argument that the plain language of the CWA is permissive, not mandatory. The court rejected this argument, noting that EPA's permissive plain language argument appeared valid on first review "without context," however courts routinely note that "may" does not always indicate discretionary or permissive action. As it related to the CWA, the court also observed the cases interpreting EPA's obligations have held that EPA must review relevant guidelines for possible revision, and that formal revisions must comply with detailed statutory criteria. Here, the court noted that EPA's duty to promulgate the NCP in the first instance is nondiscretionary.

An Ongoing Duty

The court also analyzed the statute's context and found that the CWA requires EPA to take various actions related to the NCP, including: (i) to "prepare and publish the NCP"; (ii) to ensure the NCP provides "efficient, coordinated, and effective action"; (iii) to establish a Coast Guard strike team and national center to assist in carrying out the NCP, a system of surveillance and notice to safeguard against discharges of oil and hazardous substances and imminent threats of such discharges, and a schedule of dispersants that may be used to carry out the NCP; and (iv) to ensure that removal of oil and hazardous

substances "shall, to the greatest extent possible, be in accordance with" the NCP. The court concluded that the NCP requirements in the CWA contemplate an ongoing duty that in turn strongly suggests that the duty to update and revise the NCP is not discretionary, but required.

The also court rejected EPA's interpretation of the statute, because it would allow EPA to "fail to review, update, or amend the NCP for decades, despite scientific advances," incidences of oil and hazardous substances discharges, and "an internal report concluding that the NCP was outdated and inadequate." EPA's interpretation would frustrate the purpose of the statute to achieve an efficient response to pollution.

The Motion to Intervene

Finally, the court denied the American Petroleum Institute's motion to intervene because plaintiffs' complaint attacked only EPA's procedures with respect to amending or revising the NCP, not the substance of the regulations, citing several supporting cases. EPA's rule-making process adequately protected the intervening party's interests.

Conclusion and Implications

The current NCP is more than 25 years old. This decision will obligate EPA to update the NCP with new information related to the use of chemical dispersants proven harmful to humans and the environment. The court's opinion is available online at: https://ecf.cand.uscourts.gov/doc1/035119332281 (Rebecca Andrews, Patrick Skahan)

DISTRICT COURT FINDS BASIC ALLEGATIONS OF FACT WITHIN A 'ZONE OF INTEREST' TO JUSTIFY STANDING UNDER THE U.S. CLEAN WATER ACT

Friends of the Capital Crescent Trail v. United States Army Corps of Engineers, ___F.Supp.3d___, Case No. JKB-19-106 (D. MD 2020).

The U.S. District Court for Maryland recently addressed standing by an NGO interest group in a small wetlands area and the group's claim to standing under the federal Clean Water Act via their "zone of interest argument."

Background

An avid group of hikers struck out on its third attempt to get a U.S. District Court to stop a light rail project that is planned for an east/west route through the Maryland suburbs near Washington, D.C. In *Friends of the Capital Crescent Trail v. United States Army Corps of Engineers*, the U.S. District Court for Maryland found that the planning process for the project, which took a number of years and considered multiple alternative routes and modes of transit, provided a well articulated rationale for the selection of the route ultimately chosen. The impact of the construction to which the Friends of the Trail objected was the federal Clean Water Act, § 404 dredge and fill permit issued by the U.S. Army Corps of Engineers (Corps) which impacted a half acre of wetlands that was in the vicinity of the project.

The District Court's Decision

The District Court articulated the standards by which the Corps was constrained to reach a decision:

> If a non-water dependent project involves discharging dredge and fill materials into a 'special aquatic site' like a wetland, then the [Clean Water Act] Guidelines establish a presumption that practicable alternatives not impacting special aquatic sites are available, 'unless clearly demonstrated otherwise.' 40 C.F.R. § 230.10(a)(3). Accordingly, the Corps may only issue a permit authorizing discharge in a special aquatic site if the Corps determines that the permit applicant has rebutted this presumption. Proof that the Corps made a reasonable determination on this score 'does not require a specific level of detail . . . but only record evidence the agency

> took a 'hard look' at the proposals and reached a meaningful conclusion based on the evidence. *Hillsdale Envt'l Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1168 (10th Cir. 2012).

Standing—'Zone of Interests' Argument

Before it engaged in the analysis of whether the Corps had done an adequate job of considering practicable alternatives to filling of the small wetland, however, the court examined whether the plaintiffs had adequately established standing to sue. The standing analysis the court went through is probably the most interesting aspect of this case, because, while the result is favorable to the plaintiff organization, the court's analysis shows that the standing question was a very close one to call.

Obviously, the members of the hiking organization enjoyed the ability to walk on and use the Capital Crescent Trail. They clearly had concern for the aesthetics, vistas and natural beauty they would encounter in doing so, and in the ability to exercise and enjoy the hike itself. However, the MTA, one of the defendants, argued to the court that the plaintiffs in an environmental challenge like this, are required to have a valid interest that is within the scope of interests protected by the specific law whose application is allegedly improper. In this case, the Clean Water Act, § 404 permit was alleged to have been improperly granted. The MTA argued that plaintiff members who stated their interests had failed to meet the test of being within the "zone of interests" the Clean Water Act protects.

The court took this CWA zone of interests question seriously. It noted:

> The primary purpose of the CWA, as declared by Congress and recognized by the Fourth Circuit, is 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' *Gaston Copper*, 204 F.3d at 151 (quoting 33 U.S.C. § 1251(a)). This is a broad goal, and the CWA's zone of interests has accordingly been held to encompass aesthetic and recreational interests related to water. *See*, *Piney Run Pres. Ass'n v. Cty. Comm'rs of Carroll Cty.*, 268 F.3d 255, 263 (4th Cir. 2001) (standing to sue under CWA where changes to a stream on plaintiff's property "significantly interfered with her use and enjoyment" of the stream); *White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033, 1039 (9th Cir. 2009) (standing to sue under CWA where members of plaintiff organization used affected area for "hiking, horseback riding[,] and other activities."). However, MTA argues that Plaintiffs' injuries fall outside this broad zone, since Plaintiffs' injuries relate to deforestation and noise-related impacts of the Purple Line project, not 'harms associated with discharges to waters of the United States.'

In the end, the court found standing to sue because one of the plaintiff organizations' members stated in a filed declaration that he took particular interest in the waters affected by the Corps permit. The court noted:

> Fitzgerald identifies these waters with particularity and testifies that though he has recently moved, he concretely plans to return to the waters described in his declaration on at least an annual basis. . . .Though Fitzgerald's injuries within the CWA's zone of interests may be minor, his declarations establish more than the 'identifiable trifle' necessary for standing.

Conclusion and Implications

The court's analysis does not really identify a tangible impact of the project on the member whose "intense interest" was averred. Whether that member could even discern the impacted area of dredge and fill when he enjoyed the project itself was not articulated or demonstrated. In short then, a different court might well have reached a different conclusion about whether an individual's expression of intensity of interest and once a year visits merit the considerable expenditure of time and human effort involved in the judicial contest over a dredge and fill permit that was arguably incidental and of questionable visibility as to the light rail project, the real impact a group of plaintiffs opposes. Sometimes the facts are everything at the trial court level in ruling on motions. This case was no exception.

(Harvey M. Sheldon)

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

CHANGE SERVICE REQUESTED

FIRST CLASS MAIL
U.S. POSTAGE
PAID
AUBURN, CA
PERMIT # 108