Volume 15, Number 8
October 2020

EASTERN WATER LAW™

& POLICY REPORTER

CONTENTS

FEATURE ARTICLE

WATER NEWS

PENALTIES AND SANCTIONS

REGULATORY DEVELOPMENTS

JUDICIAL DEVELOPMENTS

Continued on next page

ARGENT COMMUNICATIONS GROUP

WWW.ARGENTCO.COM

Publisher's Note:

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

WWW.ARGENTCO.COM

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

FEATURE ARTICLE

SWEEPING ENDANGERED SPECIES ACT REGULATIONS ALREADY ADOPTED, WITH MORE PROPOSED, WILL PROFOUNDLY ALTER IMPLEMENTATION OF THE ACT

By David C. Smith, Esq. and Jennifer Lynch, Esq.

The federal Endangered Species Act (ESA or the Act) has not escaped the Trump administration's mandate for regulatory streamlining and consolidation. Beyond voluntary actions by the administration, the U.S. Supreme Court fostered additional regulatory reforms. Though garnering relatively little attention, these adopted and proposed regulatory reforms impact some of the most crucial operative provisions of the Act.

Environmental Organizations and States Challenge ESA 'Regulatory Reform'—Calls for Injunction Rejected

In August 2019, the Trump administration finalized and adopted three packages of significant regulatory reforms. The reforms apply only prospectively and will not alter any designations of species already listed under the ESA.

Although the reforms are numerous, they fall into three general categories:

- Interagency cooperation under Section 7 of the ESA;
- Listing of species and designation of criterial habitat under Section 4 of the ESA; and
- Treatment of species listed as "threatened," as opposed to "endangered," under the ESA.

The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (together: the Services) are responsible for administering the ESA and promulgating its regulations.

Predictably, the reforms are now the subject of multiple lawsuits. The first, *Center for Biological Diversity v. Bernhardt*, was brought by a coalition of environmental groups that includes the Center for Biological Diversity, Sierra Club, and the Natural Resources Defense Council. The second, *State of California v. Bernhardt*, was brought by 17 states, the District of Columbia, and New York City. The third, *Animal Defense Fund v. U.S. Department of Interior et al.*, was brought by a single environmental plaintiff. Each suit was brought in the U.S. District Court for the Northern District of California, and all aim to block implementation of what they term "the Interagency Consultation Rule," "the Listing Rule," and "the 4(d) Rule."

Challenges to the Section 7 Interagency Consultation Rule

Section 7 prohibits any federal agency from funding or taking an action causing the "destruction or adverse modification" of the given species' designated "critical habitat." Prior to the reforms, "destruction or adverse modification" was defined as:

> . . .a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. . . .[including alterations] that alter the physical or biological features essential to the conservation of a species. . . .

The reforms clarify that adverse modifications are considered at the scale *of the entire critical habitat* designation. As such, even if a project would cause

adverse effects to a *portion* of a designated critical habitat, such effects would not meet the definition of "destruction or adverse modification" unless they went so far as to reduce the *overall* value of the critical habitat.

The suits argue this change will limit the circumstances under which a federal agency action would be deemed to destroy or adversely modify designated critical habitat in a way that is contrary to the text, purposes, and conservation mandate of the ESA.

Challenges to the Section 4 Listing Rule

Section 4 provides the process and standards for listing species for protection, designation of their protected habitat, and eventual delisting. Under the statutory terms of the ESA, economics are not a factor to be considered in making listing determinations. Section 4 also requires the Services to, at the time a species is listed, designate such species' "critical habitat," defined as areas "essential to the conservation of the species." The ESA provides for the Services to include both "occupied" and "unoccupied" acreage in the designation within specific parameters.

The reforms strike the phrase "without reference to possible economic or other impacts of such determination" from the ESA's implementing regulations. In addition, they limit the circumstances under which a species can be listed, change the factors to be considered when delisting a species, and limit the circumstances under which *unoccupied* habitat may be designated as critical habitat.

As with the Interagency Consultation Rule challenges, the suits claim that the Listing Rule reforms violate express provisions of the ESA, as well as its conservation purposes and mandate.

Challenges to the Section 4(d) Rule

Section 4 also identifies two categories of listed species: "threatened" and "endangered." An "endangered species" is one "in danger of extinction throughout all or a significant portion of its range." A "threatened" species is one "likely to become an endangered species within the foreseeable future." Under the statute, only species designated as "endangered" are subject to the protective prohibitions against "take" of a species established in Section 9. NMFS has observed that differentiation in its implementation of the ESA, applying the "take" prohibition only to species listed as "endangered." The FWS, however, adopted a blanket rule affording identical protections to species designated as "threatened" as to those designated as "endangered." The reforms repeal that blanket rule.

The suits allege that the 4(d) Rule removal of the blanket extension of Section 9 protections to threatened species is a "radical departure" from the FWS' longstanding practice, as well as claim this change violates the text of the ESA and its conservation purposes and mandate.

National Environmental Policy Act Challenges

The suits also allege violations of the National Environmental Policy Act (NEPA), which requires preparation of an Environmental Impact Statement (EIS) analyzing and disclosing the environmental consequences of any "major federal action significantly affecting the quality of the human environment." These include the adoption of the new or revised regulations, unless such adoption qualifies for an "exclusion" to the general rule requiring an EIS.

Prior to adopting the reforms, no EIS was prepared, the suits claim, in violation of NEPA.

Federal Defendants' Motions to Dismiss

In February 2020, the federal defendants filed motions to dismiss in each of the three suits. Each argued that the plaintiffs lack standing and the claims are not ripe for judicial review, on grounds none of the suits showed how any plaintiffs would be specifically and imminently injured by the reforms, given that the reforms apply only prospectively, and no protections currently applying to any species would be changed.

In May 2020, the U.S. District Court agreed with defendants as to the two suits brought by environmental group petitioners, finding that these suits failed to show how at least one identified member of the organizations would suffer harm, or, in the alternative, how the reforms would cause the organizations to divert more resources. However, in dismissing the suits the court granted petitioners the opportunity to amend and refile. Amended complaints in both lawsuits have since been filed. It remains to be seen if these revised complaints will withstand another motion to dismiss, if the defendants choose to file one.

The District Court disagreed with the defendants

as to the suit brought by government agency plaintiffs. Finding the allegations of risk of harm to the government agency plaintiffs' natural resources and economic interests sufficient to afford standing, and finding the claims constitutionally ripe, the court declined to dismiss the suit, and it will proceed to the merits.

What Qualifies as Habitat, above and beyond Statutory Critical Habitat for Purposes of the ESA?

As discussed above, the ESA defines "critical habitat" and requires that, usually, it be designated concurrent with a decision to list a species for protection under the Act. The U.S. Supreme Court recently noted, however, that "critical habitat" must necessarily be a subset of a larger category of "habitat" for a given species. While "critical habitat" has a relatively narrow definition as those areas "essential to the conservation of the species," "habitat," in general, must necessarily be broader but must also must have some limitations. Congress failed to provide a definition of "habitat" in the ESA, and the Court called on the lower court or, more appropriately, the Services to craft one.

The issue arose in the widely watched case of *Weyerhaeuser Co. v. United States Fish & Wildlife Service*, 139 S.Ct. 361 (2018). The species at issue was the dusky gopher frog. Historically, the frog existed throughout coastal Alabama, Louisiana, and Mississippi. But at the time of listing, the frog was known to exist only in one pond in southern Mississippi.

The proposed designation of critical habitat for the frog included so-called "Unit 1," a 1,500-acre area in Louisiana owned by plaintiff Weyerhaeuser. Logging practices, among other things in the area including Unit 1, had left the physical and biological attributes incapable of supporting the frog. Nonetheless, the FWS designated the area as critical habitat stating that it could be converted to supportable habitat and finding it essential to the conservation of the frog.

The case garnered national attention. Critics stated that with sufficient resources (*e.g.*, infinite amounts of land and money), almost any area could be made to be habitat for almost any species. They argued that the ESA did not require or even allow regulatory mandates requiring private parties to engage in such extraordinary measures to comply with the Act.

Chief Justice Roberts authored the opinion of the Court. Starting from the legal premise that "[a]n area is eligible for designation as critical habitat under [the ESA] only if it is habitat for the species," Roberts noted that Congress failed to define "habitat." Accordingly, the Court remanded the matter for consideration of what is and is not "habitat" from which the subset of statutory "critical habitat" may be designated.

While Weyerhaeuser and the FWS ultimately settled their dispute, the Services subsequently defined "habitat" in a new rulemaking. The Services explain their approach to the proposed definition as follows:

> Under the text and logic of the statute, the definition of 'habitat' must inherently be broader than the statutory definition of 'critical habitat.' To give effect to all of section 3(5)(A), the definition of 'habitat' we propose is broad enough to include both occupied critical habitat and unoccupied critical habitat, because the statute defines 'critical habitat' to include both occupied and unoccupied areas.

The Services proffered two proposed definitions on which they sought public comment:

> • The physical places that individuals of a species depend upon to carry out one or more life processes. Habitat includes areas with existing attributes that have the capacity to support individuals of the species.
>
> • Alternatively, the physical places that individuals of a species use to carry out one or more life processes. Habitat includes areas where individuals of the species do not presently exist but have the capacity to support such individuals, only where the necessary attributes to support the species presently exist.

While conceptually broad enough to include both occupied and unoccupied habitat (as they must be within the statue's inclusion of both), the emphasis on "existing" and "presently exist" is inescapable. Both proposed versions of the rule reject the notion of extraordinary measures to create or re-establish absent habitat attributes.

The Services further elaborated on their rationale

behind the proposed definitions:

> We solicit comment on these definitions, in particular on whether "depend upon" in the proposed definition sufficiently differentiates areas that could be considered habitat, or whether "use" better describes the relationship between a species and its habitat. We also solicit comment on the second sentence of the alternative definition. Though it is similar to the second sentence of the proposed definition, it expressly limits unoccupied habitat for a species to areas "where the necessary attributes to support the species presently exist," and explicitly excludes areas that have no present capacity to support individuals of the species. We invite comment on whether either definition is too broad or too narrow or is otherwise proper or improper, and on whether other formulations of a definition of "habitat" would be preferable to either of the two definitions, including formulations that incorporate various aspects of these two definitions.

The Services went on to garner comment as follows:

> While we have intentionally refrained from using within this proposed regulatory definition of "habitat" terms of art from other definitions in the Act to avoid potential confusion, including the phrase "physical or biological features" from the definition of "critical habitat," we propose "existing attributes" to include, but not be limited to, such "physical or biological features." We invite comment on this issue, including whether the words "existing attributes" are appropriate to include and whether they warrant further clarification or change or should be differently or further defined or explained.

Addressing specific components of any definition of "habitat," the Services included "food, water, cover, or space that individuals of a species depend upon to carry out one or more of their life processes." And habitats may only be applicable or of use to the species at some times of the year and not others, for example, seasonally used breeding areas or feeding areas.

As to the process for identifying a species' habitat relative to this rulemaking, the Services were clear that they do not mean to create or establish a new and additional regulatory step in the designation process. Rather:

> . . .[w]e expect that in the vast majority of cases that would be unnecessary, in light of the specific criteria of the statutory definition of 'critical habitat' . . . . Specifically, we interpret the statutory definition of 'critical habitat,' as it applies to occupied habitat, to inherently verify that an area meeting that definition is 'habitat.'

The Services went on to state, for areas not presently occupied by the species:

> In those fewer cases where unoccupied habitat is at issue, we would consider any questions raised as to whether the area is "habitat" in the context of the new regulatory requirements at § 424.12(b)(2) and document the determination whether the area is habitat. In this way, the proposed regulatory definition of "habitat" would not impose any additional procedural steps or change in how we designate critical habitat, but would instead serve as a regulatory standard to help ensure that unoccupied areas that we designate as critical habitat are "habitat" for the species and are defensible as such. With the addition of the regulatory definition of "habitat," the process of designating critical habitat will remain efficient by limiting the need to evaluate whether an area is "habitat" to only those cases where genuine questions exist.

As with the regulatory enactments discussed above, application of a definition of "habitat" will be prospective only and will not be applied to any existing listings or critical habitat designations. The public comment period for the proposed rulemaking closed on September 4, 2020.

The Services' Discretion to Exclude Qualifying Areas from Designated Critical Habitat

In *Weyerhaeuser*, the Supreme Court gave the Services an additional departure from seemingly long-settled ESA jurisprudence. For a law recognized as the most potentially sweeping and proscriptive in terms

of limiting property rights, the ESA also includes one of the most nearly boundless provisions for exercise of administrative discretion.

The topic here, again, is the designation of critical habitat. It is clear that in requiring the designation of critical habitat, Congress was allowing potentially dire and constraining restrictions relative to a given piece of property. Accordingly, Congress included a bit of an escape clause. As to any area qualifying as "critical habitat" under the Act, whether occupied or unoccupied, the respective Secretaries of the Services were vested with the discretion to exclude given areas from the designation based upon specified considerations. The Act's only limitation on the discretion to exclude is if such exclusion would result in the "extinction" of the species. This extraordinary authority is referred to as "4(b)(2) discretion."

In several instances, private property owners sued the Service for the failure of the Secretary to exercise their 4(b)(2) discretion to exclude a given area. Uniformly, however, the courts held that the Secretaries' discretion under § 4(b)(2) was so unbounded in the statute that a Secretary's decision not to exercise it was not even subject to judicial review.

In *Weyerhaeuser*, the Supreme Court rejected that principle. While it recognized the remarkable discretion inherent in § 4(b)(2), the High Court said such discretion was not subject to arbitrary or capricious refusal to even consider an exclusion in violation of the Administrative Procedure Act. Accordingly, in the interests of transparency, consistency, and predictability, the FWS circulated for public comment a proposed rule that would define the process by which the FWS would consider proposed 4(b)(2) exclusions of critical habitat. NMFS did not join in this proposed rulemaking, electing instead to continue its consideration under existing policies and regulations. The proposed rule circulated stated:

> We, the U.S. Fish and Wildlife Service (FWS), propose to amend portions of our regulations that implement section 4 of the Endangered Species Act of 1973, as amended (Act). The proposed revisions set forth a process for excluding areas of critical habitat under section 4(b)(2) of the Act, which mandates our consideration of the impacts of designating critical habitat and permits exclusions of particular areas following a discretionary exclusion analysis. We want to articulate clearly when and how FWS will undertake an exclusion analysis, including identifying a nonexhaustive list of categories of potential impacts for FWS to consider.

The critical consideration at the heart of § 4(b)(2) is whether the benefits of excluding a given area outweigh the benefit of inclusion, provided, again, that such exclusion would not result in the extinction of the species. While the "benefit of inclusion" is measured universally in terms of the conservation benefit to the species of including the area, the bases on which an exclusion may be justified are numerous.

The proposed rule is largely divided into two parts. The first addresses the Secretary's decision whether to even consider an exclusion from the critical habitat designation. The second defines the considerations and processes by which any consideration of an exclusion should be carried out.

Proposed paragraph (c)(1) reiterates that the Secretary has discretion whether to enter into an exclusion analysis under § 4(b)(2) of the Act. Proposed paragraph (c)(2) describes the two circumstances in which FWS will conduct an exclusion analysis for a particular area: Either 1) when a proponent of excluding the area has presented credible information in support of the request; or 2) where such information has not been presented, when the Secretary exercises his or her discretion to evaluate any particular area for potential exclusion.

The Services went on to state:

> We have not previously articulated our general approach to determining whether to exercise the discretion afforded under the statute to undertake the optional weighing process under the second sentence of 4(b)(2) of the Act. Although the Policy identified specific factors to consider if a discretionary exclusion analysis is conducted, it stopped short of articulating more generally how we approach the determination to undertake that analysis. We now propose to describe specifically what "other relevant impacts" may include and articulate how we approach determining whether we will undertake the discretionary exclusion analysis. We therefore propose paragraph (b) as set forth in the rule portion of this document.

Consistent with the first sentence of § 4(b)(2), proposed paragraph (b) sets out a mandatory requirement that FWS consider the economic impact, impact on national security, and any other relevant impacts prior to designating an area as part of a critical habitat designation. These economic impacts may include, for example, the economy of a particular area, productivity, and creation or elimination of jobs, opportunity costs potentially arising from critical habitat designation, and potential benefits from a potential designation such as outdoor recreation or ecosystem services. The proposed regulations would provide categories of "other relevant impacts" that we may consider, including: Public health and safety; community interests; and the environment (such as increased risk of wildfire or pest and invasive species management). This list is not an exhaustive list of the types of impacts that may be relevant in a particular case; rather, it provides additional clarity by identifying some additional types of impacts that may be relevant. Our discussion of proposed new paragraph (d), below, describes specific considerations related to tribes, states, and local governments; national security; conservation plans, agreements, or partnerships; and federal lands.

At the crux of the determination whether to even entertain consideration of an exclusion from a critical habitat designation is the notion of "credible information." For purposes of these procedures, the proposed rule defines "credible information" as:

> . . .information that constitutes a reasonably reliable indication regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion for a particular area.

Conclusion and Implications

For the most part, the proposed rule is not at all a radical departure from longstanding practice of the FWS. Rather, in light of the Supreme Court's ruling in *Weyerhaeser*, it seems the FWS hopes a codified procedure with greater transparency will help ensure the courts' ongoing deference to the Secretary's exertion of the broad 4(b)(2) discretion.

There is one notable exception. Historically, the FWS uniformly refused to consider a 4(b)(2) exclusion for any designation on federally owned land. This proposed rule expressly rejects that previous standard practice. Referencing private parties' use of federal lands, other regulatory protections on federal lands, and regulatory and economic burdens, the proposed rule makes clear that consideration of a 4(b)(2) exclusion of critical habitat will not be prohibited merely by virtue of the fact that it involves federally owned land.

As with all enactments discussed in this article, application of this proposed procedure applies prospectively only. The public comment period on this proposed rulemaking closed on October 8, 2020.

The lack of attention to these adopted and proposed regulatory enactments is striking given their sweeping scope and potential impacts on ESA implementation in the field. But as is always the case with tinkering with any aspect of the ESA, all will be subjected to judicial scrutiny, not to mention potential reversal with any change in Administration.

David C. Smith is a partner with Manatt, Phelps & Phillips practicing out of the firm's San Francisco and Orange County offices. Mr. Smith's practice includes entitlement and regulatory compliance at all jurisdictional levels from local agencies to the federal government. His expertise includes practice under the Endangered Species Act, the Clean Water Act, the Clean Air Act, the California Environmental Quality Act, the National Environmental Policy Act, and other regulatory regimes throughout California.

Jennifer Lynch is an associate with Manatt, Phelps & Phillips based in Orange County. She counsels and defends both public agencies and private developers regarding complex state and federal environmental and land use laws, with a special emphasis on the California Environmental Quality Act.

EASTERN WATER NEWS

STATE ATTORNEYS GENERAL CHALLENGE TRUMP ADMINISTRATION'S REVAMP OF THE NATIONAL ENVIRONMENTAL POLICY ACT

In July 2020, the Council on Environmental Quality adopted sweeping revisions to its longstanding 1978 regulations detailing implementation of the National Environmental Policy Act (NEPA). In late August 2020, several states and local government entities brought an action against the council alleging that the agency's newly adopted regulations violated *NEPA* and the Administrative Procedure Act. As this article went to press, a motion seeking to enjoin implementation of the Final Rule on NEPA was made before the court. [*States of California, et al. v. Council on Environmental Quality, et al.*, Case No. 3:20-cv-06057 (N.D. Cal. 2020).]

Background

Enacted on January 1, 1970, the National Environmental Policy Act is a federal law that promotes the protection of the environment and established the President's Council on Environmental Quality (CEQ or Council). NEPA was developed at a time of heighted awareness and growing concern about the environment in response to a series of high-profile environmental crises in the late 1960s, such as the Cuyahoga River fire. As a result, NEPA has been described as the foundation for many state-level environmental protections across the country and is often referred to as the "Magna Carta" of United States environmental law. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 193 (D.C. Cir. 1991).

To ensure that the policies outlined by NEPA are "integrated into the very process of decision-making," NEPA outlines "action-forcing" procedures. *Andrus v. Sierra Club*, 442 U.S. 347, 349-50. These procedures require federal agencies to prepare a detailed environmental review or Environmental Impact Statement (EIS) for major federal actions significantly affecting the quality of the environment, including those impacting regulated waters. *Id.* In short, NEPA requires federal agencies to make well-informed and transparent decisions based on a thorough review of environmental and public health impacts, and input from states, local governments, and the public.

In 1978, CEQ promulgated regulations that have guided the implementation of NEPA for more than 40 years. These longstanding regulations have directed federal agencies, and in some situations, state agencies and local governments involved in major Federal actions significantly affecting the environment, on how to comply with NEPA's procedural requirements and its environmental protection policies. *See*, 40 C.F.R. pt. 1500 (1978) (1978 regulations). These regulations have remained largely unchanged with the exception of two minor amendments enacted in 1986 and 2005.

In 2017, President Donald Trump issued Executive Order 13,807, which called for revisions to the NEPA regulations, to expedite infrastructure projects and boost the economy. In response to this Executive Order, CEQ announced a plan to overhaul the 1978 regulations, including a list of topics that might be addressed by the rulemaking process, and taking public comments. *Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act*, 83 Fed. Reg. 28,591 (June 20, 2018) (Advance Notice). On January 10, 2020, CEQ released its proposal (Proposed Rule) to revise the 1978 regulations, which included revisions that would significantly alter the current implementation of NEPA.

After the publication of the Proposed Rule, CEQ provided 60 days for the public to review, analyze, and submit comments. During this timeframe, interested parties submitted over 1.1 million comments, a significant portion of which opposed the Proposed Rule. Four months after the close of the comment period, the Final Rule was published in the *Federal Register* on July 16, 2020. The Final Rule adopted a majority of the changes outlined by the Proposed Rule's revisions to the 1978 Regulations.

In response to the publication of the Final Rule, several states and local government entities filed a lawsuit against CEQ in the U.S. District Court for

the Northern District of California, alleging that CEQ's adoption of the Final Rule violated NEPA and the Administrative Procedure Act (APA).

The NEPA Claims

An agency does not have authority to promulgate a regulation that is "plainly contrary to the statute." *Babbitt v. Sweet Home Chapter of Cmtys. For a Great Or.*, 515 U.S. 687, 703 (1995). Plaintiffs allege that the Final Rule violates NEPA by adopting provisions that, both individually and collectively, conflict with NEPA's overriding purposes of environmental protection, public participation, and informed decision-making. Specifically, the Final Rule may potentially restrict the number of projects subject to detailed environmental review, while also limiting the scope of environmental effects to be considered by federal agencies when conducting NEPA review. For example, if a project could potentially impact a local water source, the conducting agency may be required to consider only direct impacts of the imposed action on the water source, rather than future/cumulative actions. According to plaintiffs, these two changes directly conflict with NEPA's goal of applying the statute to the "fullest extent possible" and addressing the "long-range character of environmental problems." *See,* 42 U.S.C. §§ 4311, 4322. As a result, according to plaintiffs, the Final Rule should be set aside because it is plainly contrary to NEPA.

Additionally, NEPA requires federal agencies to prepare an EIS for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). CEQ is a federal agency subject to NEPA. An EIS must discuss:

> . . .the environmental impact of the proposed federal action, any adverse and unavoidable environmental effects, any alternatives to the proposed action, and any irreversible and irretrievable committed of resources involved in the proposed action. *Id.*

Under CEQ's 1978 regulations, a "major Federal action" included "new or revised agency rules [and] regulations." 40 C.F.R. § 1508.18(a) (1978). As a result, plaintiffs allege that CEQ was required, but failed to address the Final Rule's significant environmental impacts and reasonable alternatives to the Final Rule in an EIS or, at a minimum, an Environmental Assessment (EA). Given CEQ's failure to prepare an EA or EIS, the states argue that the Final Rule should be declared unlawful and set aside.

The APA Claims

The Administrative Procedure Act provides that a court shall "hold unlawful and set aside" agency action that is arbitrary and capricious without the observance of procedure required by law or in excess of statutory authority. 5 U.S.C. § 706(2). Pursuant to the APA, in promulgating a regulation an:

> . . .agency, must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. *Motor Veh. Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 43 (1983).

Plaintiffs allege that in promulgating the Final Rule, CEQ failed to provide a rational explanation for its changes to its longstanding NEPA interpretations and policies, relied on factors Congress did not intend for CEQ to consider, and offered explanations that ran counter to the evidence before the agency. Similarly, plaintiffs allege that CEQ lacked the statutory authority to implement certain provisions of the Final Rule, such as defining "major Federal action" to exclude an agency's failure to act, directly contradicting the 5 U.S.C. § 551(13). Plaintiffs also allege that CEQ failed to properly follow the APA's notice and comment requirements by failing to respond significant comments. As a result, plaintiffs argue that the Final Rule should be ruled unlawful and set aside on these grounds, in addition to the NEPA ground discussed above.

Conclusion and Implications

The Final Rule marks a significant alteration of the current NEPA scheme that will likely alter the environmental analysis undertaken for future federal and federalized projects, including those related to water. This suit led by a variety of state and local governments is the latest in a line of legal challenges of the Final Rule. In early August, a coalition of environmental groups led by the Natural Resources Defense Council, filed suit against the administration, challenging the rollback of environmental protections as

outlined by the Final Rule. Ultimately, it remains to be seen if these legal proceedings will result in a roll-back of the changes outlined in the Final Rule. The lawsuit can be found online here: https://oag.ca.gov/system/files/attachments/press-docs/%5B1%5D%20Complaint%20for%20Declaratory%20and%20Injunctive%20Relief.pdf.

Editor's Note:

On September 22, 2020, the California Attorney General issued a 60-day notice of intention to sue the CEQ, along with several other states, on a new cause of action in relation to the NEPA Final Rule—violation of the federal Endangered Species Act. For the notice of intention, *see:* https://oag.ca.gov/sites/default/files/Notice%20Letter%20to%20CEQ.pdf.pdf. (Geremy Holm, Miles Krieger, Steve Anderson)

NEWS FROM THE WEST

In this month's News from the West, we address an important decision out of the California Supreme Court clarifying when a municipality's well permitting structure would be considered a ministerial, discretionary approval triggering the need to comply with California's NEPA like statute, the California Environmental Quality Act.

We also report on a decision out of the Nevada Supreme Court, replying to certified questions posed to the Court by the Ninth Circuit Court of Appeals, regarding the nature and extent of the state's public trust doctrine relating to water.

California Supreme Court Holds County's Blanket Classification of all Well Construction Permit Issuances as Ministerial Violates CEQA

Protecting Our Water and Environmental Resources v. County of Stanislaus, ___Cal.5th___, Case No. S. 251709 (Aug. 27, 2020).

The California Supreme Court in *Protecting Our Water and Environmental Resources v. County of Stanislaus* found that the County of Stanislaus (County) had violated the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 *et seq.*) by making a "blanket classification" that all permits issued under Chapter 9.36 of its groundwater well permitting ordinance, other than those requiring a variance, were "ministerial." The Court found the practice unlawful under CEQA because, ". . . while many of its decisions are ministerial. . . some of County's decisions may be discretionary."

Factual and Procedural Background

In 1968, the California Department of Water Resources (DWR) issued Water Resources Bulletin No. 74, Water Well Standards: State of California. As revised and supplemented, Bulletin No. 74 has been described as a "90-page document filled with technical specifications for water wells."

Under Water Code § 13801, subdivision (c), counties are required to adopt well construction ordinances that meet or exceed the standards in Bulletin No. 74. Many counties have incorporated the bulletin's standards into their well permitting ordinances.

In 1973, the County of Stanislaus enacted Chapter 9.36 of its County Code regulating the location, construction, maintenance, abandonment, and destruction of wells that might affect the quality and potability of groundwater. Many of the permit standards in Chapter 9.36 incorporate by references standard set forth in Bulletin No. 74, including Standards 8.A, 8.B, and 8.C.

Standard 8.A addresses the distance between proposed wells and potential sources of contamination such as storm sewers, septic tanks, feedlots, etc. It requires that all wells "be located an adequate horizontal distance" from those sources and provides specific separation distances that are "generally" considered to be adequate—but allows an agency to increase or decrease suggested distances, depending on circumstances.

Standard 8.B provides that "[w]here possible, a well shall be located up the ground water gradient from potential sources of pollution or contamination." Under Standard 8.C, "[i]f possible, a well should be located outside areas of flooding."

Chapter 9.36 of the County Code also allows for variance permits to be issued by the County Health Officer authorizing an exception to any provision of Chapter 9.36 "when, in his/her opinion, the applica-

tion of such provision is unnecessary." When authorizing a variance, the health officer may prescribe "such conditions as, in his or her judgment, are necessary to protect the waters of the state."

In 1983, the County adopted its CEQA regulations generally classifying *all* well construction permits as ministerial projects absent a variance permit. In 2014, the County amended Chapter 9.37 of the County Code to prohibit the unsustainable extraction and export of groundwater. Chapter 9.37 requires that permit applications also satisfy Chapter 9.36.

Since 2014, the County has had a practice of treating all non-variance permit approvals as ministerial. Plaintiffs sued the County, alleging "a pattern and practice" of approving well permits without CEQA review. Plaintiffs asserted that all permit issuance decisions under Chapter 9.36 are discretionary because the County can:

> . . .deny [a] permit or require changes in the project as a condition of permit approval to address concerns relating to environmental impacts.

The trial court ruled that the County's approval of all non-variance permits was ministerial. The Court of Appeal reversed, concluding that issuance of well construction permits is a discretionary decision, but acknowledged that many of the decisions the County may make under Chapter 9.36 would be ministerial. Nevertheless, the appellate court found that the County's compliance determination under Standard 8.A involved sufficient discretionary authority to make the issuance of all permits under Chapter 9.36 discretionary—which would trigger CEQA compliance.

The Supreme Court granted the County's petition for review.

The Supreme Court's Decision

The Supreme Court began its inquiry by distinguishing discretionary projects from ministerial projects. A project is discretionary if the government can shape the project in any way which could respond to any of the concerns which might be identified" during an environmental review. The Court noted that when a project involves an approval that contains elements of both a ministerial action and a discretionary action, the project will be deemed to be discretionary.

De Novo Review

In setting forth the standard of review, the Supreme Court articulated that because the County's position that the permits were regardless of the circumstances is based on the County's legal interpretation of Chapter 9.36, the Court reviews that interpretation *de novo*.

Standard 8.A Confers County Discretion to Deviate from General Standards

The Court concluded that the plain language of Standard 8.A authorizes the County to exercise judgment or deliberation when it decides to approve or disapprove a permit. Although the standard sets out distances generally considered adequate, individualized judgments may be required. For example, Standard 8.A notes that an:

> . . .adequate horizontal distance may depend on '[m]any variables' and '[n]o set separation distance is adequate and reasonable for all conditions.

The Court acknowledged that the standard does provide a list of minimum suggested distances, but notes that Standard 8.A expressly provides that "[l]ocal conditions may require greater separation distances." Moreover, if, in the opinion of the enforcing agency adverse conditions exist, Standard 8.A requires that the suggested distance be increased, or special means of protection be provided. Finally, approval of lesser distances may be allowable by the enforcing agency on a "case-by-case basis." The Supreme Court concluded that the language in Standard 8.A confers significant discretion on the County to deviate from these general standards depending on the circumstances. Such permit issuance cannot therefore be classified as ministerial.

Limited Discretion is Not the Same Thing as Lacking Discretion

The Supreme Court rejected the County's argument that permit issuance is ministerial because under Standard 8.A the County may only adjust the location of a well to prevent groundwater contami-

nation. Chapter 9.36 does not allow the County to address other environmental concerns or impose other measures that might prevent groundwater contamination, such as regulating pesticides or fertilizers. In response, the Court stated that "[j]ust because the agency is not empowered to do everything does not mean it lacks discretion to do anything." That the County has the authority to require a different well location, or deny the permit, is sufficient to make the issuance of the permit discretionary.

The Appropriate Remedy

The Supreme Court, however, disagreed with the appellate court that permits issued under Chapter 9.36 are always a discretionary project. The fact that an ordinance contains provisions that allow an agency to exercise independent judgment in some instances does not mean that all permits are discretionary. The Court observed that sometimes the discretionary provisions are not relevant to a particular permit. For example, Standard 8.A only applies when there is contamination source near a proposed well.

The Supreme Court concluded by reversing the Court of Appeal holding that all permit issuances under Chapter 9.36 are discretionary but finding that plaintiffs were not entitled to a declaration to that effect nor an injunction requiring the County to treat all permit issuances as discretionary. Rather, the Court held that plaintiffs were entitled to a declaration that the County's blanket ministerial categorization is unlawful:

> Accordingly, classifying all issuances as ministerial violates CEQA. Plaintiffs are entitled to a declaration to that effect. But they are not entitled to injunctive relief at this stage, because they have not demonstrated that *all* permit decisions covered by the classification practice are discretionary.

Conclusion and Implications

In light of this decision, a local agency that categorically classifies the issuance of a particular permit as ministerial may want to review its permitting ordinance to ensure that it complies with the Supreme Court's holdings. When an ordinance contains standards which, if applicable, give an agency the required degree of independent judgment, the agency may not categorically classify the issuance of permits as ministerial. But the agency may classify a particular permit as ministerial and develop a record in support of that classification. The Court's opinion is available at: https://www.courts.ca.gov/opinions/documents/S251709.PDF
(Christina Berglund)

Nevada Supreme Court Answers Certified Questions from the Ninth Circuit Court of Appeals Regarding the State's Public Trust Doctrine

Mineral County, et al. v. Lyon County, et al., Case No. 75917, 136 Nev.Adv.Op. 58 (Sept. 17, 2020).

On September 17, 2020, the Nevada Supreme Court issued an eagerly awaited ruling regarding the public trust doctrine in the long-running Walker River litigation. Answering a certified question from the Ninth Circuit Court of Appeals, the court held that the public trust doctrine, as implemented through Nevada's comprehensive water statutes, does not permit a court to reallocate water rights that were adjudicated and settled under the prior appropriation doctrine. In reaffirming that the public trust doctrine applies in Nevada, the Court recognized it to include all waters of the state, not just those that were navigable at statehood. A dissenting opinion by two of the seven justices took issue with both of these conclusions

The Walker River

The Walker River runs from the Sierra Nevada mountains in California into the Great Basin of Nevada, where it terminates in Walker Lake. The majority of precipitation and surface water flow into the Walker River Basin occurs in California, but most of the water is consumed by irrigators in Nevada. Since agricultural appropriations from the river and its tributaries first commenced in the mid-nineteenth century, the size and volume of Walker Lake have shrunk significantly, and the concentrations of total dissolved solids have risen to the point where the lake can no longer sustain a fishery. Disagreement exists as to the causes of these changes, but there is general consensus that upstream diversions play at least some part.

Litigation over the Walker River

Litigation over the Walker River commenced in 1902 as a trans-border dispute in the U.S. District Court for Nevada between two ranching operations, one in California and one in Nevada. The case ended in 1919, but five years later, the United States commenced a new action in the same federal court seeking to establish a federally reserved water right for the Walker River Paiute Tribe (Tribe). The court issued a decree in 1936 (subsequently amended in 1940) that distributed water rights to the Tribe and various other claimants and that retained jurisdiction in the decree court for future modification.

In 1991, the Walker River Irrigation District filed a petition with the decree court to enforce its decreed rights in response to regulatory action by the California Water Resources Control Board to prevent the District from dewatering portions of the river. The Tribe and the United States filed counterclaims, asserting new rights for a reservoir built on the tribal land. In 1994, Mineral County—in which Walker Lake it located—moved to intervene, requesting that the court reopen and modify the decree "to recognize the rights of Mineral County … and the public to have minimum [water] levels to maintain the viability of Walker Lake." Invoking the public trust doctrine, Mineral County requested that the court require at least 127,000 acre-feet annually to reach Walker Lake.

In 2015, the decree court dismissed Mineral County's complaint in intervention for lack of standing but nevertheless proceeded to address, in detail, the applicability of the public trust doctrine. The court concluded that the public trust doctrine could not be used to reallocate decreed rights without constituting a taking for which just compensation must be paid. Mineral County appealed.

Certified Questions from the Ninth Circuit Court of Appeals

The Ninth Circuit held the District Court erred by dismissing Mineral County's complaint in intervention for lack of standing and certified two questions to the Nevada Supreme Court:

> Does the public trust doctrine apply to rights already adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent?
>
> If the public trust doctrine applies and allows for reallocation of rights settled under the doctrine of prior appropriation, does the abrogation of such adjudicated or vested rights constitute a "taking" under the Nevada Constitution requiring payment of just compensation?

The Nevada Supreme Court accepted both certified questions and ordered briefing. Nearly 30 interested parties filed amicus briefs, including the Nevada State Engineer, municipal water purveyors, environmental groups, farmers, ranchers, the Pacific Legal Foundation, the Nevada Mining Association, and a group of law professors. Also participating as an *amicus* was the State of California, which discussed its own implementation of its public trust responsibility to the Walker River based on the groundbreaking *National Audubon Society v. Superior Court* case related to Mono Lake. 33 Cal.3d 419, 452 (1983).

The Nevada Supreme Court's Majority Opinion

The court's analysis went through the origins of public trust doctrine jurisprudence, from the seminal *Illinois Central Railroad* case issued by the United States Supreme Court to its own decision in *Lawrence v. Clark County*, which was the first to expressly adopt the public trust doctrine in Nevada. 127 Nev. 390, 406, 254 P.3d 606, 617 (2011). The Court cited the sources of Nevada's public trust doctrine as the common law, the state's constitution and statutes and the inherent limitations on state sovereignty. As to water, the Court noted that the Nevada Legislature "effectively codified" public trust principles when declaring that all waters within the state, whether above or beneath the surface, belong to the public. NRS 533.025.

Acknowledging that this precedent makes clear that the public trust doctrine applies to the waters of the state, the Supreme Court rephrased the first certified question to ask:

> Does the public trust doctrine permit reallocating rights already adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent?

Although the Court "explicitly recognize[d] that the public trust doctrine applies to rights already adjudicated and settled under the doctrine of prior

appropriation, such that the doctrine has always inhered in the water law of Nevada as a qualification or constraint in every appropriated right," the Court nevertheless answered the first certified question (as rephrased) "no."

To reach this conclusion, the Supreme Court looked to the state's comprehensive water statutes. Although the Legislature has declared that all water belongs to the public, it also embraced the prior appropriation doctrine, which makes all appropriations subject to existing rights. The state's water statutes also incorporate the concept of beneficial use as a fundamental principle governing water appropriations. To that end, the statutes allow a multitude of uses, including not only traditional uses such as irrigation, stockwater, mining, municipal, commercial and industrial, but also recreation and wildlife.

When considering an application to appropriate or change the use of water, the State Engineer must follow numerous legislatively established guidelines. Among those guidelines are whether the proposed use is environmentally sound, is appropriate for the long term without unduly limiting future growth and development, or threatens to prove detrimental to the public interest. The court deemed these statutory guardrails as "consistent with the public trust doctrine" and, therefore, as fulfilling the state's responsibility to protect the public trust.

Although water rights are usufructuary, the Court concluded that:

> . . .this does not necessarily mean that water rights can be reallocated under the public trust doctrine. Rather, it means that rights holders must continually use water beneficially or lose those rights.

As a result, although recognizing the "tragic decline of Walker Lake" and the "resulting negative impacts on the wildlife, resources and economy of Mineral County," the Court determined that it could not, under the public trust doctrine, "uproot an entire water system, particularly where finality is firmly rooted in our statutes."

The Court deemed this a matter of policy for the Legislature, not the courts, to address. It is in that important respect that the court reached the opposite conclusion than the California Supreme Court reached nearly 40 years ago in the *Audubon* case.

Because the Court answered the first certified question in the negative, it did not need to reach the second.

Clarification of the Public Trust Doctrine As to Nonnavigable Tributaries

In an interesting turn, the Court:

> . . .clarif[ied] that the public trust doctrine applies to all waters of the state, whether navigable or nonnavigable, and to the lands underneath navigable waters.

In reaching this result, the Court expanded the public trust beyond how it was originally envisioned in *Illinois Central* and its progeny. In explaining its interpretation, the Court relied on the Legislature's recognition of all water sources as belonging to the public. For that reason, the Court concluded that nonnavigable tributaries are within the scope of the public trust doctrine. Although not expressly mentioned, the decision leads to the conclusion that groundwater is also within the public trust doctrine's reach.

The Dissent

Two Justices concurred in part and dissented in part, taking issue with the manner in which the majority both reframed and then answered the certified question. Citing the *Audubon* case, the dissent complained:

> As revised, the question suggests an all-or-nothing approach that is fundamentally inconsistent with the public trust doctrine. Nevada's appropriative water rights system and the public trust doctrine developed independently of each other. The goal is to balance them and their competing values, not set them on a collision course.

By reframing the certified question, the dissent protested, the majority "misdirects the analysis, because it excludes the balancing that lies at the heart of the public trust doctrine." The dissent disagreed that Nevada's water statutes, as implemented by the State Engineer's discretionary decision making, is the exclusive means by which the state carries out its public trust responsibilities:

> This view fundamentally misapprehends the

public trust doctrine and its constitutional and sovereign dimensions.

Even if the State Engineer might conclude that an appropriation is in the public interest, the dissent noted, it still might harm public trust values.

As emphasized by the dissent, to the extent the public trust doctrine is enshrined in Nevada's water statutes, there must still be a "judicial check" on how the Legislature implements it:

> [T]he public trust doctrine, enforced by a separate and independent judiciary, is one intentionally endowed with flexibility—to consider a multitude of needs and impacts, to encompass more and different protections over this state's water sources, to check the actions by legislative and executive actors for absolute compliance with their fiduciary obligations—that those limited statutory sections cited lack.

This conclusion derives from two sources: 1) the Court's constitutional responsibility to provide judicial oversight over legislative actions that purport to convey property held in trust for the public; and 2) separation of powers principles. As summarized by the dissent:

> . . .it cannot be that with the enactment of [the water statutes], the Legislature effectively delegated to an administrative officer its own public trust obligations and the judiciary's responsibility to police constitutional and sovereign limits on the Legislature's own authority.

The desire for finality does not abdicate this oversight role particularly when, the dissent noted, Mineral County identified several potential remedies that would not disturb vested rights or impinge on principles of finality. In any event, the dissent observed, finality would be one piece of what the trial court would take into account when reexamining existing rights within the framework of the public trust doctrine. Because even vested water rights are subject to the public trust, the dissent concluded, the trial court's enforcement of the public trust doctrine would not affect a reallocation of rights and therefore would not "divest anyone of legal title previously held."

Interestingly, while decrying what it deemed the majority's abandonment of the judiciary's role in enforcing the public trust doctrine, the dissent also criticized the majority for expanding the public trust doctrine to include nonnavigable waters. Although the dissent recognized this as consistent with how the public trust doctrine is evolving in various jurisdictions, the dissent deemed this conclusion to be outside the ambit of the certified questions and beyond the scope of facts presented in the case.

Conclusion and Implications

Although the members of the court disagreed as to how the public trust doctrine should be implemented in stressed river systems such as the Walker River, they agreed that it is enshrined in Nevada law. Ultimately, the Supreme Court's holding was narrowly tailored to address the question of reallocation of vested water rights. It left open the potential use of other remedial strategies, such as those urged by Mineral County, to protect public trust values. That will be the task for the federal decree court on remand. (Debbie Leonard)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

Editor's Note: Complaints and indictments discussed below are merely allegations unless or until they are proven in a court of law of competent jurisdiction. All accused are presumed innocent until convicted or judged liable. Most settlements are subject to a public comment period. Due to COVID-19 and recent efforts by the Trump administration to relax enforcement actions, there were fewer items to report on this month.

Civil Enforcement Actions and Settlements—Water Quality

•August 24, 2020 - EPA has ordered the Lee Bar Ranch mobile home park on the Pala Band of Mission Indians Reservation to comply with federal drinking water requirements and to identify and correct problems at its sewer and drinking water systems that present a danger to the residents of the park. The sewer and water systems serve approximately 90 residents and are privately owned. A boil water notice has been issued to all customers. During several inspections between January and May 2020, the Pala Environmental Department (PED) learned that untreated human sewage was regularly discharged onto the soil throughout the property as a result of septic system failures. Additionally, PED observed a broken drinking water line, which may lead to a loss of pressure and a reversal in the water flow. Both the potential exposure of an underground source of drinking water to human waste and reversal in the water flow may lead to fecal contamination of the drinking water or contamination by other disease-causing organisms. Lastly, the drinking water system on Lee Bar Ranch was not registered with the EPA and has failed to comply with all applicable monitoring and reporting regulations under the Safe Drinking Water Act. Under the terms of the agency's administrative order, the owners of the water system are required to: 1) Issue a boil water notice to all customers; 2) Take drinking water samples from different points in the drinking water system for the presence of total coliform bacteria; 3) If any of the water samples have a positive *E. coli* result, owners must provide at least one gallon of water per person per day for every individual served by the system; 4) Conduct a technical review of the drinking water and wastewater infrastructures to identify problems, and draft and follow a plan to correct those problems; 5) Provide verification that the system has a qualified water operator; 6) Properly monitor the system's drinking water and report findings to the EPA. The Pala Band of Mission Indians has no direct control or ownership of the water system.

•August 27, 2020 - EPA has announced a settlement agreement with the City of San Juan Bautista over violations of the federal Clean Water Act. The settlement requires the City to make major updates to the way it treats wastewater after EPA found the City was discharging wastewater into San Juan Creek, a tributary to the San Benito River. The EPA inspection found that the discharges violated federal standards. This action was referred to EPA for enforcement by California's State Water Resources Control Board and the Central Coast Regional Water Quality Control Board (Water Boards). EPA works closely with the Water Boards to ensure the protection of water bodies in California. EPA and the Water Boards inspected the treatment plant in June 2019 and found multiple violations of the Clean Water Act. Those violations included discharges of pollutants—primarily chlorides and sodium—in excess of its permit, failure to properly monitor and maintain records, and failure to adequately operate and maintain its wastewater treatment system. The settlement requires the City to complete all work in the plan and return to compliance with the Clean Water Act by December 31, 2023. The treatment system currently has the capacity to treat approximately half a million gallons per day of wastewater generated by a population of about 2,500 and three vegetable processors.

•September 2, 2020 - EPA recently ordered North Edwards Water District to address ongoing arsenic violations of the Safe Drinking Water Act. The Cali-

fornia's State Water Resources Control Board—Division of Drinking Water (DDW) referred the system to EPA for enforcement. The North Edwards Water District system serves approximately 600 residents through more than 200 connections. The system's current source of drinking water is groundwater from two wells. Arsenic, a naturally occurring mineral found throughout the United States, can be found in groundwater. Drinking high levels of arsenic over many years can increase the risk of lung, bladder, and skin cancers, as well as heart disease, diabetes, and neurological damage. Arsenic also inhibits the body's ability to fight off cancer and other diseases. As part of EPA's order, North Edwards Water District must comply with the arsenic maximum contaminant level (MCL) of 10 micrograms per liter no later than April 30, 2023. The system has been serving water with arsenic levels above the MCL since at least 2013. The District must provide a compliance plan by the end of October 2020 outlining how it will comply with the arsenic MCL standard. The District has applied for funding from the California State Water Resources Control Board—Division of Financial Assistance to provide residents with alternative water until the system complies with federal and state drinking water requirements. EPA will continue to monitor North Edwards Water District's efforts to provide safe drinking water and may levy penalties if the utility fails to meet the compliance provisions in the order.

•September 11, 2020—EPA issued a new emergency drinking water order to the Oasis Mobile Home Park, which is located on the Torres Martinez Tribe's lands in California. The order calls on Oasis to comply with federal drinking water requirements and to identify and correct problems with its drinking water system that present a danger to the residents of the park. The mobile home park must provide alternative drinking water, reduce the levels of arsenic in its distribution system and monitor the water for contamination. EPA is also requiring Oasis Mobile Home Park to conduct a study to identify a long-term compliance option based around consolidating the current privately-operated Oasis system to a local public water system. The Oasis Mobile Home Park's current drinking water system serves approximately 1,900 residents using groundwater that has naturally occurring arsenic. In August 2019, EPA issued the first emergency order to the water system for failure to comply with the regulatory Maximum Contaminant Level (MCL) for arsenic, which is 10 parts per billion (ppb). Arsenic, a naturally occurring mineral found throughout the United States, can be found in groundwater. Drinking high levels of arsenic over many years can increase the risk of lung, bladder, and skin cancers, as well as heart disease, diabetes, and neurological damage. Arsenic also inhibits the body's ability to fight off cancer and other diseases. The Torres Martinez Desert Cahuilla Indians tribe has no direct control or ownership of the water system and has been consulted about the violations. The new order, issued for failure to properly maintain and operate its primary drinking water well and distribution system, requires Oasis Mobile Home Park and its owner to: 1) Provide at least one gallon of drinking water per person per day at no cost for every individual served by the system; 2) Hire an outside consultant to assess the arsenic treatment and distribution systems; 3) Submit a compliance plan for approval; 4) Identify long-term compliance options for the system; 5) Increase sampling and reporting of arsenic and iron levels throughout the distribution system.

Indictments, Convictions, and Sentencing

•September 2, 2020 - In an order issued, the U.S. District Court for the Eastern District of California agreed with the Justice Department that John Sweeney and his company, Point Buckler Club LLC, committed "very serious" violations of the Clean Water Act associated with the construction of a nearly mile-long levee in sensitive tidal channels and marsh without a permit. The violations occurred on Point Buckler Island, an island in the greater San Francisco Bay that Sweeney had purchased in 2011. More particularly, Point Buckler Island is part of the Suisun Marsh, the largest contiguous brackish water marsh remaining on the west coast of North America. The Island is located in a heavily utilized fish corridor and is critical habitat for several species of federally protected fish. When Sweeney acquired the Island, nearly 40 acres of it supported and functioned as a tidal channel and tidal marsh wetlands system. As the court found, at that time Sweeney knew that Solano County, California, had zoned it as "Marsh Land." Sweeney had also, by that time, sought and obtained a Clean Water Act permit for activities in other areas of the Suisun Marsh. Beginning in 2014, without a permit, Sweeney excavated and dumped thousands of

cubic yards of soil directly into the Island's tidal channels and marsh. This unlawful conduct, the court found, eliminated tidal exchange, harmed aquatic habitat, and adversely impacted water quality. The court noted that the Island's waters are "extremely acidic and saline." As the court's order provides, further proceedings will be conducted to determine the appropriate remedy.
(Andre Monette)

REGULATORY DEVELOPMENTS

FEDERAL AGENCIES RELEASE COLUMBIA RIVER SYSTEM OPERATIONS FINAL EIS THAT, FOR FIRST TIME, CONSIDERS IN DETAIL ALTERNATIVE OF BREACHING FOUR LOWER SNAKE RIVER DAMS

After almost 30 years since the first salmonid was listed under the federal Endangered Species Act (ESA) in the Columbia River Basin and 25 years since issuance of the last broad-scale Environmental Impact Statement (EIS) addressing operation of the Columbia River Hydropower System (System) pursuant to the National Environmental Policy Act (NEPA), on July 31, 2020, three federal agencies issued a new Final EIS addressing the effects of the System's operations (CRSO FEIS).

Background

The impetus for its preparation was the 2016 opinion of the U.S. District Court for the District of Oregon in *National Wildlife Fed'n v. National Marine Fisheries Serv.*, 184 F.Supp.3d 861 (D. Or. 2016) (*NWF v. NMFS*) in which the court ruled that the previous NEPA documents on which the agencies sought to rely to establish compliance with the statute were either outdated or too narrow in scope to satisfy that purpose; that the series of actions prescribed to avoid having System operations be likely to jeopardize the continued existence of listed species or result in adverse modification of their designated critical habitat in a previous Biological Opinion should be evaluated in a single EIS; and, in reaching these rulings, looked ahead to the composition of that new single EIS to clearly telegraph that one of the "reasonable alternatives" it would need to consider in detail is breaching the four Lower Snake River dams that form a portion of the fourteen federal dams comprising the overall system.

The Final EIS

In that light, the CSRO FEIS represents a milestone because it does in fact for the first time provide detailed consideration to an alternative that would breach the four Lower Snake River Dams that has been, as the FEIS puts it, "a topic of public discourse for decades." In addition to discussing how the FEIS addresses this alternative, this article will also briefly highlight some of the other noteworthy features of the newly released document.

Size

As is not surprising for a document addressing the environmental effects of the operations, maintenance, and configuration of the Columbia River Hydropower System comprising 14 federal dams and associated reservoirs across four states (Washington, Oregon, Idaho, and Montana) on the river and its major tributaries, the CRSO FEIS is immense. The body of the document comprises nearly 2500 pages, and the 24 supporting appendices, which range from a compendium and analysis of substantive issues raised in the nearly 59,000 comments submitted on the Draft EIS, to the two Biological Opinions that NOAA Fisheries and the U.S. Fish & Wildlife Service issued on the Preferred Alternative, collectively run to more than another 9000.

Complexity

The analysis in the CRSO FEIS is also highly complex, a characteristic that stems from myriad factors. One of the major ones is simply that operating the System is quite literally a perpetually ongoing action requiring a tremendous degree of coordination and orchestration across a huge swath of territory and multiple agencies, jurisdictions, and large-scale projects designed to serve myriad purposes. In addition, considerable complexity arises from the multiplicity of variables that affect the primary focus of effects analysis in the document, the thirteen species of salmon and steelhead listed under the ESA, in particular given the multi-dimensional life cycles and often-vast ranges and migratory patterns of anadromous fish that span freshwater, estuarine, and marine habitats. Indeed, these factors alone call to mind the quip former Forest Service Chief and wildlife biologist Jack Ward Thomas proffered when heading up the team that performed viability analyses for the numerous species associated with late-successional

and old-growth forests that laid the environmental groundwork for the Northwest Forest Plan: "Ecosystems are not only more complex than we think, they are more complex than we can think."

Importance of Modeling for Projecting Effects to Listed Fish Species

The CRSO FEIS breaks down its effects analysis into 17 categories across a wide spectrum of natural resources, values, and interests, from Hydrology and Hydraulics to Indian Trust Assets and Tribal Perspectives and Interests. The main focus of its analysis of environmental effects, however, is the 13 salmon and steelhead species listed under the ESA, in part because the CRSO FEIS was prepared in conjunction with two new Biological Opinions that evaluated the effects of the Preferred Alternative on those (and other) listed species pursuant to the ESA, and in many ways the focus of the trade-offs reflected in the FEIS revolve around taking steps to benefit those species vis-à-vis hydropower generation and operations to serve other ends (such as supporting the use of other renewable sources of power that are variable in nature such as solar and wind).

In addressing effects to listed fish species, the co-lead agencies relied heavily on the use of models. This follows in large measure because of the multitude of biotic and abiotic factors and variables that affect the health, distribution, and abundance of species affected by the System at various life stages, and thus, modeling becomes one way to try to account for and predict how modifying one or more such factors will influence fish and their viability over time, at least in relative terms. Unlike scientific inquiries that proceed based on the classic scientific method involving the testing of a hypothesis that can be replicated under tightly controlled conditions and holding certain variables constant, making projections related to effects on the life cycle of species in the natural world involves a considerably different exercise. In that light, the CRSO FEIS used several models that produced quite different results regarding the expected projected benefits to fish species from potential System actions such as increased spill and dam removal, and sought to draw inferences on likely effects based on a consideration of all such results.

Multi-Faceted and Multi-Layered Purpose & Need-Plus Statement

The NEPA implementing regulations the Council on Environmental Quality (CEQ) has promulgated provide that EISes must include a "Purpose and Need" statement that, as its name implies, "briefly specif[ies] the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." (The new version of these CEQ regulations were set to go into effect as of Sept. 14, 2020, retain a similar, but slightly varied formulation, of this requirement.) The reason the Purpose and Need Statement is critical to any NEPA analysis is because it becomes the filter agency uses to determine which alternatives are worthy of full-blown, detailed consideration in its EIS.

In addressing the primary purposes the System is designed to serve, the CRSO FEIS looks to the underlying statutory authority under which the Congress has directed the Corps and Bureau to construct, operate, and maintain the 14 CRS projects, which it collectively and broadly articulates as flood control, navigation, hydropower production, irrigation, fish and wildlife conservation, recreation, municipal and industrial water supply, and water quality. The FEIS in in turn extrapolates from these to produce a longer list of 13 more specific purposes of System operations. The overarching need to which the co-lead agencies are responding is stated as "reviewing and updating the management of the System, including evaluating measures to avoid, offset, or minimize impacts to resources affected by the management of the System." The FEIS also cites their need to respond to the rulings and observations of the District Court in *NWF v. NMFS*.

The co-lead agencies then took a further step and, in conjunction with the more than 30 cooperating agencies involved in preparing the CSRO FEIS, identified eight principal objectives deriving from the Purpose and Need Statement to be achieved in fashioning and adopting a strategy for operating the System, even though such a procedural measure is not prescribed by CEQ's NEPA implementing regulations. These objectives then formed the primary criteria against which each of the different action alternatives were evaluated in the FEIS.

Alternatives

The alternatives section of an EIS has long been referred to as its "heart" in CEQ's implementing regulations (although this characterization is not carried forward in the new version of the regulations set to go into effect on Sept. 14, 2020). In the CRSO FEIS, the co-lead agencies evaluated five Multiple-Objective (MO) Alternatives in detail in addition to the "No Action" alternative. Because operating the System is quite literally a perpetually ongoing action, the CSRO FEIS chose to define the "No Action" alternative as constituting those operations and other measures in effect or planned when work on it commenced in Sept. 2016. The five action alternatives can be described in shorthand as using Block Spill Design to improve outcomes for fish beyond those provided by the No Action alternative (MO1); prioritizing hydropower production and flexibility to more substantially reduce Greenhouse Gas emissions and to instead rely mostly on structural and transportation measures in an effort to benefit fish (MO2); breaching the four lower Snake River Dams per the court's strong admonition that such an alternative be considered in detail in the EIS (MO3); maximizing spill to benefit ESA-listed salmonids (MO4); and the Preferred Alternative, which the CRSO FEIS presents as the one that reflects the optimal "balance" among all of the multiple purposes and objectives of the System.

More on MO3

Because it has never before been considered in detail by a federal agency and given the intense public interest from various stakeholders in the alternative of breaching the four Lower Snake River dams, a few additional remarks about how the CSRO FEIS analyzes MO3 are in order. First, the FEIS explains that new congressional authorizing legislation and appropriations would be required to implement the MO3 alternative given that the 14 CRS projects were built and are operated pursuant to explicit statutory direction. As the court noted in urging consideration of the alternative in *NWF v. NMFS*, however, the current version of CEQ regulations under which the FEIS was prepared expressly state that reasonable alternatives do not need to be "within the jurisdiction of the lead agency" (a provision that, again, was not carried forward in the new version set to go into effect on Sept. 14, 2020). Second, not surprisingly, the FEIS notes that its modeling revealed the highest predicted potential benefits for Snake River salmon and steelhead from MO3 among the alternatives considered in detail, but goes on to note that it would not allow operation of the Lower Snake River dams for their other congressionally authorized purposes of navigation, hydropower, recreation, and water supply. In particular, it explains that MO3 would not satisfy the objective of ensuing a reliable and economic power supply for the Pacific Northwest, due in large measure to the reduction in hydropower generation that would result from breaching the dams as well as the loss of storage capabilities that greatly enhance the System's flexibility to readily supply load as needed to help avoid the risk of power shortages.

Conclusion and Implications

The CSRO FEIS evaluates five action alternatives in detail, including for the first time one that would provide for breaching the four Lower Snake River dams, which, as the court itself openly acknowledged in *NWF v. NMFS*, it has been trying to get the co-lead agencies to consider adopting for decades. 184 F.Supp.3d at 942 (describing the alternative as one the federal agencies under various administrations "have done their utmost to avoid considering for decades," notwithstanding the court's having "repeatedly and strenuously encouraged the government to at least study the costs, benefits, and feasibility of such action, to no avail").

At the same time, it is almost certain that the co-lead agencies will eventually adopt the Preferred Alternative in their Record(s) of Decision scheduled for release by Sept. 30, 2020. This follows for two main reasons. First, and most important, the Preferred Alternative forms the basis of the proposed action on which both NOAA Fisheries and FWS have issued "No Jeopardy" Biological Opinions (included as Appendices V-2 and V-3 to the CSRO FEIS) and thus confirm the consulting agencies' position that the Preferred Alternative complies with the co-lead agencies' substantive ESA duties. Second, as has been conclusively established since *Strycker's Bay Neighborhd. Council v. Karlen*, 444 U.S. 223 (1980), NEPA's mandates are procedural in nature only, and only require federal agencies to consider environmental effects, not give them priority.

The CSRO FEIS is available online at: https://www.nwd.usace.army.mil/CRSO/Final-EIS/#top. (Steve Odell)

JUDICIAL DEVELOPMENTS

SECOND CIRCUIT DECISION EXTENDS THE POTENTIAL SCOPE OF OIL POLLUTION ACT CLAIMS

Power Authority of the State of New York v. M/V Ellen S. Bouchard, 968 F.3d 165 (2nd Cir. 2020).

Although it is not the statute most commonly involved in water pollution litigation, the Oil Pollution Act (OPA) has played a major role in addressing marine spills. Disasters such as the Exxon Valdez spill have led to legislative strengthening of the statute from time to time since its origin in the late 19th Century, when it was regarded as more concerned with refuse than with oil spills.

On July 30, 2020 the Second Circuit reversed the decision of the U.S. District Court in a case that shows the potential breadth of the law.

Background

The facts involve a tugboat and barge in Long Island Sound waters that put down an anchor at just the wrong place. The anchor snagged an important specially constructed cable that transmitted high voltage electricity. The cable was fitted with a system that used a dielectric fluid as an insulator for the electricity in the cable. The dielectric fluid pressure was monitored and pressure in it was maintained by physical pump stations at either end of the cable where it came ashore.

The anchor cut the electric cable, and the result included a release of several thousand gallons of the dielectric fluid into the waters of the harbor. The clean-up cost was nearly $10 million for the utility company alone.

Because the case involved vessels on navigable waters, there are special legislatively imposed limitations on the recovery of damages from mishaps. The law that so provides is called the Limitation Act. Although the defendants in the case had brought a Limitation Act proceeding, the Limitation Act accommodates claims that that are provided for by other specific laws. In this case, the Power Authority brought an OPA claim.

At The District Court

The District Court heard the OPA claim and determined that the facts did not show the requisite elements for maintaining an OPA claim. The principal reason for that ruling was the holding of the District Court that the specialized electric cables were not within the definition of "facilities" under the OPA. "Facility" is defined as follows:

> [A]ny structure, group of structures, equipment, or device (other than a vessel) which is used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil. This term includes any motor vehicle, rolling stock, or pipeline used for one or more of these purposes. (*OPA, 33 USC* § 2701(9).)

Under the law, the term "oil" has a broad definition:

> . . .means oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include any substance which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601) and which is subject to the provisions of that Act; (33 USCS § 2701)

The Second Circuit's Decision

The Second Circuit Court of Appeals noted that in reviewing a grant of summary judgment, especially whether a trial court has correctly applied a statute, the court's decision is a matter of law for which it makes a *de novo* determination.

Defining 'Facility' and 'Used for' under the OPA

In this case, the Court of Appeals indicated that

the plain meaning of the "facility" definition fits what happens to the dielectric fluid within the cable. It observes that the fluid is "transferred" by the operation of the cables. It elaborated:

> The crux of the question, then, is whether the utilization of this [transfer] capability suffices for the cables to be considered 'used for' that 'purpose[].' *33 U.S.C. § 2701(9)*. We hold that it does. The definition's language requires nothing more than that the cables be employed to transfer the dielectric fluid. And it is clear from the undisputed facts in the record that the cables are regularly used to, among other purposes, convey dielectric fluid along the length of the cables and between the cables and the pressurization plants, as the system calibrates and adjusts the volume of fluid required to maintain proper pressure in light of external conditions. Indeed, the record establishes that this movement of dielectric fluid—that is, its transfer in and out of the cables—is vitally important for the system to function properly.

In the end, the Second Circuit found as follows:

> The district court entered summary judgment on the basis that the cable was not a "facility" as defined by the OPA because it was not "used for" one of the statutory definition's enumerated purposes, meaning the discharge was not governed by the OPA. We disagree, finding that the cable system is used for at least one of the enumerated purposes, and that it was therefore error to conclude the system was not a "facility" on that basis. For this reason, we **VACATE** the order of the district court and **REMAND** for further proceedings consistent with this opinion.

Conclusion and Implications

The court engaged in a discussion by which it made clear that it sees the definitions in the Oil Pollution Act as extending beyond the traditional oil spill, whether from a vessel or a facility onshore. The only doubt it expresses is a degree of uncertainty over whether the dielectric fluid in the cables is a true "oil". It expects that the District Court will determine that more specifically upon remand. However, the record quoted in the opinion makes clear that some, if not all, the dielectric fluid is a hydrocarbon derived oily material. The definition itself would seem to permit the law's application to virtually any sort of oil, including vegetable oils. The Court of Appeals' opinion is available online at: https://www.hklaw.com/-/media/files/insights/publications/2020/09/y49secondcircuitopinion.pdf.
(Harvey M. Sheldon)

DISTRICT COURT REVERSES ARMY CORPS' CLEAN WATER ACT JURISDICTIONAL DETERMINATION—APPLIES BOTH JUSTICE KENNEDY AND JUSTICE SCALIA'S ANALYSES IN *RAPANOS*

Lewis v. United States, ___F.Supp.3d___, Case No. CV 18-1838 (E.D. La. Aug. 18, 2020).

The U.S. District Court for the Eastern District of Louisiana recently reversed and remanded a U.S. Army Corps of Engineers (Corps) federal Clean Water Act (CWA) jurisdictional determination regarding two grass-covered, majority dry fields. The court noted a lack of appropriate evidence supporting the Corps' determination under two different Supreme Court tests.

Factual and Procedural Background

Plaintiff Gary Lewis owns two tracts of land, both of which are grassy, predominantly dry, and were previously used for timber farming. When water is present on the property, it flows from the tracts' roadside drainage ditches to an unnamed tributary, then to Colyell Creek (an "impaired" water), and then to Colyell Bay (a traditional navigable water). Water from Lewis' property travels some 10-15 miles before reaching Colyell Bay.

Lewis made plans to develop his land in July 2015 and therefore sought a jurisdictional determination from the Corps to determine whether the property was considered a wetland subject to the CWA. The following summer, the Corps issued its Approved

Jurisdictional Determination, concluding that some portions of each of Lewis' tracts were jurisdictional wetlands, and both tracts in their entireties were therefore subject to the CWA. Lewis challenged the Corps' decision, arguing in particular that the Corps incorrectly determined the size and location of the property's adjacent wetlands and improperly concluded that a significant nexus between Lewis' property and the adjacent wetlands existed. The Corps thereafter reviewed its decision and in November 2017 reached the same conclusion.

Lewis then appealed to the judiciary and filed a motion for summary judgment, explaining the Supreme Court's *Rapanos* decision required a different outcome. The Corps filed a cross-motion for summary judgment, contending that the district court owes the Corps' decision great deference and that the record establishes a significant nexus between Lewis' wetlands and the waterway.

In light of the parties' cross motions, the threshold issue before the District Court became whether factual evidence in the record supported the Corps' conclusion that portions of Lewis' property were wetlands subject to the CWA.

The District Court's Decision

Under the Administrative Procedure Act, agency actions, findings, and conclusions can be set aside only if the court finds the decision is arbitrary, capricious, or otherwise not in accordance with the law.

The *Rapanos* Decision and the Scalia and Kennedy Analyses for Corp Jurisdiction of Wetlands

In *Rapanos v. United States*, 547 U.S. 715 (2006), the United States Supreme Court delivered a plurality opinion explaining when a wetland is subject to the CWA. In it, Justice Scalia's plurality adopted the "adjacency test," under which only wetlands with a "continuous surface connection" to other navigable water bodies are subject to the CWA. Justice Kennedy filed a concurring opinion advancing the "significant nexus test," which subjects wetlands to the CWA when there is a "significant nexus between the wetlands in question and [traditional] navigable waters." Justice Kennedy's test relies on hydrologic and ecologic factors to determine if a wetland's connection with other water bodies is significant.

Circuit Courts have split on which approach is correct, and the Fifth Circuit has not endorsed any approach. The District Court is within the Fifth Judicial Circuit.

District Court Uses Both Approaches to Jurisdictional Determination

The court here declined to adopt either approach to wetlands and Corps jurisdiction, and, instead, evaluated the facts under both tests.

First, the court noted that the Corps acknowledged Lewis' land did not meet Justice Scalia's adjacency test. There was, therefore, no basis for CWA jurisdiction under this approach.

Second, the court considered Justice Kennedy's significant nexus test and concluded the nexus between Lewis' property and other water bodies was not significant. Regarding hydrologic factors, the court emphasized that the Corps observed only evidence of water flow from which it made inferences regarding the property's actual water flow and its impacts. But evidence of flow, the court explained, is not actual flow. Furthermore, the Corps relied on "field indicators" which likewise can only predict surface flow at some points during any given year. Since the Corps' analysis regarding the property's actual water flow relied only on inferences and predictions rather than actual observations, the court concluded the property's hydrologic factors weighed against CWA jurisdiction.

Considering the property's ecologic factors, the court again emphasized that the Corps' report was lacking. Because Lewis' land lies within a 500-year flood plain, the court explained, a portion of the property's pollutants will no doubt at some point flow downstream. Even still, the Corps' report failed to determine whether significant rain or flooding events occur often enough to have a substantial impact on the downstream water bodies. Therefore, since the Corps' report did not indicate the amount of pollutants actually traveling downstream and whether their collective effects were significant, the court concluded the ecologic factors, too, weighed against CWA jurisdiction.

Summary Judgment

After determining that both the hydrologic and ecologic factors weigh against the Corps' decision, the

court concluded Lewis was entitled to summary judgment as a matter of law and granted Lewis' motion. In doing so, the court dismissed the Corps' argument that its budgetary constraints limited its ability to determine with perfection whether a significant nexus existed. The court made clear that, regardless of budgetary or other constraints, Justice Kennedy's significant nexus cannot be established without demonstrating through the record a wetland's substantial effects on a traditional navigable waterway.

The court remanded the decision to the Corps for further consideration.

Conclusion and Implications

This case recognizes but does not specifically endorse any approach to Clean Water Act jurisdictional determinations for wetlands within the Fifth Circuit. It does, however, suggest that parties seeking to challenge a Clean Water Act jurisdictional determination in the Fifth Circuit should be prepared, when possible, to argue under each of the plurality's approaches. This case also evaluates the type of evidence needed to support a jurisdictional determination. The court's opinion is available here: https://www.govinfo.gov/content/pkg/USCOURTS-laed-2_18-cv-01838/pdf/USCOURTS-laed-2_18-cv-01838-0.pdf.
(Melissa Jo Townsend, Rebecca Andrews)

DISTRICT COURT BARS CITIZEN SUIT AGAINST COUNTY IN GEORGIA DUE TO THE DILIGENT PROSECUTION PROVISION OF THE CLEAN WATER ACT

South River Watershed Alliance, Inc. v. DeKalb County,
___F.Supp.3d___, Case No. 1:19-cv-04299-SDG (N.D. Ga. Aug. 31, 2020).

The U.S. District Court for the Northern District of Georgia recently dismissed a citizen suit seeking to enforce the federal Clean Water Act against a defendant that had previously executed a consent decree with the U.S. Environmental Protection Agency and state Environmental Protection Department. The court found that the plaintiffs' citizen suit sought to enforce the same "standard, order, or limitation" as the consent decree and that the plaintiff did not plausibly allege a lack of "diligent prosecution" by the government agencies. The court therefore held that the Clean Water Act's diligent prosecution provision barred the plaintiffs' action.

Factual and Procedural Background

The Clean Water Act (CWA) governs the discharge of pollutants into the navigable waters of the United States and prohibits the "discharge of any pollutant" from any point source without a permit authorizing such discharge. The CWA grants the U.S. Environmental Protection Agency (EPA) authority to issue such permits, known as National Pollutant Discharge Elimination System (NPDES) permits. The CWA also authorizes private citizens to file a civil action (citizen suit) against an alleged polluter in violation of an effluent standard or limitation under the CWA or an order issued by the EPA or a state with respect to such standard or limitation. However, this right is limited by the CWA's diligent prosecution provision, which prohibits the commencement of a citizen suit when the EPA or state has commenced and is diligently prosecuting a civil or criminal action to require compliance with a "standard, limitation, or order."

DeKalb County, Georgia (DeKalb), owns and operates a Water Collection and Transmission System (WCTS) designed to collect and transport wastewater to three locations. DeKalb is required to treat wastewater at these locations before discharging the water into surface water pursuant to NPDES permits issued by the Georgia Environmental Protection Department (EPD). In December 2010, the United States and the state of Georgia filed a complaint against DeKalb on behalf of the EPA and the EPD, respectively, alleging that, since 2006, DeKalb's WCTS experienced hundreds of untreated wastewater overflows that contained pollutants in violation of the CWA and the Georgia Water Quality Control

Act (GWQCA). In 2011, the District Court approved a consent decree executed by DeKalb, the EPA, and the EPD. Pursuant to the consent decree, DeKalb was to undertake several actions to achieve the stated goal of full compliance with the CWA and the GWQCA.

In 2019, plaintiffs initiated a citizen suit, alleging DeKalb violated the consent decree, the CWA, and its NPDES permits. DeKalb thereafter filed a motion to dismiss, arguing the plaintiffs' claims were barred by the CWA's diligent prosecution provision. Plaintiffs argued the 2011 consent decree was insufficient to ensure DeKalb's compliance and, alternatively, the government was not diligently prosecuting DeKalb for its violations.

The District Court's Decision

Prior to reviewing the motion to dismiss, the District Court determined whether the motion to dismiss was governed by Federal Rules of Civil Procedure (FRCP) Rule 12(b)(1), lack of subject-matter jurisdiction, or 12(b)(6), failure to state a claim. If the diligent prosecution provision is jurisdictional, the court stated, then Rule 12(b)(1) controls. Otherwise, FRCP Rule 12(b)(6) applies. The District Court determined that, because Congress did not provide a clear statement in the CWA that the diligent prosecution provision is a jurisdictional requirement, the provision was non-jurisdictional. Therefore, FRCP Rule 12(b)(6) applied.

Diligent Prosecution Provision

The District Court next determined whether the CWA's diligent prosecution provision barred the plaintiffs' citizen suit. The court applied the following two-part inquiry: first, the court must determine whether a prosecution by the state (or the EPA Administrator) to enforce the same "standard, order, or limitation" was pending on the date that the citizen suit commenced. If so, the court must then determine whether the prior pending action was being "diligently prosecuted" by the state or EPA at the time that the citizen suit was filed.

'Same Standard, Order or Limitation'

Under the first prong, the court may rely primarily on a comparison of the pleadings in the two actions to make its determination. The claims need not be identical for the action to cover the same standards and limitations. Comparing the plaintiffs' amended complaint with the 2010 complaint and the 2011 consent decree, the court concluded that there was substantial overlap in the standards and limitations on which the government and plaintiffs based their claims such that the two actions concerned the same "standard, limitation, or order." The court therefore addressed the second prong of the analysis: whether the EPA and the EPD were diligently prosecuting the claims raised in their 2010 complaint and addressed by the 2011 consent decree.

'Diligent Prosecution'

In analyzing the second prong, a court ordinarily considers a CWA enforcement prosecution "diligent" if the judicial action is capable of requiring compliance with the CWA and is in good faith calculated to do so. Diligence is presumed, and the burden for proving non-diligence is heavy. A plaintiff must do more than show that the agency's prosecution strategy is less aggressive than the plaintiff would like or that it did not produce a completely satisfactory result. That is, a plaintiff must show that the government's actions are incapable of requiring compliance with the applicable standards.

The District Court quickly dismissed DeKalb's first argument–that the 2011 consent decree alone was sufficient to establish diligent prosecution–noting that the consent decree's language did not limit the rights of third parties, not a party to the consent decree, against DeKalb. Moreover, such a conclusion would diverge from clearly established law, the court stated.

The District Court, however, agreed with DeKalb's second argument that the government agencies' ongoing efforts to require compliance with the 2011 consent decree established diligent prosecution. Specifically, plaintiffs had alleged that sewage discharges from the WCTS into watersheds had not decreased in either priority or non-priority areas since the entry of the 2011 consent decree, the fines were too low to force compliance, DeKalb failed to meet a June 20, 2020 deadline to rehabilitate priority areas, the consent decree did not establish a timeline to rehabilitate nonpriority areas, and DeKalb implemented a different type of hydraulic model, with permission, than that required by the consent decree.

With regard to DeKalb's continued sewage dis-

charges, the court focused on the government's repeated fining of DeKalb for noncompliance, reasoning that an "unsatisfactory result does not necessarily imply lack of diligence." The court was also unpersuaded by the plaintiffs' criticisms of the fine amounts, concluding that the appropriate fine amount is the type of discretionary matter to which the court should defer to the government agencies' expertise. Further, the court noted the plaintiffs did not allege the bad faith needed to overcome the heavy presumption of diligence. As to DeKalb's failure to meet the June 20 deadline, the court reasoned that DeKalb's breach did not translate into a factual allegation of non-diligent prosecution by the government. Finally, as with the determination of the fine amount, the court reasoned that the government agencies' decision to not include a timeline for nonpriority areas and to permit DeKalb to implement a different hydraulic model than required by the consent decree were discretionary decisions best left to the agencies' expertise. Thus, the court held that the plaintiffs failed to allege any facts that could plausibly overcome the heavy presumption of diligence afforded to the government agencies.

Conclusion and Implications

This case demonstrates that an alleged polluter is not immunized from citizen suits under the CWA simply by entering into a consent decree with the government. However, for such an action to survive a motion to dismiss, a plaintiff must allege facts that state a plausible lack of diligence by the government agencies beyond mere disagreement with the agencies' approach. Instead, the plaintiff must allege facts that plausibly state the government's actions are incapable of requiring compliance with the applicable standards. The court's opinion is available online at: https://www.courtlistener.com/recap/gov.uscourts.gand.268968/gov.uscourts.gand.268968.57.0.pdf. (Heraclio Pimentel, Rebecca Andrews)

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

CHANGE SERVICE REQUESTED

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