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EWL

FEATURE ARTICLE

ARE 'WETLANDS' REALLY 'WATERS OF THE STATE'?

By David Ivester, Esq.

California regulates "discharges of waste" into "waters of the state" under the Porter-Cologne Act. Contrary to popular supposition, "waters of the state" properly do not include "wetlands." The California Legislature had no intention of reaching wetlands when it enacted the statute in 1969. What!? But the State Water Resources Control Board (SWRCB) and the Regional Water Quality Control Boards (RWQCBs) have long treated "wetlands" as "waters of the state" and asserted they have jurisdiction to regulate discharges of waste into them. Indeed, after a decade or so of consideration, the SWRCB recently adopted an extensive regulation prescribing detailed procedures by which it intends to do exactly that. That the SWRCB and RWQCBs have claimed this authority and have so far gotten away with it does not though establish the validity of their claim nor shield it from challenge.

The Porter-Cologne Act

Whether "wetlands" are "waters of the state" regulated under the Porter-Cologne Act is a question of how to read and understand the statute, and that calls for recognizing and following well established, fundamental principles of statutory interpretation. Even though the SWRCB and RWQCBs have long been in the habit of treating wetlands as waters of the state, their claim has never been examined or sanctioned by any court. It remains, in that sense, an open legal question.

The Porter-Cologne Act provides that anyone discharging or proposing to discharge "waste" within any region in the state that could affect the quality of "waters of the state" must first file a report of waste discharge with the pertinent RWQCB and then comply with the conditions of any "waste discharge requirements" (*i.e.*, a permit by another name) issued by the SWRCB. (Wat. Code §§ 13260, 13264.) (Whether discharging "waste" extends beyond discarding or disposing of "sewage and any and all other waste substances," as "waste" is defined in the Porter-Cologne Act, to also encompass placing and using materials such as sand, gravel, soil, concrete, and lumber for some intended, useful purpose, e.g., building houses and roads, repairing levees, or contouring agricultural fields, is a different question for another day.)

When enacting the Porter-Cologne Act in 1969, the Legislature defined "waters of the state" to mean "any surface water or groundwater, including saline waters, within the boundaries of the state." (Wat. Code § 13050(e).)

Legislative Intent

The touchstone of understanding a statute is legislative intent, and in construing a statute, the "fundamental task is to ascertain the Legislature's intent so as to effectuate the purpose of the statute." (*Smith v. Superior Court*, 39 Cal.4th 77, 83 (2006).) Toward this end, "we begin with the language of the statute, giving the words their usual and ordinary meaning." (*Id.*)

In 1969, the Legislature undoubtedly understood "surface water" in keeping with its ordinary meaning and then existing law to refer not just to any H_2O on the ground surface, but rather to an actual body of water, either flowing or still, that:

> encompasses both natural lakes, rivers and creeks and other bodies of water, as well as artificially created bodies such as reservoirs, canals, and dams. (*People ex rel. Lungren v. Superior Court*, 14 Cal.4th 294, 301-302 (1996).)

> But by surface waters are not meant any waters which may be on or moving across the surface of the land without being collected into a natural watercourse. (*Horton v. Goodenough,* 184 Cal. 451, 453 (1920).)

Integral to identifying a surface waterbody and delineating its extent is ascertaining and recognizing its boundary, the ordinary high-water mark at common law, which distinguishes the surface waterbody from surrounding land. In *Churchill Co. v. Kingsbury,* 178 Cal. 554 (1918), for instance, the California Supreme Court considered whether certain lands:

> . . .were swamp and overflowed lands, passing to the state by grant from the United States, or were lands lying under the waters of a navigable lake, belonging to the state by virtue of her sovereignty. (*Id.* at 557).

Noting that a survey had been made of the ordinary high-water mark of the lake, the Court affirmed that "[t]he lake consists of the body of water contained within the banks as they exist at the stage of ordinary high water." (*Id.* at 559.) It distinguished that from other "land [that] was not a part of the bed of the lake, but was marsh or swamp land adjoining the border of the lake." (*Id.*)

"Wetlands" was a word not yet appearing in any California court decision by the time the Porter-Cologne Act was enacted. The term has come into currency more recently to generally refer to areas that do not contain enough water often enough or long enough to develop an ordinary high water mark identifying them as waterbodies and delimiting their boundaries, but instead experience inundation or saturation by water often enough and long enough (perhaps as little as a couple weeks per year) to develop soil characteristics typical of anaerobic conditions and support a prevalence of vegetation typically adapted for saturated soil conditions.

Not only did the Legislature define "waters of the state" to mean "surface waters" as commonly understood, it also said nothing in the Porter-Cologne Act or its legislative history to suggest it intended these terms to include "wetlands" (or swamps, marshes, bogs, or the like). When passing the act, the Legislature said nothing of "wetlands" in its definition of "waters of the state." Indeed, the Legislature never mentioned wetlands *anywhere* in the Porter-Cologne Act. Nor did it refer to wetlands *anywhere* in the legislative history of the Porter-Cologne Act. If the Legislature had intended to depart from the common understanding of surface waters and start treating wetlands as waters of the state, one would reasonably expect the Legislature to have left at least some hint of that innovation in the act and its legislative history. It did nothing of the sort. The Legislature's omission of any reference to wetlands is compelling; it plainly did not have wetlands in mind when it enacted the statute and defined the "waters of the state" regulated under the act.

That rightly marks the end of the inquiry:

> Where the words of the statute are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history. (*Burden v. Snowden,* 2 Cal.4th 556, 562 (1992).)

The Legislature's intent is manifest. "Waters of the state" as defined by the Legislature in the Porter-Cologne Act do not include wetlands.

State Water Resources Control Board Claims over Wetlands

The SWRCB and RWQCBs nonetheless have long claimed authority to regulate wetlands as "waters of the state." On April 2, 2019, the SWRCB formalized their regulatory practices in this regard by adopting a state wetland definition and procedures for discharges of dredged or fill material to waters of the state. (State Water Resources Control Board, Res. No. 2019-0015; 23 Cal. Code Reg. § 3013.) In doing so, it asserted that wetlands of various types are "waters of the state." (State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State, p. 2 (Apr. 2, 2019) (Procedures); Staff Report, pp. 3-4 (Apr. 2, 2019).)

This claim does not withstand scrutiny. Disregarding the first principle of statutory interpretation, the SWRCB failed even to attempt the fundamental task necessary to understanding the Porter-Cologne Act, *i.e.*, read it with the aim of ascertaining the Legislature's intent. In the Procedures and accompanying materials, the SWRCB spoke much about why it regarded including wetlands within its regulatory purview to be a good idea, but said almost nothing

about what the Legislature intended. The act's meaning though is not a question of policy for the SWRCB to decide as if writing on a clean slate, but rather a question of statutory interpretation. The SWRCB's responsibility is to faithfully ascertain and implement the Legislature's intent, and not to arrogate to itself the authority to decide what it thinks should be the scope of its own regulatory jurisdiction.

As explained above, both the text and legislative history of the Porter-Cologne Act reveal no intent of the Legislature to treat wetlands as "waters of the state." The SWRCB has not offered any sound reason to imagine otherwise. It said nothing of the omission of any reference to "wetlands" in the statute and its legislative history. It said nothing of the ordinary meaning and common law understanding of "surface waters." The most the SWRCB offered was its own characterization that the act defines waters of the state "broadly" to include "any surface water or groundwater, including saline waters, within the boundaries of the state." (Procedures, p. 2; Staff Report, p. 57.) Simply labeling the act's definition as "broad," though, hardly serves as evidence of the Legislature's intent. Even less does such a facile assertion explain or justify supposing the Legislature intended to include wetlands within "waters of the state."

Seemingly dropping all pretense of seeking the Legislature's intent, the SWRCB instead offered a novel theory for injecting "wetlands" into "waters of the state." It observed that Congress enacted the federal Clean Water Act to regulate discharges of dredged or fill material into "waters of the United States." Since the Clean Water Act is subject to constitutional limitations, *e.g.*, the limited reach of the federal commerce power, inapplicable to the Porter-Cologne Act predicated on the state's general police powers, the SWRCB observed that "waters of the state" thus could extend beyond "waters of the United States" that Congress might regulate under the commerce power. (Staff Report, pp. 16-17.) On that premise, the SWRCB asserted without further explanation that "'[w]aters of the state' includes all 'waters of the U.S.'" (Procedures, p. 2; Staff Report, p. 57.) Extending its assertion even further, the SWRCB reasoned that since the term "waters of the United States" has been defined by the U.S. Army Corps of Engineers (Corps) and U.S. Environmental Protection Agency (EPA) in their regulations to include "wetlands," "waters of the state" necessarily includes wetlands as well. (Staff Report, pp. 13-21, 55.)

This makes no sense. It is but wordplay, toying with an impossibility and a *non sequitur*—and failing to offer any real basis for the SWRCB's claim over wetlands. First, the impossibility: When the Legislature enacted the Porter-Cologne Act in 1969, it could not have intended "waters of the state" to include "waters of the United States" because the latter term had not yet been invented. Congress did not coin it until three years later when passing the Clean Water Act in 1972. Similarly, the Legislature could not have had in mind then nonexistent Corps and EPA wetland regulations when it defined "waters of the state" in the Porter-Cologne Act. The SWRCB cannot subsequently infuse "waters of the state" with meaning the Legislature could not possibly have intended when it defined the term. (*See*, *Dyna-Med, Inc. v. Fair Employment & Housing Com.*, 43 Cal.3d 1379, 1388-1389 (1987); 78 Ops.Cal.Atty.Gen. 137, 140 (1995), observing that a California statute "could not possibly have been intended or designed to conform with the federal counterpart" enacted years later.)

The SWRCB nonetheless tried bootstrapping its claim, saying that its own regulation adopted in 2000 stating that, for certain limited purposes, "[a]ll waters of the United States are also 'waters of the state'" (23 Code Cal. Reg. § 3831(w)):

> [This]. . .reflects an intention by the Water Boards to include a broad interpretation of waters of the United States into the definition of waters of the state. (Staff Report, p. 57.)

The SWRCB's regulation, though, equates waters of the state with waters of the United States *only* for purposes of "certifications" provided by the SWRCB and RWQCBs pursuant to certain federal laws, such as § 401 of the federal Clean Water Act, and not for any other purposes. If anything, the regulation's limitation to circumstances governed by federal law suggests that, contrary to the SWRCB's supposition, in other contexts all waters of the United States are *not* necessarily waters of the state. More to the point, though, it is the Legislature's intention, not the SWRCB's, that establishes the meaning of "waters of the state." An agency cannot simply will a statute to mean what *it* wishes. Indeed, to the extent the

SWRCB strayed beyond the Legislature's intention, its regulation is invalid.

Second, the *non sequitur*: In defining "waters of the state," the Legislature of course was not bound by constitutional limitations on Congress in defining "waters of the United States," and that may explain how "waters of the state" could extend to surface waters beyond the reach of the federal commerce power. How that observation might have any bearing though on the SWRCB's further assertion that "waters of the state" must also be read to encompass features other than the "surface waters" specified by the Legislature, the SWRCB does not explain. It simply does not follow that because the Legislature had the power to regulate surface waters beyond Congress' reach, it necessarily intended to regulate features other than surface waters, such as wetlands—and, moreover, did so without saying so.

Conclusion and Implications

The Porter-Cologne Act and its legislative history demonstrate the lack of any intent by the California Legislature to treat "wetlands" as "waters of the state." In nonetheless claiming authority to regulate "wetlands," the State Water Resources Control Board shrugs off the California Legislature's intent and instead resorts to alternative theories serving only to reveal the absence of any sound basis for its claim. "Waters of the state" within the meaning of the Porter-Cologne Act properly do not extend beyond "surface waters" to encompass "wetlands" elsewhere on the landscape.

That said, as a matter of practicality, there is little reason to expect major changes in the scope of wetland regulation in California any time soon. The vast majority of wetlands are regulated under the federal Clean Water Act by the Corps and EPA—and by the State Water Resources Control Board and Regional Water Quality Control Boards exercising their authority under § 401 of that federal CWA to "certify" whether permits to fill such wetlands comply with pertinent federal and state requirements. That regulatory program will continue unaffected by whether the Boards regard wetlands to be "waters of the state" under state law. Moreover, wetlands outside federal jurisdiction commonly are regulated in some manner under local ordinances or other state or regional programs; those regulatory programs will continue as well.

The SWRCB's newly adopted wetland regulatory Procedures may well remain in place too. Having accustomed itself for many years to enjoy regulatory jurisdiction under the Porter-Cologne Act at least coextensive with that exercised by the Corps and EPA under the Clean Water Act and having worked for a decade to develop the Procedures to extend and refine its regulatory program, the Board appears sufficiently invested in the effort to not readily relinquish it. Few landowners have much incentive to challenge that claim. Owners of the vast majority of wetlands regulated under the federal or some other program would gain little or no regulatory relief by removal of the SWRCB's largely duplicative regulation of wetlands under the Porter-Cologne Act. Whatever projects or activities they undertake affecting those wetlands would remain subject to regulation under those other programs even if the SWRCB or a court set aside the Procedures. Landowners with wetlands outside the jurisdiction of the federal agencies, who thus might gain some regulatory relief by removal of the SWRCB and RWQCBs' regulatory program, typically tend to prefer trying to reach acceptable resolutions of their land use issues through permitting rather than litigation. Generally, only those with their backs against the wall, such as those facing enforcement actions and penalties or onerous permit requirements, prohibitively expensive avoidance and mitigation measures, and the like, may feel sufficiently motivated to contest the legality of the Boards' claim that they can regulate "wetlands" as "waters

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EASTERN WATER NEWS

NEWS FROM THE WEST

In this month's News from the West we report on an important water rights court settlement in the State of Nevada. We also report on a project in California to restore habitat for salmon. Tribes in northern California have long-in-time fishing rights to salmon and the species is of great importance, not only to the Tribes, but also to the commercial fishing industry in the state.

Settlement Reached in Dispute over Groundwater/Surface Water Conflicts in Nevada's Humboldt River Basin

Pershing County Water Conservation District v. Tim Wilson, P.E., Nevada State Engineer, CV15-12019, (11th Dist. Nov. 20, 2020).

In the February 2020 issue of *Western Water Law & Policy Reporter*, we described litigation initiated by surface water users in Nevada's Humboldt River Basin against the State Engineer in 2015 to seek curtailment of groundwater pumping that captured senior, decreed river flows. Five years into the litigation, the court ordered the plaintiff, Pershing County Water Conservation District (PCWCD), to provide notice of the lawsuit to holders of water rights in the basin, setting an October 14, 2020 deadline. The court also scheduled an evidentiary hearing for March 22-26, 2021. Before the notice deadline arrived, the parties filed a stipulation to stay proceedings so they could engage in settlement discussions.

The State Engineer's Efforts to Conjunctively Manage the Humboldt River Basin

While the lawsuit was ongoing, the Nevada Legislature adopted a policy declaration:

> . . .[t]o manage conjunctively the appropriation, use and administration of all waters of this State, regardless of the source of the water. Nev. Rev. Stat. § 533.024(1)(e).

To facilitate the conjunctive management of groundwater and surface water in the Humboldt River Basin, the State Engineer contracted with the U.S. Geologic Survey (USGS) and Desert Research Institute (DRI) to build a groundwater capture model to quantify the amount of river depletion caused by groundwater withdrawals. USGS and DRI also developed improved groundwater budgets at the basin scale. Initial model results became available in January 2020.

In addition to the model, the State Engineer undertook other notable steps to proactively manage the Humboldt River region to balance the interests of senior decreed river rights and junior groundwater rights. These included:

- Establishing a policy that requires inclusion of evaporative losses from mine pit lakes in the basin groundwater budget and the permanent relinquishment of groundwater rights to account for such losses;

- Engaging in continued stakeholder outreach, data sharing and uniform region-wide management; and

- Issuing an order requiring the installation of totalizing meters and water use reporting, subsequent field verification of meter installation and data accuracy, and development of a database to manage and report groundwater pumping data.

Settlement Terms

In light of these actions and other management commitments, PCWCD and the State Engineer were able to reach a settlement of the litigation. The settlement requires the State Engineer to issue an administrative order that creates clear procedures and standards—informed by the groundwater model—for considering groundwater applications in the Humboldt River basin. The order must set out specific thresholds for surface water capture by new groundwater appropriations and mandate that an applicant provide sufficient replacement water to avoid conflicts with existing rights. The mitigation require-

ments must be specific as to quantity, priority, and such other considerations that are necessary to avoid such conflicts.

The settlement terms also require the order to set out specific capture thresholds for applications to change existing groundwater appropriations. When reviewing such applications, the State Engineer must consider variations in capture and any resulting potential conflict caused by a change in the point of diversion. For changes to a point of diversion that will increase river capture, the to-be-issued administrative order must set out specific requirements for offsetting such increases with either surface water replacement or relinquishment of groundwater rights.

In addition, the administrative order must set out a mechanism to address future conflicts between valid existing groundwater users and decreed Humboldt River rights. The State Engineer must articulate a basis upon which future orders would restrict withdrawals to conform to priorities, based upon the best available science, and establish specific considerations for determining whether a curtailment order is warranted.

Whether for new appropriations or change applications, the administrative order must require notice to all applicants that approval of an application would be subject to any long-term conjunctive management plan the State Engineer deems necessary to prevent or avoid conflicts with existing rights.

The settlement necessitates that the administrative order first be issued in draft form and undergo a notice and comment period, followed by a public hearing. The State Engineer agreed to issue the draft order within 90 days of the settlement agreement's effective date, which was October 19, 2020. As a result, the draft order is anticipated in mid-January 2021.

In consideration of these terms, PCWCD agreed to dismiss its litigation with prejudice. The court entered its order of dismissal on November 20, 2020.

Conclusion and Implications

The settlement agreement avoided protracted and expensive litigation that could have ultimately ended up in the same place the parties reached through negotiation. With the USGS/DRI model, the Nevada State Engineer has a powerful tool to conjunctively manage surface and groundwater withdrawals throughout a large geographic area. Using the best available science, and the guard rails established in the settlement, the State Engineer will be able to actively protect against impacts to surface water rights caused by groundwater withdrawals.
(Debbie Leonard)

Potter Valley Project Seeks to Restore Eel River Habitat for North Coast Salmon and Steelhead

In the beautiful Mendocino National Forest, just about an hour's drive northwest of the City of Ukiah, lies the camper's paradise of Lake Pillsbury. This 2,300-acre reservoir has served as a hotspot for summer vacationers with its lakeside camp sites and serene stretch of the Eel River below Scott Dam, but all of this may see a big change in the coming years.

The Potter Valley Project

The Potter Valley Project lies on the Eel River just north of the small farming community of the same name. Comprising the Project are the Scott and Cape Horn Dams, an intake tunnel diverting water from the Eel into the Russian River watershed, and the Potter Valley Powerhouse. For many years now, this project has been operated by PG&E. With the Project's license set to expire in April of 2022—requiring costly updates to its infrastructure including a $100 million fish passage system—PG&E has deemed the 100-year-old Project as no longer economically viable.

Although it initially began the relicensing process in 2017, PG&E officially withdrew its application to relicense the Potter Valley Project in early 2019. Six months later, several agencies and organizations banded together and filed a new Notice of Intent to file an application for a new license for the Project.

Progress in Relicensing

Led by Mendocino County IWPC, Sonoma County Water Agency, Cal Trout, Humboldt County and later Round Valley Indian Tribes (together: NOI Parties), the troupe has set out to relicense the project with an ultimate plan to have Scott Dam removed entirely, freeing up roughly 300 miles of high elevation steelhead and salmon habitat in the Mendocino National Forest. In addition to its plans to improve fish habitat conditions, the NOI Parties' plan seeks to increase winter diversions to maintain adequate water supply for the Russian River watershed which

currently receives an average of 60,000 AFY from the Eel through the Potter Valley Powerhouse.

In advancing these goals, the NOI Parties submitted its initial Scoping Document for the Project with a proposed pre-filing process plan and schedule in July of 2019. This schedule—which was echoed by the NOI Parties' Ad Hoc Committee in September of 2020—was broken into three phases.

First up would be the initiation of the licensing process. This phase 1 involved the filing of the NOI, submission of a feasibility study, and submission of an updated scoping document. Scheduled through most of 2020, this Phase 1 is nearing completion as the NOI Parties have already submitted both a Feasibility Study and Scoping Document 3.

Phase 2 consists of conducting further study on the Project's potential impacts in preparation for the submission of the Final License Application. With the deadline to submit a final application for relicensing pushed back to April of 2022, the NOI Parties appear set to enter into Phase 2 as early as January, 2021.

Lastly, Phase 3 involves the final step in the relicensing process—preparation and submission of the Final License Application. Anticipated in its scheduling for sometime late 2021, this final phase will commence once the NOI Parties file its Updated Study Report and have a Study Plan Determination issued.

Conclusion and Implications

The NOI Parties have a lot of work ahead of them if they are to keep with their plan of submitting a Final License Application by April of 2022. In addition to the phasing set out above, the NOI Parties are acting as a proxy for a proposed Regional Entity that would ultimately be the license applicant for the Potter Valley Project. The Regional Entity has not yet been formed under California law, but once formed, the Regional Entity would supplant the NOI Parties in the licensing process. While no official timeline for the establishment of this Regional Entity has been released, it is expected that the Regional Entity will be discussed before the California Legislature sometime next year if the NOI Parties plan to have this Entity submit the Final License Application.

Dam removal is by no means an easy or quick process, and obviously is very controversial. This Project will continue to face much opposition as it moves along and it certainly has a long way to go before anything can be definitively said about the future of the Eel River. This process has, however, been a move towards habitat restoration in the Eel, and the Two Basin Solution touted by the NOI Parties hopes to balance that with the water supply needs that Lake Pillsbury has historically fulfilled in the Russian River watershed.

In the coming months, interested parties can keep an eye out for updates on the Phase 2 studies and on the formation of the Regional Entity. For more information on the Potter Valley Project and its progress, both the Potter Valley Project's and California Trout's website offer resources for staying up to date.
(Wesley A. Miliband & Kristopher T. Strouse)

LEGISLATIVE DEVELOPMENTS

FEDERAL LEGISLATION REINTRODUCED TO TACKLE PFAS WATER CONTAMINATION ISSUES

A growing concern over the effects of water contaminants perfluoroalkyl and polyfluoroalkyl substances (commonly referred to as PFAS) in recent years has resulted in several states passing legislation to impose regulations on these "forever chemicals." Congress also made attempts at federal regulation. With a new federal administration on the horizon, congressional proponents of such regulation are preparing to reintroduce previously stalled PFAS legislation.

Background

PFAS can be found in many household products that have been used for decades. It has also been increasingly discovered in drinking water throughout California and the United States. For example, firefighting foam widely employed on military bases, airports and at industrial sites has been found to be one prevalent source of PFAS in groundwater basins supplying drinking water.

Scientists refer to PFAS as "forever chemicals" because they accumulate in the human body and do not dissipate over time. Human exposure to PFAS chemicals has been linked to kidney and testicular cancer, high levels of cholesterol, thyroid disease and other health issues.

PFAS Legislation Reintroduced in 2020

Early in 2020, the United States House of Representatives passed House Resolution (HR) 535; however, the bill did not go on to pass in the Senate. Recent reports indicate that the House intends to reintroduce PFAS legislation in early 2021, to signal to the incoming Biden administration the importance of regulating PFAS. This bill, unless further modified, would propose to enact a variety of PFAS related controls, including the following:

- The Environmental Protection Agency (EPA) would be required to designate certain PFAS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund). The EPA would then have five years to determine whether the remaining PFAS should be designated as hazardous substances, individually or in groups. However, the bill would exempt public agencies or private owners of public airports that receive federal funding from Superfund liability for remediation of certain releases of PFAS into the environment resulting from the use of aqueous film forming foam in certain circumstances:

- The EPA would be required to create regulations for the disposal of materials containing PFAS or aqueous film forming foam. Within one year, the EPA would be required to issue guidance on minimizing the use of, or contact with, firefighting foam and other related equipment containing any PFAS by fire fighters and other first responders, without jeopardizing firefighting efforts. Additionally, materials containing PFAS would be considered hazardous waste for criminal penalty purposes.

- The bill would also require the EPA to promulgate a national primary drinking water regulation for certain PFAS within two years, and would require it to consider regulating additional PFAS or classes of PFAS in drinking water within a set time frame. The EPA would publish a health advisory for PFAS not subject to a national primary drinking water regulation.

- The EPA would be prohibited from imposing financial penalties for a violation of a PFAS national primary drinking water regulation within the first five years after the bill's enactment into law.

- The bill would require the EPA to establish a grant program to financially assist community water systems with treating PFAS contaminated water.

- The EPA would be directed to investigate meth-

ods and means to prevent contamination of surface waters, including those used for drinking water, by certain PFAS.

• An owner or operator of an industrial source would be prohibited from introducing PFAS into treatment works (systems that treat municipal sewage or industrial wastes) unless such owner or operator first provides certain notices to such treatment works, including notice of the identity and quantity of the introduced PFAS.

• The EPA would biennially review the discharge of PFAS from certain point sources and make a determination whether or not to add certain measureable PFAS to the list of toxic pollutants, or to establish effluent limitations and pretreatment standards for such PFAS.

The Biden Administration's Stance on PFAS

Even if the reintroduction of HR 535 again fails in the Senate, the Biden administration would likely consider pursuing actions via the executive action to limit PFAS exposure. Such actions could include Superfund designation of PFAS as hazardous substances. The Biden administration's online environmental justice platform (https://joebiden.com/environmental-justice-plan/) has already signaled that it intends to prioritize PFAS regulation by:

> . . .designating PFAS as a hazardous substance, setting enforceable limits for PFAS in the Safe Drinking Water Act, prioritizing substitutes through procurement, and accelerating toxicity studies and research on PFAS.

Conclusion and Implications

HR 535 is intended to create a safer working environment for those exposed to PFAS while also reducing the exposure of PFAS in drinking water supplies. However, whether this bill becomes law depends largely on the balance of power in Congress, which as of the data of this writing remains undetermined. Nevertheless, this bill is intended to signal the importance of PFAS regulation in order to encourage action from the executive branch with respect to setting new PFAS controls during the next presidential administration. For more information on HR 535 *see*: https://www.congress.gov/bill/116th-congress/house-bill/535

(Gabriel J. Pitassi, Derek R. Hoffman)

REGULATORY DEVELOPMENTS

U.S. FISH AND WILDLIFE SERVICE ISSUES FINAL EIS FOR CHANGES TO MIGRATORY BIRD TREATY ACT

On November 27, 2020, the U.S. Fish and Wildlife Service (FWS or Service) published a final Environmental Impact Statement (EIS) analyzing a proposed rule change to the Migratory Bird Treaty Act (MBTA) that would significantly reduce potential liability under the statute, including for water agencies. Specifically, the proposed rule would adopt a regulation exempting activities that incidentally result in "take" of protected bird species from the scope of the MBTA's prohibitions, meaning that the MBTA would only reach, and create potential civil or criminal liability for, actions designed to intentionally kill or harm migratory birds, their nests, or their eggs. [U.S. Department of the Interior Fish & Wildlife Serv., *Regulations Governing Take of Migratory Birds: Final Environmental Impact Statement* (November 2020).]

Background

The FWS is the federal agency delegated the primary responsibility for managing migratory birds consistent with four international migratory bird treaties (between the United States and Canada, Mexico, Japan, and Russia) and implementing the MBTA. The MBTA was enacted in 1918 to help fulfill the United States' obligations under the 1916 "Convention between the United States and Great Britain for the protection of Migratory Birds." The goal of the MBTA was to stop the unregulated killing of migratory birds at the federal level.

On December 22, 2017, the Principal Deputy Solicitor of the Department of the Interior (Solicitor), exercising the authority of the Solicitor pursuant to Secretary's Order 3345, issued a legal opinion, M-Opinion 37050, "The Migratory Bird Treaty Act Does Not Prohibit Incidental Take." M-Opinion 37050 concluded that the MBTA's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same apply only to actions intentionally or purposefully "taking" migratory birds, their nests or their eggs. In response to this opinion, several environmental groups took legal action in federal court, alleging that the proposed interpretation would severely rollback the ability of the federal government to prosecute industries for violations of the MBTA.

The FWS sought to adopt the Solicitor's opinion, publishing a proposed rule codifying M-Opinion 37050 on February 3, 2020. Following the administrative process required by the National Environmental Policy Act (NEPA), the Service released a draft Environmental Impact Statement on June 5, 2020. After the issuance of the proposed rule and draft EIS, a U.S. District Court vacated M-Opinion 37050. (*See, Natural Resources Defense Council v. U.S. Department of the Interior*, ___F.Supp.3d___, Case 18-cv-4596(S.D. N.Y. Aug. 11, 2020); *see:* https://www.biologicaldiversity.org/species/birds/pdfs/Migratory-Bird-Treaty-Act-Ruling.pdf)

In response to the court's *vacatur* of the M-Opinion, the FWS continued to proceed through the NEPA process. On November 27, 2020, the Service published the final EIS, providing responses to comments received throughout the process. The final EIS is available for public review for 30 days, after which the Service will issue a Record of Decision (ROD). *See*: https://www.fws.gov/regulations/mbta/.

After the ROD is issued, the final step of the rulemaking process will be the publication of a final rule.

The Migratory Bird Treaty Act and 'Takings'

The MBTA makes it unlawful to, among other things, take individuals of many bird species found in the United States, unless that taking is authorized by a regulation promulgated under 16 U.S.C.§ 704. 16 U.S.C. § 703. "Take" is defined in the Service's general wildlife regulations as "to pursue, hunt, shoot, wound, kill, trap, capture, collect, or attempt to hunt, shoot, wound, kill, trap, capture, or collect." 50 C.F.R § 10.12. Prior to M-Opinion 37050, § 703 of the MBTA was interpreted as a strict liability provision, meaning that no criminal intent is required for a violation to have taken place, any act that takes or kills a bird must be covered as long as the act results in the death of a bird. M-Opinion 37041 at 2 (January 10, 2017). Instead, the FWS relied on enforce-

ment discretion to determine when to pursue alleged incidental take violations. *Id.* at 12.

However, federal courts have adopted different views on whether the MBTA prohibits the "incidental take" of migratory birds. Some Courts of Appeal and District Courts have held that the MBTA criminalizes certain activities that incidentally take migratory birds, generally with some form of limiting construction, while others have indicated that it does not. For instance, the FWS did not enforce incidental take of migratory birds within the jurisdiction of the Fifth Circuit Court of Appeals because that court held the MBTA does not prohibit incidental take. *See: United States v. CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015).

The Fish and Wildlife Service's Proposed Rule

By its most recent action, the Service proposes to develop a regulation in 50 C.F.R part 10 that defines the scope of the MBTA to exclude incidental take, claiming that the adoption of the regulation is necessary to provide legal certainty for the public regarding what actions are prohibited under the MBTA.

In the proposed rule, the FWS seeks to interpret the MBTA to prohibit only actions directed at migratory birds, their nests, or their eggs, clarifying that incidental take is not prohibited. With the proposed rule, the Service proposes to adopt a regulation defining the scope of the MBTA's prohibitions to reach only activities expressly directed at killing migratory birds, their nests, or their eggs. In other words, take of a migratory bird, its nest, or eggs that is incidental to another lawful activity does not violate the MBTA, and the MBTA's criminal provisions do not apply to those activities. Only deliberate acts intended to take a migratory bird are prohibited under the MBTA. As a result, this interpretation would significantly reduce the activities that would result in liability under the MBTA, including activities undertaken by water agencies that may inadvertently lead to take of migratory birds.

Conclusion and Implications

The Record of Decision for the proposed rule is due to be issued at the end of December, after which the final rule will be published. Given the controversy surrounding this issue and previous litigation attempts, it remains to be seen if there will be any last-minute legal challenges. Ultimately, the proposed rule will significantly change current enforcement of the MBTA. However, with a Biden administration coming to office in January 2021, it is possible that these changes to the MBTA may be reversed. (Geremy Holm, Steve Anderson)

NOAA REPORTS HALF OF THE UNITED STATES IS MIRED IN DROUGHT CONDITIONS

The National Oceanic and Atmospheric Administration (NOAA) recently reported 47 percent of the contiguous United States to be experiencing drought conditions due to lack of precipitation and higher than average temperatures. Looking ahead, federal climatologists are reportedly not optimistic that conditions will improve during the winter season.

U.S. Drought Conditions

NOAA reports that in 2020, drought conditions broadened and intensified throughout the western United States, particularly in California, the Four Corners region and western Texas, due to a lack of seasonal monsoons over the past two years.

According to the NOAA, many climatologists project that La Niña conditions, which are characterized by below-average sea surface temperatures resulting in below-average precipitation, are likely to continue throughout the winter and early spring seasons, providing little relief to the western United States. At the same time, unprecedented wildfires in the region have been exacerbated as a result of the emerging drought conditions. Colorado, Oregon, and California each experienced their largest wildfires on record in 2020. California, in particular, now seeks to mitigate risks of subsequent landslides and pronounced flooding in burn areas.

California Drought Conditions

According to the United States Drought Monitor (USDM), more than three-quarters of California is experiencing at least some level of drought condi-

tions. The USDM categorizes drought levels at moderate, severe, extreme, or exceptional. The USDM estimates that more than 30 million or, approximately 77 percent of the state's population, live in areas in drought conditions.

Additional relevant data regarding California drought and water supply conditions includes:

The California Department of Water Resources (DWR) eight precipitation stations in northern California recorded a record low 0 percent of average historic rainfall in October 2020 and 53 percent of average in November.

Most of the state's major reservoirs are lower than historical average to date compared to last year. The federal Central Valley Project's (CVP) largest reservoir was recently reported to hold 75 percent of its historical average for this time of year compared to 119 percent of its historical average at the same time in 2019. Lake Oroville, the State Water Project's largest reservoir, recently reported holding just 61 percent compared to 90 percent of its historical average to date in 2019. San Luis Reservoir, a joint-use facility for the State Water Project and CVP, reported holding 76 percent compared to 72 percent of its historical average to date in 2019.

Looking to the watershed areas, recent statewide mountain area soil water equivalent (SWE) was reported at just 47 percent of normal. The current regional breakdown (percentage of normal SWE) is as follows: Northern Sierra/Trinity–46 percent, Central Sierra–53 percent, and Southern Sierra–29 percent.

Finally, areas of severe drought and extreme drought expanded in southern California where precipitation during a recent 90-day reporting period was generally less than 25 percent of normal.

California Department of Water Resources Initial State Water Project Allocations

Due to the drying conditions statewide, DWR announced in December its initial State Water Project allocation of just 10 percent of requested supplies for 2021. The allocation amounts to 422,848 acre-feet of water, enough to serve approximately 27 million Californians and 750,000 acres of farmland. The 2021 percentage allocation matches DWR's initial allocation for 2020.

Allocations are based on conservative assumptions of hydrological conditions statewide, the state's snowpack levels, and reservoir storage, among other factors. DWR allocations are reviewed monthly and are subject to change, as they did last year when DWR eventually revised its allocation to 20 percent in May of 2020.

Conclusion and Implications

While drought conditions may improve, the early signs are troubling. Both the broadening of the drought, now affecting nearly half the United States, and the increased severity of the drought in places like California are of particular concern. In California, the drought has prompted a statewide governmental response addressing water policy, project funding, and broad stakeholder involvement. Will a multi-regional drought demand further actions? Stay tuned. As this article went to "print" northern California received several storms.

(Chris Carrillo, Derek R. Hoffman)

JUDICIAL DEVELOPMENTS

U.S. SUPREME COURT RULES IN FAVOR OF NEW MEXICO IN LATEST INTERSTATE COMPACT WATER DISPUTE

Texas v. New Mexico, 592 U. S. ____ (Dec. 14, 2020).

On December 14, 2020, the Supreme Court issued an opinion ruling in favor of New Mexico over the latest dispute with Texas regarding the Pecos River. As the downstream state, Texas' continued focus in this long interstate litigation is ensuring New Mexico meets its various Interstate Compact delivery requirements. In the 7-1 decision, the Court upheld the Pecos River Master's determination in favor of New Mexico as both accurate and fair under the applicable laws and the River Master's Manual. As Justice Kavanaugh succinctly begins his Opinion "[t]his is a case about evaporated water." *Id.* at 1.

Background

This latest dispute between the Texas and New Mexico began in the fall of 2014 when Tropical Storm Odile resulted in heavy rainfall in the Pecos River Basin. The massive rains quickly filled Red Bluff Reservoir located just south of the New Mexico—Texas border on the Pecos River. In order to prevent the ensuing flooding, Texas' Pecos River Commissioner wrote to New Mexico requesting that New Mexico store Texas' apportioned flows until the water could again be stored in Red Bluff Reservoir. New Mexico agreed to store the water in Brantley Reservoir, which is located in New Mexico, but owned by the United States. The Commissioners' exchange during the fall of 2014 included the understanding that but for Texas' request, New Mexico was obligated under the Pecos River Compact to release the water to Texas at the state line. Of course, if the water had been released, it would have caused flooding in Texas. At the time, New Mexico's Commissioner understood that the evaporative losses should be borne by Texas. The back-and-forth exchanges and emails between the Texas and New Mexico Commissioners were key and likely determinative of the Court's decision to uphold the Pecos River Master.

In 2015, Texas and New Mexico continued to negotiate how to account for the evaporated water under the Compact, however, the States failed to reach an agreement. When the stored water was finally released in August 2015, the parties were faced with a significant amount of evaporative loss—approximately 21,000 acre-feet or almost 7 billion gallons. In May of 2015, the Pecos River Master issued a preliminary report, which did not account for the evaporated water because the States were still evaluating options. The Final Report issued in July 2015 continued to note that the outstanding issue of the evaporated water accounting would be resolved at a later date. New Mexico and Texas continued to work toward a joint proposal to submit to the Pecos River Master, but after several years, negotiations eventually broke down. In 2018, New Mexico filed a motion seeking delivery credit of the evaporated water because the evaporative loss should have been borne by Texas. The River Master ruled in favor of New Mexico. Report of the River Master, Water Year 2017, Accounting Year 2018, Final Report, Texas v. New Mexico, No. 65, orig. (Sep. 6, 2018) (available at https://www.supremecourt.gov/DocketPDF/22/22O65/66243/20181009151349342_Pecos%20Final%20Report%20AY%202018%20Sep%206%20sent.pdf) (last visited Dec. 28, 2020).

The Supreme Court's Decision

The Pecos River Compact was signed by New Mexico and Texas in 1948 and approved by Congress in 1949. The Compact's purpose, *inter alia*, is to provide for the equitable division and apportionment of the use of Pecos River waters, to provide interstate comity, remove causes of present and future controversies and protect life and property from floods.

Under the Interstate Compact, water accounting between New Mexico and Texas is calculated each spring for the prior calendar water year. The River Master must follow the River Master's Manual in making the yearly calculations. In this case, the River Master relied upon the River Master's Manual, which

was adopted by the Supreme Court in 1988. The Manual states:

> . . .[i]f a quantity of the Texas allocation is stored in facilities constructed in New Mexico at the request of Texas, then . . . this quantity will be reduced by the amount of reservoir losses attributable to its storage. Section C.5.

The Supreme Court agreed with the River Master that:

> . . .the water was stored in New Mexico at the request of Texas, so New Mexico's delivery obligation must be reduced by the amount of water that evaporated during its storage. Slip op. at 2.

The Court also agreed with the River Master "that the text of Section C.5 of the [River Master] Manual easily resolves this case." *Id.* at 8. In reaching its conclusion, the Court summarily dismisses Texas' proffered arguments that the stored water was not part of Texas' allocation under Section C.5 and that New Mexico did not actually store the water because Sec. C.5 should be interpreted to mean storing water long term for beneficial use.

In recent years, prolonged drought conditions have played a significant role in all Western states' interstate water issues. Ongoing severe drought seasons implicate New Mexico's delivery obligations to Texas under both the Rio Grande Compact and the Pecos River Compact. Typically, the trend is for downstream states to increasingly seek to invoke the U.S. Supreme Court's original jurisdiction to address problems created in the event drought results in under deliveries and municipal demand increases in the face of decreased supplies and storage. The Supreme Court has declined to accept jurisdiction over many of these requests. However, the Court accepted jurisdiction in this case, which ironically, is not based on drought conditions and delivery requirements, but rather, on delivery credit for evaporated losses from flood storage.

Conclusion and Implications

This case marks the first time the Supreme Court has reviewed the decision of a River Master in an interstate compact case. There are only two appointed River Masters in the country; the other interstate compacts are overseen by Special Masters. The Court did reference the deference it provides to the decisions of its appointed River Masters in a concluding footnote: "[t]he Court has previously stated that the River Master's determinations are reviewed only for clear error. *Texas v. New Mexico*, 485 U.S. 388, 393 (1988) (noting that here, New Mexico prevails even under *de novo* review, so the standards of review does not affect our judgment in this case)." While this case may not provide precedent guidance in other major interstate compact disputes, it does provide a glimpse into how the current Court approaches an interpretation of the language of an established water rights decree and corresponding River Master Manual. The Supreme Court's opinion is available online at: https://www.law.cornell.edu/supremecourt/text/19-0065

(Christina J. Bruff)

DISTRICT COURT BACKS WASHINGTON STATE DEPARTMENT OF ECOLOGY REGARDING BAN ON VESSEL SEWAGE DUMPING IN PUGET SOUND

American Waterways Operators v. Wheeler, ___F.Supp.3d___, Case No. 18-cv-02933 (D. D.C. Nov. 30, 2020).

The U.S. District Court for the District of Columbia recently declined to allow the U.S. Environmental Protection Agency (EPA) to take back and reconsider its decision allowing the Washington State Department of Ecology (Ecology) to impose a vessel sewage dumping ban in Puget Sound prior to ruling on aspects of the merits of what had become a multi-party high profile dispute.

Background

The case arose for judicial review of decisions made by EPA pursuant to federal Clean Water Act, §

312(f)(3). That subsection permits no discharge zones to be established in particular circumstances:

> (3) After the effective date of the initial standards and regulations promulgated under this section, if any State determines that the protection and enhancement of the quality of some or all of the waters within such State require greater environmental protection, such State may completely prohibit the discharge from all vessels of any sewage, whether treated or not, into such waters, except that no such prohibition shall apply until the Administrator determines that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for such water to which such prohibition would apply. Upon application of the State, the Administrator shall make such determination within 90 days of the date of such application. (33 USC § 1322)

EPA initially granted Washington authorities the right to declare a No-Discharge Zone (NDZ) in the Sound. Some 40,000 comments had been submitted in response to the rule under consideration. The state proceeded to establish the ban. Some major shipping interests sued the EPA thereafter, alleging that the EPA had failed to account for the costs involved in meeting the requirements of the ban. Apparently under pressure from commercial shipping companies, EPA responded to the lawsuit by seeking to stipulate that it had erred, and sought a remand to reconsider its ruling. The U.S. District Court (Judge Amit Mehta) denied the remand and the parties (including environmental groups arguing that EPA was correct in its ruling), the state, and the shipping companies made and extensively briefed cross motions for summary judgment.

The District Court's Decision

The case is notable for at least two facets of the decision. The initial portion of the decision reviewed and analyzed whether justice would be better served by remand or by hearing the case. The court determined, somewhat ironically, that unless the EPA had benefit of the court's judgment on what economic consideration is relevant under the Clean Water Act's terms for allowing an NDZ, there could be a decision in a legal vacuum that created undue uncertainties for all parties, as well as risk to the Puget Sound. It followed that he usual saving of judicial effort and time that justified most remands would not necessarily materialize in the context of the Puget Sound dispute.

EPA's Decision, Economic Factors and Judicial Guidance

The court then turns to the merits of the EPA decision, which were at issue between the parties in court. The court emphasized that the review of the EPA decision is based on the record in front of the agency. The court then explored the parameters of arbitrariness and compliance with the law, beginning with the relevance of economic factors.

The court looked to the leading precedents from the U.S. Supreme Court on when courts should rule that agencies must or cannot consider economic costs in reaching their determinations. The District Court looked to holdings and statutory terms under review in two Clean Air Act cases: *Whitman v. American Trucking* Associations, 531 U.S. 457 (2001); and *Michigan v. U.S. EPA*, 576 U.S. 743 (2015) for guidance.

The *Whitman* case the involved the EPA's ability to issue National Ambient Air Quality Standards under §§ 108 and 109 of the federal Clean Air Act. The Supreme Court reversed the ruling of the Court of Appeals, holding that the EPA's interpretation of Sections 108 & 109 of the Clean Air Act did not unconstitutionaly delegae legislative power to the EPA, though the EPA's implementation policy for the 1997 Ozone NAAQS had been unlawful. (*See:* https://ballotpedia.org/Whitman_v._American_Trucking_Associations).

In the *Michigan* case the Supreme Court held that cost considerations were required under a provision directing the EPA to regulate power plant if such regulation was "appropriate and necessary." (*See:* https://harvardlawreview.org/2015/11/michigan-v-epa/)

Read together, *Whitman* and *Michigan* stand for the proposition that whether an agency is required to consider costs depends on the breadth of the statutory text and the degree to which it compels the agency to balance costs and benefits. Since the Supreme Court decided *Michigan*, courts in the D.C. Circuit have helpfully fleshed out the *Whitman—Michigan* dichotomy. For example, in *Utility Solid Waste Activities Group v. EPA*, the D.C. Circuit concluded that EPA was not required to consider costs when determining whether a waste site should be classified as an "open dump."

901 F.3d 414, 448-49, 438 (D.C. Cir. 2018).

Section 312(f)(3)

Armed with judicial precedent, the District Court looked at the specific terms of § 312(f)(3), looking for similarities with either of the two lodestar cases. The court found that the language of the section requiring analysis of "reasonable availability" of disposal facilities and other terms dictate that *economics are in play*. The court found that the EPA did err by failure adequately to analyze cost and benefit of the Puget Sound DNZ, and that a remand would be appropriate.

Conclusion and Implications

The court went on to deal with contentions of the parties as to the adequacy of other aspects of the record and EPA's decision-making. Given the specialized nature of an NDZ rule, most of those are very much issue specific discussions that do not bear repeating here. However, the court did determine that although there will be a remand ordered, it should not include a *vacatur*, or repeal, of the rule that was issued. This is because the record evidence assembled but not adequately parsed and evaluated by EPA does lend credence to the belief that in the end the NDZ costs will be found less than the benefits. The court also found that the state has the exclusive role in deciding there is need for an NDZ under the wording of the law; EPA is not authorized to second guess that judgement.

In addition to fleshing out the law of NDZ determinations, the decision presents an excellent review of some of the leading cases that frame and affect the outcome of judicial review under major environmental statutes, including the Clean Water Act.
(Harvey M. Sheldon)

DISTRICT COURT ADDRESSES LESSOR LIABILITY UNDER THE CWA FOR VIOLATIONS OF FORMER TENANTS UNDER A TERMINATED GENERAL PERMIT

Puget Soundkeeper Alliance v. APM Terminals Tacoma, LLC,
___F.Supp.3d___, Case No. C17-5016 BHS (W.D. Wash. Nov. 17, 2020).

The U.S. District Court for the Western District of Washington recently granted in part and denied in part motions for summary judgment following a lengthy docket on a federal Clean Water Act (CWA) case regarding liability for successor permittees. The court ruled that once a permit holder has terminated its lease, and terminates its permit, violations of the CWA are not considered ongoing as to the lessor. Therefore, the Port was not held liable for violations of its former lessee.

Factual and Procedural Background

APM Terminals Tacoma, LLC (APM) secured a lease with the Port of Tacoma (Port), and obtained an Industrial Stormwater General Permit (ISGP) to discharge pollutants near the Tacoma Port. In a 2013 annual report, APM admitted to exceeding established benchmarks for pollutants for all four quarters, resulting in Level 1, 2, and 3 corrective action requirements under the ISGP.

In 2017, following discussions with the Washington Department of Ecology (Ecology) to consider corrective actions, including the construction of a new stormwater treatment system, APM terminated its lease, and the Port assumed the design and construction of the stormwater treatment system. Thereafter, the Port applied for a new ISGP through Ecology. Following public comment, Puget Soundkeeper Alliance (Soundkeeper) opposed the new ISGP, indicating in their opposition that the ISGP needed to either include an administrative order for the Port to implement Level 3 corrective actions or to transfer APM's ISGP to the Port.

In October 2017, Ecology issued the new ISGP and signed an Agreed Order with the Port agreeing to implement best management practices, create a new Stormwater Pollution Prevention Plan (SWPPP), and construct the stormwater treatment system by September 30, 2018.

Plaintiff Soundkeeper filed its complaint in January 2017 against APM for the violation of the National Pollutant Discharge Elimination System (NPDES),

listing the Port as a defendant in an amended complaint in November 2017. After a series of amended complaints, Soundkeeper and the Port filed cross motions for summary judgment.

Soundkeeper moved for partial summary judgment that it had standing to bring the action, that the Port is jointly liable for alleged violations that occurred during APM's tenancy, that the Port is liable for failing to monitor discharges from the wharf and to identify the wharf in its Stormwater Pollution Prevention Plan. The Port moved for summary judgment on Soundkeeper's entire claim against the Port.

The District Court's Decision

A moving party is entitled to judgment when the nonmoving party fails to make a sufficient showing on an essential element of a claim on which the nonmoving party has the burden of proof.

Soundkeeper's Motion for Summary Judgment and Standing

The court first considered Soundkeeper's motion for summary judgment. The court considered and rejected four arguments raised by the Port and determined that Soundkeeper had standing to sue under the CWA citizens suit provision. The Port first argued that standing and subject matter jurisdiction should be determined after the completion of discovery. The court rejected this argument, reasoning that standing was a threshold question to be considered before the merits. Additionally, subject matter jurisdiction can be raised at any time, including before discovery.

Second, the Port argued that Soundkeeper failed to bring sufficient evidence to establish an injury in fact, as the Port's discharges only had minimal impact on Commencement Bay. The court found that the Port failed to provide adequate authority on its proposition and found for Soundkeeper's authority, which expanded injuries due to CWA violations. Thus, the court found that Soundkeeper provided sufficient evidence to establish an injury in fact.

Third, the Port argued that Soundkeeper had failed to establish the element of causation. The court found this argument without merit as causation is not an element of standing. Rather, courts must consider whether the injuries are "fairly traceable" to the Port's alleged CWA violations.

Fourth, the Port argued that Soundkeeper failed to bring forth redressable claims because the Port was not violating the CWA. However, the court determined that this argument goes to the merits and cannot be used to determine whether Soundkeeper may bring a claim under the citizens' suit provision. Therefore, redressability was not at issue in determining standing for Soundkeeper.

Soundkeeper's Motion for Summary Judgment and Level 3 Violations Liability

The court next considered two arguments related to the Port's liability for the Level 3 corrective actions. First, Soundkeeper argued the Port was liable because the Port managed and oversaw its lessee, APM. The court recognized that the CWA holds those who violate CWA provisions and permits accountable regardless of whether they are a permit holder, however, this determination is a fact-based analysis.

Second, the Port argued that even if the Port was responsible for permit violations, the violations ceased when APM terminated its lease and were not ongoing. Soundkeeper filed the complaint after APM terminated its lease and after APM's permit was terminated. Rather than transfer APM's permit to the Port, Ecology entered into an Agreed Order with the Port to correct the actions of APM. Because Soundkeeper failed to oppose the transfer during public comment and provided no authority to support the proposition that a lessor's alleged violations are continuous after a permit has been terminated, the court denied Soundkeeper's summary judgement and granted the Port's.

Soundkeeper's Motion for Summary Judgment and the Wharf

The court next considered Soundkeeper's argument that the Port was liable for failing to monitor discharges from the wharf and failing to identify the wharf in its SWPPP. The court quickly found for the Port because the wharf was not covered by the ISGP. Thus, Soundkeeper's argument that the Port was liable for its failure in monitoring discharges from the wharf as well as identifying the wharf in the stormwater pollution prevention plan was moot.

The Port's Motion for Summary Judgment

Finally, the court considered the Port's motion for summary judgment on Soundkeeper's claim of liability for the Level 3 corrective actions required for the violation of the ISGP. The court determined that the Port could not be held liable for the violations of APM, as APM had terminated its ISGP when it terminated its lease with the Port. So, while the Port had applied for a new permit and entered into an Agreed Order with Ecology to establish a new stormwater treatment system and commence corrective actions for the former violations, the Port's permit allowed this to be completed by September 30, 2019 at the earliest. Thus, Soundkeeper's decision to file complaint for violations of the Port's ISGP was premature. The court found that the Port was in violation of its Agreed Order with Ecology, however, it was not determined whether a violation of an Agreed Order was grounds for a citizen suit. Thus, the court granted the Port's motion for summary judgement on Soundkeeper's claim of liability for the Level 3 corrective actions.

Conclusion and Implications

A current permit holder cannot be liable for violations that occurred prior to the transition of permit holders, unless the violation is continuous and ongoing. Here, APM's violations ceased when it terminated its permit. Therefore, the Port, as owner and lessor, could not be held liable. The court's ruling is available online at: https://casetext.com/case/puget-soundkeeper-alliance-v-apm-terminals-tacoma-llc-4 (Kara Coronado, Rebecca Andrews)

DISTRICT COURT HOLDS ISSUANCE OF NEW NPDES PERMIT DOES NOT MOOT CLAIMS FOR VIOLATIONS OF PRIOR PERMIT IF NEW PERMIT IS STAYED

Sierra Club, Inc. v. Granite Shore Power LLC, ___F.Supp.3d___, Case No. 19-cv-216-JL (D. N.H. Nov. 25, 2020).

The U.S. District Court for New Hampshire recently determined that allegations of violations of a 1992 federal Clean Water Act, National Pollutant Discharge Elimination System (NPDES) permit were not moot even after issuance of a new permit, where the effectiveness of the new permit was subject to a stay while undergoing appellate review. The court also denied defendants' motion for partial summary judgment as to plaintiffs' claim that defendants violated reporting requirements in the 1992 discharge permit, finding that genuine disputes of material fact remained regarding the meaning of the reporting requirement.

Factual and Procedural Background

Granite Shore Power LLC and GSP Merrimack LLC (collectively: Granite Shore) own Merrimack Station, a coal-fueled power plant that discharges heated water into a shallow, impounded section of Merrimack River known as Hooksett Pool. In 1992, the U.S. Environmental Protection Agency (EPA) issued an NPDES permit for Merrimack Station (1992 Permit). The 1992 Permit limited thermal discharges and required regular monitoring and reporting of the river water temperature and dissolved oxygen content. Originally set to expire in 1997, the permit was administratively continued and remained fully effective and enforceable under EPA regulations.

In 2011, EPA issued a new, draft NPDES permit for Merrimack Station (2011 Draft Permit). EPA's draft determinations for the 2011 Draft Permit noted that Merrimack Station's thermal discharges had caused or contributed appreciable harm to the Hooksett Pool's balanced, indigenous community of fish. Issuance of a final permit was delayed several times. According to EPA, this delay was due in part to certain factual and legal developments, including, among other things, EPA's revised understanding of the thermal data evaluated in the 2011 Draft Permit.

In 2019, Sierra Club, Inc. and Conservation Law Foundation, Inc., (plaintiffs) brought suit in the District Court against Granite Shore alleging violations of three conditions in the 1992 Permit. Plaintiffs alleged violations related to thermal discharge limitations and violations of the annual reporting condition.

In May 2020, EPA issued a final permit that would take effect in September 2020 (2020 Permit) and supersede the 1992 permit. Prior to the 2020 Permit's effective date, Granite Shore and plaintiffs challenged different conditions in the 2020 Permit to the Environmental Appeals Board (EAB). As a result, the contested 2020 Permit conditions were stayed, and the corresponding 1992 Permit provisions remained in effect pending final agency action. Thereafter, Granite Shore moved for summary judgment in the District Court case, alleging that plaintiffs' claims were moot as a result of the issuance of the 2020 Permit. Granite Shore also moved for partial summary judgment as to plaintiffs' claim that it violated the annual reporting condition.

The District Court's Decision

Claim of Mootness

The District Court first addressed Granite Shore's argument that the plaintiffs' claims were moot because the 2020 Permit removed and replaced the 1992 Permit conditions at issue in the plaintiffs' complaint. A case is moot when the issues presented are no longer "live" or the parties lack a cognizable interest in the outcome. However, as long as the parties have even a small concrete interest in the outcome of the litigation, the case is not moot. The court's primary inquiry was whether adjudication of the issue would grant meaningful relief.

In reviewing Granite Shore's mootness argument, the District Court noted that lawsuits based on a defendant's violations of a rule have been rendered moot by the enactment of a superseding rule with which the defendant complies. However, the court determined that the 1992 Permit conditions at issue in the present case were not superseded by the corresponding 2020 Permit conditions, because those conditions were contested and therefore stayed pending the appeal before the EAB and final agency action. The court held that because the relevant 1992 Permit conditions remained in effect, the controversy involving those permit conditions was not moot.

Granite Shore also argued that the plaintiffs' complaint was moot because it was premised on EPA's 2011 assessment regarding the harm caused to the Hooksett Pool, which the EPA had abandoned. The court interpreted this argument as mootness based on voluntary cessation. In order for defendants' argument to succeed, defendants needed to show that they were no longer violating the 1992 Permit and that it was absolutely clear that the alleged permit violations could not reasonably be expected to recur. Unpersuaded by defendants' argument, the court concluded that defendants failed to establish that there was no genuine dispute of material fact on these points.

Motion for Partial Summary Judgment

The District Court next addressed Granite Shore's motion for partial summary judgment as to plaintiffs' claim that defendants were violating the 1992 Permit's reporting requirements by providing statistical summaries of certain data rather than the entirety of the continuous data collected. Granite Shore argued that summary judgment was proper because they had complied with their interpretation of the relevant reporting condition, which they asserted was unambiguous.

NPDES permits are interpreted as contracts. Because the 1992 Permit is a contract with the federal government, it is interpreted under the federal common law of contracts. The core principle of contract interpretation requires that unambiguous contract language be construed according to its plain and natural meaning. If ambiguities remain after analyzing the plain language, ultimate resolution of the meaning typically turns on the parties' intent. As such, summary judgment based on contract interpretation is appropriate only if the language's meaning is clear, considering the surroundings circumstances and undisputed evidence of intent, and there is no genuine issue as to the inferences which might reasonably be drawn from the language.

Plaintiffs argued that the 1992 permit required "continuous" monitoring of data, and thus the condition that "[a]ll . . . monitoring program data be submitted" required Granite Shore to report the entirety of the data collected through continuous monitoring." In contrast, Granite Shore contended that "all" modified the term "program" and referred to "categories" of data that must be reported and maintained. Granite Shore also argued that other language in the 1992 Permit indicated that the monitoring data reported should be "representative" of the data collected, and not the entirety of the data collected. The District Court held that both of these interpretations

were reasonable and therefore the plain language of the contested condition was ambiguous.

The court then turned to the "intent manifested" by the contested reporting condition. Granite Shore argued that EPA consistently accepted their annual reports as compliant and that the EPA included a temperature reporting requirement in the 2020 Permit that, according to EPA, follows "the format from the 2018-2019" annual reports. Plaintiffs countered that EPA's failure to contest the adequacy of the annual reports was due in part to "bureaucratic inattention" as evidenced by the long delay in issuing a new NPDES permit and EPA's failure to evaluate annual reports. As evidence of the inadequacy of the annual reports, plaintiffs pointed to a 2015 EPA request for the water temperature data used to create the annual report summary statistics from three stations covering the periods from April to October, from 1984-2004. The court found that the parties' theories as to the intent of the reporting condition raised genuine issues of material fact. Thus, the District Court denied the motion for partial summary judgment because genuine disputes of material fact remained as to the meaning of the reporting requirement and Granite Shore's compliance with it.

Conclusion and Implications

This case elucidates the key inquiry under the mootness doctrine. That is, when reviewing whether a claim is moot, the core question before the court is whether the controversy is presently live. The case also shows the difficulty in succeeding on a motion for summary judgment based on a disputed interpretation of an arguably ambiguous contract condition. The court's opinion is available online at: https://www.govinfo.gov/content/pkg/USCOURTS-nhd-1_19-cv-00216/pdf/USCOURTS-nhd-1_19-cv-00216-0.pdf
(Heraclio Pimentel, Rebecca Andrews)

DISTRICT COURT DENIES LANDOWNERS' REQUEST FOR PRELIMINARY INJUNCTION AGAINST IRRIGATION DISTRICT'S CANAL PIPING PROJECT

Smith v. Tumalo Irrigation District, ___F.Supp.3d___, Case no. No. 6:20-cv-00345-MK (D. Or. Nov. 13, 2020).

The U.S. District Court for Oregon denied a request to preliminarily enjoin construction of a project by which the Tumalo Irrigation District (TID) plans to pipe nearly 70 miles of its open canal system within the Deschutes Basin in central Oregon (Project).

Background

A group of eight affected landowners made the request, arguing that the U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS), who awarded a federal grant to fund nearly 70 percent of the Project pursuant to the Watershed Protection and Flood Prevention Act, failed to comply with the National Environmental Policy Act (NEPA) in the Environmental Assessment (EA) it adopted to evaluate the Project's effects. Plaintiffs further claimed that the piping the Project entails is beyond the scope of TID's right-of-way under the Carey Desert Land Act of 1894.

The District Court's Decision

As explained below, even though the District Court concluded that plaintiff landowners would be irreparably injured by the Project due to the hundreds of thousands of dollars its property values would plummet as a result of the piping the Project prescribes, it declined to enter a preliminary injunction based on its further findings that plaintiffs had failed to establish any of the other three criteria relevant to securing such relief: that they would be likely to prevail on the merits of their claims, the injunction is in the public interest, and the balance of equities tilts in favor of the requested relief.

Plaintiffs' Likelihood of Success on the Merits

Plaintiffs brought a total of four claims to challenge the Project, although the gravamen of their case arises from allegations that the EA that NRCS adopted fails to comply with NEPA in various respects.

In addition to that claim, plaintiffs also asserted that the Project is inconsistent with NRCS's regulations setting forth specific criteria for its implementation of the Watershed Protection and Flood Prevention Act. The other two claims plaintiffs brought are against TID, with one asserting that the Project is inconsistent with, and exceeds the bounds of, the district's statutory right-of-way under the Carey Act, and the other asserting that the Project constitutes a private nuisance under Oregon state law.

Plaintiffs' NEPA Claim against NRCS

Plaintiffs' NEPA claim asserts that the Project EA violates NEPA and its implementing regulations based on five major arguments: 1) failure to consider a reasonable range of alternatives; 2) failure to adequately consider cumulative impacts; 3) improper assessment of the Project's costs and benefits; 4) unsubstantiated findings of public-safety benefits arising from a reduction in drowning risk; and 5) inadequate analysis of recreational impacts.

As an initial matter, the court nearly declined to address the merits of any of plaintiffs' NEPA issues in their Complaint whatsoever given that only two plaintiff landowners participated in the administrative NEPA public process and, even then, only scratched the surface of a few of the myriad issues plaintiffs briefed in support of their preliminary injunction motion. Slip Op. at 5-6. Instead, plaintiffs sought to rely heavily on new declarations of three specialists—an arborist, economist, and real-estate appraiser—in support of the arguments of which they sought the court's review. In this context, the court stated that it remained unconvinced that it should delve into the merits of such arguments, but ultimately decided to do so, quite likely because it believed that plaintiffs might be likely to appeal an adverse ruling.

First, the court found that the EA considered a reasonable range of alternatives. In addition to the selected alternative, which entails replacing approximately 1.9 miles of canals and 66.9 miles of laterals in the TID system across nearly 170,000 acres with high-density polyethylene (HDPE) gravity-pressurized buried pipe, the EA considered two other alternatives in detail: The No-Action alternative and one designed to achieve the water conservation goals of the proposed action by lining open canals and laterals with polyethylene geocomposite, covered with shotcrete. The court reached its ruling largely on two grounds working in concert with one another: (a) the scope of alternatives required to be considered in an EA is narrower than that required for an Environmental Impact Statement (EIS); and (b) its finding that the EA adequately explained why NRCS opted not to consider in detail plaintiffs' preferred on-farm efficiency upgrades alternative, largely due to the agency's determination that it did not meet several elements of the multi-faceted Purpose of and Need for the proposed action at issue. Slip Op. at 6-8.

Second, the court found that the EA's discussion of cumulative effects was not arbitrary and capricious, specifically in the context of impacts to vegetation and wetlands that have developed along the canals since their original construction, largely on the grounds that it did not want to "second-guess" the methodology NRCS used to analyze cumulative effects and in reliance on NRCS's finding that impacts to such resources would overall be "minimal" due to the compensatory benefits projected to accrue to such resources in the vicinity of the natural riverine systems within the area of the Project's potential effects. Slip Op. at 8-9. What is somewhat notable is that, in setting forth its ultimate ruling in this regard, the court does not cite the EA's section addressing cumulative impacts (although it does refer to it earlier in its analysis), but instead cites sections addressing impacts of the Project itself. As a result, the opinion does not directly address the crux of plaintiffs' cumulative impact argument that the EA neglects to evaluate the effects of the Project in conjunction with those resulting from other irrigation district piping projects currently being implemented or "reasonably foreseeable" within the Basin.

Third, the court rejected virtually out-of-hand plaintiffs' argument that the EA violated NEPA by improperly assessing the costs and benefits of the Project, including with respect to the water conservation benefits NRCS projected it will produce. Slip Op. at 9. The court premised its rejection on its reading of caselaw that NEPA does not require a formal cost-benefit analysis given that its principal purpose is protection of environmental, not economic, interests.

Fourth, the court also made quick work of plaintiffs' final two primary NEPA arguments. With respect to plaintiffs' argument that NRCS's analysis of potential drowning risks posed by open canals was little more than a "sham" designed to justify a predis-

position to adopt the proposed action, the court summarily and seemingly somewhat irritatingly rebuffed the notion, going so far as to say it would have been surprising had NRCS not considered such risks. Slip Op. at 9-10. With respect to plaintiffs' argument that the EA failed to adequately address potential recreational impacts, the court construed it as effectively a policy disagreement over the loss of recreational opportunities arising from the Project, and thereby rejected it on the ground that NEPA is a procedural statute designed to ensure consideration of environmental effects, not one to challenge a decision with which one does not agree substantively. *Id.* at 10. [The court also quickly dispensed of plaintiffs' claim that, in approving the Project, NRCS violated one of the eligibility criteria for such projects laid out in its own implementing regulations for the Watershed Protection and Flood Prevention Program, 7 C.F.R. § 622.11(a)(6), concurring with Federal Defendants' interpretation of the criterion at issue. Slip Op. at 10-11.]

Plaintiffs' State Law Private Nuisance Claim against TID

Plaintiffs' nuisance claim asserted that the Project would substantially and unreasonably interfere with the use and enjoyment of the land plaintiffs own by, among other things, significantly diminishing their property values as a result of the adverse effects it will have on the vegetation and riparian-related resources that have developed along the canals. The court rejected this claim largely on the ground that TID's Project is a legal activity, which it concluded cannot form the basis of a nuisance claim under Oregon law. Slip Op. at 11-12.

Plaintiffs' Carey Act Claim

Plaintiffs' Carey Act claim asserted that the Project is inconsistent with the right-of-way TID holds as a result of operation of that statute because it allegedly goes well beyond the right-of-way's purpose, which it contends that, based on the statute's language, was principally "[t]o aid the public-land States in the reclamation of the desert lands" within their boundaries. The court, relying heavily on its 2006 decision involving a similar piping project in *Swalley Irrigation Dist. v. Alvis*, ___F.Supp.3d___, Case No. Civ. 04-1721-AA (D. Or. Mar. 1, 2006), ruled that the piping the Project involves is "reasonably necessary" for TID to effectuate the purposes of the Carey Act right-of-way, and therefore, fits within its scope. Slip Op. at 12-15.

Other Injunction Factors: Irreparable Injury, Balancing of Equities, and Public Interest

After devoting the vast majority of its opinion to the merits of plaintiffs' claims, the court closed by succinctly addressing each of the other three elements relevant to plaintiffs' preliminary injunction motion. Significantly, the court did find that plaintiffs satisfied their burden to establish that the Project would cause them irreparable injury given what it termed "the unquestionable devaluation of their properties," allegedly on the order of hundreds of thousands of dollars. Slip Op. at 15. At the same time, the court nevertheless went on to rule that the balance of equities leaned against entry of the preliminary injunction that plaintiffs sought, citing the interests the Project is designed to serve of conserving water, improving water resources, and meeting environmental objectives. *Id.* at 15-16. Lastly, in evaluating the public interest, the court relied primarily on the fact that both the United States and Oregon Governor's Office support the Project—as well as noting that no "environmental-advocacy group" had challenged it—to conclude that "Plaintiffs private interests are outweighed by the community's interest" in improving the irrigation system in the Deschutes Basin. *Id.* at 16.

Conclusion and Implications

There are several principal implications of the U.S. District Court's opinion worth noting in conclusion. First, it represents a ruling on a preliminary injunction motion, and thus, as the court itself expressly declared, does not constitute a definitive ruling on the merits of any of plaintiffs' claims. Slip Op. at 4. Second, the court seemed to be influenced by its perception that, in bringing their NEPA claims, plaintiffs were largely animated by economic interests, which may have colored the way it treated their arguments alleging inadequate analysis of environmental effects. Third, and most importantly, as alluded to above, the TID Project is just one of many other similar piping projects that are either ongoing or are proposed in the Deschutes Basin. In fact, seven other irrigation

districts in the region either have implemented, are in the midst of implementing, or have proposed plans to implement similar projects (Arnold, Central Oregon, Lone Pine, North Unit, Ochoco, Swalley, and Three Sisters). Much of the impetus driving these projects is the districts' work, along with that of the City of Prineville, with the U.S. Fish and Wildlife Service and National Marine Fisheries Service on the Deschutes Basin Habitat Conservation Plan (HCP) in support of Incidental Take Permits for which they have applied pursuant to the Endangered Species Act to cover impacts to several listed species affected by their activities. The goal of most conservation measures in the HCP is to modify the hydrology of the natural waters within the Basin for the benefit of covered species, which will require lesser diversions from such waters at various times of the year, thereby giving rise to a need for the districts to achieve greater conservation of the water they will continue to divert for irrigation purposes.

On December 4, 2020, plaintiffs filed an appeal of the District Court's opinion to the Ninth Circuit. (Stephen J. Odell)

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