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EWL

FEATURE ARTICLE

COASTAL 'MANAGED RETREAT'—A SENSIBLE AND TEMPERED MITIGATION STRATEGY OR A SACRIFICIAL ABANDONMENT?

By David C. Smith

It is your coastal dream home—beach-front access and 180-degree ocean views. However, due to being included in a "hazards" overlay zone, you are unable to secure homeowners' insurance at any reasonable cost and no title company will extend full coverage title insurance. Or if not designated formally as a "hazard" zone, your house sits on land historically the victim of hurricane flooding. Or experts looking to the future predict, due to climate change, that sea level rise places your house as risk. Nonetheless, enactments of local elected officials and regulators are tanking the value and insurability of your single greatest asset. And when you propose to build structures that engineers certify will protect your home decades into the future, regulators refuse to allow it. What if local officials are already considering possibly forcing you "retreat" further inland to "protect you"?

This hypothetical scenario is proving not quite so "hypothetical" as "managed retreat" becomes an increasing focus of attention for both the public at large and regulatory officials. Climate change modeling and hazard projections increasingly fuel debates over appropriate mitigation and adaptation measures to combat the future threat of rising seas. And the threat is not just for the wealthy in exclusive enclaves like Malibu or distant third-world countries. The threat may be most dire for the already vulnerable among us, such as disadvantaged communities living in mobile home units in the very shadow of Silicon Valley tech giants. Advocates fear redlining practices from banks and others due to projected vulnerabilities will destine such communities to the fate of New Orleans' Ninth Ward in the wake of Hurricane Katrina.

Background

So, what is "managed retreat"? A reporter for *National Public Radio* (NPR) covered a conference on managed retreat in New York in June 2019. He described it this way:

> So it's a technical term, a political term. And it is essentially like a formal acknowledgement that there are places in the U.S. and around the world—not just the East Coast, I should say—that are going to be, if they aren't already, at such huge levels of risk from climate change that it just won't make sense for those places to remain. And that can be, you know, communities at risk of increased wildfire heat. But primarily, what we're talking about at this conference—it's focused on the impacts on coastal zones—cities by the sea, oceanside towns that are going to be inundated or see more flooding as sea levels rise. It just won't make sense for those places to remain.

What does that mean? And who gets to decide that an existing home or community should no longer "remain"? And what are the consequences for those potentially displaced? All of these critical considerations remain open and unresolved as the promotion of, opposition to, and debate over managed retreat escalates.

Managed Retreat Is Not a New Concept

Managed retreat is not a new concept. In 2011, the Bay Conservation and Development Commission (BCDC), the San Francisco Bay equivalent of and

state predecessor to the California Coastal Commission, adopted climate-change-related amendments to its governing document, the Bay Plan. The approval came only after months of highly contentious debate, including whether lowlying areas, communities, infrastructure, and even tech campus were potentially subject to abandonment to rising seas. For many, this was their first exposure to the term "managed retreat" and the potential for government-sanctioned abandonment of private property as an actual regulatory concept.

In March 2017, the scientific journal *Nature Climate Change* (NCC) published an analysis and proposed model evaluating approaches to and consequences of managed retreat. It noted that the United Nation's International Panel on Climate Change (IPCC) included managed retreat "as an alternative to coastal protection" in its First Assessment Report in 1990. According to the NCC piece:

> Retreat' is used to capture the philosophy of moving away from the coast rather than fortifying it in place. 'Managed retreat,' on the other hand, derives from coastal engineering and has been defined as 'the application of coastal zone management and mitigation tools designed to move existing and planned development out of the path of eroding coastlines and coastal hazards. . . .' We identify two defining features of managed retreat in coastal and other settings. First, it is a deliberate intervention intended to manage natural hazard risk, requiring an implementing or enabling party. Second, it involves the abandonment of land or relocation of assets. We use those characteristics to define managed retreat as the strategic relocation of structures or abandonment of land to manage natural hazard risk.

As managed retreat becomes more broadly recognized and understood, as well as advocated for inclusion in broad regulatory policies addressing the future of California's precious coastline, the owners of potentially vulnerable properties are beginning to realize that others, not themselves, have already begun debating "strategic relocation of structures or abandonment" of that individual's privately owned property (including, frequently, their home) "to manage natural hazard risk." And many of them are not at all happy about it.

Del Mar, California Rejects Managed Retreat

At the present time in California, there is no greater battleground debate over managed retreat than in San Diego County's smallest city, Del Mar, and its ongoing conflict with the Coastal Commission. At issue is the Coastal Commission's refusal to certify Del Mar's Local Coastal Program (LCP) for the City's own regulation of development and other activities in the Coastal Zone. Under the California Coastal Act (Pub. Resources Code §. 30000 *et seq.*), the Coastal Commission has ultimate authority over regulation of the Coastal Zone. However, cities within the Coastal Zone may adopt programs for local implementation of the Coastal Act's requirements through an LCP, though the LCP must be periodically certified by the Coastal Commission itself. Specified approvals by a city pursuant to an LCP may be appealed up to the Coastal Commission itself.

According to the *San Diego Union Tribune*, the consistent approach of the Coastal Commission in reviewing LCP certifications throughout the state includes:

> . . .[a] slow and calculated retreat . . . . The strategy includes warning property owners and prospective buyers of the possibility they could be flooded, prohibiting new or additional development in threatened areas and in some cases providing financial assistance to people who need to relocate out of harm's way.

Del Mar has long opposed the concept of managed retreat. With beach-front properties regularly valued at over $10 million each, Del Mar has argued that codifying managed retreat today could have a devastating impact on property values and insurability of these properties. Further, the City points out that residential neighborhoods behind the beach-front properties are even more low-lying than the beach properties themselves, so allowing the front line of homes along the beach to be abandoned ensures loss of the next neighborhoods as well. Instead, the City has adopted a long-term adaptation strategy whereby regular replenishment of sand on the beach and seawalls are the primary defense mechanisms against rising seas.

Del Mar is in the midst of seeking certification of its LCP and has resisted what it characterizes as the Coastal Commission's insistence that the LCP

include managed retreat as a mitigation measure for future Coastal Development Permits (CDP) issued under the LCP. And the dispute has been pending for nearly four and a half years.

Most recently, as outlined in a Staff Report dated September 27, 2019, the Coastal Commission staff recommended denial of certification of Del Mar's proposed LCP unless the City agreed to 25 proposed changes. These included provisions relating to bluff setbacks, waiver of any future right to build structure protections against sea level rise, and addressing potential implications of regulations posing the risk of liability for an unconstitutional "taking" of property. Coastal Commission staff stated that it viewed the proposed amendments as standard for LCPs in an era addressing future sea level rise; fully consistent with the City's proposed adaptation plan that accompanied, though does not have the regulatory authority of, the LCP itself; and never expressly required managed retreat.

At its City Council meeting on October 7, 2019, Del Mar unanimously rejected in summary fashion all proposed 25 amendments by the Coastal Commission. The City stated that the proposed amendments were the Coastal Commission's attempt to "back door" managed retreat into the LCP.

The Coastal Commission hearing on the LCP and staff's recommendation regarding the 25 proposed amendments was just over a week later on October 16, 2019. While staff expressed great surprise and frustration with the City's summary dismissal of the proposed amendments after four years of discussion and negotiation, Coastal Commission staff ultimately agreed to postpone the hearing so that additional negotiation could take place.

The Lindstroms, Encinitas, California, and the Coastal Commission

Unfortunately for Del Mar, Coastal Commission staff was likely bolstered in their confidence in the negotiations in light of a sweeping victory they received from the California Court of Appeal's Fourth District Court on September 19, 2019, just over a week before Coastal Commission staff issued their staff report recommending denial of Del Mar's proposed LCP without the 25 amendments. In *Lindstrom v. Coastal Commission*, 40 Cal.App.5th 73 (Sept. 19, 2019), four conditions imposed by the Coastal Commission on an individual CDP for a single-family residence on an ocean-front bluff in the City of Encinitas were nearly universally upheld. And these four permit conditions strikingly mirror the types of policies the Coastal Commission is looking to integrate into LCPs statewide in order to confront sea level rise.

The Lindstrom's saga is a testament not only to the substantive requirements individual permit applicants and jurisdictions seeking LCP certification should expect, but the complex, time-consuming, and expensive process entailed in challenging such requirements. The Lindstrom's first applied for their CDP in 2012, and the court of appeal ruling was not issued until seven years later.

Background

The Lindstroms owned a 6,776 square foot lot on bluffs 70 feet above the ocean in the city of Encinitas, California. In 2012, they applied to Encinitas for entitlements, including a CDP under Encinitas' LCP, to construct a two-story 3,553 square foot home. "The seaward side of the structure would be set back 40 feet from the edge of the bluff."

One of the common requirements for CDP applications, whether under a certified LCP or from the Coastal Commission itself, is for thorough geotechnical analysis demonstrating that the approved structure will remain secure from erosion or other hazards for at least, typically, 75 years and that the new structure will not require additional structural protection such as a sea wall in the future. Encinitas' code was no exception:

The City's LCP requires that permit applications for development in the Coastal Bluff Overlay Zone, where the Lot is located, be accompanied by a geotechnical report prepared by "a certified engineering geologist." (Encinitas Mun. Code, Ch. 30.34, § 30.34.020D.)

> The review/report shall certify that the development proposed will have no adverse [e]ffect on the stability of the bluff, will not endanger life or property, and that any proposed structure or facility is expected to be reasonably safe from failure and erosion over its lifetime without having to propose any shore or bluff stabilization to protect the structure in the future. (Encinitas Mun. Code, § 30.34.020D.)

The City's LCP lists certain aspects of bluff stability that the geotechnical report shall consider.[] It

further states that:

> . . .[t]he report shall also express a professional opinion as to whether the project can be designed or located so that it will neither be subject to nor contribute to significant geologic instability throughout the life span of the project. (Encinitas Mun. Code, § 30.34.020D.11, 1st par.)

The geotechnical analysis under this requirement became a major point of contention between the Lindstroms and the Coastal Commission as to a condition relating to the required setback of the new structure from the bluff's ocean-ward edge.

Encinitas, through its Planning Commission, certified the project as consistent with its LCP and approved the new residence.

> As one of the conditions for the permit, the City required the Lindstroms to provide a letter stating that 'the building as designed could be removed in the event of endangerment, and the property owner agreed to participate in any comprehensive plan adopted by the City to address coastal bluff recessions and shoreline erosion problems in the City.'

The Court of Appeal further explained:

> This condition was required pursuant to the portion of the City's LCP concerning the Coastal Bluff Overlay Zone, which states, 'Any new construction shall be specifically designed and constructed such that it could be removed in the event of endangerment and the property owner shall agree to participate in any comprehensive plan adopted by the City to address coastal bluff recession and shoreline erosion problems in the City. (Encinitas Mun. Code, § 30.34.020B.1.a.)

Two sitting members of the Coastal Commission appealed Encinitas' approval of the Lindstrom's new home. (The Coastal Act makes express provision for two Coastal Commission members to appeal decisions under local LCPs to the full Coastal Commission for review.)

> As relevant here, one ground of the commissioners' appeals was that the City's approval 'appears inconsistent with the policies of the LCP relating to the requirement that new development be sited in a safe location that will not require shoreline protection in the future.'

The appeal came before the California Coastal Commission on July 13, 2016. The Coastal Commission approved the construction of the Lindstrom's home, but added four additional conditions to Encinitas' approval, "including that the structure be set back 60 to 62 feet from the edge of the bluff," as opposed to the 40 feet required by Encinitas. The four exact conditions required by the Coastal Commission were:

> •A setback from the bluff 20 feet further than that required by Encinitas:
> [1.a] The foundation of the proposed home and the proposed basement and shoring beams shall be located no less than 60 to 62 ft. feet [sic] landward of the existing upper bluff edge on the northern and southern portions of the site, respectively.
>
> •Waiver of any right to construct protective structures in the future:
> [3.a] By acceptance of this Permit, the applicants agree, on behalf of themselves and all successors and assigns, that no bluff or shoreline protective device(s) shall ever be constructed to protect the development approved pursuant to Coastal Development Permit No. A-6-ENC-13-0210 including, but not limited to, the residence and foundation in the event that the development is threatened with damage or destruction from waves, erosion, storm conditions, bluff retreat, landslides, or other natural hazards in the future. By acceptance of this Permit, the applicants hereby waive, on behalf of themselves and all successors and assigns, any rights to construct such devices that may exist under Public Resources Code § 30235.
>
> •Confirmation they will remove the residence and foundation if ordered to do so:
> [3.b] By acceptance of this Permit, the applicants further agree, on behalf of themselves and all successors and assigns, that the landowner shall remove the development authorized by this Permit, including the residence and foundation, if any government agency has ordered that the structures are not to be occupied due to any of the hazards identified above. In the event that portions of the

development fall to the beach before they are removed, the landowner shall remove all recoverable debris associated with the development from the beach and ocean and lawfully dispose of the material in an approved disposal site. Such removal shall require a coastal development permit.

•Obtain and comply with a new geotechnical study under specified conditions:
[3.c] In the event the edge of the bluff recedes to within 10 feet of the principal residence but no government agency has ordered that the structures not be occupied, a geotechnical investigation shall be prepared by a licensed coastal engineer and geologist retained by the applicants, that addresses whether any portions of the residence are threatened by wave, erosion, storm conditions, or other natural hazards. The report shall identify all those immediate or potential future measures that could stabilize the principal residence without shore or bluff protection, including but not limited to removal or relocation of portions of the residence. The report shall be submitted to the Executive Director and the appropriate local government official. If the geotechnical report concludes that the residence or any portion of the residence is unsafe for occupancy, the permittee shall, within 90 days of submitting the report, apply for a coastal development permit amendment to remedy the hazard, which shall include removal of the threatened portion of the structure.

There are at least two immediately noteworthy aspects of the additional conditions imposed by the Coastal Commission. First, as to the length of the setback from the bluff, a veritable battle-of-the-experts broke out before the Coastal Commission. Over the course of processing the entitlements, the Lindstroms retained two different geotechnical firms that had different methodologies but both placed the setback at less than the City's codified mandatory minimum of 40 feet. When the question came before the Coastal Commission, the staff geologist—not an engineer—took the two methodologies and, rather than embracing the merits of one over the other, he added the two distances together for a single sum distance. There was expert testimony that this approach was baseless and nonsensical. The two methodologies were distinct approaches to coming up with a single distance, not a single compound analysis. There was no professional justification for adding one on top of the other for, effectively, a double distance. But that is exactly how the Coastal Commission got to 60 to 62 feet of setback.

The other notable attribute is the Coastal Commission's reference to and forced waiver of Public Resources Code Section 30235 in condition 3.a. That statute provides an express right in the Coastal Act to defend imperiled properties with structural protections. However, it is now the position of the Coastal Commission that the section's protections apply, if at all, only to existing structures and that proposed new structures may be conditioned on waiver of that statutory right. The Lindstroms argued both that this violated the Coastal Act and that it was an unconstitutional taking of property without compensation.

At the Trial Court

The Lindstroms filed suit challenging all four conditions.

The trial court ruled that the Coastal Commission abused its discretion as to conditions 1.a (60- to 62foot setback) and 3.a (waiver of any future right to build structural protection) as contrary to the language of Encinitas' LCP and the Coastal Act. The trial court upheld conditions 3.b (removal of residence upon order of a government agency) and 3.c (obtain and adhere to a new geotechnical report).

Both the Lindstroms and the Coastal Commission appealed their respective losses.

The Court of Appeal's Decision

As to condition 1.a—quite incredibly, frankly, given the record—the Fourth District Court of Appeal found the Coastal Commission's methodology of requiring both distances summed together to a total of 60 to 62 feet as reasonable.

As to condition 3.a, the court held that the Coastal Commission has full authority to require waiver of future structure protections to new construction.

As to condition 3.b, the court disallowed it, but only on a minor and easily fixable drafting error to clarify that the only hazards that could implicate vacating and removing the structures had to be hazards within the purview of Coastal Commission authority.

And finally, as to condition 3.c, the court held that the Coastal Commission with within its authority to

require preparation of and adherence to a new geotechnical study upon specified future circumstances.

The most important point as to this sweeping victory for the Coastal Commission, of which the court may or may not have been aware, was that the precedential implications of this ruling go far beyond the conditions to this or any other future permit. Indeed, the four substantive provisions at the heart of the respective conditions actually track some of they foundational strategies the Coastal Commission is seeking to integrate system wide through the LCP programs. Namely, those four strategies are:

> Mandatory minimum setbacks; Waiver of any right to future structural shoreline protections;
>
> Future removal and disposal of the structures and foundations under specified circumstances; and Automatic mandates under specified circumstances for the preparation of technical studies that could themselves require removal of structures.

Conclusion and Implications

Harkening back to *NPR's* coverage of the managed retreat conference in New York in 2019, the reporter was asked if there was any semblance of good news emerging from the apparent chaos surrounding the politics of managed retreat. As with many dynamics in the world today, one thing seemed clear—things are changing:

> I mean, there's a lot of excitement that the conversation is happening. I've heard more than one person say that it's about time we start tackling this. But I also wanted to steal a quote that one of the presenters stole from Oliver Smith, a Marine Corps general who served in World War II and the Korean War, where, in a battle, he said—he famously said, *you know, we're not retreating; we're just advancing in a different direction*. And, look; climate change is going to make us have to change direction. And there's a lot of hope at this conference that as we rebuild communities, as we rethink them, there's an opportunity to do that in a way that doesn't have some of the inequalities and segregation that our current systems have. (*Emphasis* added.)

I don't think the residents of Del Mar would agree.

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EASTERN WATER NEWS

NEWS FROM THE WEST

In this month's News from the West, we cover two important state court decision. The first, out of the Utah Supreme Court addresses water rights, change applications and distinguishes water right impairment from water right interference. The second decision is out of the Washington Supreme Court validating the state's regulating agency, the Department of Ecology's decision on establishment of instream flows during the summer months. Instream flows are crucial to balance the water needs of municipalities and farming against biological resources.

Utah Supreme Court Distinguishes Water Right Impairment from Interference—Finds Claimant Need Not Make Administrative Phase Protest of Change Application to Later Raise Interference Argument

Rocky Ford Irrigation Company v. Kents Lake Reservoir Company, 2020 UT 47 (UT July 13, 2020).

The Utah Supreme Court issued an *amended* decision in this case and clarified the distinction between impairment of and interference with water rights. Crucially, the Court held that a party need not protest a change application at the administrative phase in order to assert interference at a later date.

Factual and Procedural Background

This amended decision represents the end of a long running dispute between two water users' groups. Kents Lake Reservoir Company (Kents Lake) and Rocky Ford Irrigation Company (Rocky Ford) divert and store water from the Beaver River in Central Utah. Each company owns direct-flow and storage water rights that were recognized in the 1931 Beaver River Decree. The Beaver River Decree held that all upper users were entitled to obtain their water rights prior to the lower users, irrespective of their relative priority dates. Kents Lake is located upstream of Rocky Ford and is considered to be in the upper basin, while Rocky Ford is in the lower basin.

Kents Lake filed change applications in 1938 and 1940 to store additional water in its reservoir. These change applications were both approved by the Division of Water Rights over the protests of Rocky Ford. Subsequently, the two companies entered into an agreement to "provide for the practical administration of storage … and to prevent future controversy concerning the diversion for storage." *Rocky Ford v. Kents Lake*, 2019 UT 31, ¶ 9. This agreement provided that: 1) Rocky Ford would not protest Kents Lake's planned change application seeking an option storage right in Three Creeks Reservoir, 2) Kents Lake would not oppose Rocky Ford's enlargement of its reservoir, and 3) Rocky Ford has an exclusive right to store all water available to it from November 1 to the following April 1 each year.

As agreed, Kents Lake submitted a change application to the Utah State Engineer seeking to create an option storage right in Three Creeks Reservoir. Rocky Ford, as promised, did not protest the application. The State Engineer approved the application and granted Kents Lake's request for these "direct-storage changes." Kents Lake now had a direct-storage right, allowing it to either use the water directly or store it in Three Creeks Reservoir. Kents Lake subsequently perfected this change and received a certificate of beneficial use for the direct-storage right.

Beginning in the 1970s Beaver River water users gradually shifted to sprinkler irrigation, which requires less diversion of water and produces less return flows. Entities such as Kents Lake began to store these efficiency gains and this reduced the flow available to lower users, such as Rocky Ford. The reduction of return flows can adversely impact lower users as insufficient water is made available.

At the District Court

In 2010, after requesting assistance from the Division of Water Rights, Rocky Ford brought suit in state District Court against Kents Lake. The suit alleged water right interference, conversion of water rights, and negligence, and seeking declaratory relief,

injunctive relief, and rescission of the 1953 Agreement. Rocky Ford contends that its water rights have been impaired by the approved changes to the direct-storage and other actions taken by Kents Lake. Essentially, Rocky Ford asserted that its water rights had priority over the direct-storage rights approved in Kents Lake's change application when the issue of interference arises.

Following discovery, Rocky Ford moved for partial summary judgment. It asserted that: 1) the direct-storage changes maintain an 1890 priority date only to the extent they don't injure Rocky Ford's direct flow rights, and 2) Rocky Ford's direct flow rights are not subordinated or waived under a plain language reading of the Agreement. The District Court denied the motion holding that Rocky Ford had "intentionally waived its direct flow rights against [Kents Lake] through its entrance into the 1953 agreement" and that Kents Lake could continue to store its water as it has "even to the detriment of [Rocky Ford]'s direct flow rights." Id. at ¶ 15.

Following a bench trial, the District Court issued its written Memorandum Decision. The court first denied Rocky Ford's request for injunctive and declarative relief regarding Kents Lake's measurement obligations. Because Kents Lake had followed the instructions of the State Engineer with regard to measurement, the District Court concluded that Rocky Ford was not entitled to declarative or injunctive relief. The District Court also declined to rescind the 1953 Agreement. It concluded that Rocky Ford had not proved material breach, impracticability, frustration of purpose, or mutual mistake. Lastly, the District Court awarded attorney fees to Kents Lake and Beaver City *sua sponte* under Utah Code § 78B-5-825.

Issues on Appeal

Rocky Ford appealed the decision and asserted five principal questions for review. First, did the trial court commit legal error when it denied Rocky Ford's motion for summary judgment? Second, did the trial court err in refusing to declare that Kents Lake could not store the water it saved through improved efficiency? Third, did the trial court err in refusing to declare that Kents Lake must measure its usage consistent with the requirements of the Beaver River Decree? Fourth, did the trial court err in refusing to rescind the 1953 Agreement? And fifth, did the trial court err in awarding attorney fees to Kents Lake and Beaver City?

The Court heard argument on the appeal and published an opinion in July 2019. Rocky *Ford Irrigation Co. v. Kents Lake Reservoir Co.*, 2019 UT 31. The parties filed petitions for rehearing, seeking substantive changes to Parts II(A) and (B) of the original opinion. The Court granted the petitions and reheard the case in March 2020.

The Supreme Court's Amended Decision

There are five principal questions at issue: 1) Did the District Court err in denying Rocky Ford's motion for summary judgment? 2) Did it err in refusing to declare that Kents Lake could not store its efficiency gains? 3) Did it err in refusing to declare that Kents Lake must measure its usage consistent with the requirements of the Beaver River Decree? 4) Did it err in refusing to rescind the 1953 Agreement? 5) Did it err in awarding attorney fees to Kents Lake and Beaver City?

The Court reversed the lower court's denial of Rocky Ford's motion for summary judgement, the denial of Rocky Ford's request for declaratory judgment as to Kents Lake's measurement obligations under the Decree, and the decision awarding attorney fees to Kents Lake and Beaver City. But the Court affirmed the lower court's decision refusing to declare that Kents Lake could not store its efficiency gains and the decision refusing to rescind the 1953 Agreement. The case was remanded for further proceedings.

Changes Are Expressly Made Subject to Vested Rights at New Point of Diversion or Place of Use

The key clarification in this amended opinion is that the Court held that Kents Lake's direct storage changes retain their original priority only to the extent they do not injure Rocky Ford's direct flow rights. This is made clear in the Utah Code, which provides that a water user may seek to change its rights in a water source by filing a change application with the State Engineer. Utah Code § 73-3-3. A change application requests a change in the "place of diversion or use" of the water for a purpose other than that originally appropriated. Id. Because such a change is not permitted "if it impairs any vested right," id., other water users are entitled to file a

protest of a proposed change with the State Engineer. id. § 73-3-7. The State Engineer then reviews the impairment claims and approves the change if there is "reason to believe" that the approval will not impair vest water rights. *Searle v. Millburn Irr. Co.*, 2006 UT 16, ¶ 31, also Utah Code § 73-3-3.

Because a change to a water right is made subject to preexisting water rights, it is clear that the change cannot harm those preexisting water rights. A subsidiary point is also implicit: The change maintains its original priority only so long as it does not harm preexisting rights. *See, Hague v. Nephi Irrigation Co.*, 52 P. 765, 769 (Utah 1898) ("[w]hen water has been lawfully appropriated, the priority thereby acquired is not lost by changing the use for which it was first appropriated and applied, or the place at which it was first employed, provided that the alterations made … shall not be injurious to the rights acquired by others prior to that change.") In this case, Kents Lake's changed right retains priority over Rocky Ford's rights so long as Kents Lake's changed water storage does not injure Rocky Ford's direct flow rights.

The Court held that there exists a presumption that a water right subject to a change application retains its original priority date. An aggrieved party may allege an injury sufficient to defeat the presumption of original priority by either protesting a change during the application process *or* bringing a claim after the change has been approved. A party can, in other words, allege either prospective injury stemming from another water user's proposed change, or actual injury stemming from another water user's actual change.

Distinguishing 'Impairment' from 'Interference'

The Supreme Court noted that impairment and interference have historically been used interchangeably, but now holds that they are "distinct legal claims meriting distinct labels." ¶ 37. The Court clarified that "impairment" claims are statutory claims brought under Utah Code §§ 73-3-3 and 73-3-7 during the change application process, and that "interference" claims are common-law claims brought under our case law after the change application process ends. The distinction between "impairment" and "interference" is important to the extent it highlights the two distinct roles our courts play in water law cases: 1) reviewing administrative decisions regarding water rights, and 2) adjudicating the water rights themselves (including their priority).

A determination of impairment is an administrative function and refers to a protest of proposed changes of water rights. Because the change is only proposed at this stage, the preliminary decision is whether there is "reason to believe" that injury will occur. At this stage the applicant seeking the change has the burden to show that there is reason to believe that no injury to vested rights will occur. Conversely, interference is a judicial function and refers to the determination of actual injury to a vested water right. Accordingly, once a change application is approved the burden shifts and the opponent of the change must show by a preponderance of the evidence that the change has interfered with their water rights.

Conclusion and Implications

The Utah Supreme Court's earlier decision recognized that a change application did not alter the underlying priority date of a water right, but did not acknowledge the fact all changes are made subject to existing rights. This amended decision clarifies that a change is expressly made subject to vested rights at the new point of diversion or place of use. Further, it firmly delineates that impairment and interference are separate and distinct causes of action. The Utah Supreme Court's Decision may be found at: https://www.utcourts.gov/opinions/supopin/Rocky%20Ford%20v.%20Kents%20Lake20200713_20170290_47.pdf
(Jonathan Clyde)

Washington Supreme Court Overturns the Court of Appeals on the Instream Flow Rule—Reinstates Summer Instream Flows

Center for Environmental Law & Policy, et al., v. State of Washington, Department of Ecology, Case No. 97684-8 (August 6, 2020), *on review of Center for Environmental Law & Policy, American Whitewater, and Sierra Club v State of Washington, Dept of Ecology*, 444 P.3d 622 (Wash.App., Div. II, 2019).

The Washington Supreme Court has upheld summer flows set by the Department of Ecology (Ecology), overturning a state Court of Appeals decision. (*See*, 24 *West. Water L. & Plcy Rptr* 103 (Feb. 2020).

Background

Ecology established minimum instream flows for portions of the Spokane River by rule in 2015. A collection of environmental groups challenged the validity of a portion of the Rule, calling into question the agency's authority and methodology for establishing instream flow rules. The Court of Appeals found in favor of the appellants, invalidating the summer portion of the rules in favor of revisiting whether recreational values were adequately considered. The Washington Supreme Court overturned the Court of Appeals, reinstating the summer instream flows rules as set by rule.

The Spokane River

The Spokane River runs 111 miles from its Lake Coeur D'Alene headwaters in Northern Idaho across the state line into Washington where it flows through the heart of the City of Spokane to its eventual confluence with the Columbia River. The Spokane River is a focal point in an otherwise arid landscape, providing cultural, economic and recreational touch points to a growing population and is home to much fish and wildlife, including trout and mountain whitefish among other species.

Regulation of Instream Flows in Washington

The case arose from a challenge by recreational water users to instream flows set by rule on the grounds that the rule was Arbitrary and Capricious because the summer flows failed to accommodate flows recommended by recreationists which were higher than the flows recommended for fish.

Ecology is authorized and directed by various statues to manage the waters of the state for a myriad of purposes, including setting instream flows by regulation. The authority for setting instream flows arises under multiple code sections, adopted and amended over the course of the last fifty plus years. The creation of instream flow rules has become increasingly controversial, as these rules have become the fulcrum in the balance between authorizing new out of stream uses of water and restricting or requiring mitigation of for the protection of flows. Once adopted, the minimum instream flow established by rule becomes an appropriative right within the priority scheme of "first in time, first in right," which must be protected from injury by junior water uses.

Issues on Appeal to the Supreme Court

At issue was the interpretation of two different code provides with seemingly contradictory provisions.

Under the Minimum Water Flows and Levels Act (Ch 90.22 RCW, first adopted in 1969, amended in 1987, 1988, 1994, and 1997), Ecology is authorized to establish:

> . . .minimum water flows or levels. . . for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be in the public interest to establish the same. RCW 90.22.010.

Under the Water Resources Act (Ch 90.54 RCW, adopted in 1971, amended in 1990), the legislature added additional nuance to Ecology's water management considerations, with such additional goals as directing the agency to allocate water for "the maximum net benefits for the people of the state" while also converting and refining the laundry list of purposes from the Minimum Water Flows and Levels Act including making the list of purposes to be considered conjunctive and obligatory with the use of "shall" and "and" in the contexts of protecting and enhancing the quality of the natural environment, and retaining "base flows" "for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values."

Ecology took a narrow read by relying solely on the Minimum Water Flows and Levels Act (RCW 90.22) in setting instream flows levels on the basis of fish needs alone, and the appellants taking a more expansive position that Ecology is required to consider and address all instream flows uses under the direction of the Water Resources Act (RCW 90.54). The Court of Appeals invalidated the rule finding its adoption was arbitrary and capricious, and in doing so the Court created a hybrid of the two legislative enactments which created a higher standard than either of the provisions acting alone.

In addition to the Administrative Procedures arguments requiring the reconciliation of code provisions, the appellants raised Public Trust Doctrine arguments which the Court of Appeals did not find persuasive. The Public Trust argument were not raised by the appellants to the State Supreme Court but was raised

by Amicus. The Court was not persuaded and elected not to consider the matter in a footnote.

Statutory Interpretation

When the paragraph headings in the opinion is a grammar primer—[“”Shall,” “or,” “and”“]—be prepared for some hairsplitting. In this case, the Court applied its exception to the rule instead of the rule itself. Instead of finding that “shall” imposes a mandatory requirement, the Court went to find that shall isn’t mandatory when “a contrary legislative intent is apparent,” and that a “contrary legislative intent” is indeed found within RCW 90.54. RCW 90.54.020, with the statutory captions of “General declaration of fundaments for utilization and management of waters of the state” according to the Court, are “guidelines, not elements that must be met..

When establishing minimum instream flows under RCW 90.22.010, the Court found that Ecology can balance competing interests based on the disjunctive “or” found in the statute. “… RCW 90.22.010’s plain language provides it with the authority to:

> . . .establish minimum water flows. . .for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be in the public interest to establish the same. *No. 97684-8, p14.*

In doing so, the Court recognized that Ecology has authority to decide instream flows *and to exercise its discretion in doing so*.

The Court further doubled down on Ecology’s discretion in these regulatory matters, quoting previous cases wherein the agency was given broad discretion.

Conclusion and Implications

This is the first water case in which the Washington Supreme Court has accepted direct review since 2016 (*See, Whatcom County v Hirst Et Al*, 186 Wash.2d 648, 381 P.2d 1 (2016)). The case opinion is also notable as evidenced by the Court’s unanimous decision—rare for the Court in a water case. The Washington Supreme Court overturned the Court of Appeals, reinstating the summer instream flows rules as set by rule.
(Jamie Moran)

REGULATORY DEVELOPMENTS

COUNCIL ON ENVIRONMENTAL QUALITY PUBLISHES FINAL RULE UPDATING NEPA'S IMPLEMENTING REGULATIONS

The Council on Environmental Quality (CEQ) recently published a final rule updating the National Environmental Policy Act's (NEPA) implementing regulations. Among other things, the updated regulations are intended to promote a more timely and efficient NEPA review process, streamline the development of federal infrastructure projects, and promote better federal decision-making. The new regulations, however, have also prompted concerns voiced by some in the environmental community.

Background

NEPA was signed into law by President Nixon on January 1, 1970. The purpose of NEPA is to:

> . . .foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans. (42 U.S.C. § 4331(a).)

To that end, NEPA requires that federal agencies undertaking a "major" federal action that significantly affect the quality of the human environment to prepare detailed statements on their actions' environmental effects, any such adverse effects that cannot be avoided if the proposed action is implemented, alternatives to the proposed action, the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. (*Id.* at § 4332(C).)

NEPA does not, however, mandate specific outcomes, rather it requires "Federal agencies to consider environmental impacts of proposed actions as part of agencies' decision-making processes." (85 Fed. Reg. 43304-01, 43306.) Thus, in very general terms, federal agencies comply with NEPA by: 1) preparing an Environmental Assessment of their proposed actions; and 2) preparing an Environmental Impact Statement if the Environmental Assessment concludes that the action may have significant effects on the environment. (*See generally*, 40 C.F.R. § 1501.4(c).)

NEPA also established the CEQ and empowered it to administer the implementation of the statute. (42 U.S.C. §§ 4332(B), 4342, 4344.) In 1977, President Carter directed the CEQ to issue implementing regulations for NEPA, and the CEQ did so in 1978. (85 Fed. Reg. 43304-01, 43307. Since then, the CEQ has only once issued substantive amendments to those regulations. (*Id.*)

President Trump Directs the CEQ to Make Changes

In 2017, President Trump directed the CEQ to issue such regulations as it deemed necessary to, among other things, enhance interagency coordination of environmental review and authorization decisions, ensure that interagency environmental reviews under NEPA are conducted efficiently, and require that agencies reduce unnecessary burdens and delays in applying NEPA. (*Id.* at 43312.) In accordance with this directive, CEQ issued an advance notice of proposed rulemaking on June 20, 2018. (*Id.*) The CEQ's notice of proposed rulemaking was published in the *Federal Register* on January 10, 2020.

Discussion and Summary of Key Elements of the Final Rule

The Final Rule published on July 16, 2020, contains numerous changes to NEPA's implementing regulations. (*See generally*, 85 Fed. Reg. 43304-01.)

Definitions

Among the most significant are changes to the regulatory definitions of "Effects," "Cumulative Impacts," and "Major Federal Action." Under the new definition of "Effects," effects must be "reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives[.]"

(*Id.* at 43343.) Thus, under the definition, a but-for causal relationship will be insufficient to make an agency responsible for the environmental effects of a major federal action under NEPA. (*Id.*) CEQ's explanation of this definition indicates that it is similar to the test of proximate causation applied in tort law. (*Id.*) The Final Rule also completely eliminates the definitions of, and references to, "cumulative impacts" from NEPA's implementing regulations. CEQ has explained that it has eliminated this definition to:

> . . .focus agency time and resources on considering whether the proposed action causes an effect rather than on categorizing the type of effect. . .[and because]. . .cumulative effects analysis has been interpreted so expansively as to undermine informed decision making, and led agencies to conduct analyses to include effects that are not reasonably foreseeable or do not have a reasonably close causal relationship to the proposed action or alternatives. (*Id.* at 43343-43344.)

Finally, the new regulations clarify that "Major Federal Actions" do not include projects where, due to "minimal Federal funding or minimal Federal involvement" the agency lacks control over the outcome of a project. (*Id.* at 43347.)

Deadlines and Page Limits

The new regulations also set deadlines and page limits that govern the development of environmental documents. Under the Final Rule, federal agencies must issue Environmental Assessments within one year of deciding to prepare such a document, and Environmental Impact Statements must be issued within two years. (*Id.* at 43327.) Similarly, the Final Rule now sets a 75-page limit for Environmental Assessments, a 150-page limit for typical Environmental Impact Statements, and a 300-page limit for Environmental Impact Statements of "unusual" scope or complexity. (*Id.* at 43352.) However, all of these deadlines and page limits may be extended if approved by a senior agency official. (*Id.*)

Prohibition on 'Irreversible and Irretrievable' Commitments of Resources

Finally, while NEPA prohibits the "irreversible and irretrievable" commitment of resources which would be involved in a proposed action before the environmental review process is complete (42 U.S.C. § 4332(C)(v), the Final Rule clarifies that non-federal entities may take actions necessary to support an application for federal, state, tribal, or local permits or assistance. (85 Fed. Reg. 43304-01, 43336.) Such actions may include, but are not limited to, the acquisition of interests in land and the purchase of long lead-time equipment. (*Id.* at 43370.)

Conclusion and Implications

The CEQ's Final Rule is more than 70-pages along and contains many more changes in addition to those described above. Although interests such as the U.S. Chamber of Commerce support the new regulations, numerous environmental groups have already challenged the CEQ's adoption of the Final Rule on both substantive and procedural grounds. These lawsuits filed in the U.S. District Courts for the Western District of Virginia (*Wild Virginia, et al. v. Council on Envtl. Quality, et al.*, Case No. 3:20-cv-00045) and the Northern District of California (*Alaska Comty. Action on Toxics, et al. v. Council on Envtl. Quality, et al.*, Case No. 20-cv-05199) are in the earliest stages of litigation, and it is unclear if they will succeed. For more information on the changes to NEPA, *see:* https://www.whitehouse.gov/ceq/nepa-modernization/ (Sam Bivins, Meredith Nikkel)

FERC ORDER REQUIRES PACIFICORP TO REMAIN ON FOR KLAMATH DAM REMOVALS

A recent ruling by the Federal Energy Regulatory Commission (FERC) has inserted a new condition on a longstanding plan to demolish four hydroelectric dams on the Klamath River in northern California and southern Oregon. Despite the terms of a settlement agreement that called for PacifiCorp, the dams' current owner and operator, to sever ties—and liability—by transferring its operating license to the group that would oversee the demolition, FERC's approval of the transfer includes a condition that PacifiCorp remain a co-licensee.

Background

For decades, the Klamath River Basin (Basin) has been an epicenter for disputes over water and other natural resources among farmers, tribes, fishermen, environmentalists, and state and federal authorities. The Basin spans over 16,000 square miles in Oregon and California, consisting of agricultural, forest, and refuge lands. The four hydroelectric dams proposed for demolition were built between 1908 and 1962, along the Lower Klamath River. The placement of the dams interrupts access to hundreds of miles of historical spawning and rearing habitats in the Upper Klamath for migratory Chinook and coho salmon.

In 2004, PacifiCorp sought FERC approval to re-license its operation of the dams for another 30 to 50 years. In response, a 2004 economic study by the California Energy Commission and the U.S. Department of the Interior found that decommissioning the dams instead could actually saving PacifiCorp ratepayers up to $285 million over a 30-year period. A settlement group comprised of representatives from PacifiCorp, Klamath Basin tribes, state and federal agencies, counties, farmers, fishermen and conservation groups, was formed in 2005 to potentially resolve the years of disputes and litigation over habitat, fishery, and water quality concerns surrounding the four contested dams.

The 2010 Klamath Hydroelectric Settlement Agreement, amended in 2016 to incorporate delayed state legislative approvals, finally brought the parties to terms on the decommission and demolition of the four Lower Klamath dams. Under a key provision of the Settlement Agreement, PacifiCorp would request to transfer its ownership of the dam facilities and FERC operator's license and contribute $200 million collected through utility bill surcharges towards the $450 million removal effort. In exchange, PacifiCorp would be protected from all liability for potential damages caused by the ensuing dam removal process.

FERC Grants Partial Transfer of PacifiCorp's License

On July 16, 2020, four years after the transfer application was submitted, FERC's 31-page Order Approving Partial Transfer of License, Lifting Stay of Order Amending License, and Denying Motion for Clarification and Motion to Dismiss, 172 FERC ¶ 61,062 (FERC Order) granted only a partial transfer of PacifiCorp's license to the Klamath River Renewal Corporation (KRRC), a nonprofit organization formed to carry out the decommission and removal of the dams.

In requiring that PacifiCorp and KRRC accept their status as co-licensees, FERC pointed to the discrepancy between KRRC's limited finances and lack of experience with hydropower dam operation and removal, and PacifiCorp's additional financial resources and 32 years of experience in operating the Lower Klamath facilities. (FERC Order, pp. 17-18.) While the Settlement Agreement contemplated a budget of $450 million that would fully fund the removal project, FERC cautioned that "[c]osts could escalate beyond the level anticipated and unexpected technical issues could arise." (*Id.* at p. 17.)

Out of concern for the "uncertainties attendant on final design and project execution, and the potential impacts of dam removal on public safety and the environment," FERC determined it would not be in the public interest for KRRC to bear all responsibility and liability on its own, despite the express intent of the settling parties. (*Id.* at 17-18.) Thus, FERC's approval of the transfer is conditioned on PacifiCorp remaining on the license.

Despite the significant change to the parties' proposal, FERC suggests PacifiCorp's status as co-licensee may not ultimately affect the final results. In the event KRRC has access to sufficient funding and no unforeseen issues arise in the removal process, Paci-

fiCorp would not bear additional burdens. (*Id.* at p. 18.) FERC also suggested that the parties may further amend the Settlement Agreement so that KRRC agrees to indemnify PacifiCorp for any expenses or damages that may result from the shared licensing obligation. (*Id.*)

Conclusion and Implications

While the Federal Energy Regulatory Commission Order provides a pathway forward to the next milestone, it may take more time before the plan to demolish the four Lower Klamath dams can be realized. Consistent with FERC's recommendation, it can be expected that PacifiCorp, KRRC, and the other stakeholders to the Settlement Agreement will coordinate to develop satisfactory terms to account for this latest snag in an already drawn-out process.

The July 16, 2020 FERC Order is available at: http://www.klamathrenewal.org/wp-content/uploads/2020/07/FERC-Order-20_0716.pdf
(Austin C. Cho, Meredith Nikkel)

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.

Civil Enforcement Actions and Settlements—Water Quality

•June 18, 2020—Pacific Seafood—Westport, LLC, has settled with the U.S. Environmental Protection Agency (EPA) over federal Clean Water Act violations at its Westport, Washington, crab and shrimp processing facility. Pacific Seafood—Westport, LLC, is part of a major global seafood processing operation that employs more than 3,000 people at 41 facilities in 11 states, including several offshore locations. According to settlement documents, EPA identified over 2,100 violations of the Westport facility's wastewater discharge permit during an unannounced inspection in 2017. EPA documented discharge limit violations, as well as violations related to monitoring frequency, incorrect sampling, and incomplete or inadequate reporting. As part of the settlement, the company agreed to pay a penalty of $190,000. In addition to paying the penalty, Pacific Seafood—Westport, LLC has launched a variety of new programs and implemented technologies to address compliance challenges at its Westport facility. By calculating the environmental impact of the violations, EPA expects to see the following environmental benefits as a direct result of the enforcement action taken:

•Fecal Coliform reduced by 17,995 lbs/year

•Biochemical Oxygen Demand (BOD_5) reduced by 256,564 lbs/year

•Total Suspended Solids (TSS) reduced by 115,845 lbs/year

•Oil & Grease (O&G) discharge reduced by 48,255 lbs/year

As part of the agreement, Pacific Seafood—Westport, LLC neither confirms nor denies the allegations contained in the signed Consent Agreement and Final Order.

•July 7, 2020—The United States and the state of Nebraska have reached a settlement with Henningsen Foods Inc. to resolve alleged violations of the federal Clean Water Act at the company's egg processing facility in David City, Nebraska. Under the terms of the settlement, the company will spend about $2 million in upgrades to reduce the amount of pollutants the facility sends to the David City wastewater treatment system. The company also agreed to pay a $827,500 civil penalty. Henningsen processes approximately 1.2 million eggs per day and is one of the largest egg processors in the state. The facility is subject to Clean Water Act regulations that prevent industries from overloading municipal wastewater treatment systems with industrial pollutants. According to the EPA, high loads of egg-processing waste and cleaning solution generated by Henningsen are sent to the David City wastewater treatment facility. Since at least 2014, this waste has caused both Henningsen and David City to violate the Clean Water Act on multiple occasions by discharging pollutants in excess of state and federal limits to Keysor Creek, which flows into the North Fork Big Blue River. These pollutants included ammonia and oxygen-depleting substances that are toxic to aquatic life and potentially harmful to people. Further, EPA alleges that Henningsen repeatedly failed to submit timely and accurate pollutant monitoring information required by law. As a result of this enforcement action, Henningsen has installed pretreatment equipment at its facility and agreed to operate and maintain it in order to reduce pollutants before they reach the David City wastewater treatment facility. The company will also continue to pay for its share of upgrades to the wastewater treatment facility to adequately treat Henningsen's wastewater, and will increase the frequency of its pollutant monitoring and reporting. The settlement is detailed in a Consent Decree that

was filed with the United States District Court for the District of Nebraska on July 7, 2020, and will be subject to a 30-day public comment period before final court approval.

•July 8, 2020—EPA and the Bogus Basin Recreational Association, Inc., have settled a Clean Water Act enforcement case stemming from alleged violations of construction stormwater permit requirements at the ski area and recreation complex located 16 miles northwest of Boise, Idaho. Bogus Basin is a 501(C)(3) non-profit organization which operates by a Special Use Permit on the Boise National Forest under the U.S. Department of Agriculture. EPA alleges violations took place at Bogus Basin's Stabilization Project, designed to support existing ski and recreation facilities. Construction included installing a retention dam, creating an in-stream 42-acre-foot water storage pond for snowmaking, and chair lift replacement. Concluded under an Expedited Settlement Agreement, the action included a penalty of $52,680. Expedited Settlement Agreements offer business and industry a faster, more streamlined process to resolve permit violations with monetary penalties commensurate to the severity of the violations.

•July 13, 2020—EPA and the U.S. Department of Justice announced an agreement with the City of Manchester that will result in significant reductions of sewage from the city's wastewater treatment systems into the Merrimack River and its tributaries. The State of New Hampshire joined the U.S. government as a co-plaintiff on this agreement, which also resolves alleged violations of the Clean Water Act by the City of Manchester. Under a proposed consent decree filed in the U.S. District Court for the District of New Hampshire, the City of Manchester has agreed to implement a 20-year plan to control and significantly reduce overflows of its sewer system, which will improve water quality of the Merrimack River. The plan is estimated to cost $231 million to implement. The Merrimack River is a drinking water source for more than 500,000 people, is stocked with bass and trout for fishing, is used for kayaking and boating and other recreational opportunities. The settlement addresses problems with Manchester's combined sewer system, which when overwhelmed by rain and stormwater, frequently discharges raw sewage, industrial waste, nitrogen, phosphorus and polluted stormwater into the Merrimack River and its tributaries. The volume of combined sewage that overflows from the Manchester's combined sewer system is approximately 280 million gallons annually, which is approximately half of the combined sewage discharge volume from all communities to the Merrimack River. Under the proposed consent decree, Manchester will implement combined sewer overflow (CSO) abatement controls and upgrades at its wastewater treatment facilities that are expected to reduce the city's total annual combined sewer discharge volume by approximately 74 percent from approximately 280 million gallons to 73 million gallons. The city will also design and construct projects to separate the combined sewers for areas adjacent to the Cemetery Brook drain. These drainage and sewer separation projects will together address the largest drainage basin in the city and produce the greatest volume of CSO reduction. The work under the proposed consent decree also includes the construction of a new drain and sewer separation in the Christian Brook drainage basin, which will remove the third largest brook from the wastewater collection system. The proposed consent decree also requires the city to implement a CSO discharge monitoring and notification program, which will include direct measurement of all discharges from six CSO outfalls estimated to be more than 99 percent of all of the city's total CSO discharge volumes. In addition to the 20-year control plan, the proposed settlement also requires the upgrades to improve the handling of solid waste at the wastewater treatment plant to reduce discharges of phosphorous.

•July 22, 2020—The EPA will take enforcement actions on Oahu and the Big Island to bring about the closure of three pollution-causing large-capacity cesspools (LCCs) and issue $268,000 in fines. Under the Safe Drinking Water Act, EPA banned LCCs in 2005.

EPA is authorized to issue compliance orders and/or assess penalties to violators of the Safe Drinking Water Act's LCC regulations. EPA actions to close LCCs owned by state and local government include: 1) the Helemano Plantation: Located in central Oahu, which is owned by the Hawai'i Department of Land and Natural Resources and leased by the City and County of Honolulu (CCH) and 2) the Kainaliu

Comfort Station: Located on the leeward side of the Big Island in Kealakekua. The comfort station has a public toilet in its parking lot which discharges to an LCC. Hawai'i County has agreed to pay a $133,000 fine and close the cesspool by the end of this year.

Since the 2005 LCC ban, more than 3,600 LCCs in Hawai'i have been closed; 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 local water supply in Hawai'i, where cesspools are used more widely than in any other state.

In 2017, the state of Hawai'i passed Act 125, which requires the replacement of all cesspools by 2050. It is estimated that there are approximately 88,000 cesspools in Hawai'i. A state income tax credit is available for upgrading qualified cesspools to a septic system or aerobic treatment unit or connecting them to a sewer. The tax credit ends on December 31, 2020.

•July 22, 2020—The U.S. Department of Justice and the EPA have entered into a Consent Decree (CD) with Pacific Energy South West Pacific, Ltd. (Pacific Energy) related to that company's violations of the Clean Water Act. Under the CD, Pacific Energy will pay $300,000 in a civil penalty and will take action to protect Pago Pago Harbor by eliminating unauthorized wastewater discharges from the American Samoa Terminal. Pacific Energy also will take steps to return the terminal to compliance with Clean Water Act sampling and reporting requirements. Pacific Energy operates a major bulk fuel terminal in Pago Pago that stores large quantities of petroleum fuel for distribution on American Samoa. The terminal routinely generates industrial wastewater by draining water that has separated from the fuel in its tanks. This industrial wastewater is then comingled with stormwater and discharged to Pago Pago Harbor. Under the Clean Water Act, the terminal is required to have a National Pollutant Discharge Elimination System (NPDES) permit and meet the requirements of that permit. Pacific Energy had an NPDES permit from 2010 through 2015 but did not conduct regular wastewater sampling or meet the permit's other requirements. Pacific Energy allowed its NPDES permit to expire in 2015 and then operated without a permit—in violation of the Clean Water Act and of a related 2016 EPA administrative order—until November 1, 2019, when its current NPDES permit became effective. Pacific Energy's unmonitored discharge of pollutants such as oil, grease and other toxic pollutants to Pago Pago Harbor may have damaged water quality and harmed the chemical, physical, and biological balance of the Harbor. Many Samoans fish and recreate in Pago Pago Harbor, which is home to important cultural and environmental resources, including nearly 200 species of coral.

•July 27, 2020—EPA has announced an agreement with Pacific Seafood-Eureka, LLC over violations of the federal Clean Water Act. The settlement requires the company to pay a $74,500 penalty after an EPA inspection found the company was discharging wastewater in violation of local and federal standards into the City of Eureka's sewer system and Humboldt Bay's Eureka Slough. Pacific Seafood-Eureka, part of the Pacific Seafood Group headquartered in Portland, Oregon, operates a seafood processing facility at its Eureka location. During a 2018 inspection with the North Coast Regional Water Quality Control Board and Eureka's Public Works Department, EPA found the company discharged wastewater directly to the Eureka Slough waterway without the appropriate permit. EPA conducted its inspection after the City of Eureka issued several notices of violations to the facility. The facility also discharged wastewater to the city of Eureka's sanitary sewer in violation of pretreatment standards. Violations associated with operation and maintenance of the facility's pretreatment system were identified, including: wastewater from the indoor shrimp processing area was bypassing the facility's pretreatment system; the facility lacked adequate secondary containment in the indoor bulk chemical storage area and outdoor chemical storage area; wastewater from the de-shelling process was observed entering a storm drain; and the company was discharging the water used to rinse off oysters and crabs directly into the Eureka Slough. The company addressed all of these compliance issues.

•August 14, 2020—EPA, the U.S. Department of Justice and the California Department of Toxic Substances Control (DTSC) have reached a $56.6 million settlement with Montrose Chemical Corporation of California, Bayer CropScience,

Inc., TFCF America, Inc., Stauffer Management Company LLC, and JCI Jones Chemicals, Inc. for further cleanup work of contaminated groundwater at the Dual Site Groundwater Operable Unit of the Montrose Chemical Corp. and Del Amo Superfund Sites (also known as the Dual Site) in Los Angeles County, California. This work will include operating and maintaining the primary groundwater treatment system for the remedy selected in the 1999 Dual Site cleanup plan. The settlement also includes payment to EPA of $4 million in past costs, another payment of costs incurred by DTSC, and payment of EPA's and DTSC's future oversight costs. Groundwater at the Dual Site is contaminated with hazardous substances from industrial operations, including chlorobenzene from the former Montrose facility where DDT was manufactured, benzene from the Del Amo facility where synthetic rubber was manufactured, and trichloroethylene (TCE) related to several facilities. This settlement specifically addresses the chlorobenzene plume, which refers to the entire distribution of chlorobenzene in groundwater at the Dual Site and all other contaminants that are commingled with the chlorobenzene. Cleanup activities will involve pumping the groundwater in the chlorobenzene plume and treating it to federal and State of California cleanup standards identified in the 1999 remedy. The treated water will then be reinjected into the aquifer outside of the contaminated groundwater area. The objective is to contain a zone of groundwater contamination surrounding source areas (also known as the 'containment zone') and clean up the chlorobenzene plume outside of that zone. Containment will occur soon after pumping operations begin, and cleanup of groundwater beyond the containment zone is expected to take approximately 50 years to complete. In addition, EPA will pursue settlements with other parties to conduct cleanup work selected for the benzene and TCE plumes in the Dual Site cleanup plan.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•July 2, 2020—EPA announced a settlement with Waste Management of Wisconsin, Inc. (WMWI) that will include enhanced monitoring for hazardous waste near the Metro Landfill in Franklin, Wis., and a $232,000 fine to resolve alleged violations of the Resource Conservation and Recovery Act (RCRA). WMWI, a subsidiary of Waste Management, Inc., owns and operates the Metro Recycling and Disposal Facility (Metro Landfill), in Franklin, Wis. The Metro Landfill is licensed by the State of Wisconsin to accept non-hazardous municipal, commercial, industrial, and special wastes for disposal, but is not authorized to treat, store, or dispose of hazardous waste. EPA alleged that WMWI improperly disposed of hazardous electric arc furnace dust from a steel casting foundry at the Metro Landfill on at least ten days. The dust was contaminated with chromium, a hazardous waste and known human carcinogen. Under the terms of the settlement, WMWI has agreed to conduct leachate and groundwater monitoring, and update its waste management plan and training program. The settlement also includes a civil penalty of $232,000.

•July 9, 2020—EPA and the U.S. Department of Justice announced a settlement with J.R. Simplot Company and its subsidiary, Simplot Phosphates LLC (Simplot), involving Simplot's Rock Springs, Wyoming, manufacturing facility. This settlement resolves allegations under the Resource Conservation and Recovery Act (RCRA) at the facility, including that Simplot failed to properly identify and manage certain waste streams as hazardous wastes. The settlement requires Simplot to implement process modifications designed to enable greater recovery and reuse of phosphate, a valuable resource. The settlement also requires Simplot to ensure that financial resources will be available when the time comes for environmentally sound closure of the facility. Simplot's Rock Springs facility manufactures phosphate products for agriculture and industry, including phosphoric acid and phosphate fertilizer, through processes that generate large quantities of acidic wastewater and a solid material called phosphogypsum. The phosphogypsum is deposited in a large pile known as a gypstack, and acidic wastewater is also routed to the gypstack. The gypstack at the Wyoming facility is fully lined and has a capacity to hold several billion gallons of acidic wastewater. This settlement also resolves alleged violations of the Emergency Planning and Community Right-to-Know Act (EPCRA) for Simplot's failure to report certain quantities of toxic chemicals in accordance with EPCRA standards. Under the settlement, Simplot agrees to implement specific waste management measures valued at nearly $20 million. Significantly, these measures include extensive new efforts

to recover and reuse the phosphate content within these wastes and avoid their disposal in the gypstack. The settlement also includes a detailed plan setting the terms for the future closure and long-term care of the gypstack. The settlement requires Simplot to immediately secure and maintain approximately $126 million in dedicated financing to ensure that funding for closure and long-term care will be available when the facility is eventually closed. Simplot also agrees to submit revised EPCRA Form R reports (Toxic Release Inventory) for 2004 to 2013 to include estimates of certain metal compounds manufactured, processed, or otherwise used at the facility. Simplot will also pay a $775,000 civil penalty to resolve both the RCRA and EPCRA claims.

•July 14, 2020—EPA and the U.S. Department of Justice announced a proposed settlement between the United States and 16 parties that will require the design and implementation of cleanup actions in the southwestern portion of the Wells G&H Superfund Site, known as Operable Unit 4 (OU4) or the "Southwest Properties" (SWP), in Woburn, Massachusetts. The proposed settlement, if approved by the federal court, will require cleanup measures on the southwestern portion of this Superfund site. The cleanup being made possible through this settlement agreement will protect human health and the environment by addressing unacceptable risks in site soils, wetlands, and groundwater. Under the proposed consent decree, three current or former owners or operators of parcels within the SWP, 280 Salem Street LLC; ConAgra Grocery Products Company, LLC, as successor-in-interest to Beatrice Company; and Murphy's Waste Oil Service, Inc. are responsible for performing the cleanup work at the site. In addition, 13 arrangers for disposal of hazardous substances at the SWP will be required to make payments into a trust fund, to be used by the settling defendants performing the cleanup to help finance that work. Settling defendants will make payment into a trust fund. The work includes excavation and off-site disposal of contaminated soil, non-aqueous phase liquid (NAPL), NAPL-impacted soil, and wetland sediment; backfilling soil and NAPL excavations; construction of impermeable caps; pumping and treating contaminated groundwater; wetland restoration; operation and maintenance; long-term monitoring; five-year reviews; and institutional controls. EPA estimates that the remedial work will cost approximately $19.1 million.

•July 13, 2020—EPA, the U.S. Department of Justice, and the state of Texas have announced a settlement with E.I. Du Pont de Nemours and Company (DuPont) to resolve alleged hazardous waste, air, and water violations at its former La Porte, Texas chemical manufacturing facility. In 2014, the La Porte facility was the site of a chemical accident where the release of nearly 24,000 pounds of methyl mercaptan resulted in the death of four workers and forced the company to permanently close the chemical manufacturing plant in 2016. As part of a separate settlement in 2018, DuPont paid a $3.1 million civil penalty for violating EPA's chemical accident prevention program. Under this settlement agreement, DuPont will pay a $3.195 million civil penalty. This settlement resolves alleged violations of the Resource, Conservation and Recovery Act (RCRA), the Clean Water Act (CWA) and the Clean Air Act (CAA) from DuPont's past chemical manufacturing operations. The alleged RCRA violations include failure to make hazardous waste determinations; treatment, storage or disposal of hazardous waste without a permit; and, failure to meet land disposal restrictions. The alleged CWA violations include failure to fully implement the facility's oil spill prevention plan. Even though the facility closed in 2016, DuPont continues to operate a wastewater treatment system on site and, as a result of this settlement, will perform sampling and analysis to determine the extent of any existing soil, sediment, or groundwater contamination within or around impoundments remaining on site which may contain wastes from the closed chemical manufacturing plant. DuPont will perform this work pursuant to Texas' Risk Reduction Program and perform any necessary cleanup. The Consent Decree was lodged on July 9, 2020 in the United States District Court for the Southern District of Texas. (Andre Monette)

JUDICIAL DEVELOPMENTS

EPA'S RANKING OF HAZARDOUS WASTE SITE FOR INCLUSION ON NATIONAL PRIORITIES LIST SURVIVES CHALLENGE IN THE D.C. CIRCUIT

Meritor, Inc. v. U.S. Environmental Protection Agency, 966 F.3d 864 (D.C. Cir. 2020).

The successor in interest to a polluting industrial operator challenged the listing of a site on the National Priorities List, asserting the U.S. Environmental Protection Agency (EPA) acted arbitrarily and capriciously in failing to account for mitigation measures and in using residential health benchmark to analyze whether human health was at risk from air contamination within industrial buildings.

Background

Between 1966 and 1985, Rockwell International Corporation manufactured wheel covers at a facility in Grenada, Mississippi (Rockwell Facility or Rockwell Site), which borders a residential neighborhood, as well as a creek and agricultural land. In 1985, Rockwell International sold the Rockwell Facility to another company and subsequently Rockwell International spun off its automotive division into a separate corporation called Meritor, Inc. As a result, while "Meritor never owned or operated the [Rockwell] Site[,]" it took on the liabilities of Rockwell, including those associated with the Rockwell Site. Rockwell's manufacturing activities at the facility "produced hazardous substances, including toluene, trichloroethylene (TCE), and cis-1,2-dichloroethene ("DCE"), which were stored on site" leading to the development of a plume of toluene and TCE collecting in the soil and groundwater under and around the Rockwell Facility, first identified in 1994

CERCLA and the National Priorities List

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. §§ 9601 *et seq.*, CERCLA) directs the EPA "to address the growing problem of inactive hazardous waste sites throughout the United States" (*Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 922, 925 (D.C. Cir. 1985)) by developing "criteria for determining priorities among releases or threatened releases" of hazardous waste. 42 U.S.C. § 9605(a)(8)(A). The resulting "National Priorities List" or "NPL" orders contaminated sites by "the relative risk or danger they pose to the public health, public welfare, or the environment," thereby "identif[ying] those hazardous-waste sites considered to be the foremost candidates for environmental cleanup." *CTS Corp. v. EPA*, 759 F.3d 52, 55 (D.C. Cir. 2014); 42 U.S.C. § 9605(a)(8)(B). The EPA uses the Hazard Ranking System set forth in 40 C.F.R. Part 300, App. A "to evaluate whether, and to what degree, a site poses a risk to the environment or to human health and welfare."

The Rockwell Facility

Post-1994, studies established "the continued presence of hazardous waste" at the Rockwell Facility, "which has in turn harmed air quality in the area." A 2016 EPA study identified elevated indoor concentrations of toluene, TCE, and DCE in the "main production building" and a Meritor-commissioned 2017 study "found heightened levels of toluene and TCE beneath the surface."

That same year, Meritor installed a sub-slab depressurization system below the Rockwell Facility's main building. The depressurization system was designed to reduce the intrusion of contaminated air into the building by creating a pressure differential between the building and the underlying soil. Despite improvements in air quality following the installation of this system, the degree of contamination within the main building continued to exceed ambient levels

In 2018, the EPA added the Rockwell Facility and "surrounding areas" to the NPL "based on the hazardous subsurface intrusion of toluene, TCE, and DCE." 83 Fed. Reg. at 46,411.

Meritor's Challenge to the Hazard Ranking System

Meritor challenged the EPA's application of the

Hazard Ranking System to rank the severity of "subsurface intrusion" of "noxious vapors from the soil into occupied buildings." Specifically, Meritor criticized the agency for "failing to account for the company's mitigation efforts," *i.e.*, installation of the sub-slab depressurization system, and using the "residential health benchmark" in its analysis of "the 'targets' of the hazardous waste, meaning who will suffer exposure, whether humans, animals, natural resources, or sensitive environments."

The D.C. Circuit's Decision

Remediation Efforts Made

Meritor argued that the Hazard Ranking System regulations "strips away the EPA's discretion to disregard remedial measures" such as the sub-slab depressurization when analyzing "the 'likelihood of release' of hazard waste into the environment" and in its "targets" analysis, by which the agency "accounts for populations and sensitive environments located near the contaminated area."

Distinguishing prior D.C. Circuit cases that analyzed the prior 1982 version of the Hazard Ranking System (*Eagle-Picher Indus., Inc. v. EPA*, 822 F.2d 132, 149 (D.C. Cir. 1987) and *Linemaster Switch Corp. v. EPA*, 938 F.2d 1299, 1306–1307 (D.C. Cir. 1991)), Meritor cited "to two portions of the Hazard Ranking System that expressly account for the presence of mitigation measures." Meritor's first pointed to that portion of the current regulations that accounts for "whether a mitigation system has been installed" when assessing "the *potential* for exposure" under the "likelihood of release" analysis. The Court of Appeal dismissed this argument as irrelevant because:

> . . .the EPA had no occasion to evaluate the potential for exposure (and so to consider Meritor's installation of a sub-slab depressurization system) because the agency documented an actual, observed exposure at the site.

Rather, when exposure has been established the regulations require that the EPA "automatically assign[] the maximum score of 550 for the 'likelihood of release' component without regard to mitigation measures."

Target Analysis

As for the "target" analysis, the court noted that the EPA's exclusion of consideration of the sub-slab depressurization system "resulted in a *lower or equal* overall score for the 'targets' metric." Fundamentally, the court rejected Meritor's argument that:

> . . .the regulations' sporadic references to mitigation systems in some factors implicitly mandate the consideration of mitigation systems at every step and for every factor in the analysis.

Rather, "the Hazard Ranking System's selective inclusion and omission of mitigation systems as a consideration suggests 'that the omission' of any reference to mitigation systems in other 'context[s] was deliberate.'" Quoting *Council for Urological Interests v. Burwell*, 790 F.3d 212, 221 (D.C. Cir. 2015).

Meritor also faulted the EPA's use of a "residential health benchmark" in its "targets" analysis. The targets analysis examined the relative health risks faced by the people occupying the buildings at the Rockwell Facility. "[T]he EPA relies on an exposure scenario 'consistent with a residential individual … across all … pathways[,]" *i.e.*, oral, inhalation or other exposure to carcinogens, "'as this is most protective.'" Meritor argued the EPA should have instead employed an "industrial, rather than residential, health benchmark because the employees did not reside at the Rockwell Facility full time." But as the court pointed out, the regulations require that the residential health benchmark be weighted by "dividing the number of people" exposed "by three if they are full-time workers and by six if they are part-time workers," thereby "account[ing] for the worker's reduced hours of exposure relative to residents."

Conclusion and Implications

A big fact that seems like it *should* change the entire calculus—here, voluntary installation of an effective mitigation measure—didn't. A close reading of the applicable regulations defeated these claims, because crediting the petitioner's theories would have entailed "amend[ing] rather than apply[ing] the existing regulatory scheme." The D.C. Circuit's July 28, 2020 opinion is available online at: https://www.cadc.uscourts.gov/internet/opinions.nsf/4B3CE37E780788EA852585B30050D1D9/$file/18-1325-1853718.pdf
(Deborah Quick)

DISTRICT COURT FINDS NRDC LACKS STANDING TO SUE OVER EPAS DELAY IN EMERGENCY RULEMAKING ON MONITORING AND REPORTING

National Resources Defense Council v. Bodine, ___F.Supp.3d___, Case No. 20 CIV. 3058 (CM) (S.D. N.Y. July 8, 2020).

The U.S. District Court for the Southern District of New York recently granted the U.S. Environmental Protection Agency (EPA) summary judgment and dismissed a complaint that alleged EPA unreasonably delayed in responding to a petition requesting an emergency rule to require written notice from any entity that suspends monitoring and reporting because of the COVID-19 pandemic.

Factual and Procedural Background

On March 26, 2020, EPA issued a Temporary Enforcement Policy (Policy) regarding EPA's enforcement of environmental obligations during the COVID-19 pandemic. The Policy was issued without advance notice to the public after EPA received numerous inquiries from regulated entities concerned by the risk of civil penalties sought by the EPA due to their inability, despite their best efforts, to comply with environmental obligations during the COVID-19 pandemic. The Policy was retroactive to March 13, 2020, with no end date specified originally, but was later amended to August 31, 2020 by the EPA.

The Policy provided that EPA would exercise enforcement discretion for noncompliance of environmental obligations, particularly monitoring and reporting, by regulated entities resulting from the COVID-19 pandemic, provided entities followed the steps required in the Policy. Notably, the Policy required regulated entities to document the specific nature and dates of the noncompliance, to maintain this information internally and make it available to the EPA upon request, and to return to compliance with its monitoring and reporting obligations as soon as possible.

> The Policy applies to nearly every industry in the country: chemical manufacturing, power plants, refineries, mining, factory farms, and every other federally regulated source of pollution

Under the Administrative Procedure Act (APA), an interested person may petition EPA for the issuance, amendment, or repeal of a rule. EPA is required to conclude a matter presented to it within a reasonable time.

On April 1, 2020, the NRDC, along with 14 other environmental justice, public health, and public interest organizations, petitioned the EPA for the issuance of an emergency rule which would require any entity that suspends monitoring and reporting because of the COVID-19 pandemic to provide written notice to the relevant state and to EPA immediately (Petition). On April 16, 2020, NRDC filed their Complaint for Declaratory and Injunctive Relief. (https://www.nrdc.org/sites/default/files/complaint-epa-non-enforcement-20200416.pdf)

On April 29, 2020, NRDC filed a motion for summary judgment. EPA cross moved for summary judgment, challenging NRDC's standing and denying that is unreasonably delayed in responding to the Petition.

The District Court's Decision

The court focused its analysis on whether plaintiffs had standing. Plaintiffs argued they had standing in their own right and that they had associational standing.

Standing in Their Own Right

To establish standing on its own behalf, an organization must meet the same standing test that applies to individuals and demonstrate: 1) injury in fact, 2) a causal connection between the injury and the complained-of conduct, and 3) a likelihood that the injury will be redressed by a favorable decision. Plaintiffs argued that they had standing in their own right based on "informational injury," because the Policy degraded the integrity of environmental monitoring data, thereby harming plaintiffs in their educational and advocacy efforts. The court rejected this argument.

To establish "an injury in fact" based on an informational injury, plaintiffs must demonstrate that: 1) the law entitles the plaintiff to that information; and

2) it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure. Here, the court determined that plaintiffs' standing argument failed because they were not legally entitled to the information they sought from the EPA.

Associational Standing

Next, the court addressed whether plaintiffs established "associational standing" based on injury to its members. To establish associational standing, plaintiffs must show: 1) its members would otherwise have standing to sue in their own right; 2) the interests it seeks to protect are germane to the organization's purpose; and 3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. EPA did not challenge plaintiffs' showing on the second and third factors. EPA argued that plaintiffs lacked associational standing because they did not show injury in fact or a likelihood that the injury will be redressed by a favorable decision.

Injury in Fact

EPA argued that plaintiffs' members did not have standing to sue in their own right because plaintiffs' members did not establish they suffered a sufficiently concrete injury. The court applied a two-pronged test for concreteness: 1) whether the statutory provisions at issue were established to protect plaintiffs' concrete interests (as opposed to purely procedural rights), and if so, 2) whether the specific procedural violations alleged in this case actually harm, or present a material risk of harm to, such interests. Here, the court reasoned that plaintiffs' failed the first condition because the alleged violation at issue—unreasonable delay under the APA—was established to protect procedural rights. As to the second prong, the court determined that the procedural violation alleged by Plaintiffs –EPA's purported delay in responding to the Petition—did not actually harm plaintiffs' members or presents a material risk of doing so. The court distinguished a fear of facing an increase in exposure to a risk of environmental harm, as opposed to actual exposure to pollution. In addition, the plaintiffs failed to provide any evidence that pollution had in fact increased by entities who did or did not monitor and report during the COVID -19 pandemic.

Redressability and Fairly Traceable to the Alleged Violation

EPA also argued that plaintiffs' alleged injuries were not traceable to EPA's conduct in not yet responding to the Petition. The court reasoned that the delay of fifteen days between filing the Petition and filing the complaint was not the cause of the environmental harms that plaintiffs alleged. Plaintiffs argued that in the absence of reporting, their members would not know whether they were being exposed to more pollution and a greater risk. The court rejected this argument, reasoning that the Policy itself expressly requires regulated entities to contact EPA or an authorized state if impacts by COVID-19 "may create an acute risk or imminent threat to human health or the environment" *before* deciding to suspend monitoring, rather than after. The court determined that plaintiffs failed to show their alleged injury was fairly traceable to the delay in responding to the Petition, rather than to the circumstances and challenges presented by the COVID-19 pandemic itself:

> Plaintiffs have neither established that they have suffered a sufficiently concrete injury nor that that alleged injury is fairly traceable to EPA's purported delay in responding to the Petition. Therefore, it is unnecessary to address whether it would be redressed by the only relief I could offer in this instance, ordering the EPA to respond to the Petition.

Conclusion and Implications

In this case, the District Court ultimately rejected a challenge to EPA's Temporary Enforcement Policy. However more instructive, perhaps, was the court's thorough analysis of standing. The court's opinion is available online at: http://nsglc.olemiss.edu/casealert/july-2020/nrdc.pdf
(Berenise Bermudez, Rebecca Andrews)

CLEAN WATER ACT CITIZEN SUIT DISMISSED BY THE DISTRICT COURT AS TIME-BARRED AND PROCEDURALLY DEFICIENT

South Side Quarry, LLC v. Metropolitan Sewer District,
___F.Supp.3d___, Case No. 3:18-CV-706-DJH-RSE (W.D. Ky. July 14, 2020).

The U.S. District Court for the Western District of Kentucky recently dismissed a citizen suit brought under the federal Clean Water Act because the statute's 60-day notice requirement was not met. The Clean Water Act's notice requirement is a "jurisdictional prerequisite to bringing suits against private defendants under the [Act]" and must "include sufficient information to permit the recipient to identify the specific standards, limitation, or order alleged to have been violated."

Factual and Procedural Background

In 2012, plaintiff Jason Lee Stanford purchased Vulcan Quarry (the quarry), a large inactive quarry now filled with water. Since 1998, the quarry has been part of a drainage system designed to prevent flooding in the area. Defendant Metropolitan Sewer District (MSD) is the quarry's sponsor and is required to maintain it. MSD does so through a "flowage" easement, which allows MSD:

> . . .the perpetual right, power, privilege and easement to permanently overflow, flood and submerge the land . . . [provided] that any use of the land shall be subject to Federal and State laws with respect to pollutants.

Separately, MSD also acquired discharge permits from Kentucky's Department of Environmental Protection (KDEP), which allow it to mitigate its ongoing problem with sanitary sewer overflows by maintaining a plan to minimize unauthorized discharge from certain combined sewage overflow locations.

Upon acquiring the quarry, Stanford and his business, South Side Quarry, LLC, ("the plaintiffs") filed a motion to show cause in 2013 against MSD, asserting that MSD should be held in civil and criminal contempt for violating the terms of the easement and diverting excessive stormwater into the quarry. The motion was denied; however, litigation surrounding the property continued.

In 2018, the plaintiffs filed suit again, this time claiming that MSD was utilizing the quarry as "a permanent settling pond/septic system/filtration system" in violation of both its KDEP permit and the CWA. Before filing suit, plaintiffs sent a notice of intent to MSD, KDEP, and the U.S. Environmental Protection Agency (EPA) conveying their intent to pursue a CWA citizen suit. The notice alleged that MSD violated its KDEP and NPDES permits by exceeding the volume of water that the permits allow MSD to route over and through the quarry. In their complaint, the plaintiffs alleged that MSD added two distinct pollutants to the quarry: 1) wastewater in an amount that exceeded the relevant permits and 2) sewage. The complaint also alleged numerous other state-law claims.

MSD moved to dismiss the case for failure to state a claim, arguing that the statute of limitations for claims brought under the CWA had lapsed and that the plaintiffs further failed to give the requisite notice as required by the CWA. With MSD's motion, the threshold issue before the court became whether the plaintiffs alleged with sufficient clarity a claim for which relief could be granted.

The District Court's Decision

Under the CWA, a citizen suit "comes to life" when five elements are present: 1) a pollutant must be 2) added 3) to navigable waters 4) from 5) a point source. Additionally, citizen-suit plaintiffs must raise their claims in accordance with the CWA's five-year statute of limitations and 60-day pre-suit notice requirement.

MSD did not take issue with the substantive validity of plaintiffs' claims, and the court likewise concluded that the plaintiffs properly asserted that MSD added sewage to the quarry and added wastewater in an amount that exceeded the relevant permits. After determining that the five-element test was satisfied, the court then moved to MSD's argument regarding the procedural validity of plaintiffs' claims.

In this analysis, the court first clarified the difference between plaintiffs' allegations from the June 2013 motion to show cause and the October 2018 complaint by emphasizing the difference between

stormwater and wastewater. While the 2013 motion established that plaintiffs were aware of pollution caused by excess *stormwater*, the 2013 motion did not show plaintiffs were aware of pollution caused by excess *sewage*. Thus, only the plaintiffs' claims regarding stormwater pollution would be time-barred by the CWA's five-year statute of limitations.

Notice and 'Sewage' As a Pollutant

With regard to sewage, however, the court explained the CWA's "strict notice requirement" was not met because "the [notice] letter [was] devoid of any allegation that MSD permitted sewage to enter the quarry." Indeed, plaintiffs' notice letter "only refer[red] to 'floodwater' and 'stormwater' as sources of pollution." So, while the letter properly explained how MSD allegedly violated the CWA when MSD exceeded the effluent standards or limitations of its KDEP permit, "[p]laintiffs' notice letter fail[ed] to identify sewage as a pollutant." Thus, the notice letter was deficient because it did not "effectively put MSD on notice that plaintiffs intended to sue MSD for polluting the quarry with sewage."

Having thus concluded that plaintiffs' claims were either time-barred or procedurally deficient, the court granted MSD's motion to dismiss for failure to state a claim. Because the plaintiffs' federal claims were dismissed, the court refused to consider plaintiffs' remaining state-law claims.

Conclusion and Implications

This case emphasizes the importance of both the CWA's 60-day notice requirement, as well as the specificity with which claims must be brought under the CWA—in this case, verbiage as to "stormwater" versus "sewage." Parties seeking relief under the CWA must give notice with sufficient information to allow defendants to identify all pertinent aspects of its alleged violations without extensive investigation. (Melissa Jo Townsend, Rebecca Andrews)

DISTRICT COURT DISMISSES CLEAN WATER ACT FOR PRE-SUIT NOTICE DEFICIENCY AND CONCLUSORY STATEMENTS IN COMPLAINT

Stevens v. St. Tammany Parish Government, et al, ___F.Supp.3d___, Case No. 20-928 (E.D. La. July 23, 2020).

The U.S. District Court for the Eastern District of Louisiana recently dismissed a federal Clean Water Act citizen suit due to an insufficient pre-suit notice and insufficient allegations to support plaintiffs' right to relief.

Factual and Procedural Background

On March 17, 2020, Terri Lewis Stevens, Craig Rivera and Jennifer Rivera (plaintiffs) brought suit against St. Tammany Parish Government (STPG) and the Louisiana Department of Environmental Quality (LDEQ) for violations of the Clean Water Act (CWA) and a Louisiana Pollutant Discharge Elimination System (LPDES) permit. In the initial complaint, plaintiffs alleged that sanitary sewer overflows, along with other pollutants, spilled from STPG's drainage ditches and onto their property before being discharged into various waters of the United States. Plaintiffs alleged LDEQ failed to enforce the applicable Louisiana state laws and LPDES permit.

On April 27, 2020, prior to receiving an answer from LDEQ and STPG, plaintiffs filed the First Amended Complaint (FAC). In the FAC, plaintiffs sought additional remedies specific to LDEQ's lack of enforcement of the CWA. Plaintiffs also added more claims against LDEQ, including Fifth and Fourteenth Amendment violations and unconstitutional takings of their property.

On May 12, 2020, STPG filed a motion to dismiss plaintiffs' complaint and the FAC, pursuant to Federal Rules of Civil Procedure Rule 12(b)(6). LDEQ filed a motion to dismiss for lack of jurisdiction. On June 3, 2020, plaintiffs filed for permission to file a Second Amended Complaint (SAC), prior to STPG and LDEQ's response to the initial complaint of March 17.

On June 20, 2020, Plaintiffs dismissed LDEQ without prejudice. On June 23, 2020, the court heard oral arguments for the remaining STPG motion to dismiss.

The District Court's Decision

STPG argued that plaintiffs' complaint and FAC should be dismissed on the doctrine of *res judicata* and that plaintiffs failed to provide adequate pre-suite notice. Plaintiffs did not oppose STPG's motion to dismiss. Instead, plaintiffs moved to dismiss STPG's motion on the grounds that the SAC rendered STPG's motion moot.

Determining the Mootness of STPG's Motion to Dismiss

The court first considered plaintiff's mootness arguments. To determine whether the SAC rendered STPG's pending motion to dismiss moot, the court considered whether the SAC would cure the alleged defects. Here, the court found that the SAC did not cure the alleged defects because it added very little new information. The court noted that the lawsuit centered around the events already litigated in the state court. Even in the SAC, plaintiffs did not add materially different facts or assist the court in determining whether there was a claim upon which relief may be granted. Accordingly, the court determined that STPG's motion to dismiss was not moot.

STPG's *Res Judicata* Claim

The court next considered STPG's motion to dismiss on the doctrine of *res judicata*. *Res judicata* is a doctrine that bars parties from litigating a matter that has already been finalized by a court. The court began by noting that STPG had not yet answered the initial complaint filed on March 17, 2020. Typically, *res judicata* is plead in answer to a complaint and not in a motion before an answer. However, when *res judicata* is apparent in the pleadings, a dismissal may be appropriate. Here, the court found that *res judicata* was apparent in plaintiffs' complaints and supplemental documents because plaintiffs repeatedly referenced the state court litigation. The court determined that since the *res judicata* was apparent in the pleadings, it was appropriate for STPG to assert the defense before answering plaintiffs' complaint.

The court then turned to applicable law regarding *res judicata* in Louisiana. The court found that if a valid final judgment was in favor of the defendant, and the same parties are involved in subsequent litigation, all causes of action existing at the time of the judgment are barred from future causes of action if they arise out of the same transaction. In Louisiana, a judgement is made final whenever it is rendered by a court with jurisdiction over both the subject matter and the parties after proper notice was given.

Plaintiffs previously filed suit in the 22nd Judicial District Court for the state of Louisiana against STPG for the same conduct. After five years of litigation, the state court issued a final judgment in favor of STPG. While the judgment was on appeal, plaintiffs brought suit in the U.S. District Court for the Eastern District of Louisiana. Here, the court determined that the state court judgment was finalized and in favor of STPG. Additionally, the parties in both the state court litigation and the present litigation were identical. Finally, the court noted that plaintiffs' allegations arose out of the original complaint in the state court litigation and that no new allegations had been made since the state court's final judgment. The court concluded by holding that all but the CWA claims were barred from proceeding before the court.

The court then proceeded to address whether the Louisiana state court could have exercised jurisdiction over plaintiff's CWA claims to determine whether *res judicata* applied to the claim. The court noted a circuit split as to whether CWA claims could be brought in state courts. The court mentioned that the Third and Ninth Circuit issued decisions holding that federal courts had exclusive jurisdiction over CWA suits. Instead of ruling on the matter, the court considered whether the CWA claim asserted in the present lawsuit met the pleading standards under Rule 12(b)(6).

Pre-Suit Notice

The court next considered whether plaintiffs pre-suit notice was adequate. STPG argued that under Rule 12(b)(6), plaintiffs did not state a claim because they did not provide the required pre-suit notice under the CWA and they failed to specify evidence of a CWA violation. The CWA requires notice to be given to a defendant before filing suit. The notice must be specific and contain the type of violation, the person(s) responsible for the violation, the location and date(s) of the violation, along with the full name, address and telephone number of the person giving notice.

Here, STPG argued that plaintiffs' pre-suit notice was vague and overly broad. Plaintiffs argued that the parties' litigation history overcomes any notice

deficiencies. The court determined that the notice was inadequate because it lacked the specific effluent standard or limitation being violated, the person or persons responsible for the alleged violation, and the date(s) of the violation. The court determined that plaintiffs failed to plead a facially plausible claim.

Alternatively, the court reasoned that even if plaintiffs satisfied the pre-suit notice requirement, they still failed to state a CWA claim in their subsequent pleadings. The court based this on the SAC's lack of explicit connection between STPG's actions and the pollution of waters of the United States. The court noted plaintiffs' inference that the runoff from STPG's discharge would end up in waters of the United States, along with the assumption that permit noncompliance was an automatic violation of the CWA, was insufficient. With those statements and nothing more, the court concluded that Plaintiffs did not state a claim upon which relief may be granted.

Conclusion and Implications

This case highlights the importance of an adequate pre-suit notice and adequate pleading under the federal Clean Water Act. Parties wishing to bring suit under the Clean Water Act must provide a detailed pre-suit notice to violating parties and avoid inferences in their complaints. The court's opinion is available online at: https://www.govinfo.gov/content/pkg/USCOURTS-laed-2_20-cv-00928/pdf/USCOURTS-laed-2_20-cv-00928-0.pdf
(Marco Antonio Ornelas, Rebecca Andrews)

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