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C O N T E N T S

FEATURE ARTICLE

NEPA Regulations Overhaul and Their Impact on Climate Change Considerations by Darrin Gambelin, Esq. and Hina Gupta, Esq., Downey Brand, San Francisco, California 3

WESTERN WATER NEWS

Ongoing Mexico/U.S. Cross-Border Sewage Contamination Fuels Public Outcry..... 9

REGULATORY DEVELOPMENTS

U.S. Army Corps of Engineers Reissues and Proposes Modifications to Nationwide Permit Program Amidst Uncertainty Surrounding Nationwide Permit 12 11

Colorado Water Quality Control Commission Adopts New Policy Addressing PFAS, Forever Chemicals13

Washington State Department of Ecology Proposes New Areas of Adjudication 15

PENALTIES AND SANCTIONS

Recent Investigations, Settlements, Penalties and Sanctions 17

LEGISLATIVE DEVELOPMENTS

Congress Considers Amendment to Expand the Reach of the Water Infrastructure Finance and Innovation Act 20

Continued on next page

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JUDICIAL DEVELOPMENTS

Federal:

Ninth Circuit Affirms Order Vacating the Delisting of the Yellowstone Grizzly Population 22

Crow Indian Tribe v. United States, 965 F.3d 662 (9th Cir. 2020).

Tenth Circuit Rules in Favor of New Mexico Pueblo Indian Tribes Holding Pueblo Water Rights Not Extinguished by Spain 23

United States on Behalf of the Pueblos of Jemez, Santa Ana and Zia v. Abouselman, ___F.3d___, Case No. 18-2164 (10th Cir. Sept. 29, 2020).

District Court Orders EPA to Provide More Frequent Status Reports on Development of Anacostia

River Clean Water Act TMDL 26
Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency, ___F.Supp.3d___, Case No. 16-1861(JDB) (D. D.C. Sept. 21, 2020).

District Court Approves Consent Decree Between Federal, State and Local Government Which Aims to Remedy Clean Water Act Violations 28

U.S. and State of Texas v. City of Corpus Christi, ___F. Supp.3d___, Case No. 2:20-cv-00235 (S.D. Tex. Sept. 25, 2020)

State:

Utah Supreme Court Clarifies Elements for Claims of Interference of Water Rights 29

Arave v. Pineview West Water Company, 2020 UT 67 (2020).

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FEATURE ARTICLE

NEPA REGULATIONS OVERHAUL AND THEIR IMPACT
ON CLIMATE CHANGE CONSIDERATIONS

By Darrin Gambelin and Hina Gupta

In a long-awaited move, on July 16, 2020, the White House Council on Environmental Quality (CEQ) published a final rule, “Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act” (Final Rules), updating the regulations implementing the National Environmental Policy Act of 1969 (NEPA). (85 Fed. Reg. 43,304 (July 16, 2020).) CEQ is tasked with promulgating regulations to implement these NEPA requirements under the statute. (See, 42 U.S.C. §§. 4332(2)(B), (C), (I), 4342, 4344(3) (directing CEQ to “review and appraise” federal programs and activities to determine the extent to which they fulfill the statute’s stated policy, and to make recommendations to the President).) These CEQ revisions are the first significant update of the NEPA regulations in over 40 years. The Final Rules “comprehensively updates, modernizes, and clarifies the regulations to facilitate more efficient, effective, and timely NEPA reviews,” and “eliminate[s] some measure of unnecessary and burdensome delays that have hampered national infrastructure and other important projects.” (85 Fed. Reg. at 43,304, 43,306.)

The Final Rules include significant revisions to NEPA regulations including: changes to the definition of “effects” (40 C.F.R. §1508(g) (2020); 85 Fed. Reg. at 43,343); inclusion of a new “NEPA threshold” application section providing several factors for agencies to consider when determining whether NEPA even applies to a proposed action (40 C.F.R. §1501.1 (2020); 85 Fed. Reg. at 43,320); revisions to the definition of “Major Federal Action,” to clarify that non-discretionary decisions or decisions involving minimal federal funding are not subject to NEPA (85

Fed. Reg. at 43,320, 43,345-46); and allowing greater flexibility to the federal agencies to expand the use of categorical exclusions (40 C.F.R. §§ 1501.4 (2020); 85 Fed. Reg. at 43,322, 43,336.) Some of these changes represent a departure from the current case law and federal agencies’ NEPA practice.

Of these changes, the most impactful for energy projects will likely stem from how the effects of greenhouse gas (GHG) emissions on climate change are reviewed under NEPA. The Final Rules have altered the definition of environmental “effects” to remove categorization of environmental effects into direct, indirect and cumulative effects. Instead, federal agencies are directed to assess only environmental effects that are “reasonably foreseeable” and have a “reasonably close causal relationship” to the proposed action. CEQ states that analysis of climate change impacts is not precluded by the Final Rules, but the link between the proposed project and the effects must be more than speculative. Environmental groups argue that these revisions will severely narrow the extent to which effects on climate change resulting from a project’s GHG emissions, specifically indirect impacts such as upstream and downstream emissions from fossil fuel projects, will be analyzed under NEPA. These groups argue that the changes are inconsistent with the recent case law that has relied on discussion of indirect and cumulative effects of a project to require the federal agencies to analyze such upstream and downstream impacts of GHG emissions of these projects under NEPA. Given the opposition from stakeholders such as environmental advocacy groups about these changes, the Final Rules are likely to be mired in litigation, in addition to other procedural impediments in implementing these rules.

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Background on Climate Change Considerations under NEPA

NEPA requires federal agencies to take a “hard look” at environmental “effects” and obtain public input when undertaking a “major federal action significantly affecting the quality of the human environment” by requiring the agencies to prepare a detailed Environmental Impact Statement (EIS). (42 U.S.C. § 4332(2)(C); *see, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989).) The EIS must discuss: 1) The environmental impact of the proposed action; 2) any adverse environmental effects that cannot be avoided; 3) alternatives to the proposed action; 4) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity; and 5) any irreversible and irretrievable commitments of resources that would be involved in the proposed action. (42 U.S.C. § 4332(2)(C).)

Up until the Final Rules took effect on September 14, 2020 (85 Fed. Reg. at 43,304), the federal agencies analyzed three types of “effects”: direct effects, indirect effects, and cumulative effects (40 C.F.R. §§ 1508.7, 1508.8(a), (b) (2016).) Direct effects of a project were “caused by the action and occur at the same time and place.” (40 C.F.R. § 1508.8(a) (2016).) Indirect effects of a project were reasonably foreseeable effects of a project occurring “later in time or farther removed in distance,” and included:

. . .growth inducing effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems. (*Id.* at (b).)

And, cumulative effects of project were:

. . .the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions. (*Id.* at § 1508.7.)

In the context of global climate change and GHG impacts, most federal courts have found that NEPA requires an analysis of the indirect and cumulative effects of a project. For example, the D.C. Circuit has held that the Federal Energy Regulatory Commis-

sion (FERC) was required to reasonably estimate the amount of power-plant carbon emissions that pipelines would make possible downstream as an indirect environmental effect, or explain specifically why it could not make such an estimate in EIS for three new interstate natural-gas pipelines in southeastern United States. (*Sierra Club v. Fed. Energy Regulatory Comm’n*, 867 F.3d 1357, 1374 (D.C. Cir. 2017).) In another case, the Ninth Circuit found that federal agencies must evaluate climate change impacts under NEPA as “the impact of [GHG] gas emissions on climate change is precisely the kind of cumulative impact analysis that NEPA requires agencies to conduct.” (*Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008).)

To implement these requirements, over the years, CEQ has issued several versions of draft and final guidance regarding analyzing climate change impacts resulting from a project’s GHG emissions under NEPA.

Climate Change Guidance under the Obama Administration

The CEQ issued its first draft guidance on climate change considerations in NEPA reviews on February 18, 2010. (*See*, CEQ, Draft NEPA Guidance on Consideration of The Effects of Climate Change and Greenhouse Gas Emissions, 75 Fed. Reg. 8,046, at 1 (proposed Feb. 18, 2020).) [PDF of the 2010 Draft Guidance is available at: <https://obamawhitehouse.archives.gov/sites/default/files/microsites/ceq/20100218-nepa-consideration-effects-ghg-draft-guidance.pdf>]

This draft guidance provided a threshold level of direct GHG emissions of 25,000 metric tons of CO₂ equivalent annually as an indicator that analysis of climate impacts of a project was warranted under NEPA. (*Id.* at 1) But even for projects below this threshold, the guidance suggested that the agencies consider the project’s cumulative long-term emissions. (*Id.* at 1-2)

CEQ issued another draft guidance for GHG analysis on December 24, 2014. (Revised Draft Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and The Effects of Climate Change, 79 Fed. Reg. 77,802, at 1 (proposed Dec. 24, 2014).) [PDF of the 2014 Draft Guidance is available at: https://obamawhitehouse.archives.gov/sites/default/files/docs/nepa_revised_draft

[ghg_guidance_searchable.pdf](#)] This guidance had the same 25,000 metric tons significance threshold for a project's direct GHG emissions; but this draft recommended that the agencies also consider the impacts of climate change on the proposed agency action, in addition to the impacts of the project's direct GHG emissions on the environment. (*Id.* at 24.)

The CEQ then issued the final guidance on consideration of climate change impacts in NEPA reviews on August 1, 2016 (Final Guidance). (CEQ, Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and The Effects of Climate Change in National Environmental Policy Act Reviews, at 1-2 (Aug. 1, 2016).) [2016 Final Guidance available at: https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/nepa_final_ghg_guidance.pdf]

Similar to the second draft guidance, the Final Guidance continued to frame climate change considerations in NEPA reviews as “the potential effects of a proposed action on climate change as indicated by assessing GHG emissions,” and the “effects of climate change on a proposed action.” (Final Guidance, at 4.) But the Final Guidance recommended the agencies quantify both the direct and indirect GHG emissions of their proposed actions. (Final Guidance, at 11.) In addition, the Final Guidance described the widely available, and broadly used quantification tools for quantitative GHG analysis; and where the agency determined that quantification of GHG emissions is not warranted as such quantification tools are not reasonably available, the CEQ suggested that the agency provide a qualitative analysis and their “rationale for determining that the quantitative analysis is not warranted.” (Final Guidance, at 12-13.) However, the suggested 25,000 metric ton significance threshold of the draft guidance documents was notably absent from the Final Guidance. (*See generally, id.*)

Climate Change Guidance under the Trump Administration

On March 18, 2017, President Donald Trump issued an Executive Order to withdraw the Final Guidance, effective April 5, 2017. (Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 31, 2017); Withdrawal of Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, 82 Fed.

Reg. 16,576 (Apr. 5, 2017).) On June 26, 2019, CEQ issued a draft guidance titled “Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions” (2019 Draft Guidance). (CEQ, Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions, 84 Fed. Reg. 30,097 (Jun. 26, 2019).) Unlike the 2016 Final Guidance that had an extensive list of GHG considerations for federal agencies, the 2019 Draft Guidance proposed a streamlined approach to analyzing the GHG emissions impacts under NEPA. (*See generally, id.*) This guidance required quantification of a project's direct and reasonably foreseeable indirect GHG emissions, only when such emissions are “substantial enough to warrant quantification,” and when it is “practicable[,] to quantify them using available data and GHG quantification tools.” (*Id.* at 30,098.) When the quantification is not practicable or overly speculative, then the agency should explain its decision. (*Ibid.*) While the guidance did not address what would be considered “substantial,” it suggested that agencies follow a “rule of reason,” such that there is a close causal relationship between the proposed action and anticipated GHG emissions to include such emissions in NEPA analysis. (*Ibid.*) Further, the draft guidance stated that the agencies need not prepare separate cumulative effects analyses, nor undertake new research or analysis of climate effects. (*Ibid.*)

On January 10, 2020, the CEQ then published the proposal of a major overhaul of NEPA regulations that included significant changes from the past NEPA practice. (CEQ, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1,684 (Jan. 10, 2020).) While the CEQ refused to issue explicit guidance on analysis of GHG emissions and potential climate change impacts as part of these proposed regulations update, some of the proposed changes to NEPA regulation, including proposed revisions to the definition of environmental “effect” had practical implications for GHG analyses under NEPA. (85 Fed. Reg. at 1,708.)

Final Rules Update and Its Impacts on NEPA's GHG Analysis

Although the Final Rules do not directly address GHG or climate change analysis, changes to how effects and impacts are defined are likely to significantly

change how federal agencies approach the GHG analyses. The Final Rules redefined “effects” to eliminate references to “direct,” “indirect,” and “cumulative” effects, and repealed the requirement to consider cumulative impacts. (85 Fed. Reg. at 43,343 and 43,337) In doing so, the Final Rules largely tracked the revisions proposed to the definition of “effects” in proposed NEPA regulations in January 2020.

In response to the changes to the definition of “effects” in proposed NEPA regulations, several commenters had expressed concerns that such revisions would result in impacts of climate change on a proposed project no longer being taken into account under NEPA. (Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act Final Rule Response to Comments (RIN 0331-AA03) (Jun.30, 2020) (hereinafter: Response to Comments for Final Rules), [Available at: <https://www.whitehouse.gov/wp-content/uploads/2020/01/CEQ-NEPA-Regulations-Final-Rule-Response-to-Comments-Final.pdf>] at 466-467, 481-82; see also, 85 Fed. Reg. at 43,331.) But CEQ asserted that these changes were necessary because, over the years:

...the terms ‘indirect’ and ‘cumulative’ have been interpreted expansively resulting in excessive documentation about speculative effects” and led ‘to frequent litigation. (*Id.* at 43,343.)

Further, while NEPA refers to environmental impacts and environmental effects, “the terms ‘direct,’ ‘indirect,’ or ‘cumulative’ are not in the text of the statute.” (*Ibid.*) CEQ asserts that such a requirement to categorize the project’s effects as direct, indirect, or cumulative has resulted in the agencies devoting “substantial resources to categorizing effects,” when such terms are not even referenced in the NEPA statute. (*Ibid.*) Thus, in removing this categorization of effects, CEQ aims to shift an agency’s focus on the effects of a proposed action, as opposed to the *type* of effect.

The Final Rule now defines the term “effects” or “impacts” as:

...changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or al-

ternatives, including those effects that occur at the same time and place as the proposed action or alternatives and may include effects that are later in time or farther removed in distance from the proposed action or alternatives. (40 C.F.R. § 1508.1(g) (2020); 85 Fed. Reg. at 43,375.)

Thus, the Final Rule requires effects of an action to be reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives. (*Id.* at 43,343.) “Reasonably foreseeable” effects are now limited to “what a person of ordinary prudence in the position of the agency decision maker would consider in reaching a decision.” (85 Fed. Reg. at 43,351.) CEQ also explains that agencies “should not consider an effect significant if they are remote in time, geographically remote, or the result of a lengthy causal chain.” (40 C.F.R. § 1508.1(g) (2) (2020); 85 Fed. Reg. at 43,353, 43,375.) The mere “‘but for’ causal relationship is insufficient to make an agency responsible for a particular effect,” and CEQ compared the causal relationship of “effects” to the tort law’s proximate causation. (40 C.F.R. § 1508.1(g) (2) (2020); 85 Fed. Reg. at 43,375.) CEQ also stated that it is now working to revise its December 2019 Draft Guidance on GHG considerations for consistency with Final Rules. (85 Fed. Reg. at 43,351.)

The new requirement that impacts must be “reasonably foreseeable and have a reasonably close causal relationship to the proposed action” is likely to result in significant changes to how GHGs and climate effects are analyzed. Climate effects of a single project, even if it is a large infrastructure or energy project, are undetectably small, making it difficult to establish foreseeability and causal relationships of the project-related GHG emissions to a specific global impact such as potential climate effects. (*WildEarth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013).)

Further, environmental advocacy groups argue that the new “effects” framework, which does not specifically require analysis of indirect impacts, is likely to lead to reduced consideration of upstream or downstream emissions of GHG. For many energy projects, such as oil and gas leases or pipelines, indirect emissions from the downstream combustion of fossil fuels may be far greater than direct emissions. Federal actions approving such projects have often resulted in legal challenge to federal agencies’ consideration of GHG impacts. (See *e.g.*, *N. Plains Res. Council, Inc.*

v. Surface Transp. Bd., 668 F.3d 1067, 1080 (9th Cir. 2011). (finding that upstream emissions of coal mines for a rail project transporting coal from that mine as reasonably foreseeable “effect” of rail project); *WildEarth Guardians v. U. S. Office of Surface Mining, Reclamation & Enft*, 104 F.Supp.3d 1208, 1230 (D. Colo. 2015) (agency must consider downstream emissions from coal combustion); but see *Sierra Club v. Clinton*, 746 F.Supp.2d 1025, 1045 (D. Minn. 2010) (finding agency not required to evaluate upstream emissions under NEPA for a pipeline project exporting tar sands oil).

In response to such comments, however, CEQ states that it added the word “generally” in revised 40 C.F.R. § 1508.1(g)(2) of the Final Rules, a change from the CEQ’s Proposed Rules, when addressing remoteness in time, geography, or relationship. (Response to Comments for Final Rule, at 478.) The change:

...reflect[s] that there may occasionally be a circumstance where an effect that is remote in time, geographically remote, or the product of a lengthy causal chain is reasonably foreseeable and has a reasonably close causal connection to the proposed action. (85 Fed. Reg. at 42,204, 43,343-44.)

Thus, per CEQ, the federal agencies have the ability for agencies to consider effects of greenhouse gases, if they can show a close causal relationship to a proposed action.

Environmental groups have also expressed concern that the elimination of cumulative impacts will reduce the scope of climate change impacts of a project and impacts of climate change on the project from being analyzed under NEPA. In response, CEQ, in the preamble of the Final Rules clarified that consideration of the cumulative and indirect effects of climate change are not precluded by the Final Rules. The Final Rule states that “the impacts on climate change will depend on the specific circumstances of the proposed action,” and that the agencies “will consider predictable trends in the area in the baseline analysis of the affected environment.” (*Id.* at 43,331, 43,344) In response to the comments received on the January 2020’s Proposed Rules, CEQ made changes in the Final Rules such that the “Affected Environment” section of the EIS “include[es] the reasonably

foreseeable environmental trends and planned actions in the area(s).” (40 CFR § 1502.15 (2020); 85 Fed. Reg. at 43,331) Thus:

...[t]rends determined to be a consequence of climate change would be characterized in the baseline analysis of the affected environment rather than as an effect of the action. (85 Fed. Reg. at 43,331.)

For example, under the Final Rules, when reviewing a water intensive project, the affected environment section will describe if the area is expected to become drier or wetter in the coming decades; or for a project located close to a sea, whether the project location will be affected by sea-level rise or not in the coming decades.

However, because the Final Rule cautions that “[d]iscussion of the affected environment should be informative,” and not speculative (85 Fed. Reg. at 43,331), it is possible that a federal agency may interpret this to mean that any discussion of climate change impacts from a single project is too speculative. Should this approach be adopted, it would appear to be in conflict with several recent court decisions finding that a federal agency must assess a project’s GHG impacts under NEPA. (*See, e.g., Sierra Club v. Fed. Energy Regulatory Comm’n*, 867 F.3d 1357 (D.C. Cir. 2017); *WildEarth Guardians v. Zinke*, 368 F.Supp.3d 41 (D. D.C. 2019); *Indigenous En’vtl. v. U.S. Dep’t of State*, 347 F.Supp.3d 561 (2018).)

Conclusion and Implications

Because the Final Rules appear to make changes that could result in significant departures from current NEPA practice, particularly when it comes to how GHG and climate change impacts should be analyzed, it is very likely that the Final Rules will be challenged in court, either on their face or as applied to individual projects, or more likely both. In fact, some environmental interest groups have already brought challenges to the Final Rules in Virginia and California federal District Courts, alleging violations under NEPA and the Administrative Procedure Act (APA). [The complaint filed the United States District Court for the Western District of Virginia is available at: https://www.southernenvironment.org/uploads/words_docs/Final_complaint1.pdf, and the complaint filed in the United States Dis-

trict Court for the Northern District of California is available at: <https://westernlaw.org/wp-content/uploads/2020/07/2020.07.29-CEQ-NEPA-Complaint.pdf> Among other things, the complaints argue that the regulations are arbitrary and capricious and contrary to the statute, and invalidly amend judicial review standards. In addition, the next U.S. Congress will have an opportunity to nullify the amendments under the Congressional Review Act.

Even absent considerations of the Congressional Review Act and litigation, the full impact of Final Rules is unlikely to be felt right away, as the Final Rules provide other federal agencies and departments until September 2021 to “develop or revise, as necessary, proposed procedures to implement” CEQ’s regulations. (85 Fed. Reg. at 43,373.) In addition, CEQ itself is still working to revise its December

2019 Draft Guidance on GHG considerations under NEPA for consistency with Final Rules.

Once the agencies provide their own rules and guidance and apply these to NEPA evaluations, we will likely see additional litigation related to GHG and climate impacts. Environmental groups will likely argue that “indirect” and “cumulative effects”—such as upstream or downstream increases in GHG emissions—do have a “close causal relationship” to at least certain major federal actions such as fossil fuel production or transportation projects. But with the CEQ’s analogy to proximate causation, the Final Rule amendments to effects do seem to narrow the ability of federal agencies to some extent to define certain upstream or downstream emissions as “effects” of a project. It will be interesting to see how other agencies and courts will define a “close causal connection” in those instances.

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Darrin and Hina are members of the Editorial Board of the *Environmental, Energy and Climate Change Law & Regulation Reporter*.

WESTERN WATER NEWS**ONGOING MEXICO/U.S. CROSS-BORDER SEWAGE CONTAMINATION
FUELS PUBLIC OUTCRY**

Longstanding frustrations regarding the intrusion of raw sewage from Mexico into the San Diego region have come to a head over the past year, sparking a public war of words between Imperial Beach Mayor Serge Dedina and Mexican Governor of Baja California Jaime Bonilla. While recent efforts have largely alleviated a sharp increase in contamination seen since late 2019, more permanent solutions to the ongoing issue remain somewhat elusive, particularly due to the international cooperation and coordination required. Nonetheless, heightened public awareness and recent developments at the state and federal levels have generated some optimism that the long-term situation will be taken more seriously and managed more effectively.

Background

Wastewater pollution from Mexico has affected many communities in the San Diego region for decades, but the issue was notably exacerbated by the failure of Mexican pumps needed to contain the sewage in November 2019. It has been estimated that the volume of sewage intrusion in 2020 has averaged 50-60 million gallons per day in dry weather alone, with the pollution causing illness and lengthy beach closures in communities as far north as Coronado over the past year.

Human exposure to the water can bring people into contact with a number of harmful pathogens including *E. coli*, *Vibrio*, and *Salmonella*. According to Mayor Dedina, both he and his son have become physically ill from polluted waters, along with other Imperial Beach residents and others such as border patrol officers and Navy personnel. Dedina claims pollution levels this year have been in excess of anything he has seen before.

EPA Proposals to Address the Problem

In September 2020, the U.S. Environmental Protection Agency (EPA) announced measures aimed at improving the situation, particularly infrastructure

repairs to leaking pipes, broken pumps and collectors. These measures have been characterized as short-term solutions to a larger problem, though by most accounts they have markedly reduced the dire levels of contamination seen earlier this year. Action by the EPA follows sharp criticisms of the Trump administration's lack of initiative with respect to the matter, and the administration has been hit with a number of Clean Water Act lawsuits filed by several cities in the San Diego area.

Regarding long-term solutions, regional representatives were able to help secure \$300 million in funds for additional infrastructure as part of the renegotiated North America Free Trade Agreement, aimed at capturing the sewage before reaching American shorelines. Efforts to date, like those undertaken by the EPA in September, have largely been focused on assisting Mexico with the maintenance of Tijuana's wastewater infrastructure.

A Public War of Words

Governor Bonilla has been a central player in the matter on the Mexican side since assuming office in June 2019, and has openly bristled at the notion that his government bears the primary responsibility for the pollution. In September 2020, Bonilla held multiple news conferences in which he called for an apology from Dedina for his public remarks blaming Mexico. Governor Bonilla has said that the broken pumps have been fixed and trash has been cleared along the Valley, sufficiently addressing the problem on the Mexican side. Bonilla has also suggested that Dedina's attacks reflect an attempt to raise his political profile. Dedina has been outspoken regarding his desire to be selected by Governor Newsom as Kamala Harris' replacement in the U.S. Senate should be elected vice president.

For his part, Mayor Dedina has consistently rebuffed Bonilla's denials and attacks. Notwithstanding the progress that has been made by the recent repairs, Mayor Dedina cites continuing problems with an overburdened Punta Banderas pump station

six miles south of the border that continues to leave his city vulnerable to pollution drifting north. In late September, Mayor Dedina characterized recent progress as having addressed the “apocalyptic situation” that developed over the past year, but said Imperial Beach continues to grapple with “the normal horrific situation that still needs to be fixed.” Accordingly, Mayor Dedina has scoffed at the notion of apologizing, noting that substantial progress would have to be made prior to any such statement. Supporting his claims, a recent report of the International Boundary and Water Commission confirmed excessive pollutant levels in the Tijuana River Basin based on samples that were taken prior to the major pump failures in late 2019.

Raised Public Awareness and a California Bill

Despite the unpleasanties between himself and Gov. Bonilla, Mayor Dedina believes the feud has helped his community by raising public awareness in the U.S. and Mexico and adding pressure on Bonilla to address the issues at the Punta Banderas pump station. Mexican news outlets report that Baja California officials are aware of the issues at the station, and have plans for repairs to be financed by federal funding expected sometime next year.

In addition to local and federal efforts to resolve the cross-border contamination threat, the California State Legislature enacted Senate Bill (SB) 1301 on September 30, which requires the development of a Tijuana River Valley Watershed Action Plan. The plan will examine strategies for addressing the sewage contamination in the region and for promoting coordination among the state, federal government

and Mexican government, as well as other interested parties with respect to the implementation of solutions on both sides of the border. SB 1301 requires the plan to be developed jointly by the California Environmental Protection Agency and the Natural Resources Agency, and to be reviewed and updated every 3 years. In addition to facilitating cooperation among the parties involved, SB 1301 indicates the state’s desire to take matters into its own hands to the extent that such cooperation cannot be effectively achieved.

Conclusion and Implications

The cross-border nature of the problem and currently fraught relationship between the U.S. and Mexican governments makes solutions more difficult to achieve. Moreover, the Trump administration’s lack of focus with respect to environmental issues has been viewed by many as an obstacle. Nonetheless, progress has been made mitigate the alarming conditions that developed in 2020 due to recent infrastructure failures in Mexico. It remains to be seen whether more permanent solutions will be implemented using the federal funding secured in connection with the NAFTA renegotiation, and whether the Punta Banderas station will be repaired as suggested by reports from Mexican media sources. Despite the uncertainty, the new state initiatives of SB 1301 should promote continuing progress. The outlook would be further improved by the reinvigoration of the federal commitment to environmental issues that could be expected from a possible Biden administration.
(Wes Miliband)

REGULATORY DEVELOPMENTS

**U.S. ARMY CORPS OF ENGINEERS REISSUES AND PROPOSES
MODIFICATIONS TO NATIONWIDE PERMIT PROGRAM
AMIDST UNCERTAINTY SURROUNDING NATIONWIDE PERMIT 12**

On April 15, 2020, the U.S. District Court for the District of Montana vacated Nationwide Permit (NWP) 12 on the basis that the U.S. Army Corps of Engineers' (Corps) reissuance of NWP 12 in 2017 did not comply with § 7 of the federal Endangered Species Act (ESA), reasoning that the Corps failed to consult with the U.S. Fish and Wildlife Service (FWS) and/or National Marine Fisheries Service (NMFS) regarding the effect of reissuing NWP 12 on listed species. *See, Northern Plains Resource Council v. U.S. Army Corps of Engineers*, Case No. 4:19-cv-00044 (D. Mt. Apr. 15, 2020) (NPRC). NWPs authorize certain construction, maintenance, and repair activities under § 404 of the federal Clean Water Act (CWA) and § 10 of the Rivers and Harbors Act of 1899. NWP 12, which applies to activities for utility lines such as cables and pipelines, is routinely used by permittees to streamline CWA permitting requirements.

The Corps has since appealed the District Court's decision on NWP 12 to the U.S. Court of Appeals for the Ninth Circuit. Case No. 20-35412 (9th Cir.). However, given the uncertainty surrounding the validity of NWP 12, other similar risks to the validity of other Corps-issued NWPs, and in light of various presidential orders to further streamline federal permitting, on September 15, 2020, the Corps officially published a proposed rulemaking that the Corps is reissuing the Corps' 52 existing NWPs and proposing the issuance of five new NWPs. *See, Proposal To Reissue and Modify Nationwide Permits*, 85 Fed. Reg. 57,298 (Sept. 15, 2020). Significantly, the Corps also announced that it is dividing NWP 12 into three separate NWPs. While the current NWP 12 will be authorized only for oil and natural gas pipeline activities, the Corps will issue two new NWPs that will authorize activities tied to electric utility lines/telecommunication lines and utility lines that convey water, sewage, and other substances.

NWP Background

The Corps is responsible for implementing the provisions of the CWA, including requiring permits for construction activities that involve dredge and fill of water features (including wetlands) subject to the CWA's jurisdiction. *See*, 33 U.S.C. § 1344. The Corps generally grants CWA permits in one of two ways: it issues individual permits (IPs) tailored to specific projects (*id.* at § 1344(a)), or it promulgates general permits, such as NWP 12, and later "verifies" that specific manifestations of a generally approved type of project, such as crossings by pipelines and other utility lines, qualify thereunder (*see id.* at § 1344(e)). If a project does not fall within the contours of a general nationwide permit such as NWP 12, then absent a few additional permitting options (*e.g.*, use of a Regional Permit), an individual permit is required.

Legal Challenge to NWP 12

As noted above, the U.S. District Court for the District of Montana vacated NWP 12 on the basis that the Corps failed to comply with ESA § 7 when the Corps reissued NWP 12 in 2017. ESA § 7(a)(2) requires federal agencies to determine "at the earliest possible time" whether an agency-proposed action "may affect" an endangered or threatened species listed under the ESA. If the agency determines that the proposed action "may affect" a species or critical habitat, the agency must consult with the FWS and/or the NMFS regarding the effect of the proposed action. In 2017, the Corps did not consult with either of these agencies because the Corps decided NWP 12 General Condition 18 (Endangered Species) would preclude effects on listed species or habitat. However, in *NPRC*, the court found that General Condition 18 does not necessarily impose an obligation on the Corps to comply with ESA § 7 at a program-wide level, rather that determination is delegated to non-

federal permittees at the individual project level. Moreover, because the Corps is required to make this determination “at the earliest possible time,” the court reasoned the Corps should have done this when NWP 12 was reissued, not at a later time when General Condition 18 is triggered.

As a result, the District Court vacated NWP 12 and remanded NWP 12 to the Corps to consult with the FWS and/or the NMFS. The court also enjoined the Corps from authorizing any NWP 12 activities until the Corps complied with this requirement. On May 11, 2020, the District Court amended its order to vacate NWP 12 only for construction of new oil and gas pipelines, but declined to stay or further limit its order. The Corps appealed the District Court’s decision to the Ninth Circuit and requested a stay of the court’s decision on other projects pending that appeal. Although the Ninth Circuit denied the request for a partial stay, the U.S. Supreme Court later granted a stay of the District Court’s limited injunction pending the appeal before the Ninth Circuit. A decision from the Ninth Circuit is not expected until early next year.

U.S. Army Corps’ Reissuance and Proposed Modifications to NWPs

In light of the uncertainty surrounding NWP 12 and other presidential orders to further streamline federal permitting, the Corps is now proposing to reissue all 52 existing NWPs, as well as the issuance five new NWPs. With respect to NWP 12, the Corps is proposing to limit the existing NWP 12 to oil and natural gas pipeline activities. Further, the Corps intends to authorize electric utility line and telecommunications activities under new NWP “C,” and utility lines that convey substances other than oil or natural gas or electricity such as water or sewage under new NWP “D.” Part of the Corps’ intent with this proposal is to tailor these NWPs to more effectively address potential differences in how the different types of utility lines are constructed, maintained, and removed, and to potentially add industry-specific standards or best management practices that would be appropriate for the NWPs. Among other changes,

the Corps is also proposing to limit or remove certain pre-construction notification thresholds under existing NWP 12 that should help shorten the project timelines. In addition, the Corps is proposing a new pre-construction notification threshold for NWP 12 (proposed oil or natural gas pipeline activities) where the overall project is greater than 250 miles in length, and the purpose of the project is to install new pipeline along the majority of the overall project length.

Two of the other new proposed NWPs will authorize certain categories of mariculture activities (e.g., seaweed and finish mariculture) that are not currently authorized by NWP 48. The last proposed new NWP will authorize the discharge of dredge and fill material into jurisdictional waters for the construction, expansion, and maintenance of water reuse and reclamation facilities.

Conclusion and Implications

As of the writing of this article, the current deadline for submitting public comments on the Corps’ proposal is November 16, 2020.

It remains to be seen how the Corps’ current rule-making and the litigation before the Ninth Circuit (and beyond) will unfold. When ruling on the appellants’ request to stay the District Court’s decision, the Ninth Circuit did conclude that the appellants had not demonstrated a sufficient likelihood of success on the merits and the probability of irreparable harm to warrant a stay pending appeal. This can be taken as a preliminary indication that the Ninth Circuit will uphold the District Court’s decision. However, as noted above, the U.S. Supreme Court later granted a stay of the District Court’s decision and it is not out of the realm of possibility that the entire case eventually ends up before the U.S. Supreme Court. With the make-up of the Court now shifting and a presidential election only weeks (days) away, the impact of a potential Biden Administration could also impact the Corps’ pending rulemaking. The Proposal To Reissue and Modify Nationwide Permits is available online at: <https://www.federalregister.gov/documents/2020/09/15/2020-17116/proposal-to-reissue-and-modify-nationwide-permits> (Patrick Veasy, Darrin Gambelin)

COLORADO WATER QUALITY CONTROL COMMISSION ADOPTS NEW POLICY ADDRESSING PFAS, FOREVER CHEMICALS

The Colorado Water Quality Control Commission (Commission) adopted Policy 20-1, the state's first-ever policy for interpreting narrative water quality standards for Per- and Polyfluoroalkyl Substances (PFAS). The new water quality policy applies to all existing and future, surface and groundwater discharge permits issued under the Colorado Discharge Permit System, including those for municipal waste water treatment plants and other industrial dischargers.

Background on PFAS and Their Occurrence in Colorado

Polyfluoroalkyls are a family of human-engineered chemicals comprising thousands of compounds that have been utilized in a wide range of products, including food packaging, textiles, non-stick coatings, fire-fighting foams, and ski wax. Due to their chemical properties, PFAS have a high performance as water, grease, heat, and stain repellent, and their use has been ubiquitous for many years. PFAS are also notorious for their persistence and have become the subject of increasing scrutiny for their potential adverse effects on human health and the environment, including domestic water supplies.

In 2016, the EPA revised its lifetime health advisory to 70 parts per trillion for PFOA and PFOS, two of the more prevalent PFAS compounds. Around the same time, elevated levels of PFAS were confirmed in the local aquifer supplying drinking water to thousands of residents of the Fountain Valley communities of Security, Widefield, and Fountain, near Colorado Springs. Officials have since determined that the Widefield Aquifer likely had been contaminated for decades due to PFAS traced to firefighting foam used in routine training and operations at the nearby Peterson Air Force Base. The Fountain Valley incident prompted the State to begin studying and analyzing possible PFAS contamination in water supplies throughout Colorado.

Colorado's Narrative Water Quality Standards

Traditionally, Colorado has relied on the U.S. Environmental Protection Agency (EPA) to take the lead in setting maximum contaminant levels

for drinking water and recommended water quality criteria. While some progress is underway on the federal level, the EPA has not yet issued a numeric regulatory standard for PFAS. According to Nicole Rowan, the Clean Water Program Manager for the Colorado Water Quality Control Division (Division), "development of statewide MCLs and water quality criteria for PFAS would require significant resources that the department is trying to obtain, but does not have right now." Citing the potential health risks associated with PFAS in water supplies, the Commission approved Policy 20-1 as an "interim measure" until maximum contaminant levels are developed and adopted through future rule making proceedings.

Under the state's Water Quality Control Act, the Commission regulates discharges to surface and groundwater within the state using both numeric and narrative water quality standards. The narrative standard for surface water found in the Commission's Regulation No. 31 states:

state surface waters shall be free from substances attributable to human-caused point source or nonpoint source discharge in amounts, concentrations or combinations which are harmful to the beneficial uses or toxic to humans, animals, plants, or aquatic life. § 31.11(1)(a)(iv).

The narrative standard for groundwater discharges state:

Groundwater shall be free from pollutants not listed in the tables referred to in section 41.5(B), which alone or in combination with other substances, are in concentrations shown to be . . . carcinogenic, mutagenic, teratogenic, or toxic to human beings, and/or, a danger to the public health, safety, or welfare. § 41.5(A) (1).

Policy 20-1 Translation Values

The Commission's new policy translates the narrative water quality standards for five different PFAS compounds (PFOA, PFOS, PFNA, PFHxS, and PFBS) and four additional "parent constituents" that

could degrade or transform into PFOS or PFOA. For PFOA, PFOS, and PFNA, the policy sets a translation level of 70 parts per trillion based on available toxicity data available at the federal level. For PFHxS and PFBS, the policy sets translation values at 700 and 400,000 parts per trillion respectively.

The Commission recommended that the translation values be reviewed by 2025 and acknowledged that the Water Quality Control Division, the agency responsible for implementing the policy, retains the ability to apply more stringent translation values “where scientifically supportable” on a case-by-case basis.

Implementation of Policy 20-1 through the Colorado Discharge Permit System

Policy 20-1 directs the Division to implement monitoring requirements for PFAS through terms and conditions in existing and future discharge permits. The initial monitoring will be focused on facilities “with a likelihood of PFAS discharges to state waters (ground or surface waters)” based on discharger survey data and proximity to known or potential sources of PFAS contamination.

Because PFAS are manmade, there is no natural or background level for the constituents. As a result, Policy 20-1 states that when reporting levels are exceeded by dischargers, continued monitoring and source investigations may be required of a permitted facility. Source investigations are “likely to be required at municipal wastewater facilities with pre-treatment programs and at large industrial facilities.”

While the policy instructs the Division to develop effluent limits based on the translation values, it also allows the Division the discretion to apply report-only monitoring or practice-based controls, rather than numeric effluent limits when there is insufficient data or “significant uncertainty associated with a discharge.” Such an example might include short-term discharges of an uncertain quantity. Additionally, the Commission stated that it does not intend the policy to require a numeric effluent limit for PFAS in stormwater discharges.

As for municipal wastewater operators, the Policy leaves the Division discretion to postpone numeric effluent limits for domestic wastewater facilities for the first permit term in order to give those facilities the opportunity to monitor and develop source control programs where needed.

The Commission’s Economic Reasonableness Review for Policy 20-1

In approving the Policy, the Commission addressed the economic reasonableness of the action as required by the State’s Water Quality Control Act, C.R.S. § 25-8-102(5). Because of Colorado’s dependence on surface water and alluvial wells directly influenced by surface water for domestic uses, the Commission highlighted the direct connection between permitted effluent put into state waters and downstream domestic water use. According to the Commission, increasing monitoring for PFAS in discharges to state waters, allows downstream water users and the State to better understand the prevalence and potential exposure to PFAS throughout the State. By limiting discharges, requiring source investigation, control, and effluent limits, the policy is intended to decrease Coloradoans risk of PFAS exposure downstream of permitted discharges. Additionally, the Commission found the policy to be reasonable based on the potential to avoid the cost of illness and loss of health, the economic cost of treating PFAS-contaminated water or switching to alternative sources of supply, and the economic loss to communities whose water supplies are significantly affected by PFAS.

As for the economic cost associated with implementation of the policy, the Commission acknowledged there will be increased costs associated with PFAS monitoring for dischargers, including lab fees, increased time and staff costs to implement additional monitoring, source investigation, and control practices for wastewater treatment operators and industrial dischargers. Actual treatment costs will depend on the technology and scale of the treatment system deployed. Anecdotally, the Commission noted that water providers in the Fountain Valley impacted by Peterson Air Force Base had estimated the capital cost of PFAS treatment by ion exchange to range from \$94,000 for 50 gallons per minute of treatment capacity to \$2.5 million for 1,200 gallons per minute, with operating and maintenance costs associated with these systems continuing potentially into perpetuity.

Conclusion and Implications

With the adoption of Policy 20-1, Colorado joins a growing number of states addressing PFAS through water quality controls despite the lack of a federal numeric regulatory standard. The policy is intended

to be an interim measure to bridge what state regulators view as a regulatory gap, while federal efforts to research and develop maximum contaminant levels for PFOS and PFOA continue. Opponents of the policy within the regulated community cautioned that, among other things, the science and understanding surrounding PFAS toxicity continues to evolve and implementation through source control and effluent limits under the Colorado Discharge Permit System will place an undue economic burden on domestic waste water treatment operators, which will

in turn lead to higher rates for rate payers. For now, the policy allows the Water Quality Control Division discretion to postpone numeric effluent limits for domestic wastewater facilities for the first five-year permit term in order to give those facilities time to monitor and investigate the presence and extent of PFAS in their discharge systems. For more information, see: <https://www.colorado.gov/pacific/cdphe/PFCs/PFAS-Narrative-Policy-Work-Group> (Jason Groves)

WASHINGTON STATE DEPARTMENT OF ECOLOGY PROPOSES NEW AREAS OF ADJUDICATION

The Yakima Superior Court wrapped up Washington's long-standing general stream adjudication, *Ecology v. Acquavella*, in May of 2019. A handful of claimants to the proceeding have filed appeals to the final decree in the Washington Court of Appeals. Those remain pending. In the meantime, the Washington State Department of Ecology (Ecology) requested and was granted permission from the Legislature to undertake a statewide review to determine whether and where to undertake additional adjudication efforts.

What is Driving Ecology's Request to Adjudicate?

Washington adopted its first water permitting system in 1917. Prior to 1917, water rights were recognized by both notice-posting under the prior appropriation doctrine and reasonable use under the riparian doctrine. These pre-code water rights were not part of any registration system until 1974, when the Claims Registration act was passed (Ch. 90.14 RCW) which includes relinquishment provisions for nonuse. According to the Department of Ecology, there are more than 166,000 claims on file statewide. Claims are presumed to be valid water rights for documenting current authorization, but the full validity of a claim can only be confirmed through an adjudication. There have been a handful of small adjudications since the Claims Registration Act, but the Yakima River basin is the only full river basin to be adjudicated. The Yakima adjudication was limited to surface water only, no groundwater claims were

confirmed. Additionally, unlike many western states, Washington does not have a process to update water right ownership records. This makes water right management in the state difficult. Additionally, there are 29 recognized Indian tribes in Washington and at least a dozen others not officially recognized with potential claims to senior priority federal reserve water rights both on and off reservation.

Ecology's Conclusion on Adjudications

Through the process, Ecology has identified two areas for urgent adjudication, the Nooksack (WRIA 1) in Northwestern Washington and the Lake Roosevelt area (WRIA 58) in Northcentral Washington. Two additional areas are identified for eventual adjudication, the Spokane River (WRIAs 54 through 57) in Eastern Washington, and the Walla Walla River (WRIA 32) in Southeastern Washington. The two top priority basins are being driven in large part by requests from the Lummi Nation and Nooksack Tribes in the Nooksack and Colville Confederated Tribe in the Lake Roosevelt area, petitioning for adjudication of these areas.

The anticipated timeline to completion for each basin adjudication is expected to take ten to 20 years. This is not an unreasonable estimate given the complications inherent in general adjudications. Under Washington's adjudication statute, the agency must first define the water source and identify possible water users. This will require some concerted effort given that while Washington does have a water right database, it does not maintain water right ownership

records. However, advancements in the state's water right database systems in recent years should aid in this process.

Assuming the Washington Legislature approves the agency's budget request, Ecology would start the identification process in the 2021-2022 bienium, with an anticipated court filing to initiate the adjudication in 2023. Once filed, water users will be required to file claims with supporting evidence to document water usage. Unless the water code is changed before then, water users with both claims and certificates will have to document continuous beneficial use of water back to 1974 which is when statutory relinquishment was adopted. Additionally, those with water right claims will have to document that the water right was established according to the law in place at the time the water was first put to use. In many areas of the state, this requires documenting water use well prior to the 1917 surface water code and prior to the 1945 groundwater code for claims filed under the prior appropriation doctrine, and prior to 1932 for those claims filed under the riparian doctrine.

According to the statutory process, Ecology reviews the claim filings and provides a Report of Findings to the Court. Water Users then have an opportunity to contest the Report of Findings before the court. This can be a lengthy and burdensome process for water users. Eventually, the court issues orders of adjudication based on the evidentiary proceedings.

Complicating this process will be the process for joining of Federal Reserve Rights. Three of the four basins in proposed for adjudication include reservations, the four basins will have off reservation claims to water. In addition, two of the basins proposed have interstate water issues (involving the State of Idaho in the Spokane area and the State of Oregon in the Walla Walla area). The third has potential international water issues with Canada in the Nooksack.

Conclusion and Implications

Adjudications are often controversial. While the number of water right claims can create management uncertainty in certain basins, the process and length of time required to adjudicate water rights in a basin creates even more uncertainty. And can change the balance of water use, especially where large unquantified senior water rights are present. The next step will be before the legislature. In order to start the process, the Department of Ecology must request funding. To that end, despite the anticipated statewide budget cuts to address COVID related shortfalls, Ecology has made a budget request for the 2021-2022 biennial budget, which is under review at the Governor's office.

The full text of Ecology's report can be found on the Department of Ecology's website at: <https://fortress.wa.gov/ecy/publications/summarypages/2011084.html>
(Jamie Morin)

PENALTIES & SANCTIONS

**RECENT INVESTIGATIONS, SETTLEMENTS,
PENALTIES AND SANCTIONS**

Editor's Note: Complaints and indictments discussed below are merely allegations unless or until they are proven in a court of law of competent jurisdiction. All accused are presumed innocent until convicted or judged liable. Most settlements are subject to a public comment period.

**Civil Enforcement Actions and Settlements—
Water Quality**

•September 21, 2020 - EPA and CarMax Auto Superstores Inc. have reached a settlement to resolve alleged violations of the federal Clean Water Act at the company's Independence, Missouri, car dealership. According to EPA, CarMax discharged thousands of gallons of gasoline into a creek adjacent to the facility from corroded piping attached to a petroleum storage tank used to fill up the facility's cars. Under the terms of the settlement, the company agreed to pay a \$119,440 civil penalty. Once CarMax became aware of the ongoing discharges to Camp Creek in July 2019, the company notified EPA's National Response Center and the Missouri Department of Natural Resources (MDNR) and initiated cleanup of the creek. CarMax has committed to a complete cleanup and has begun that work, with oversight by MDNR, and estimates it will cost over \$1 million when finished. Facilities that store 1,320 gallons or greater of oil products in aboveground storage tanks are subject to Clean Water Act regulations that require, among other things, proper containment to contain oil releases, inspections of tanks and piping, and integrity testing of oil storage equipment. EPA alleges that CarMax failed to comply with these requirements, and that such noncompliance contributed to the discharges to Camp Creek.

•September 24, 2020—EPA announced the Port of Oakland paid a \$300,000 penalty for unauthorized ocean dumping of sediment from one of its dredging projects, in violation of the Marine Protection, Research and Sanctuaries Act, also known as the Ocean Dumping Act. Dutra Construction Co., Inc.,

the contractor hired by the Port to do the dredging project, will pay an additional \$173,000 in penalties. In August 2017, Dutra Construction, working for the Port, dredged over 6,000 cubic yards of sediment from an area (Berth 35) that had not yet been tested and approved for ocean disposal. They then dumped the sediment at the San Francisco Deep Ocean Disposal Site, about 55 miles offshore of the Golden Gate Bridge. The Port also failed to report the required disposal tracking data within 24 hours. Under the Ocean Dumping Act, the U.S. Army Corps of Engineers issues permits for disposal of dredged sediment only after EPA has concurred that the sediment is non-toxic and suitable for disposal. Once approved and permitted, sediment may then be dumped only at an EPA-designated disposal site. There are six ocean disposal sites for dredged sediment in waters offshore of California. Before designating these sites, EPA conducts an extensive environmental review process, including opportunities for public participation, to ensure that impacts from disposal sediment will be minimal. Disposal is strictly prohibited outside these sites because of the potential for harm to the marine environment.

•September 28, 2020—EPA announced a final agreement with the Clark County Department of Public Works (Clark County) over unpermitted discharges of dredged material into the Laughlin Lagoon, a part of the Colorado River, in southern Nevada. Under the terms of the settlement, Clark County will implement wetlands conservation and mitigation measures at Laughlin Lagoon. From September 2018 through January 2019, Clark County used mechanized equipment to dredge 224,342 cubic yards of sediment from approximately 22 acres of channels in Laughlin Lagoon. During dredging, Clark County deposited some of that dredged material in the lagoon to construct temporary work platforms and haul roads to assist in further dredging. For this work, Clark County failed to obtain an appropriate Clean Water Act 404 permit from the U.S. Army Corps

of Engineers in violation of §§ 301(a) and 404 of the CWA. Clark County has agreed to enter into an Administrative Order on Consent which assures that wetland conservation and mitigation measures laid out in a Fish and Wildlife 2018 Biological Opinion are carried out successfully.

•September 29, 2020—EPA and the Department of Justice announced a settlement with the Churchill Downs Louisiana Horseracing Company LLC, d/b/a Fair Grounds Corporation (Fair Grounds) that will resolve years of Clean Water Act violations at its New Orleans racetrack. Under the settlement, Fair Grounds will eliminate unauthorized discharges of manure, urine and process wastewater through operational changes and construction projects at an estimated cost of \$5,600,000. The company also will pay a civil penalty of \$2,790,000, the largest ever paid by a concentrated animal feeding operation in a CWA matter. The United States' complaint alleges that Fair Grounds violated the CWA, including the terms and conditions of its Louisiana Pollutant Discharge Elimination System (LPDES) permit issued pursuant to § 402 of the CWA. Specifically, the complaint alleges that, since at least 2012, Fair Grounds has regularly discharged untreated process wastewater into the New Orleans municipal separate storm sewer system, leading to the London Avenue Canal, Lake Pontchartrain, the Mississippi River, and ultimately to the Gulf of Mexico. Fair Grounds' permit prohibits any discharge unless there is a significant rain event (*i.e.*, when ten inches of rain falls in 24 hours). In violation of their permit, Fair Grounds has discharged wastewater after as little as a half-inch of rain, as well as in dry weather. The complaint alleges that unauthorized discharges of contaminated wastewater occurred more than 250 times between 2012 and 2018. The untreated wastewater contains manure, urine, horse wash water, and other biological materials that are "pollutants" as defined by the CWA, the facility's permit, and the applicable EPA and Louisiana Department of Environmental Quality (LDEQ) regulations. The Fair Grounds' New Orleans racetrack is a large CAFO, and during a typical horse racing season, Fair Grounds stables as many as 1,800 horses or more at one time. As part of the settlement, Fair Grounds will implement best management practices and construction projects designed to eliminate unauthorized discharges and ensure compliance with

its permit and the CWA. Fair Grounds will also perform site-specific sampling, monitoring and hydraulic modeling to help the company and EPA determine whether the remedial actions required by the consent decree are successful in eliminating unauthorized discharges. Furthermore, the consent decree includes a provision requiring Fair Grounds to implement additional remedial measures if these measures do not successfully eliminate unauthorized discharges. *This case is precedential because it includes the highest civil penalty ever collected by the EPA in a CWA enforcement action against a CAFO.* In addition, this case is part of EPA's National Compliance Initiative for Reducing Significant Noncompliance with National Pollutant Discharge Elimination System Permits.

Civil Enforcement Actions and Settlements— Chemical Regulation and Hazardous Waste

•September 24, 2020—EPA has settled alleged civil chemical accident prevention and preparedness violations with Starbucks Corporation of Kent, Washington. The settlement, reached under § 312 of the Emergency Planning and Community Right-to-Know Act, is part of EPA's ongoing efforts to reduce and eliminate accidental releases at industrial and chemical facilities. EPA alleges that Starbucks failed to file its required annual Tier II Hazardous Chemical Inventory Report in a timely way for two different facilities during the 2017 and 2018 reporting years. Both facilities stored hazardous chemicals, including sulfuric acid. Starbucks Corporation was very cooperative during settlement discussions and has since trained employees to prevent future lapses in reporting. Based on their cooperation, a reduced penalty of \$100,000 was agreed upon.

•September 28, 2020—EPA and State of New Jersey announced the lodging of a consent decree with Hercules LLC to perform the cleanup design and conduct the cleanup selected by EPA for the Hercules, Inc. (Gibbstown Plant) Superfund Site in Gibbstown, New Jersey. Under the consent decree, Hercules will design and implement the final cleanup remedy selected in EPA's 2018 Record of Decision (ROD). EPA will oversee Hercules' performance of the work, which is estimated to cost \$11.3 million. In addition, Hercules will fully reimburse EPA for approximately \$144,000 in site-related past response costs and pay EPA's future costs of overseeing the

company's performance of the cleanup design and action. New Jersey Department of Environmental Protection oversaw the remedial investigation and feasibility study for the site and Hercules also will pay New Jersey's past costs of nearly \$130,000. Under EPA's final cleanup plan, Hercules will excavate the top four feet of contaminated soil, treat the excavated soil using naturally-occurring microorganisms to destroy or break down the contaminants, and treat soil located deeper than four feet using chemicals to spur naturally occurring microorganisms to destroy or break down the contaminants in-place. The company will excavate lead-contaminated soil and dispose of it off-site. It will also remove contaminated sediment from Clonmell Creek and an on-site storm water basin and use plants that destroy or break down contamination to treat the sediment on-site. The Hercules, Inc. (Gibbstown Plant) site is located on approximately 350 acres in Gloucester County. The site encompasses an 80-acre former process area and a 4-acre area known as the Solid Waste Disposal Area (SWDA). Under the direction of the State of New Jersey, Hercules Inc. (now Hercules LLC) conducted cleanup activities that included consolidation of the tar pits and contaminated soil under a cap to reduce exposure, long-term monitoring, and restrictions on the access and use of the groundwater in the vicinity of the SWDA. From 1953 to 2010, Hercules Inc. used the former process area to manufacture chemicals including phenol and acetone. The manufacturing activities that took place during this time resulted in hazardous substances, including volatile organic compounds, being released into the soil, sediment and groundwater. Operations at the plant ceased and the structures associated with manufacturing were demolished in 2010. A groundwater extraction and treatment system was installed in the former process area as an interim cleanup action to protect local municipal drinking water wells. The system is still operating; to date, more than two billion gallons of contaminated groundwater have been extracted and treated. The remedy selected in the 2018 ROD is the final remedy for the contaminated groundwater in the former process area.

- October 9, 2020—EPA announced a settlement with Safety-Kleen Systems Inc. over federal hazardous waste violations at their hazardous waste management facility in Los Angeles. Under the settlement, the company will pay a \$102,700 civil penalty and take

specific steps to properly manage hazardous wastes at its facility. EPA inspected the Los Angeles facility in 2018 as part of EPA's National Compliance Initiative to reduce hazardous air toxic emissions at hazardous waste facilities. As a result of the inspection, EPA identified violations of federal Resource Conservation and Recovery Act (RCRA) regulations at the Safety-Kleen facility, including failure to make accurate hazardous waste determinations for certain solid waste generated on-site at the facility. In addition to paying the penalty, the company agreed to begin testing most of its customers' containers for the hazardous chemical perchloroethylene, a likely human carcinogen, and committed to perform additional sampling of its waste streams. The settlement requires Safety-Kleen to implement these changes at all their locations in the Pacific Southwest. The company plans to spend at least \$250,000 to implement these changes.

Indictments, Convictions, and Sentencing

September 30, 2020 - An Ohio man pleaded guilty in the Southern District of Ohio before U.S. District Judge Edmund A. Sargus Jr. to conspiring to illegally transport and dispose of hazardous waste at several area apartment complexes. According to court documents, in October 2018, Khaled Ebrigit, 54, of Columbus, Ohio, paid and directed Martin Eldridge, 41, of Williamsport, Ohio, to dump drums of hazardous waste near dumpsters at several apartment complexes throughout Columbus. Ebrigit knew the material was hazardous and did not have a permit to dispose of it. In total, six 55-gallon drums and 64 10-gallon drums were dumped at six residential apartment complexes in Columbus. Many of the drums were labeled with brightly colored warning labels with symbols and written statements indicating "flammable" and "irritating," and with a detailed listing of hazards and precautions. As a result of the dumping, the Ohio Environmental Protection Agency, Franklin County Sheriff's Office, Columbus Fire Department and Columbus Division of Police responded to reports of illegal dumping and cleaned the various sites. As part of his plea, Ebrigit agreed to pay at least \$30,000 in restitution. Specifically, Ebrigit pleaded guilty to one count each of conspiring to illegally transport hazardous material, transporting hazardous material and disposing of hazardous material. Eldridge pleaded guilty in December 2019 to the same three crimes. (Andre Monette)

LEGISLATIVE DEVELOPMENTS

CONGRESS CONSIDERS AMENDMENT TO EXPAND THE REACH OF THE WATER INFRASTRUCTURE FINANCE AND INNOVATION ACT

On September 11, 2020, Congressman John Garamendi introduced a bill to amend the 2014 Water Infrastructure Finance and Innovation Act (WIFIA), WIFIA Improvement Act of 2020 (H.R. 8217, 116th Cong. (2020)). WIFIA provides low-interest loans for water infrastructure projects with a maximum 35 year payoff period. If enacted, the bipartisan bill would amend WIFIA to extend the payoff period for certain long-term water infrastructure projects to 55 years. The bill would also clarify that WIFIA applies to projects owned by the U.S. Bureau of Reclamation (Bureau) but operated and maintained by local agencies.

History of the Water Infrastructure Finance and Innovation Act

Enacted in 2014, WIFIA established a program to fund the construction of water infrastructure projects with low-interest, long-term loans. The U.S. Environmental Protection Agency (EPA) administers the WIFIA loan program in partnership with the Bureau. Eligible borrowers include local, state, and tribal governments, the federal government. Private entities may also benefit from WIFIA if the entity participates with a public sponsor. Eligible projects include a wide spectrum of water infrastructure projects, including projects eligible under the Clean Water State Revolving Fund and the Drinking Water State Revolving Fund; energy efficiency projects for drinking water and wastewater facilities; repair, rehabilitation, or replacement of treatment works, community water systems, or aging water distribution or waste collection systems; desalination, alternative water supply, and water recycling projects; drought prevention, reduction, or mitigation projects; purchase of property integral to an eligible project or to mitigate environmental impacts of a project; and certain pollution control projects.

A WIFIA loan features a fixed interest rate that is established at the time of the loan's closing. If a borrower receives multiple disbursements over a span of years, the borrower keeps the same fixed rate. The

fixed interest rate is equal to the U.S. Treasury rate of a similar maturity on the date of the loan's closing, even if the borrower only has a AA or BBB rating. The date of maturity, thus the interest rate, is based on the weighted average life of the loan, not the loan's actual maturity date. This generally results in a lower interest rate because the weighted average life of the loan is usually shorter than the loan's maturity date. The loan repayment period is the earlier of either: 1) 35 years after substantial completion of the project or 2) the useful life of the project. The long repayment period allows the borrower to make smaller payment amounts throughout the life of the loan.

The loans only finance up to 49 percent of the cost of a proposed project. Congressional appropriations provide money to cover estimated losses for the projects; otherwise, the loans are funded by and repaid to the Treasury. The funds appropriated by Congress thus have a significant multiplier effect on the total amount of money invested in water infrastructure projects.

A number of California projects have already benefited from WIFIA, including a groundwater replenishment system for the Orange County Water District, along with a number of wastewater treatment and recycling facilities throughout the state.

A Bipartisan Bill Seeks to Amend the Water Infrastructure Finance and Innovation Act

On September 11, 2020, Representative John Garamendi introduced a bill titled the WIFIA Improvement Act of 2020 (H.R. 8217, 116th Cong. (2020)). The WIFIA Improvement Act has bipartisan co-sponsors, including California Representatives T.J. Cox, Jim Costa, Doug LaMalfa, and Josh Harder. To date, the WIFIA Improvement Act has been referred to the House Transportation and Infrastructure Subcommittee on Water Resources and Environment, but no further action has been taken by the House of Representatives.

The WIFIA Improvement Act would amend the

provision of WIFIA that provides that the maturity date of the loan is the earliest of either the useful life of the project or 35 years from substantial completion of the project. Instead, if a project has a useful life of *more* than 35 years, the loan's maturity date is 55 years from the date of substantial completion of the project. If a project has a useful life of less than 35 years, the loan's maturity date is 35 years. Extending the repayment period to 55 years will reduce annual debt service payments by as much as 40 percent. The WIFIA Improvement Act would also clarify that loans can be used to fund repairs and improvements to transferred works owned by the Bureau but repaired and maintained by local agencies.

Congressman Garamendi has pointed to the Sites Reservoir Project as an example of a project that would benefit from the extension of the loan repayment period to 55 years. Congressman Garamendi also claims that clarifying that WIFIA applies to federally owned but locally maintained and operated facilities would enable financing for the improvements to and modernization of the Central Valley Project,

including the C.W. "Bill" Jones Pumping Plant. Co-sponsor Representative Dan Newhouse asserts that the WIFIA Improvement Act would provide similar benefits to his constituents in central Washington.

Conclusion and Implications

The WIFIA Improvement Act would expand WIFIA to allow financing for projects with longer useful lifespans and would clarify that WIFIA applies to federally owned and locally operated projects. The stated purpose of the WIFIA Improvement Act is to unlock long-term, low-interest financing for two of California's most important water infrastructure projects: construction of Sites Reservoir and modernization of pumps for the Central Valley Project. The WIFIA Improvement Act boasts bipartisan support, but its fate—including passage through Congress and signature by the President—remains to be seen. The full text and history of H.R. 8217 is available online at: <https://www.congress.gov/bill/116th-congress/house-bill/8217?s=1&r=18>
(Brian Hamilton, Merdith Nikkel)

JUDICIAL DEVELOPMENTS

NINTH CIRCUIT AFFIRMS ORDER VACATING THE DELISTING OF THE YELLOWSTONE GRIZZLY POPULATION

Crow Indian Tribe v. United States, 965 F.3d 662 (9th Cir. 2020).

The U.S. Fish and Wildlife Service (FWS) issued a final rule removing the grizzly bear population in the Greater Yellowstone Ecosystem from the threatened species list under the federal Endangered Species Act (ESA). Following cross-motions, the U.S. District Court granted summary judgment on behalf of plaintiffs, vacating the final rule and remanding to the FWS for further consideration. The FWS and intervenor states appealed, and the Ninth Circuit Court of Appeals affirmed with one exception.

Factual and Procedural Background

This case arises from efforts by the FWS to delist the grizzly bear in the Greater Yellowstone Ecosystem of Idaho, Montana, and Wyoming. In 2007, following success brought about by the Grizzly Bear Recovery Plan, the FWS issued a rule declaring the Yellowstone grizzly population a “distinct population segment” under the ESA, declaring it no longer threatened, and removing it from protection. That action resulted in a lawsuit, with the Ninth Circuit ultimately finding that the FWS arbitrarily concluded that declines of whitebark pine (an important food source for grizzlies) were unlikely to threaten the Yellowstone grizzlies and remanding for further consideration.

Five years later, the FWS published a Conservation Strategy for the Grizzly Bear in the Greater Yellowstone Ecosystem, which outlined the manner in which the Yellowstone grizzly would be managed and monitored upon delisting. The FWS then accompanied that Conservation Strategy with a second delisting rule, which found that the decline of the whitebark pine would not pose a substantial threat to the Yellowstone grizzly. This second delisting decision again drew a lawsuit by environmental and tribal groups.

The D.C. Circuit’s Decision in *Humane Society*

In the midst of this second lawsuit, the D.C.

Circuit considered a case in which the FWS similarly had created a distinct population segment and delisted it. That case, *Humane Society v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017), involved the Western Great Lakes gray wolf. After concluding that the FWS’ position that the ESA allows it to simultaneously create and delist a distinct population segment was reasonable, the D.C. Circuit found that such action required the FWS to look at the effect of partial delisting on the portion of the species that would remain listed (remnant species).

District Court Granted Summary Judgment/Vacated the Rule

Following cross motions for summary judgment in this case, the District Court granted summary judgment on behalf of plaintiffs, vacated the rule, and remanded to the FWS for further proceedings. The FWS appealed aspects of the remand requiring the study of the effect of the delisting on the remnant grizzly population and further consideration of the threat of delisting to long-term genetic diversity of the Yellowstone grizzly. Three states in the region, as well as a number of private hunting and farming organizations, intervened on the government’s behalf and appealed other aspects of the District Court’s order involving issues pertaining to recalibration.

The Ninth Circuit’s Opinion

Appellate Jurisdiction

The Ninth Circuit first addressed appellees’ claim that the court lacked jurisdiction to consider any issue on appeal because the remand order was not appealable. In support of their argument, appellees principally relied on two cases, *Natural Resources Defense Council v. Gutierrez*, 457 F.3d 904 (9th Cir. 2006), and *Alesea Valley Alliance v. Department of Commerce*, 358 F.3d 1181 (9th Cir. 2004). The *Gutierrez* case

involved an agency’s attempt to challenge only the reasoning supporting a District Court ruling and not the relief granted. Here, by contrast, the Ninth Circuit found that the FWS did challenge the scope of the remand order and thus did not seek an advisory opinion.

Under *Alsea Valley*, a District Court’s remand order of an agency’s rulemaking is a final order as to the government and therefore appealable, although it may not be final as to private parties whose positions on the merits would be considered during proceedings on remand. Thus, under *Alsea*, the District Court’s order was final at least as to the FWS. The Ninth Circuit found, however, that it also had jurisdiction to consider the issues raised by intervenors because, unlike in *Alsea*, those issues had been resolved by the District Court and could not be taken into account in the proceedings upon remand.

Merits of the Appeal

On the merits, the Ninth Circuit first considered the issue of whether the FWS needed to make a fuller examination of the effect that delisting the Yellowstone grizzlies would have on the remnant grizzly population. While it agreed with the District Court that further examination of the remnant population was necessary to determine whether there was a sufficiently distinct and protectable remnant population such that the delisting of the distinct population segment would not further threaten existence of the remnant, it found that extensive review under § 4(a) of the ESA was not required. It thus vacated the portion of the order calling for a “comprehensive review”

of the remnant population and vacated for the District Court to order further examination.

The Ninth Circuit next considered the District Court’s order to ensure the long-term genetic diversity of the Yellowstone grizzly. Finding that there were no concrete, enforceable mechanisms in place to ensure long-term genetic health of the grizzly, the Ninth Circuit concluded that the District Court had correctly concluded that the rule was arbitrary and capricious in that regard. Remand to the FWS therefore was required.

Finally, the Ninth Circuit found that the FWS’ decision to drop a commitment to recalibration in the conservation strategy violated the ESA because it was the result of political pressure by the states rather than having been based on the best scientific and commercial data. On this basis, the District Court properly ordered the FWS to include a commitment to recalibration. The Ninth Circuit also rejected the intervenor’s argument that, because the states had committed to using the current population estimator for the foreseeable future, a commitment to recalibration would be unnecessary and speculative.

Conclusion and Implications

The case is significant because it includes a substantive discussion of relatively novel issues resulting from a decision by the FWS to simultaneously create and delist a distinct population segment under the ESA. The decision is available online at: <https://cdn.ca9.uscourts.gov/datastore/opinions/2020/07/08/18-36030.pdf> (James Purvis)

TENTH CIRCUIT RULES IN FAVOR OF NEW MEXICO PUEBLO INDIAN TRIBES HOLDING PUEBLO WATER RIGHTS NOT EXTINGUISHED BY SPAIN

United States on Behalf of the Pueblos of Jemez, Santa Ana and Zia v. Abouselman, ___F.3d___, Case No. 18-2164 (10th Cir. Sept. 29, 2020).

On September 29, 2020, the Tenth Circuit Court of Appeals addressed the question whether the U.S. District Court in New Mexico was correct in holding that the mere fact the government of Spain exercised sovereign control over the area where the Jemez Indian Pueblo had been located at the time of the exer-

cise of sovereign control, without more, destroyed the aboriginal water rights of the Jemez, Santa Ana and Zia Indian Pueblos. The Tenth Circuit reversed and ruled in favor of the Jemez River Pueblo Indian tribes concluding their water rights were not extinguished by the colonial Spanish crown.

Background

The case arose from an interlocutory appeal from a Memorandum Opinion and Order of the U.S. District Court for the District of New Mexico that held the Pueblos of Santa Ana, Zia and Jemez do not have aboriginal water rights. Memorandum Opinion and Order Overruling Objections to Proposed Findings and Recommended Disposition Regarding Issues 1 and 2 [Doc. 4397], *United States on behalf of Pueblos of Jemez v. Abouseleman*, ___F.Supp.3d___, Case No. 83-cv-1041 (D. N.M. September 30, 2017). That Memorandum Opinion and Order was significant for what it concluded the Pueblos did not have rather than what they do have in terms of water rights.

The Jemez River is a small tributary of the Rio Grande. The Jemez River Basin is the source of water for the Jemez, Zia and Santa Ana pueblos. For almost 40 years, these Pueblos residing along the small Jemez River have been involved in the Jemez River Adjudication relating to that tributary. United States District Court Judge Martha Vazquez was called upon in the context of the Adjudication to determine whether Spanish occupation of the lands where the Indian Pueblos resided long prior the Treaty of Guadalupe Hidalgo had extinguished any aboriginal rights to water held by the Pueblos. Expert witnesses were called on the topic. The Magistrate Judge in the case concluded that Spanish possession both as a matter of law and actual physical force extinguished this aboriginal water right. Judge Vazquez affirmed the Proposed Findings and Recommended Disposition of the United States Magistrate Judge William Lynch. She reasoned as follows:

Spanish law plainly provided that the waters were to be common to both the Spaniards and the Pueblos, and that the Pueblos did not have the right to expand their use of water if it were to the detriment of others. Memorandum Opinion and Order Overruling Objections to Proposed Findings and Recommended Disposition Regarding Issues 1 and 2 at 7 [Doc. 4397], *United States on behalf of Pueblos of Jemez v. Abouseleman*, No. 83-cv-1041 (D.N.M. September 30, 2017).

The Pueblo Indian Water right has been premised, in part, upon an analogy between the aboriginal water right theory of Indian reserved water rights

under which Tribes that were in possession of lands prior to creation of a federal reservation could trace their priority date back to their aboriginal possession, and prior to the time that the right was confirmed by a federal treaty with the Tribes or by a Congressional act creating a federal reservation for the tribe. In other words, their water right was based upon their aboriginal possession and not subsequent federal actions. cf. *Winters v. United States*, 207 U.S. 564 (1908); *United States v. Winans*, 198 U.S. 371 (1905). New Mexico's Indian Pueblos are unique based on the fact that their lands were not divided by the United States into reservations, therefore, they cannot claim water rights under *Winters*.

The Tenth Circuit's Decision

Parameters of the Court's Decision

The Tenth Court of Appeals was careful to make clear that the only discrete question it was deciding was whether the appellants were correct in insisting that the mere presence of Spanish sovereignty was insufficient to destroy the aboriginal rights of the Pueblo. The Court of Appeals made it clear that it was *not* deciding three sub-issues including whether: 1) "the Acts of 1866, 1870 and 1877 have any effect on the Pueblos' water rights, and, if so, what effect; 2) did the Pueblo Lands Acts of 1924 and 1933 have any effect on the Pueblos' water rights and, if so, what effect; and 3) did the Indian Claims Commission Act have any effect on the Pueblos' water rights, and, if so, what effect?" See, Op. at 9 fn. 3. The Court of Appeals also made clear that its decision provided no holding as to the proper standard for quantifying the aboriginal rights of the Pueblos. Nor does the opinion any other kinds of water rights the Pueblos may have. Nor did it decide any issues vis-a-vis the aboriginal water rights of the Pueblos that may have been taken by either Mexico or the United States. Op. at 11.

The Court of Appeals succinctly stated the narrow, discrete question it was deciding:

... [w]hether, as a matter of law, a sovereign can extinguish aboriginal rights to water by the mere imposition of its authority over such water without an affirmative act. Op. at 12.

Finally, the court pointed out that all parties to the

appeal had agreed that the Jemez Pueblo had at one time had aboriginal water rights. Op. at 8. *Therefore, the sole question was whether the actions of Spain were so clear an affirmative act as to extinguish those aboriginal rights.*

Looking to the Actions of Spain

The court then evaluated the actions taken by the Spanish crown vis-a-vis Indian Pueblos. It evaluated the expert reports below and concluded, inter alia, that:

...the direction given to local authorities in the distribution of the realengas (communal grants of land) 'typically called for Indian property and resources to be respected' Op. at 14.

The Court of Appeals pointed out that this respect for the native peoples was a part of history dating back to the early history of Spain. It then referenced the *Recopilacion de Indias*, which stated that the Indians should be left their land any resources they may need. Op. at 15 Given the *Recopilacion*, "there is no documentary evidence that Spanish magistrates forced Pueblos to allot lands and water within their communities in a particular way." *Id.* Finally, the court concluded that while there was no doubt that the Spanish had the prerogative to direct that water be used in a particular way, that did not mean that it always exercised that prerogative to control Pueblo water use. Op. at 15. The court also noted that while the Spanish government could allow local government officials to issue *repartimiento de aguas* (comparable to a modern-day adjudication procedure) there was no evidence that such a process was employed by Spain involving the Jemez, Santa Ana, or Zia Pueblos or any Pueblo during the Spanish period. The only one that occurred was during the Mexican period, and therefore, no *repartimiento* purported to reduce or modify Pueblo use of water. Op. at 16. The court then found that if there is a dispute between the United States and the Indians "(the rights) are to be resolved in favor of the Indians." Op. at 18. Finally, the court pointed out that the policy of the federal government to respect Indian rights of occupancy could only be interfered with or determined by the United States. Op. at 21 citing *Santa Fe Pac. R.R. Co.*, 314 U.S. 339 (1941).

The Court went on to conclude as a matter of law that:

...an intent to extinguish can only be found when there is an affirmative sovereign action focused at a specific rights that is held by an Indian tribe that was intended to and did in fact have a sufficiently adverse impact on the right at issue. Op. at 22 citing *Plamondon ex rel. Cowlitz Tribe of Indians v. United States*, 467 F.2d 395 (Ct. Cl. 1972).

Based upon all of the above analyses of Spanish law and the Indian tribe cases, the court concluded that:

...[w]ithout an affirmative adverse act, there is neither directed sovereign action from which a court may find a clear and plain indication that the sovereign intended to extinguish sovereign title. Op. at 25.

The court further stated:

... [t]he passive implementation of a generally applicable water administration system (as was employed by Spain) does not establish Spain's clear intent to extinguish the aboriginal water rights of these three Pueblos. Op. at 26.

Not finding any affirmative action demonstrating more than that described above, the case was reversed. Op. at 27.

The Dissent

The dissenting judge opined that the interlocutory appeal was improper because the majority did not at the same time decide issues pertaining to quantification of the aboriginal water right, which would have significant implications for all other interested parties. There was a stated concern in the dissent that the Opinion might create the impression that the aboriginal water right could be an ever-expanding right. The dissent further referenced *New Mexico ex rel. City of Las Vegas*, 89 P.3d 47, 60 (N.M. 2004), which concluded that the Treaty of Guadalupe Treaty did not provide for an expanding Pueblo water right. Finally, the dissent recommended the approach taken in *Arizona v. California*, 373 U.S. 546 (1963) limiting

the water right to a fixed amount based on practically irrigable acreage. The dissent cautioned against the impact of the Opinion on the expectations of some non-Pueblo water users who have established water rights dating back to the late 1700s.

Conclusion and Implications

The majority Opinion from the Tenth Circuit is being lauded as a correct interpretation of Spanish law as applied to Pueblo Indian water rights. The

Opinion reaffirms the principle that many have long argued that Spanish law did not modify Pueblo water rights entitlements unless there was an affirmative action making it clear that was the Spanish crown's intent. The court did not speculate as to the quantification of the Pueblos' aboriginal water right and remanded the case to the U.S. District Court for further proceedings consistent with its Opinion. The Tenth Circuit's Opinion is available online at: <https://www.ca10.uscourts.gov/opinions/18/18-2164.pdf> (Christina J. Bruff)

DISTRICT COURT ORDERS EPA TO PROVIDE MORE FREQUENT STATUS REPORTS ON DEVELOPMENT OF ANACOSTIA RIVER CLEAN WATER ACT TMDL

Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency, ___F.Supp.3d___, Case No. 16-1861(JDB) (D. D.C. Sept. 21, 2020).

The U.S. District Court for the District of Columbia recently denied a motion to reconsider its prior decision not to impose a specific deadline on the U.S. Environmental Protection Agency (EPA) to establish a new Total Maximum Daily Load (TMDL) under the federal Clean Water Act (CWA) for trash in the Anacostia River. The District Court held that no new information or extraordinary circumstances justified reconsideration of its prior decision. However, the court urged EPA to act diligently and ordered more frequent status reports going forward.

Factual and Procedural Background

The federal Clean Water Act requires states and the District of Columbia to set comprehensive water quality standards, including the establishment of a Total Maximum Daily Load of pollutants in certain waters. TMDLs are then submitted to the U.S. Environmental Protection Agency for approval. If the EPA disapproves of the TMDL, it must set its own federal TMDL within 30 days. The CWA does not set a deadline for establishing and sending TMDLs to the EPA, and courts have acknowledged that setting TMDLs takes time and resources. However, a court may construe a state's prolonged failure to submit TMDLs as a "constructive submission" that it will not submit TMDLs. The constructive submission doc-

trine generally only applies when a state clearly and unambiguously decides not to submit TMDLs. In such cases, the EPA must establish a federal TMDL within 30 days.

The State of Maryland and the District of Columbia (collectively: state agencies) developed a TMDL to limit the amount of trash in the Anacostia River and submitted the TMDL to the EPA. Rather than set a limit on the "maximum" amount of trash that may be added to the river, the TMDL set a "minimum" amount of trash that must be captured, prevented from entering, or removed from the river. The EPA approved the TMDL, and the Natural Resources Defense Council, Inc. (NRDC) challenged the EPA's approval.

In March 2018, the U.S. District Court vacated and remanded the EPA's approval of the TMDL, finding that the TMDL did not comply with the plain meaning of "maximum daily load." The court stayed the *vacatur* of EPA's approval of the deficient TMDL until the EPA's approval of a replacement TMDL. The court denied NRDC's request to set a specific deadline on the EPA for the establishment of the new TMDL. The court also gave the EPA the option to cooperate with the state agencies to develop the new TMDL or to disapprove of the existing TMDL and establish a federal TMDL. The EPA elected to

cooperate with the state agencies, and had been providing status reports to the court every six months. In January 2020, NRDC moved the court to reconsider imposing a one-year deadline on the EPA to establish a TMDL, arguing that the process was proceeding too slowly.

The District Court's Decision

The singular issue before the court was whether “new information” presented by NRDC was sufficient to invoke the court’s discretion to reconsider its prior decision not to impose a deadline on the EPA for development of a replacement TMDL. A court has discretion under Federal Rules of Civil Procedure Rule 54(b) to determine whether reconsideration of a nonfinal order or decision is necessary under the relevant circumstances. To make this determination, the court considers whether it patently misunderstood a party, made an error of apprehension, or if a controlling or significant change of law or fact has occurred since submission of the issue to the court. A Rule 54(b) motion may be appropriately granted when “new information” justifies reconsideration of the court’s previous decision. However, the court’s discretion is limited by the law-of-the-case doctrine, which provides that presentation of the same issues to the court for a second time in the same case should lead to the same result absent extraordinary circumstances.

NRDC argued that the slow pace of development and an inaccurate declaration submitted by an EPA official about the previously estimated time for completion of the TMDL constituted “new evidence” such that the court should reconsider its prior decision not to impose a deadline on the EPA. The EPA contended that these facts did not amount to a controlling or significant change in law or fact and did not justify overriding the law of the case on the issue.

The court agreed with the EPA, noting that it had already resolved the issue in the EPA’s favor when it determined not to impose a deadline in its 2018 decision. The prior decision thus became the law of the case, the court stated, and should not be reconsidered

absent extraordinary circumstances. The court concluded that the two and a half years that had elapsed in the case was simply not a sufficient justification to reconsider the court’s prior decision. The court also found NRDC’s criticism of the EPA official’s declaration unpersuasive, reasoning that the EPA was not the entity developing the replacement TMDL. As to NRDC’s implied constructive submission doctrine argument, the court found that the state agencies had in fact submitted a TMDL which remained in effect per the court’s stay of vacatur. As such, the constructive submission doctrine was inapplicable because they did not fail to submit any TMDL. Moreover, the EPA submitted substantial documentation showing that the state agencies had been working to settle on a final approach for the replacement TMDL. They had therefore not clearly and unambiguously decided not to submit a TMDL.

Based on the foregoing, the court denied NRDC’s motion, concluding that NRDC failed to meet the standard for reconsideration under Rule 54(b) or to override the law-of-the-case doctrine. However, the court ordered more frequent reporting of the state agencies’ progress and cautioned the EPA that it would not permit the process to continue interminably, indicating that it may be more receptive to a similar motion “in the not-too-distant future.”

Conclusion and Implications

This case illustrates the high bar plaintiffs face when moving a District Court to reconsider a prior decision not to set a deadline on final agency action. The opinion makes clear that the court is unwilling to impose a deadline not present in the CWA when the responsible agencies are making efforts to comply with the court’s order. However, the court’s warning to the agencies also provides a window into the circumstances under which a District Court may be willing to impose a timetable on the EPA to achieve final agency. The court’s opinion is available online at: https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2016cv1861-56 (Heraclio Pimentel, Rebecca Andrews)

DISTRICT COURT APPROVES CONSENT DECREE BETWEEN FEDERAL, STATE AND LOCAL GOVERNMENT WHICH AIMS TO REMEDY CLEAN WATER ACT VIOLATIONS

U.S. and State of Texas v. City of Corpus Christi,
___F.Supp.3d___, Case No. 2:20-cv-00235 (S.D. Tex. Sept. 25, 2020).

The U.S. Environmental Protection Agency (EPA) and the State of Texas, Commission on Environmental Quality completed negotiations on a Consent Decree with the City of Corpus Christi (City). The Consent Decree aims to remedy alleged violations of the federal Clean Water Act and relevant Texas state law from sewage overflows due to the City's unmaintained sewage system.

Factual and Procedural Background

The City of Corpus Christi owns and operates one of the largest sewer systems in Texas with approximately 1,250 miles of sewer lines, more than 100 lift stations, and six treatment plants. On September 25, 2020, the State of Texas and the United States (plaintiffs) filed a joint Consent Decree, along with a suit, against the City. Plaintiffs alleged that the City violated § 301 of the Clean Water Act by failing to comply with conditions established in a Texas Pollutant Discharge Elimination Systems permit. Specifically, plaintiffs alleged that the City was discharging pollutants, including sewage, into waters of Texas and the United States. Plaintiffs also alleged that the City's failure to operate and maintain their sewer collection system and wastewater treatment plants resulted in a number of substantial blockages in the pipes that comprise the City's wastewater system, and that system sewage overflows (SSOs) resulted from the City's failure to upgrade, operate, and maintain its wastewater system.

In the complaint, plaintiffs alleged that on numerous occasions since at least 2007, the City discharged untreated sewage and other harmful pollutants through waters around Corpus Christi. Consequently, plaintiffs sought an injunction against the illegal discharges and measures to prevent future discharge.

Terms of the Consent Decree

The Consent Decree requires to City to clean and assess its sewer system, to identify deficient system conditions and capacities, to undertake projects to

remediate deficiencies, and to undertake specifically identified capital improvement projects.

During the first four-and-a-half years of the Consent Decree, the City is required to conduct a system-wide condition and capacity assessment. The condition assessment must include gravity and force mains, manholes, air relief valves, and lift stations. The results of the condition assessment must then be used to rank the condition of the system components and to create a priority project list, which includes projects to be implemented as soon as practicable, but no later than six-and-a-half years after the effective date of the Consent Decree. Within five-and-a-half years after the effective date of the Consent Decree, the City must also create a condition remedial measures plan that identifies specific measures to remediate deficient system conditions and implement those measures on a timeline approved by EPA.

The capacity assessment must identify the capacity constraints that contributed to SSOs and include wet weather SSO characterization, hydraulic modeling evaluation, and field investigations. No later than five-and-a-half-years after the effective date of the Consent Decree, the City must submit a capacity remedial measures plan to implement remedial measures in a prioritized manner and implement all capacity remedial measures within fifteen years after the effective date of the Consent Decree.

Two specifically identified capital improvement projects required by the Consent Decree include replacement of a force main and improvements to a lift station and second force main.

The City is also required to continue implementing and improving existing programs, such as its routine cleaning and maintenance programs, its fats, oils, and grease control program, and its SSO reduction program.

Applicability of the Consent Decree

The Consent Decree is binding on the federal, state, and municipal governments involved. The

Consent Decree is also binding on the City's wastewater collection and treatment system, meaning that if the City were to sell its operations, the buyer would assume responsibility of complying with the Consent Decree. The City is also obligated to provide all "officers, employees, and agents whose duties might reasonably include compliance with any provision of this Consent Decree, as well as to any contractor or consultant retained to perform Work required under this Consent Decree" within 60 days of the effective date of the Consent Decree. The Consent Decree may be terminated upon the City's completion of all obligations in the Consent Decree.

Cost of Implementing the Consent Decree

EPA estimates the cost of implementing the system wide assessment and remedial measures to be approximately \$600 million over 15 years. The costs of the capital improvement projects are estimated at \$10.4 million over two years. Finally, the Consent Decree includes a civil penalty of \$1,136,000 in penalties, split evenly between the United States and the State

of Texas. Failure to meet deadlines and any additional sewage spills will be subject to stipulated penalties starting a \$500 per day and escalating to \$4,000 per day.

The Consent Decree was lodged in the United States District Court for the Southern District of Texas, Corpus Christi Division. The Consent Decree is subject to a 30-day public comment period, after which the court may approve and enter the consent decree as a final judgment.

Conclusion and Implications

Large public wastewater systems often face daunting and expensive delayed maintenance obligations. This case demonstrates how failure to undertake these obligations, however, can lead to significant costs and civil penalties under the Clean Water Act. <https://www.epa.gov/sites/production/files/2020-09/documents/corpuschristi-cd.pdf>
<https://www.justice.gov/enrd/consent-decree/us-and-state-texas-v-city-corpus-christi>
(Marco Antonio Ornelas, Rebecca Andrews)

UTAH SUPREME COURT CLARIFIES ELEMENTS FOR CLAIMS OF INTERFERENCE OF WATER RIGHTS

Arave v. Pineview West Water Company, 2020 UT 67 (2020).

On October 15, 2020, the Utah Supreme Court clarified the elements for a claim of interference with a water right, which specifically requires the aggrieved party to make reasonable efforts to obtain a portion of their water rights in order to show, and quantify, the interference that has occurred.

Background

This case revolves around the operations and water levels of three wells near Pineview Reservoir. The plaintiffs (the Araves) in this case both have senior water rights, which draw from rather shallow wells. Pineview West Water Company (Pineview West) is a junior appropriator that operates and pumps water from a significantly deeper well. All three of the wells in question draw water from an unconsolidated layer and likely the Norwood Tuff aquifer. Pineview West's well (Well #4) came online in 2004 and during testing very quickly impacted the plaintiffs' wells. Within

hours, one of the plaintiff's well began sucking air, resulting in silt damage. The well recovered within a day or two, but a subsequent test produced the same result. Notwithstanding this result, Well #4 was placed in operation and regularly began pumping during the irrigation season (early July to September). When Well #4 was operating, each of the plaintiff's wells began to struggle to produce water.

The parties initially came to a settlement in which the plaintiffs connected to Pineview West's system, which would supply them with culinary water for a flat rate of \$20 per month. Once connected, one of the plaintiffs removed the pump from their well and no longer used it to obtain water. Instead, they used it as a monitoring well to gather data regarding the impact of Well #4 on the water level. Several years later, the defendant sought to increase the plaintiffs' fees to match those paid by its other water users. However, the parties were unable to reach an agreement regard-

ing new fees and this suit followed. The plaintiffs asserted causes of action for interference with water rights, negligence and nuisance. They sought injunctive relief, damages and attorney fees.

At the Trial Court

At trial, the court ruled in favor of the plaintiffs on their interference and negligence claims. The court found that neither of the plaintiffs' wells experienced difficulty before Well #4 began pumping. When Well #4 is in operation, there are quick impacts to the Arave Well. When that head of the Arave Well drops below the head of the Snowberry Well, then there are impacts to both wells and they have difficulty producing water. Ultimately, the court held that pumping Well #4 dewatered the aquifer to such a degree that it temporarily reduced the level of water available to the plaintiffs' wells, which resulted in interference.

The court also held that the harm to the plaintiffs was foreseeable, because Well #4 is located near plaintiffs' wells, it draws water from the same aquifers that plaintiffs' use, and it operates at a much larger capacity. Consequently, the court enjoined Pineview West from operation Well #4 unless and until it could demonstrate that Well #4 could operate without interfering with plaintiffs' wells. Finally, the court awarded compensatory damages. Pineview West was ordered to refund all of the fees that it had collected from plaintiffs. It also included the cost of a new pump and the cost of other damages that occurred. Defendant Pineview West appealed this decision

Claims for Interference of Water Rights in Utah

Generally, a cause of action for interference lies where a junior appropriator's use of water diminishes the quantity or quality of the senior appropriator's existing water right. *Bingham v. Roosevelt City Corp.*, 2010 UT 37, ¶ 48. However, if a junior appropriator interferes with a senior appropriator's water right, the junior appropriator has the right, as his or her own expense, to replace the senior appropriator's water. *Id.* at ¶ 63. This protection also extends to the senior appropriator's right to the continued use of his or her existing and historical method of diverting water. *Wayment v. Howard*, 2006 UT 56, ¶ 13.

When rights clash, however, seniority of rights is not the sole consideration. Ordering a junior ap-

propriator to supply replacement water in perpetuity is a sweeping and pervasive responsibility that could prove to be highly inequitable and inconsistent with the objectives of our water law. *Wayman v. Murry City Corp.*, 458 P.2d 861, 864 (Utah 1969). The primary objective is ensuring that the greatest amount of available water is put to beneficial use. *Id.* at 865. This objective becomes an important consideration when a junior appropriator's diversion interferes with a senior appropriator's water right. *See, Wayman*, 458 P.2d at 864-67.

The Rule of Reasonableness

The court in *Wayman* adopted a rule of reasonableness, which allows the court to balance competing rights in a manner that best achieves the goal of putting the greatest amount of water to beneficial use. *Id.* at 865-67. Under the rule of reasonableness:

... [a]ll users are required where necessary to employ reasonable and efficient means in taking their own waters in relation to others to the end that wastage of water is avoided and that the greatest amount of available water is put to beneficial use. *Id.* at 865.

This rule tempers the prior appropriation doctrine, which could otherwise allow a senior appropriator to hold unappropriated water hostage due to outdated and inefficient methods of diversion. *Id.* at 865-66. In assessing reasonableness, courts should consider the total situation, including the quantity of water available, the average annual recharge in the basin, the existing rights and their priorities. *Id.* at 865.

The Supreme Court's Decision

In order to prevail on an interference claim, the plaintiffs must establish that: 1) they have an enforceable water right; 2) their water right is senior to the defendant's water right; 3) their methods and means of diversion are reasonable; 4) despite their reasonable efforts, they are unable to obtain the quantity or quality of water to which they are entitled; and 5) the defendant's conduct obstructed or hindered their ability to obtain that water (causation).

In this case, the District Court found that Pineview West interfered with the plaintiffs' wells when it operated Well #4. Pineview West asserts that the

court erred in several ways. First, none of the plaintiffs offered evidence that they were unable to get some quantity of their water rights. Second, that the court erred in concluding that the plaintiffs' means of obtaining their water was reasonable. Finally, the court erred in its damage assessment. The Utah Supreme Court addressed each of these issues, but focused upon the reasonableness issues.

Insufficient Findings to Establish Plaintiffs' Methods of Diversion Were Reasonable

The Supreme Court noted that the District Court made insufficient findings to establish that plaintiffs' method and means of diversion were reasonable (the third element of interference). As a result, the court could not properly conclude that despite reasonable efforts, the plaintiffs were unable to obtain some quantity of their water rights (the fourth element). For these reasons, the Court reversed the interference determination.

District Court Erred in Granting Plaintiff a Water Table Level Water Right to Which Plaintiff Has No Enforceable Right

Pineview West contended that the District Court essentially granted the plaintiffs a right to a certain level of the water table, to which they have no enforceable right. The Supreme Court agreed, clarifying that plaintiffs have an enforceable right only in their lawfully appropriated water rights—not in a particular level of the water table. Accordingly, a claim for interference cannot be divorced from the requirement that the plaintiff make reasonable efforts to obtain their water. Fundamentally, to prevail on an interference claim, the plaintiff must show that because of the actions of another, it is no longer possible to access the water to which they are entitled even though they have made reasonable efforts. If such a showing cannot be made, then all that has been shown is that the water table has been lowered, not that they have been prevented from obtaining some quantifiable portion of their water right.

Reasonable and Efficient Means of Taking Water in Relationship to Other Users

Additionally, as noted in *Wayman*, all water users are required to “employ reasonable and efficient means in taking their own waters in relation to others

to the end that wastage of water is avoided and the greatest amount of available water is put to beneficial use.” *Wayman*, at 866. Here, the District Court did not find that the means of diversion utilized by plaintiffs were reasonable and more importantly, efficient. Specifically, the District Court did not address whether plaintiffs made reasonable efforts to obtain the available water, but were unable to do so. The District Court made no findings regarding whether the pump could be lowered or the wells modified in order to reach the available water, or conversely to explain why this would not be possible. In the absence of such findings, the Supreme Court concluded that “there are not adequate findings to establish that the plaintiffs made reasonable efforts to obtain their water.” Consequently, the Supreme Court concluded that if the plaintiffs cannot demonstrate that their means and method of diversion are reasonable, it is impossible to satisfy the fourth element of the prima facie case— that despite reasonable efforts, the plaintiffs could not obtain the quantity of water to which they were entitled.

Claim of Interference Requires A Showing of How Much Water Plaintiff is Prevented from Taking

Finally, the Supreme Court noted that a claim of interference does require a showing of how much water the plaintiff is prevented from obtaining as a result of the interference. Essentially, to satisfy the fourth element, requires some factual evidence of the quantity of water that could be obtained (and also the quantity that could not). It is difficult to establish that an appropriator is prevented from obtaining some quantifiable amount of the water to which they were entitled with no measurements of the amount of water they *could* obtain at the time of the alleged interference. Because there was no finding of reasonableness, the Court reversed the findings of interference.

Other Issues on Appeal

With regard to the other issues on appeal, the Supreme Court ruled that in light of its findings regarding interference, the plaintiffs' claim for negligence should be remanded for reconsideration and further fact finding, if necessary. The Court also remanded the calculation of damages and the imposition of pro-

spective remedies. Remand was appropriate in both cases to determine how these findings are altered by the reversal of the inference determinations. Finally, the Court vacated a portion of the court's compensatory damages award.

Conclusion and Implications

A key element of a claim for interference with water rights is that the appropriator uses reasonable

methods and means of diversion. Thus, interference occurs when, despite their reasonable efforts, they are unable to obtain the quantity or quality of water to which they are entitled. A copy of the Court's opinion may be found at: https://www.utcourts.gov/opinions/supopin/Arave%20v.%20Pineview%20West%20Water%20Company20201015_20180067_67.pdf
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