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FEATURE ARTICLE

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

By David C. Smith and Jennifer Lynch

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

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

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

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

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

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

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

Challenges to the Section 7 Interagency Consultation Rule

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

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

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

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

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

Challenges to the Section 4 Listing Rule

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

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

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

Challenges to the Section 4(d) Rule

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

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

National Environmental Policy Act Challenges

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

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

Federal Defendants' Motions to Dismiss

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

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

The District Court disagreed with the defendants

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

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

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

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

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

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

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

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

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

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

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

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

The Services further elaborated on their rationale behind the proposed definitions:

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

The Services went on to garner comment as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Services went on to state:

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

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

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

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

Conclusion and Implications

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

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

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

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

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

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

LEGISLATIVE DEVELOPMENTS

IDAHO LEGISLATIVE UPDATE: THE RIPARIAN DOCTRINE AND THE MISCHIEF OF STALE STATUTES

It's the most wonderful time of the year . . . not Thanksgiving or the Christmas/Holiday season, but rather the upcoming Idaho Legislative Session commencing in early January 2021. In preparation for the season, the Idaho Water Users Association (IWUA) and the Idaho Department of Water Resources (IDWR) are busy drafting, revising, and proposing a variety of legislative amendments. IDWR, in particular, is reviewing a variety of statutes over which it has primary responsibility as part of Governor Little's request of all Idaho administrative agencies to review, amend, and purge as necessary statutes that are confusing or particularly antiquated. One of the statutes being discussed within the IWUA is Idaho Code § 42-1101.

Is the Riparian Doctrine Alive or Dead in Idaho?

Ask any practicing water law attorney in Idaho and all will tell you that the riparian doctrine is long dead, having given way to the prior appropriation doctrine over a century ago. However, Idaho Code § 42-1101 still exists and provides in its entirety:

> Rights of Landowners to water.—All persons, companies and corporations owning or claiming any lands situated on the banks or in the vicinity of any stream, are entitled to the use of the water of such stream for the purpose of irrigating the land so held or claimed.

Section 42-1101 was first enacted by the Idaho Territorial Legislature in 1887 and it has remained untouched ever since. According to *A Water Users Information Guide—Idaho Water Rights A Primer* (Rev. July 2015), published and provided by IDWR, and found at the internet URL: https://idwr.idaho.gov/files/water-rights/water-rights-brochure.pdf, the riparian rights doctrine does not exist in Idaho:

> You may also have heard of something called 'riparian rights.' In some states, an owner of land has the right to make 'reasonable use' of ground water underneath [his or] her land, or water naturally flowing on, through or along the borders of [his or] her land. A riparian right to make use of the water is not limited by priority date and it cannot be lost by non-use. Idaho law does not recognize a 'riparian right' to divert and use water. A water right under the law of the state of Idaho can be established only by appropriation, and once established, it can be lost if not used.

IDWR's pamphlet is consistent with appellate precedent and subsequent statutory enactments in the state. While there is no question that Idaho began as a hybrid state recognizing both riparian and appropriated rights, that hybrid approach quickly gave way to the prior appropriation doctrine common in most of the western United States. *See*, *e.g.*, *Taylor v. Hulett*, 15 Idaho 265, 271, 97 P. 37, 39 (1908) ("[T]he riparian doctrine of the common law has been abrogated in both Idaho and Wyoming, and the rule of 'first in time is first in right' is recognized and enforced in both states."); *Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho 484, 491, 101 P. 1059, 1062 (1909) ("A riparian proprietor in the state of Idaho has no right in or claim to the waters of a stream flowing by or through his lands that he can successfully assert as being prior or superior to the rights and claims of one who has appropriated or diverted the water of the stream and is applying it to a beneficial use. To this extent, therefore, the common-law doctrine of riparian rights is in conflict with the constitution and statutes of this state and has been abrogated thereby."); *see also*, Idaho Code §§ 42-103, 42-201(2), and 42-202, and *Idaho Power Co. v. Idaho Dep't of Water Res.*, 151 Idaho 266, 274, 255 P.3d 1152, 1160 (2011) (adopting and confirming Idaho's mandatory administrative application for water right permit process as the sole means of appropriating surface water beginning in 1971 short of *de minimis* domestic appropriations otherwise exempt from the permit process under Idaho Code § 42-111).

The Mischief Making that is Idaho Code Section 42-1101

Yet, there Idaho Code § 42-1101 sits and remains. And, its continuing existence is causing mischief today in 2020 as it threatened to do as far back as 1890. For example, this author is currently litigating a case in which opposing counsel is using Idaho Code § 42-1101 to claim his client's right to use the water of a creek flowing through a piece of property in an effort to breach, if not relocate altogether, a long-standing fence line secured by written and recorded agreement, the location of which is now in dispute between the parties. It would seem the courts would make short work of the argument; that absent a valid appropriation doctrine-based water right to the creek, the fence line does not interfere. But again, § 42-1101 is lurking and still on the books.

The presence of the statute was not lost on former Idaho Supreme Court Justice Berry in his dissenting opinion in *Drake v. Earhart*, 2 Idaho 750, 23 P. 541 (1890) either. While the majority disavowed the "phantom of riparian rights" in Idaho, Justice Berry noted the common law of the riparian rights doctrine coupled with the existence of Idaho Code Section 42-1101 (then § 3180 of the Revised Statutes). *Drake*, 2 Idaho at 762-763, 23 P. at 546. In contrast, but without addressing the existence of the statute, the majority pointedly stated:

> First in time, first in right,' should be considered the settled law here. Whether or not it is a beneficent rule, it is the lineal descendant of necessity . . . By a practically unbroken line of decisions the [prior appropriation doctrine] has been followed, and is now established by so many and such high authorities that it would seem this theme of discussion is exhausted. *Id.* at 2 Idaho 753-754, 23 P. 542-543.

Conclusion and Implications

It seems the answer lies in the combination of subsequent and long-standing appellate authority and the statutory enactments and amendments over time: the riparian rights doctrine does not exist in Idaho. But there is § 42-1101, lingering and remaining, and causing mischief over 130 years after its first enactment. The presumption is that the 2021 Legislative Session will clean up this seeming inconsistency, but that remains to be seen. In the meantime, § 42-1101 remains . . .
(Andrew J. Waldera)

NEVADA LEGISLATION UPDATE: WATER-RELATED BILLS ON TAP FOR 2021 LEGISLATIVE SESSION

The Nevada Legislature meets biennially in odd years, meaning the next legislative session will commence in January 2021. Although lawmakers are likely to be largely consumed by budget issues arising from the pandemic's economic fallout, there are multiple water-related bill draft requests that will be of interest to the state's water users. The most noteworthy of these do not relate to substantive water law but rather the procedures by which the Nevada State Engineer implements the law and the courts review the State Engineer's decisions.

Temporary Change Applications

Existing Nevada law requires a person who wishes to change the point of diversion, manner of use or place of use of water already appropriated to apply to the State Engineer for a permit to do so. NRS 533.325. After the application is filed, notice of the filing must be published once a week for four consecutive weeks in a newspaper of general circulation in the county where the point of diversion is located. NRS 533.360. Within 30 days after the date of last publication, any interested person may file a written protest against the application. The applicant then has the opportunity to answer the protest. The State Engineer has discretion as to whether to hold a hearing on the protest. NRS 533.365.

Temporary changes that will not exceed a one-year duration generally have a more streamlined process, in which the State Engineer must approve the application if:

- The application is accompanied by the prescribed fees;

- The temporary change is in the public interest; and

- The temporary change does not impair the water rights held by other persons.

However, if the State Engineer determines that the temporary change may not be in the public interest, or may impair other water rights, publication and a hearing are required. NRS 533.345. In this respect, existing law confers discretion to the State Engineer with regard to notice and hearing of permanent change applications that is not conferred for temporary change applications.

The State Engineer submitted a bill draft request for the upcoming legislative session that would amend this procedure to give the State Engineer discretion as to whether to hold a hearing before rendering a decision on any temporary change application. This proposed amendment advances the purpose of a temporary change application, which is to allow for expedient short-term modifications of water uses. And it will make the State Engineer's authority over temporary change applications consistent with his discretion over permanent change applications.

Judicial Review of the State Engineer's Decisions

Existing law provides that any person feeling aggrieved by an order or decision of the State Engineer that affects the person's interests may have the order or decision reviewed by a court.

NRS 533.450. For the 2021 legislative session, the State Engineer submitted a bill draft request to limit reviewability to a "formal" order, ruling or decision that is a final determination issued in writing and that "materially affects" the person's interests. It is not clear how "formal" will be defined, in that the State Engineer routinely renders decisions through the issuance of a letter. Additionally, what constitutes a "material effect" is open for interpretation and suggests that the proposed legislation could deprive environmental or public interest groups of standing to challenge the State Engineer's determinations. Given the widespread interest in the state's water issues by many stakeholders who may not hold water rights or otherwise have any economic stake in the State Engineer's decisions, this bill will likely confront considerable resistance.

Perhaps most eyebrow-raising of the State Engineer's proposed legislative changes is a request for a constitutional amendment to give the Nevada Court of Appeals original jurisdiction over appeals of the State Engineer's decisions. Currently, the Nevada Constitution vests original jurisdiction over appeals from administrative decisions only in Nevada's District Courts. And by statute, a petition for judicial review of a State Engineer decision must be brought in the county where the subject water source is located. NRS 533.450.

Although District Courts generally are trial courts, they hear and decide administrative appeals. The Nevada Court of Appeals and Nevada Supreme Court only have appellate jurisdiction over District Court decisions. Only after the District Court renders its decision may that appellate jurisdiction be invoked.

Nevada has a "push-down" model to determine which appellate court will hear any given appeal. All appeals are initially docketed in the Supreme Court (the State's highest court). From there, the Supreme Court decides, based on the Nevada Rules of Appellate Procedure, whether to "push down" the case to the Court of Appeals.

Currently, the rules direct the Supreme Court to retain "administrative agency cases involving … water." NRAP 17(a)(8). The Supreme Court also retains matters that raise "as a principal issue" either "a question of first impression involving the United States or Nevada Constitutions or common law" or "a question of statewide public importance." Water-related cases tend to fall in these categories. In light of this existing structure, the Supreme Court considers and decides most, if not all, appeals that involve the State's water resources.

Within this context, the State Engineer's proposed constitutional amendment to change how water cases are heard is a dramatic change from existing practice. Under the State Engineer's proposal, a petition for judicial review of a State Engineer decision would skip the District Court altogether and go straight to the appellate courts. There, rather than being heard and decided by the Supreme Court, it would go to the Court of Appeals, which until now, has not considered a single water-related case. The Supreme Court would then have discretion as to whether to review the Court of Appeals' decision.

Making the Court of Appeals a Water Court?

Essentially, the State Engineer seeks to make the Court of Appeals a *de facto* water court, which does not currently exist in Nevada. The Court of Appeals is comprised of just three judges, who generally come from district judge backgrounds. They likely have little-to-no experience in interpreting water law and, with two of the existing members being based in Las Vegas, are fairly removed from the rural communities in which many water disputes arise. The State Engineer's proposal would be a whiplash-inducing change from the status quo.

That said, there could be some benefits. The Court of Appeals tends to issue its decisions fairly quickly. In that water cases are notoriously slow moving, funneling cases that seek review of the State Engineer's decisions to the Court of Appeals could—possibly—speed up the process. Also, because Nevada judges are elected, and the Court of Appeals judges tend to be geographically distal from where many water cases originate, their decision-making may be less swayed by the potential widespread effects of water rulings on the local electorate.

Conclusion and Implications

The State Engineer's decisions are routinely challenged in courts. Those cases tend to take many years to reach a final resolution. Presumably, the State Engineer believes that the proposed legislative changes will improve the process. It remains to be seen, however, how stakeholders will react to the State Engineer's proposed bills in the 2021 legislative session.
(Debbie Leonard)

REGULATORY DEVELOPMENTS

U.S. BUREAU OF RECLAMATION AND SACRAMENTO RIVER CONTRACTORS COORDINATE AND DELAY WATER DIVERSIONS TO BENEFIT CHINOOK SALMON

Sacramento River Chinook salmon are a species of fish that have been subject to numerous protections over the years in order to battle declining populations. In light of these circumstances, the U.S. Bureau of Reclamation (Bureau) has coordinated with several entities in order to delay water diversions and early flow reductions to benefit fall-run Chinook salmon, as well as provide other benefits to the ecosystem in the Sacramento Valley area.

Background

According to Reclamation, Chinook salmon are a significant part of California's natural heritage. Chinook salmon are a species of fish native to the North Pacific Ocean and the river systems of western North America, ranging from California to Alaska. Chinook are anadromous fish, meaning that they can survive and live portions of their lives in fresh and salt water. As a result, Chinook salmon have a complex life history. A Chinook salmon will spawn and rear juveniles in freshwater rivers, which then migrate downstream to the ocean to feed, grow and mature. After maturation, the Chinook return to freshwater to spawn and repeat the process.

Four distinct runs of Chinook salmon spawn in the Sacramento-San Joaquin River system. Each run is named after the season when the majority of the salmon enter freshwater as adults. According to the Bureau, endangered Sacramento River winter-run Chinook salmon are particularly important among California's salmon runs because they exhibit a life-history strategy found nowhere else on the West Coast. These Chinook salmon are unique in that they spawn during the summer months when air temperatures usually approach their warmest. In contrast, fall-run Chinook salmon migrate upstream as adults from July through December and spawn from early October through late December. The timing of runs varies from stream to stream. Late-fall-run Chinook salmon migrate into the rivers from mid-October through December and spawn from January through mid-April. The majority of young salmon of these species migrate to the ocean during the first few months following emergence, although some may remain in freshwater and migrate as yearlings.

Fall-run Chinook salmon are currently the most abundant of the Central Valley salmon species, contributing to large commercial and recreational fisheries in the ocean and popular sport fisheries in the freshwater streams. Fall-run Chinook salmon are raised at five major Central Valley hatcheries which release more than 32 million smolts each year. Due to concerns over population size and hatchery influence, Central Valley fall and late-fall-run Chinook salmon are a Species of Concern under the federal Endangered Species Act.

Under § 7 of the federal Endangered Species Act, federal agencies must consult with the National Oceanic and Atmospheric Administration Fisheries (NOAA Fisheries or NMFS) relating to activities that may affect ESA-listed species. Formal consultations result in NOAA Fisheries developing a Biological Opinion. The intent of a Biological Opinion is to evaluate whether a proposed federal action will jeopardize the continued existence of an ESA-listed species, or adversely modify such species designated critical habitat. A non-jeopardy Biological Opinion usually also includes conservation recommendations that are designed to help further the recovery of ESA-listed species. A non-jeopardy Biological Opinion typically also includes reasonable and prudent measures as needed to minimize any harmful effects, and may require monitoring and reporting to ensure that the project or action is implemented as described.

In October 2019, NOAA Fisheries published its *Biological Opinion for the Reinitiation of Consultation on the Long-Term Operation of the Central Valley Project and State Water Project* (Biological Opinion). In this Biological Opinion, NOAA Fisheries evaluated the impact of Central Valley Project and State

Water Project water operations on ESA-listed species, including Sacramento River winter-run Chinook salmon. The Biological Opinion documented impacts from the proposed operations of the two water projects. NOAA Fisheries worked with the Bureau to modify the proposed action to minimize and offset those impacts.

Bureau Actions

Pursuant to the recommendations in the Biological Opinion, the Bureau has begun to work with a large variety of federal and state public agencies and contractors, to implement fall water operations to benefit salmon populations in the Sacramento River.

In order to balance temperature and wildlife needs, the Biological Opinion recommends that the Bureau reduce fall releases to save cold water and storage for next year's temperature management season in years with lower end-of-September storage. Maintaining releases to keep late spawning winter-run Chinook salmon redds underwater may drawdown storage necessary for temperature management in a subsequent year. In years with sufficient end of September storage, the Bureau will maintain higher releases in the fall to avoid dewatering the last winter-run salmon redds, indicating that there is flexibility depending on the amount of water storage available. It is also recommended that the Bureau adhere to ramping rate restrictions to reduce the risk of juvenile stranding during these operations. The Biological Opinion also contains recommendations for coordination with Sacramento River water diverters, specifically delaying diversions to avoid the risk of impacting Chinook salmon populations.

Voluntary Delay of Water Diversions

In October, the Bureau coordinated with the Sacramento River Settlement Contractors (SRS Contractors) to voluntarily delay a portion of their water diversions from October 16-31 until November 1-23, which would allow the Bureau to further reduce flows in the Sacramento River in mid-October. With lower late October and early November flows, fall-run Chinook salmon are less likely to spawn in shallow areas that would be subject to dewatering during winter base flows. As a result, according to the Bureau, early flow reductions balance the potential dewatering late spawning winter-run Chinook salmon redds and early fall-run Chinook salmon redds. These delayed water diversions and corresponding early flow reductions are anticipated to prevent the dewatering of 2.2 percent of fall-run Chinook salmon redds, which is approximately 1 million eggs, greatly benefiting fall-run Chinook salmon populations.

Conclusion and Implications

Ultimately, the Bureau of Reclamation's actions highlight ongoing partnerships in water resource management to allow entities to quickly respond to changing water conditions in a manner that ensures efficient water supply management while also addressing the needs of fish and wildlife habitat. This flexibility may prove to be a boon given that circumstances may differ greatly year-to-year. It remains to be seen if future interactions between the SRS Contractors, Bureau, and other agencies will remain on good footing, but the current interactions showcase a commitment to maintaining these relationships. For more information, *see:* https://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=73005
(Miles Krieger, Steve Anderson)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD GRANTS PETITION FOR STATUTORY ADJUDICATION OF FRESNO RIVER WATERSHED

On October 20, 2020, the California State Water Resources Control Board (SWRCB) granted a petition by Madera Irrigation District (District) for a statutory adjudication of water rights to the Fresno River and its tributaries (Petition), marking the first such adjudication that has been requested in forty years. Once concluded, the adjudication could result in a comprehensive resolution to the conflicts over water rights, water use, and water allocations within the Fresno River watershed.

Background

Water right claims to the Fresno River below Hidden Dam and Hensley Lake have been a source of conflict over water allocation and use in the watershed since the dam was constructed in the 1970s. There are an estimated 300 water right claims (not including unexercised riparian claims) in the Fresno River stream system, and conflicts and uncertainty regarding Fresno River rights arise when supplies are exceeded. Previous board actions and efforts to mediate private agreements in the Fresno River watershed have been both less comprehensive and unsuccessful in resolving the conflicting priorities and rights of claimants to the use of water in the Fresno River stream system.

Negotiated Management Attempts

In the Fall of 2019, the SWRCB adopted Resolution No. 2019-0049 postponing action on the Petition until May 2020, in order to give the parties more time to negotiate a settlement and management framework that would resolve diversion and use of water conflicts in the Fresno River watershed. Resolution No. 2019-0049 also provided eight requirements to be met in the negotiations, along with seven milestones the SWRCB would use to assess progress toward a negotiated settlement. The SWRCB further postponed action on the Petition to October 2020.

Also, in the Fall of 2019, a third-party facilitator was brought in to mediate negotiations and assist the parties in making substantial progress toward achieving a negotiated settlement. The facilitator's report on the mediation (Final Report on Mediation) was submitted to the SWRCB in August 2020, noting incomplete results. The Final Report on Mediation indicated that while the parties made some progress, they had not met the required elements or reached an agreement on water right quantities, water accounting, or administration. The District did not believe that negotiations would be able to resolve any substantive issues and again requested statutory adjudication of the Fresno River watershed.

Statutory Adjudication

A statutory adjudication determines the rights to water in a stream system through a board proceeding and court decree (Water Code §§ 2500-2868). According to the resolution of the SWRCB granting the Petition:

> A comprehensive statutory adjudication of the Fresno River watershed would evaluate and determine all claims of right to water in the Fresno River and its tributaries, from the upper watershed to the confluence with the San Joaquin River, encompassing approximately 300 claims.

The SWRCB makes a determination on the pending Petition after evaluating whether a statutory adjudication would serve the public interest and necessity. The following are a number of the relevant facts and conditions the SWRCB considered in making its public interest and necessity determination:

- The degree to which the waters of the stream system are fully used: Several previous board actions determined that the Fresno River is fully appropriated from spring through fall.

- The existence of uncertainty as to the relative priority of rights to the use of waters of the stream system: The Petition and Final Report on Mediation are both clear that uncertainties exist regarding the relative priority of water rights in the Fresno River watershed.

- The unsuitability of less comprehensive measures, such as private litigation or agreements, to achieve certainty of rights to the use of waters of the stream system: The board's previous actions in the Fresno River were limited in scope. Additionally, after two years of negotiations, including the involvement of a facilitator, the Final Report on Mediation indicates that meaningful progress toward a negotiated settlement has not been made.

- The need for a system-wide decree or watermaster service, or both, to assure fair and efficient allocation of the waters of the stream system: The District alleged in the Petition that it has in effect become watermaster of the Fresno River watershed without the appropriate legal authority. The Petition and Final Report on Mediation show that a system-wide decree and designation of a watermaster would likely provide a fair and efficient allocation of the Fresno River watershed.

The public trust may also be a consideration in a statutory adjudication, and the SWRCB's resolution granting the Petition noted that a statutory adjudication would provide:

> . . an opportunity for the [SWRCB] to evaluate the public trust resources of the Fresno River stream system and the flows necessary to protect those resources and meet applicable water quality standards.

The statutory adjudication process is intended to result in an order of the SWRCB determining and establishing the rights to water in the Fresno River stream system, which order would then be filed with the clerk of the Superior Court of the county in which the stream system is located. Each party of interest may file exceptions with the court and request relief. The court may then conduct proceedings, including hearings, prior to entering the decree that would ultimately determine the rights of all parties involved in the proceeding.

Conclusion and Implications

The statutory adjudication process seeks to provide a comprehensive resolution to the conflicts over water rights and water use in the Fresno River stream system. Claimants, and potential claimants, should note that failing to appear and submit proof of claim prior to the entry of the court decree will likely bar any claimant from subsequent attempts to claim any right to water in the Fresno River stream system. Thus, participation in the statutory adjudication process is critical for parties seeking to protect a claim of right to the use of water in the Fresno River stream system.
(Gabriel J. Pitassi, Derek R. Hoffman)

COLORADO RIVER DISTRICT COMPLETES STUDY ON THE ECONOMIC IMPACTS OF DEMAND MANAGEMENT PROGRAM

The Colorado River District released its final "Upper Basin Demand Management Economic Study in Western Colorado" (Study) on September 27, 2020. The Study, more than a year in the making, analyzed potential economic impacts of implementing a demand management program in western Colorado, specifically under the lens of "moderate" and "aggressive" plans. The findings outlined both positive and negative outcomes from any type of demand management plan, along with multiple uncertainties that cannot yet be answered.

Background

The Upper Basin Demand Management Economic Study in Western Colorado (Study) was undertaken by the Colorado River Water Bank Work Group. The Work Group was first conceived in 2009 as a partnership between the Colorado River District and the Southwestern Water Conservation District. The Nature Conservancy, Tri-State Generation and Transmission, Uncompahgre Valley Water Users Association, Upper Gunnison River Water Conservancy District, and the Grand Valley Water Users Association have since joined and contributed to the Work Group with the goal of finding solutions to balance all types of water use in Colorado, particularly under the looming threat of a "compact call" under the 1922 Colorado River Compact.

More specifically, given that all stakeholders to the Work Group are western slope entities, the group has been researching solutions that would avoid long-term agricultural dry up due to concerns that a compact call would result in buy-and-dry of western slope water rights, or even forced sales to Front Range cities whose more junior trans-mountain water supplies could be called out and in turn lead to situations where water might be permanently severed from its historical place of use in western Colorado.

The Study was completed by BBC Research and Consulting, with input from all four major water basins in western Colorado (Colorado, Gunnison, San Juan/Dolores, and Yampa/White). Importantly, the Study only analyzed the impacts of a demand management program that principally included fallowing western Colorado agricultural lands; the Study noted that a truly successful demand management program would necessarily include conserved consumption

from all types of water use, in all areas of Colorado. Additionally, the Study was only a feasibility study, and not an endorsement of any type of demand management program in the state.

Study Parameters and Limitations

The Study researched effects from a "voluntary, temporary, and compensated" demand management program. The Study began by noting that any mandatory, long-term water curtailment, whether as a result of a compact call or otherwise, is generally viewed as a worst-case scenario outcome. The Study also identified three primary objectives: 1) examine and document baseline economic conditions and trends in West Slope communities; 2) estimate the magnitude of potential positive and negative secondary economic and social impacts; and 3) identify areas for maximizing positive benefits and avoiding, minimizing, or mitigating negative impacts. The Study then applied those objectives to "moderate" and aggressive" hypothetical demand management programs.

Under the "moderate" program, there would be 125,000 acre-feet of reductions, or 25,000 acre-feet per year for five years from western Colorado farms and ranches. To conserve that volume of water, an estimated one out of every 60 irrigated acres of hay and corn crops would be fallowed. The "aggressive" program assumed 25,000 acre-feet of reduced water use, from each of western Colorado's four basins, every year. That means the program would conserve 100,000 acre-feet per year, or 500,000 acre-feet over the same five-year scenario discussed in the moderate program. Given the equal 25,000 acre-feet reduction in each basin, the amount of acreage required to be fallowed ranged from one in eight (Yampa/White) to one in 18 (Gunnison).

The Study also noted several uncertainties and limitations. First, the Study was only able to estimate multi-year impacts on hay fields from fallowing the fields for one year. It is unknown how quickly the fallowed fields would rebound after the dry up period. If one year of fallowing has longer-lasting impacts, then the feasibility of any demand management program would necessarily be impacted. Second, the Study only analyzed full season fallowing, although it is noted that partial season fallowing has been discussed, but the feasibility had not been studied to date.

Findings

The Study found that if funding to compensate participating irrigators in a demand management program came from outside western Colorado, those payments and the multiplier effects from the portion of the payments that is spent locally, would provide a regional economic benefit that could help offset adverse impacts on local communities. To date, there have been no concrete plans developed to fund any type of demand management program. Any funding that only originates in western Colorado (for example, through an increased property tax) would serve to offset any economic benefits gained from the demand management program. Therefore, the Study posits, a state-wide funding mechanism would be necessary for a successful program. A state-wide program could gain support, as discussed above, because many large population centers on the Front Range have relatively junior water rights in the Colorado River Basin that could be at risk during a Compact call. Therefore, a demand management program, even if only implemented in western Colorado, would likely have state-wide benefits.

The Study projected compensation payments ranging from $194 to 263 per acre-foot of conserved water. This number was developed through an estimation of the "break-even" cost for water users, plus a fifty percent premium for "lost" net operating income. Using an assumption of approximately two acre-feet of water per acre (which varies greatly depending on a multitude of factors including crop type, soil composition, and location), the estimated payment would then be approximately $388 to 526 per acre of fallowed land. In addition to variances due to water usage, the study also predicts that actual payment levels would likely vary by geographic location and year.

Under the "aggressive plan," crop prices and inventory were even expected to be impacted more significantly than under the moderate plan. An aggressive program is projected to reduce hay and corn production by approximately $23 million per year. This corresponds to an estimated increase in the price of local hay by 6 percent, and a decrease in regional livestock numbers by two percent. These effects are much smaller under the moderate plan.

In addition to the effects on actual water users, the Study also analyzed the secondary economic impacts to western Colorado from a demand management

program. These indirect effects include everything from fewer agriculture-related purchases to how the changed economy would affect non-agriculture jobs in the region. Importantly, the moderate plan is projected to result, as a consequence of secondary effects, in the loss of 55 full and part-time jobs, as well as an approximate $4.2 million annual output across western Colorado. Combined with the direct effects of the decreased production, the regional economic output would be expected to decrease by about $10 million per year. The aggressive plan is even more extreme, with a projected reduction of regional output by $40 million and the loss of 500 jobs. Importantly, however, more than half of those jobs would consist of workers on participating farms and ranches and therefore would be compensated to some degree through the program.

While the negative projections initially sound grim, the Study was quick to point out that the projected economic benefits, both direct and indirect, are comparable in scale to the negative effects. However, the Study also noted that while the raw numbers may be relatively equal, the distribution of spending under a demand management program may be very different from the current local economies. For example, the jobs supported through the demand management payments will likely be different jobs than those currently supported by the farming and ranching economies. As an example, a job that previously provided services to a farm or ranch (a feed store) might be replaced by another service job in the community (a restaurant).

Conclusion and Implications

The Study finished with several general conclusions and recommendations for designing a demand management program to be economically sustainable in western Colorado. Critically, a program that is sustainable on a regional level could still have more serious repercussions on a local level. To emphasize the hyper-locality of potential impacts, the quantity of acreage to be fallowed under the moderate plan (12,700) is already more than the total number of irrigated acres in several counties including Eagle and Dolores. The best design for a sustainable demand management program in western Colorado, according to the Study, should: 1) ensure that participation and impacts are widely distributed among and within the four western Colorado Basins; 2) limit the frequency and duration of participants to avoid a "retirement" plan for irrigators; 3) provide an opportunity for water users to opt out during severe drought years; and 4) offer opportunities for split or partial season fallowing or other deficit irrigation methods to reduce impacts and costs to Western Slope communities.

Although the Study specifically declined to explicitly endorse the moderate or aggressive, or any, demand management program, the Study marks yet another step in the planning stages for such a program in Colorado. The Colorado Water Conservation Board, through its Interbasin Compact Committee, is another entity that has been exploring demand management programs on a state-wide level. The funding mechanism for any program is still one of the bigger unanswered questions at this stage. However, the Study provides a glimpse of the potential economic impacts that could result in western Colorado.
(John Sittler, Jason Groves)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

Civil Enforcement Actions and Settlements—Water Quality

•October 29, 2020—The U.S. Department of Justice and the EPA announced a settlement with the City of Colorado Springs, Colorado, to resolve violations of the Clean Water Act with respect to the City's storm sewer system. The settlement also includes the State of Colorado as a co-plaintiff, and the Lower Arkansas Valley Water Conservancy District and the Board of County Commissioners of the County of Pueblo as plaintiff-intervenors. The improvements made by the city under this settlement will result in significant reductions in the discharge of pollutants, such as sediment, oil and grease, heavy metals, pesticides, fertilizers, and bacteria, into Fountain Creek and its tributaries in Colorado Springs. Communities downstream of Colorado Springs will also see significant water quality improvements from the settlement. The amended complaint generally alleged that the City of Colorado Springs violated its National Pollutant Discharge Elimination System (NPDES) permit for its municipal stormwater management program by failing to require the installation and maintenance of stormwater management structures at residential and commercial developments. The complaint also alleged that the city failed to enforce requirements to prevent polluted stormwater from running off active construction sites. The city has since taken significant steps to improve its stormwater management program. The proposed settlement requires the city to take additional actions, including developing standard operating procedures and increased staff training for critical elements of its stormwater management program. In addition, under the settlement the city will capture the volume of stormwater that was required to be captured under the city's NPDES permit using an innovative approach that identifies capacity needs and the appropriate locations for adding capacity on a watershed basis. The proposed settlement also requires the city to mitigate the damage to Fountain Creek and its tributaries through stream restoration projects. The city will spend a total of $11 million on this mitigation. Finally, the City of Colorado Springs will pay a $1 million federal civil penalty. In lieu of paying a civil penalty to the state, the city will perform state-approved supplemental environmental projects valued at $1 million that will improve water quality in the Arkansas River, into which Fountain Creek flows south of the city. The City of Colorado Springs' storm sewer system serves a population of more than 460,000 people and comprises approximately 250 miles of storm water ditches and channels, with more than 690 major outfalls, throughout the City of Colorado Springs.

•October 29, 2020 - The U.S. Department of Justice and the EPA have reached a settlement with Bobby Wolford Trucking & Salvage, Inc. and Karl Frederick Klock Pacific Bison, LLC, for federal Clean Water Act violations. The government alleges that the two parties discharged fill material into wetlands, an oxbow of the Skykomish River, and a perennial stream without obtaining the required permits. According to the federal consent decree, over a three-year period beginning in 2008, Bobby Wolford Trucking & Salvage, Inc. delivered fill material to the Karl Frederick Klock Pacific Bison, LCC property, located approximately three miles east of Monroe, Washington. The government alleges that the trucking company used heavy equipment to dump—and charged others to dump—more than 54,000 cubic yards of fill material, including construction debris, enough to fill more than 16 Olympic sized swimming pools. The fill was then dumped into an oxbow of the Skykomish River, nearby wetlands, and a perennial stream flowing through the Klock property. The government further alleges that neither Karl Frederick Klock Pacific Bison, LLC, nor Bobby Wolford Trucking & Salvage, Inc. obtained the required Clean Water Act permits before undertaking the work. Several listed "threatened" species depend on the Skykomish River, including Steelhead, Chum, Coho, and Pink salmon, as well as Chinook salmon and Bull Trout, for which

this stretch of the Skykomish is designated critical habitat. Under the terms of the consent decree: 1) Bobby Wolford Trucking & Salvage, Inc. will pay $300,000 in civil penalties; 2) will perform significant restoration work, including removing approximately 40,000 cubic yards of unauthorized fill from the oxbow of the Skykomish River and nearby wetlands, re-grading the site, and paying for native plants for revegetation efforts.

The Tulalip Tribes of Washington will oversee the earth-moving and restoration work and install native plants on 17 acres of the property.

Karl Frederick Klock Pacific Bison, LLC will execute an environmental covenant to place restrictions on approximately 188 acres of the property.

•November 18, 2020 - The EPA has reached settlements with two Hays, Kansas, crude oil production facilities for allegedly discharging oil into the Saline River, in violation of the federal Clean Water Act. According to EPA, R.P. Nixon Operations Inc. released approximately 165 barrels of oil in 2016, and Empire Energy E&P LLC released approximately 16 barrels in 2019. EPA inspections of the companies' facilities conducted after the reported discharges revealed additional violations of regulations intended to prevent and contain oil spills. Under the terms of the settlements, R.P. Nixon and Empire Energy agreed to pay civil penalties of $50,000 and $37,000, respectively. R.P. Nixon also agreed to take actions to achieve compliance at approximately 90 of its oil production facilities in Kansas. Facilities that store 1,320 gallons or greater of oil products in aboveground storage tanks are subject to Clean Water Act. EPA alleges that the companies failed to comply with these requirements, and that such noncompliance contributed to the discharges to the Saline River.

•November 19, 2020 - Koppers Inc. has agreed to settle with the EPA, the state of West Virginia and the state of Pennsylvania to resolve alleged violations of federal and state environmental laws at its facilities in Follansbee and Green Spring, West Virginia, and Clairton, Pennsylvania, EPA announced. A complaint filed with the settlement agreement cited violations of the Clean Water Act's Spill Prevention, Control and Countermeasure (SPCC) and Facility Response Plan (FRP) requirements. The SPCC rules help facilities prevent a discharge of oil into navigable waters or adjoining shorelines. The FRP rules require certain facilities to submit a response plan and prepare to respond to a worst-case oil discharge or threat of a discharge. Under a proposed consent decree filed in the United States District Court of the Northern District of West Virginia, Koppers will pay $800,000 to the United States, $175,000 to West Virginia, and $24,500 to Pennsylvania. The proposed consent decree is subject to a 30-day public comment period. The complaint also cited violations of the West Virginia Above Ground Storage Tank Act and its implementing regulations, which seek to protect and conserve the water resources of the state and its citizens. In addition, the complaint cited violations of the Pennsylvania Storage Tank and Spill Prevention Act and its implementing regulations, which set forth tank handling and inspection requirements.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•November 9, 2020—The EPA has reached a settlement with Quest USA Corp. for violations of federal pesticide law. The company, based in New York, illegally imported alcohol wipes that were not registered with the EPA through the Port of Long Beach. As the product was not EPA-registered, neither its public health claims or potential effects on human health and environment have been evaluated. The company has agreed to pay a $213,668 civil penalty. The Quest products, *BioPure Multipurpose Wipes*, were halted under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), which prohibits the distribution or sale of unregistered pesticides. The company also failed to file required documents stating that it was importing pesticides into the United States. Under FIFRA, purported disinfectant products that claim to kill or repel viruses, bacteria or germs are considered pesticides and must be registered with the EPA prior to distribution or sale.

•November 12, 2020 - The EPA has entered into settlements with Central Garden & Pet, Inc. (CG&P) of Walnut Creek, California, and Nufarm Americas Inc. (Nufarm) of Alsip, Illinois, resolving alleged violations of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) that occurred in a pesticide production facility located in Longmont, Colorado. Under the terms of two separate Consent Agreements and two Final Orders filed on September

24, 2020, CG&P will pay a civil penalty of $285,700, Nufarm will pay a civil penalty of $80,000, and both companies must ensure the pesticides they sell and distribute are properly labeled. The settlements resulted from a July 29, 2016, EPA-led investigation at GRO TEC II, a pesticide production facility in Longmont, Colorado, owned by the parent company CG&P. The inspection found that CG&P and Nufarm were distributing pesticide products with outdated labeling that were missing important, current information on how to safely use, store, and dispose of pesticide products. The process of registering a pesticide is a scientific, legal, and administrative procedure through which EPA examines the ingredients of the pesticide; the specific site or crop where it is to be used; the amount, frequency, and timing of its use; and storage and disposal practices.

•November 24, 2020 - The EPA and CJ Air, LLC, an aerial pesticide applicator based in Nezperce, ID, have reached a settlement over a pesticide container disposal case that occurred on the Nez Perce Reservation in July 2018. EPA alleges that the containers were not rinsed according to labeling instructions and still contained toxic pesticide residue at the time of disposal. Pesticide product labels provide critical instructions about how to safely and legally handle and use pesticide products including proper disposal of containers. Unlike most other types of product labels, pesticide labels are legally enforceable. In other words, the label is the law. In this case, the label requires users to follow specific rinsing procedures prior to disposing of empty containers. Failure to properly rinse and dispose of pesticide containers—especially those containing "restricted use" pesticides—can cause environmental damage and harm people, pets and wildlife. Restricted use pesticides are not available for purchase or use by the general public because they have the greatest potential to cause serious harm to the environment and injury to applicators or bystanders if used improperly. Availability and use of such products are restricted to applicators with special training and in some cases, those under their direct supervision. The unrinsed containers created a noticeable odor and some of them contained restricted use pesticide residue. When made aware of the situation, CJ Air promptly retrieved the unrinsed containers and rinsed them according to label instructions. As part of the settlement, CJ Air agreed to pay a $5,400 penalty.
(Andre Monette)

JUDICIAL DEVELOPMENTS

NINTH CIRCUIT REJECTS NEPA LAWSUIT CHALLENGING EIS FOR SHEEP GRAZING PLAN IN GRIZZLY BEAR HABITAT

Cottonwood Environmental Law Center v. U.S. Sheep Experiment Station, Unpub., Case 19-35511 (9th Cir. Oct. 28, 2020).

In an *unpublished* decision, the U.S. Court of Appeals for the Ninth Circuit rejected environmental plaintiffs' arguments that an Environmental Impact Statement (EIS) prepared for a sheepherding plan in Montana's Centennial Mountains, a grizzly-bear habitat, violated the National Environmental Policy Act (NEPA). Plaintiffs pointed to factual inconsistencies in the Final Environmental Impact Statement (FEIS) prepared for the decision where parts of the FEIS noted there were no grizzly-bear and human interactions, but other parts of the FEIS and record detailed at least one such interaction. The court relied on the "rule of reason" to note that despite these inconsistencies, the FEIS still contained sufficient information and analysis for the federal agency to make an informed decision to approve the sheep grazing plan and examine project alternatives.

Factual and Procedural History

In 2017, environmental plaintiffs filed their third lawsuit challenging domestic sheep grazing by the federal Agricultural Research Service (ARS) in portions of the Centennial Mountains in southwestern Montana. The area is part of the Greater Yellowstone Ecosystem which is an important habitat linkage for the endangered grizzly bear population in and near Yellowstone National Park. The environmental groups alleged the presence of sheep in the area increased the likelihood of threats to the grizzly bears resulting from interactions between the bears and sheep and humans.

Plaintiffs' alleged specifically that ARS violated NEPA by conducting a flawed environmental review that was arbitrary and capricious. Specifically, Plaintiffs alleged that the FEIS was self-contradictory. The FEIS claimed that there had not been any human, grizzly-bear interactions, however there were documents in the record indicated that at least one encounter occurred between grizzly bears and sheep herders. ARS responded that the FEIS disclosed this grizzly bear encounter, and noted that the species of bear involved in the incident was unknown at the time of the encounter. ARS noted that the bear encounter was consistent with natural bear behavior, and that the bear had not lost its natural wariness of humans, and the incident was resolved by moving the sheep to a different pasture.

Plaintiffs filed a motion for summary judgment, which the district court denied. Instead, the court entered a judgment for defendants, which plaintiffs appealed to the Ninth Circuit.

The Ninth Circuit's Decision

In an *unpublished memorandum* decision, the Court of Appeals rejected plaintiffs' arguments. The court noted that it reviews administrative agency decisions under the abuse of discretion standard. Under this standard, an agency action is arbitrary and capricious if the agency has:

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

The 'Hard Look' Standard of Review

The court rejected plaintiffs' contention, noting that NEPA does not impose "substantive environmental" obligations on federal agencies, but instead prohibits "uninformed—rather than unwise—agency action." All that is required is that an agency take a "hard look" at environmental consequences of the agency's proposed actions. Despite plaintiffs' claims regarding internal inconsistencies in the FEIS, the court was convinced that the ARS took a hard look

at the consequences of continued sheep grazing in Montana's Centennial Mountains. In reaching its decision, the court differentiated the instant matter from prior cases where unexplained, conflicting findings in an EIS rendered the analysis therein arbitrary and capricious. Those cases involved federal agencies that changed their decision based on the same factual record without providing a reasoned explanation for its change in course. Here, ARS did not change its course and merely characterized bear encounters differently in different parts of the FEIS.

The 'Rule of Reason'

The court relied on the "rule of reason standard" which:

> . . .requires a pragmatic judgment whether the EIS's form, content and preparation foster both informed decision-making and informed public participation.

In the instant case, the discrepancies in the FEIS's description of grizzly bear encounters did not render the FEIS so misleading that the agency and the public could not make an informed comparison of alternatives. Accordingly the court ruled that the project's analysis did not violate NEPA.

Conclusion and Implications

This latest *Cottonwood* decision is the culmination of several years of litigation challenging federal sheep grazing programs in the Centennial Mountains. While efforts to reintroduce grizzly bears, wolves, and other native species throughout the west continue, disputes and litigation between grazing interests and conservationists are sure to follow. The Ninth Circuit's *unpublished memorandum* opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/memoranda/2020/10/28/19-35511.pdf
(Travis Brooks)

D.C. CIRCUIT FINDS DISTRICT OF COLUMBIA'S WATER POLLUTION CONTROL ACT IS DISCRETIONARY

District of Columbia v. Miss Dallas Trucking, LLC,
___F.3d___, Case No. 19-CV-540 (D.C. Cir. Oct. 22, 2020), *as amended* (Nov. 12, 2020).

The Court of Appeals for the District of Columbia recently held that civil penalties under the District of Columbia's Water Pollution Control Act (WPCA) are discretionary rather than mandatory. The court's decision deviates from several federal Circuit Courts of Appeal decisions interpreting mandatory civil penalties in the language of the distinct federal Clean Water Act (CWA), the statute which served as a model for the WPCA.

Factual and Procedural Background

In March 2016, a truck owned by Miss Dallas Trucking, LLC (MDT) crashed in the District of Columbia (District) and spilled about 900 gallons of fuel and engine oil into a drainage channel leading into the Potomac River. MDT refused a request to begin cleanup, leaving the District's Department of Energy & Environment to conduct cleanup at a cost of $31,399.69. The District initiated a civil enforcement action against MDT for violations of the WPCA.

The District sought recovery of its cleanup costs and a $50,000 civil penalty for violations of the WPCA. When MDT did not answer the District's complaint, the trial court entered default judgment against MDT and granted the District an award in the amount of its cleanup costs. With regard to the civil penalty, the trial court explained that it had to consider four statutory factors when fashioning a civil penalty: 1) the size of the business, 2) its ability to continue the business despite the penalty, 3) the seriousness of the violation, and 4) the nature and extent of its success in its cleanup efforts.

At the Trial Court

The trial court concluded that the District did not adequately address the first two factors and therefore imposed no civil penalty.

The District asked the trial court to reconsider its determination as to the civil penalty. It argued that the civil penalties were mandatory based on the language of the WPCA, that any lack of evidence should be held against MDT, who possessed and withheld the pertinent information, and that the court should otherwise treat those two factors as insignificant and fashion a penalty based on the evidence available. The trial court again denied the District's request, holding that imposition of a civil penalty under the WPCA was discretionary rather than mandatory. The trial court further reasoned that the lack of evidence on MDT's size and ability to absorb the penalty precluded its imposition. The District appealed.

The D.C. Circuit's Decision

The threshold issue on appeal was whether imposition of a civil penalty was mandatory or discretionary under the WPCA. The District argued that a civil penalty, however minimal, was mandatory and that, alternatively, the trial court abused its discretion in determining no penalty was appropriated due to the lack of evidence as to two of the four statutory factors.

Whether civil penalties are mandatory under the WPCA is a question of statutory interpretation which is reviewed *de novo*.

The Court of Appeals began its inquiry with a review of the relevant statutory text, which provides as follows: "A person who violates the [WPCA] shall be subject to a civil penalty of no more than $50,000 for each violation." While the court agreed with the District that the word "shall" typically signifies a mandate, the court reasoned that "shall" was modified by the words "be subject to," which indicate that violators are liable to be assessed a civil penalty, but not that one is required.

A Split in the Circuits?

The D.C. Circuit acknowledged that four U.S. Courts of Appeal decisions had interpreted the phrase "shall be subject to a civil penalty" in the language of the CWA as requiring a civil penalty. While the WPCA was modeled after the CWA, the court pointed out that only the Ninth Circuit attempted to consider the indeterminate nature of the phrase "be subject to," noting that the Ninth Circuit had found that, at first glance, the phrase "shall be subject to" means "penalties are discretionary." And although the Ninth Circuit deviated from this interpretation in significant part to conform to the earlier decisions of its sister Circuits interpreting the CWA, the court concluded that there was no similar incentive for the court to align its interpretation of the WPCA with the distinct CWA.

Further, the court reasoned that even if the phrase "shall be subject to" were ambiguous, the rest of the statute favors the conclusion that the imposition of civil penalties is discretionary. The court pointed to the fact that the WPCA contained no statutory minimum civil penalty such that if a penalty were required, it could be nominal. The court disagreed with the District's argument that such a nominal penalty could serve a symbolic purpose, concluding that the resulting civil penalty could be as little as a penny which does not convey that WPCA violations are treated seriously. The court also opined that such a penalty was ill-suited to the strict liability imposed by the WPCA because such a symbolic gesture would apply with equal force to an inadvertent violator who made all attempts to comply with the WPCA.

The court was also unpersuaded by the District's argument that because the WPCA used clearly discretionary language elsewhere which provides that "a civil penalty . . . *may* be assessed by the Mayor," the more ambiguous phrase, "shall be subject to," should be read as a mandatory penalty. The court reasoned that the converse was also true because the WPCA's criminal penalties contained unmistakably mandatory language, plainly indicating that fines are sometimes mandatory: "'[a] person *shall be fined* at least $2,500' for criminal violations." Because this analytical point was susceptible to both interpretations, the court determined that it did not provide a basis for deviating from the phrase's most natural reading.

Abuse of Discretion at the Trial Court

Having concluded that civil penalties under the WPCA are discretionary, the court next turned to whether the trial court abused its discretion in declining to impose a civil penalty due to incomplete information on the first two statutory factors. On this point, the court agreed with the District, finding that the WPCA does not preclude imposition of a civil penalty because of a relative lack of evidence on the statutory factors. The court noted that the trial court never weighed the information it possessed on the

four factors and that the statute did not require each factor to favor imposition of a civil penalty. Thus, the trial court abused its discretion.

Limits of the Court's Decision

Finally, the court declined to squarely address whether the District had the burden to show evidence regarding the four statutory factors or whether MPT had the burden to show it lacked the size and ability to absorb a fine to mitigate an otherwise appropriate civil penalty. Instead, the court held that MPT had the burden to establish mitigating evidence because it forfeited any argument to the contrary by failing to participate in the litigation. The court thus vacated and remanded the case to the trial court for reconsideration of whether a civil penalty should be imposed.

Conclusion and Implications

This case provides state courts and litigants with a perspective on how to approach related but distinct federal precedent on an issue of statutory interpretation. It also serves as a cautionary tale for defendants who willfully neglect to defend their interests in court. The court's opinion is available online at: https://www.dccourts.gov/sites/default/files/2020-10/D.C.%20v.%20Miss%20Dallas%20Trucking%2C%2019-CV-0540.pdf
(Heraclio Pimentel, Rebecca Andrews)

DISTRICT COURT VACATES DEPARTMENT OF THE INTERIOR'S MEMORANDUM REMOVING INCIDENTAL TAKE PROTECTIONS FOR MIGRATORY BIRDS

Natural Resources Defense Council, Inc., et al v. U.S. Department of the Interior, et al., ___F.Supp.3d___, Case No. 1:18-cv-04596-VEC (S.D. NY 2020).

In the waning days of summer 2020 the U.S. District Court for the Southern District of New York vacated a 2017 legal opinion issued by the U.S. Department of the Interior's Solicitor's Office interpreting the Migratory Bird Treaty Act not to prohibit incidental taking or killing of listed bird species. The Opinion reversed a legal opinion issued a little under one year earlier (January 2017), in the waning days of the prior administration, in which the same office affirmed the Department of the Interior's (DOI or Department) long-standing interpretation that the Migratory Bird Treaty Act (MBTA or Act) prohibits the incidental taking or killing of migratory birds even where the activity is not specifically directed at birds. The District Court vacated the 2017 Opinion and related guidance on the grounds that it was contrary to the plain meaning of the statute and the agency's longstanding interpretation and administrative practice.

The Migratory Bird Treaty Act

In 1916, the United States and the United Kingdom (acting on behalf of Canada) entered into the "Convention between the United States and Great Britain for the Protection of Migratory Birds" with the stated purpose of "saving from indiscriminate slaughter and of ensuring the preservation of such migratory birds as are either useful to man or are harmless." In 1918, Congress ratified the Convention by passing the Migratory Bird Treaty Act. The MBTA provides that "it shall be unlawful at any time, by any means, or in any manner, to pursue, hunt, take, capture, [or] kill…any migratory bird."

From the early 1970s until 2017, DOI formally interpreted the MBTA to prohibit incidental takes and kills. It also imposed liability for activities and hazards that led to the death of birds, regardless of whether the activities targeted or were intended to take or kill birds. Although DOI formally interpreted the Act to apply to the take of even one individual bird, in practice it exercised its enforcement discretion to focus on wrongdoers who ignored industry standards and actions which had "population level" impacts. Over this period, the U.S. Fish and Wildlife Service (FWS) regularly investigated the causes of incidental

takes and kills of migratory birds from various industrial and other activities, and conducted enforcement activities related to the incidental take of migratory birds.

The Jorjani Opinion

In December 2017, Daniel Jorjani, the Principal Deputy Solicitor of the U.S. Department of the Interior issued a memorandum concluding the MBTA does not prohibit incidental takes or kills because the statute applies only to activities specifically aimed at birds. (While commonly referred to as the "M" Opinion, the District Court in this case referred to the Opinion by the name of its author, and so this note does so for convenience as well.) For example, under the Jorjani Opinion, demolishing a barn containing owl nests ("incidentally" killing the owls) would not be a violation of the MBTA because destroying a barn is "rarely if ever… an act that has killing owl nestlings as its purpose." FWS FAQs following the Jorjani Opinion further provides that FWS "will not withhold a permit, request, or require mitigation based upon incidental take concerns under the MBTA."

The District Court's Decision

A suit by several U.S. States (led by New York and California) and two suits filed by environmental groups to vacate the Jorjani Opinion and subsequent guidance were consolidated into this action. Plaintiffs moved and DOI cross-moved for summary judgment. The case turned on whether DOI's interpretation of the MBTA was invalid as contrary to law under the Administrative Procedure Act (APA) and, if so, whether it had to be set aside.

Standard of Review

The court analyzed the Jorjani Opinion under the *Skidmore* deference standard, which requires the court to defer to the opinion to the extent it has the "power to persuade." Under *Skidmore* (which provides for far less deference than *Chevron* deference), factors considered include:

> . . .the agency's expertise, the care it took in reaching its conclusions, the formality with which it promulgates its interpretations, the consistency of its views over time, and the ultimate persuasiveness of its arguments.

The Court Vacates the Jorjani Opinion

Under these factors, the court determined that the Jorjani Opinion was not entitled to any deference. According to the court, the Jorjani Opinion was an informal pronouncement lacking notice and comment or other rulemaking procedures. Second, the court found DOI's claim to agency expertise failed because there was no evidence that DOI requested input from FWS, the expert agency tasked with implementing the statute. The court further found that the DOI's claim that the Jorjani Opinion settled years of controversy was undermined by the fact that Circuit Courts, according to the District Court, generally agree that the MBTA prohibits the incidental taking and killing of migratory birds. (Despite the court's statement, the Second Circuit Court of Appeals is one of only two Circuit Courts that have embraced this perspective. Three out of five Circuits have refused to embrace this expansive reading.) Finally, the court found that the plain language of the MBTA supports the agency's longstanding interpretation of the words "take" and "kill" to include incidental taking and killing.

The District Court vacated the Jorjani Opinion on the grounds that its interpretations of "take" and "kill" were contrary to the plain meaning of the MBTA. The Court found no significant risk of disruption due to the *vacatur*, because vacating the Jorjani Opinion "simply undoes a recent departure from the agency's prior longstanding position and enforcement practices."

Conclusion and Implications

One of the early actions of a Biden Interior Department has long been thought to be reversal of the "M" Opinion; the District Court's decision here vacated the "M" Opinion, making action by the new administration to reverse it unnecessary. On November 27, 2020, FWS announced the publication of the Final Environmental Impact Statement for its proposed rule putting the "M" Opinion into regulation, defining the scope of the MBTA to exclude incidental take. The final rule is scheduled to become effective prior to the change of Administration. If the final rule is ultimately rendered ineffective by a court decision or rulemaking, practitioners will want to see if FWS returns to its pre-Obama years of enforcement discretion or, instead, seeks to use the MBTA

more aggressively to address cases where there is no industry standard (such as exist for renewable energy projects) or where take is insignificant compared to a population level event. The District Court's opinion is available online at: http://nsglc.olemiss.edu/case-alert/aug-2020/us-interior.pdf
(Chris Carr, Molly Coyne)

DISTRICT COURT DENIES MOTION TO DISMISS CLEAN WATER ACT CITIZEN SUIT—FINDS SUFFICIENT PLEADING OF CONTINUING OR INTERMITTENT VIOLATIONS

Okanogan Highlands Alliance, et al. v. *Crown Resources Corporation, et al.*, ___F.Supp.3d___, Case No. 2:20-CV-147-RMP (E.D. Wash. Oct. 5, 2020).

The U.S. District Court for the Eastern District of Washington recently denied a motion to dismiss, ruling that plaintiffs sufficiently plead continuing or intermittent violations of effluent standards or limitations to state a claim under the federal Clean Water Act (CWA) and avoid dismissal.

Factual and Procedural Background

Defendants, Kinross Gold USA, Inc., and its subsidiary, Crown Resource Corporation, own and operate Buckhorn Mountain Mine (Mine) in Okanogan County, Washington. In 2014, defendants obtained a federal Clean Water Act, National Pollutant Discharge Elimination System (NPDES) permit from the Washington State Department of Ecology, allowing it to discharge pollutants into waters of the state, provided that it complied with various terms and conditions. Defendants' NPDES permit was modified twice after it was issued. The Second Modified NPDES permit is alleged to require defendants to capture and treat all water at the mine, meet certain numeric effluent limitations at water quality monitoring points, maintain a capture zone for mine-generated pollutants, and adhere to monitoring and reporting requirements.

Plaintiffs Okanogan Highlands Alliance and the State of Washington brought a citizen suit action under the Clean Water Act alleging that defendants violated several terms of their NPDES permit and polluted local waters continuously since 2014. Active mining ceased in 2017; however, plaintiffs alleged that defendants continue reclamation efforts and are still discharging pollutants to ground and surface waters surrounding the Mine. Specifically, plaintiffs allege that defendants are discharging pollutants in excess of average monthly effluent limitations, failing to maintain capture zones for mine-impacted water, and failing to follow reporting requirements. In response to these claims, defendants brought a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

The District Court's Decision

Defendants' raised two arguments in support of the motion to dismiss. First, defendants argued the court did not have proper jurisdiction, because the plaintiffs alleged only "wholly past" violations of the CWA. Second, defendants argued the plaintiffs' claims should be dismissed for failing to state a cognizable claim under the CWA.

Issue of 'Wholly Past Violations'

The court first considered whether plaintiffs alleged wholly past violations. Under the CWA, a citizen plaintiff must allege "a state of either continuous or intermittent violation. . .that is, a reasonable likelihood that a past polluter will continue to pollute in the future." The court noted that citizen plaintiffs need not prove the allegations of ongoing noncompliance before jurisdiction attaches. To withstand a motion to dismiss, the plaintiffs were required to meet a minimal pleading standard, with allegations based on "good-faith beliefs, formed after reasonable injury and are well-grounded in fact.

The court determined that the plaintiffs alleged past violations by the defendants and also alleged

continuing violations. These allegations included the defendants' failure to maintain the capture zone, which was purported to have occurred every day for the last five years as well as an ongoing pattern of noncompliance with the NPDES permit's reporting requirements. Plaintiffs also alleged the defendants continue to own and operate the Mine and to discharge pollutants to the waters around the Mine.

Ultimately, the court found the plaintiffs' allegations appeared to be based on good-faith beliefs, formed after reasonable inquiry and were well grounded in fact, which satisfied the minimum threshold requirements for a properly plead complaint:

> Plaintiffs allege not only past violations by Defendants, but continuing violations as well. . . .These alleged violations include Defendants' failure to maintain the "capture zone," which has purportedly occurred every day for the last five years. . . .Plaintiffs further allege an ongoing pattern of frequent noncompliance with the permit's reporting requirements. . . .In support of these allegations, Plaintiffs contend that Defendants continue to own and operate the Mine; Defendants still hold an NPDES permit and are subject to its requirements; and Defendants continue to discharge pollutants to surrounding waters around the Mine. . . .Therefore, Plaintiffs' allegations of continuing violations committed by Defendants appear to be based on good-faith beliefs, "formed after reasonably inquiry," that are "well-grounded in fact. . .

As a result, the court had jurisdiction over the plaintiff's claims.

Issue of 'Failure to State a Cognizable Claim'

The court next considered whether plaintiffs' claims should be dismissed for failing to state a cognizable claim under the CWA. Dismissal of a complaint is proper where the plaintiff fails to state a claim upon which relief can be granted. In reviewing the sufficiency of a complaint, a court accepts all well-pleaded allegations of material fact as true and construes those allegations in the light most favorable to the nonmoving party. To withstand dismissal, a complaint must contain "enough facts to state a claim to relief that is plausible on its face."

Taking the factual allegations in the complaint as true for the purposes of the motion to dismiss, the court found that plaintiffs alleged sufficient facts to state a claim. Plaintiffs alleged various violations of "effluent standards or limitations," failure to maintain the "capture zone" as required by the NPDES permit, repeatedly ignoring reporting requirements outlined by the NPDES permit. As a result, defendants' motion to dismiss was denied.

Conclusion and Implications

This case provides a reminder that at the pleading stage, allegation of fact may be sufficient to defend against a motion to dismiss. The case is also an example of how liberal pleading standards may encourage Clean Water Act citizen suits to proceed to the discovery stage. The court's ruling is available online at: https://www.courthousenews.com/wp-content/uploads/2020/10/DirtyMine.pdf
(Geremy Holm, Rebecca Andrews)

DISTRICT COURT REVERSES EPA'S NARROW JURISDICTIONAL DELINEATION BY APPLYING CONTEMPORARY JUDICIAL SCOPE OF THE CLEAN WATER ACT JURISDICTION

San Francisco Baykeeper et al. v. U.S. Environmental Protection Agency, ___F.Supp.3d___, Case No. 3:19-cv-05941-WHA (N.D. Cal. 2020).

In October 2020, the U.S. District Court for the Northern District of California rejected a March 2019 jurisdictional delineation in which the U.S. Environmental Protection Agency (EPA) determined that a salt production complex adjacent to the San Francisco Bay was not jurisdictional and therefore not subject to federal Clean Water Act (CWA) § 404. Specifically, the court found that EPA failed to consider whether the salt ponds fell within the regulatory definition of "waters of the United States" (WOTUS), and instead erroneously applied case law to reach a determination that the salt ponds were "fast lands," which are categorically excluded from CWA jurisdiction. "Fast lands" are those areas formerly subject to inundation, which were converted to dry land prior to enactment of the CWA. The court's holding: 1) maintains the status quo with regard to CWA jurisdiction over properly identified fast lands, and 2) indicates that the true measure of the jurisdictional extent of a WOTUS is the natural extent of such waters, absent any artificial components that limit the reach of an adjacent jurisdictional water body. Moreover, the court's holding suggests that jurisdictional delineations of wet areas at facilities developed prior to adoption of the CWA should be re-evaluated to apply landmark rulings regarding the appropriate scope of WOTUS and establishment of the "significant nexus" analysis established in the U.S. Supreme Court's *Rapanos* decision. In reaching this decision, the court did not consider or apply the most recent WOTUS definition, which became effective in June 2020 and eliminated the significant nexus analysis.

Background

The Redwood City Salt Plant continuously operated as a commercial salt-producing facility since at least 1902. The facility's salt ponds were created by reclaiming tidal marshes in San Francisco Bay through dredging, and construction of a system of levees, dikes, and gated inlets, permitted by the U.S. Army Corps of Engineers (Corps) in the 1940s. In the early 1950s, the Corps authorized construction of a brine pipeline, which connects the Redwood City Salt Plant to another salt production facility in Hayward, California. The Redwood City facility's operations have remained largely unchanged since 1951, prior to the adoption of the federal Clean Water Act in 1972. In 2000 and 2001, Cargill, Incorporated (Cargill), the current facility owner, constructed new intake pipes to bring in seawater and improve brine flow at the facility. In the absence of the improvements made by Cargill and its predecessors, some of the salt ponds would be inundated with the San Francisco Bay's jurisdictional waters.

In 2012, Cargill requested that EPA determine the jurisdictional status of the salt ponds. In response, EPA Region IX developed a draft jurisdictional determination in 2016, which indicated that only 95 acres of the Redwood City facility had been converted to "fast land" prior to enactment of the CWA. According to Region IX, the remaining 1,270 acres of the facility were jurisdictional under the CWA because:

> (1) the tidal channels within the Redwood City Salt Ponds were part of the traditionally navigable waters of the San Francisco Bay, and were not converted to fast land prior to enactment of the CWA; (2) the salt ponds in their current condition have been shown to be navigable in fact, and are susceptible to use in interstate or foreign commerce with reasonable improvements; (3) the salt ponds are impoundments of waters otherwise defined as waters of the United States; and (4) the salt ponds have a significant nexus to the traditionally navigable waters of the adjacent San Francisco Bay.

Ultimately, EPA headquarters issued a significantly different determination in March 2019, which found that the entire Redwood City facility was *not* jurisdictional, spurring a challenge by four environmental organizations.

The District Court's Decision

According to the court, EPA was bound to apply its regulatory WOTUS definition, rather than Ninth Circuit case law on the scope of CWA jurisdiction. The court found that even if headquarters intended to apply judicial precedent on the issue of "fast lands," it did so improperly. In 1978, the Ninth Circuit had previously evaluated the jurisdiction of the Redwood City Salt Plant ponds, and concluded differently than the March 2019 jurisdictional determination. *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978). In that earlier case, the Ninth Circuit determined: 1) that CWA jurisdiction still extended at least to those waters no longer subject to tidal inundation merely by reason of artificial dikes; and 2) the fast lands jurisdictional exemption applies only where the reclaimed area was filled in as dry upland before adoption of the CWA.

The court went on to examine EPA's application of *United States v. Milner*, 583 F.3d 1174 (9th Cir. 2009), a case that determined tribal rights on land that became submerged, and thus converted to tidelands. In that case, lessors of the previously upland areas and adjacent homeowners erected shoreline defense structures on dry land, which, once submerged, constituted a trespass on the tribe's tidelands, and a violation of the CWA and the Rivers and Harbors Act. While the Ninth Circuit found violation in this case, the Ninth Circuit also confirmed that fast lands, where properly identified, are not subject to the CWA's permitting requirements. According to the court:

> . . .[e]ven if land has been maintained as dry through artificial means, if the activity does not reach or otherwise have an effect on the waters, excavating, filling and other work does not present the kind of threat the CWA is meant to regulate.

Conclusion and Implications

In addition to providing a refined view of Clean Water Act jurisdiction over aquatic features separated from a jurisdictional water by artificial means, the court also suggested that although operations at the Redwood City Salt Plant had remained largely unchanged since 1951, any evaluation of the facility's jurisdictional status should be updated to account for the three major Supreme Court decisions regarding the appropriate scope of CWA jurisdiction: *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); and *Rapanos v. United States*, 547 U.S. 715 (2006). The *Rapanos* decision's significant nexus analysis seems to have largely influenced the court's decision here. According to the court, the salt ponds "enjoyed a water nexus to the Bay," and found that issue to be dispositive, triggering reversal of headquarters' jurisdictional determination even absent appropriate application of prior applicable Ninth Circuit case law. The court's opinion is available online at: https://oag.ca.gov/sites/default/files/Redwood%20City%20Salt%20Ponds%20MSJ%20Order.pdf?source=email

(Nicole E. Granquist, Brenda C. Bass, Meghan A. Quinn, Meredith Nikkel)

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

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