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# EASTERN WATER LAW™
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## EASTERN WATER NEWS

# CRIMINAL CHARGES FILED AGAINST FORMER MICHIGAN GOVERNOR STEMMING FROM FLINT DRINKING WATER CRISIS

In a move that surprised some observers of the Flint Michigan drinking water crisis and saga, the former Governor of Michigan, Rick Snyder, was indicted earlier this month on two criminal charges of willful neglect of duty.

### Factual Background

The facts surrounding the Snyder indictments involve his being informed in advance that there were definite as well as additional possible health risks involved in making the water supply switch, a move dictated primarily by a search for less expensive water. Because of the age and condition of the Flint system, the condition of the river water, and basic water delivery chemistry, the change resulted in there being pollutants, including lead leached from pipes, in the water delivered at peoples' taps. Snyder allowed the change to proceed and only declared a crisis after serious harm was obviously occurring.

### The Charges

Both are misdemeanor allegations that relate to the Governor's participation in the replacement of the drinking water supply for Flint Michigan. At least a dozen deaths are attributed to drinking the replacement water drawn from the Flint River, which was known to be polluted, rather than purchasing water supplies drawn from Lake Huron. The charges were sought and are being advanced by the Attorney General of Michigan, Dana Nessel. Prosecution is in the hands of the Michigan Solicitor General and the Wayne County prosecutor. Eight other officials were indicted at the same time as Snyder, with the charges individualized for each. In two cases, the indictments include involuntary manslaughter felony allegations. In another, perjury is alleged.

### Procedural Summary of Case

In mid-year 2020 the Sixth Circuit U.S. Court of Appeals had remanded to federal District Courts the pending class actions for tort recovery against Snyder and several other Michigan state and local government officials, finding that Snyder's alleged conduct was egregious enough to believe he may be found by a jury to have violated the substantive due process rights of Flint citizens by his lack of actions to protect against dangers of illness explained to him. He is the first governor in Michigan history to face indictment for conduct in office.

### Issue of Immunity

Throughout the saga there have been reports of officials at different levels of federal, state and local government not taking seriously enough or acting fast enough to prevent the foreseeable and foreseen problems of health issues for those Flint residents and others drinking the replacement water. Usually in the past, where tragedies have occurred, governmental officials have enjoyed the protection of immunities that are afforded by law. If the Flint saga teaches nothing else to lawyers and officials, those days of expected and rather regularly accorded immunity are apparently gone.

### The Parties Weigh in

The criminal charges were denounced by several Flint activists as being a mere slap in the face. Some advocated for manslaughter charges that would result in hard time for the former governor.

Governor Snyder's counsel denounced the indictment as a political stunt. Attorney General Nessel had ordered her predecessor's investigation into the same situation curtailed, claiming that the investigation was not proceeding in a professional enough manner. She had then appointed the Solicitor General and Wayne County prosecutor to conduct a new investigation, from which the current indictments have resulted. A special grand jury consisting of a circuit judge reviewed the evidence and returned the indictments.

### Conclusion and Implications

As these charges pend, a U.S. District Court in Ann Arbor has taken under advisement a proposed settlement on behalf of affected people in Flint. The settlement is valued at about $640 million, with not all potential defendant parties involved participating. The federal EPA itself, along with engineering firms, remain targets of additional litigation for tort recovery. Proceeds are to be distributed to citizens who drank the Flint water. The opposition to the settlement contends the money received per Flint resident, reportedly around $500, is too little to be serious compensation for the harms caused.

The case and defense of the Governor may well explore the limits of power, both legal and practical, in the 21st century. Although governors of states are singularly powerful officials, their actions are constrained not only by state, but federal laws. Local decisions and authority also must often be consulted. (Harvey M. Sheldon)

## MASSACHUSETTS INSTITUTE OF TECHNOLOGY CONVENES INDUSTRY LEADERS INTO CLIMATE AND SUSTAINABILITY CONSORTIUM

On January 28, the Massachusetts Institute of Technology (MIT) convened the "MIT Climate and Sustainability Consortium" (MCSC), an alliance of leaders from a broad range of industries and aims to vastly accelerate large-scale implementation of real-world solutions to address the threat of climate change. The MCSC unites similarly motivated companies to work with MIT to build a process, market, and ambitious implementation strategy to create innovative environmental solutions.

### Background

The MCSC will involve a cross-sector collaboration to meet the urgency of climate change. The MCSC will take positive action and foster the necessary collaboration to meet this challenge, with the intention of influencing efforts across industries. Through a unifying, deeply inclusive, global effort, the MCSC will strive to drive down costs, lower barriers to adoption of best-available technology and processes, speed retirement of carbon-intensive power generating and materials-producing equipment, direct investment where it will be most effective, and rapidly adopt best practices from one industry to another.

The consortium will focus on fostering collaboration to meet the urgency of climate change. The MCSC will take positive action and foster the necessary collaboration to meet the moment, with the intention of influencing efforts across industries. The MCSC will strive to drive down costs, lower barriers to adoption of technology and processes, speed retirement of carbon-intensive power generating and materials-producing equipment, direct investment where it will be most effective, and rapidly translate best practices from one industry to the next in an effort to deploy social and technological solutions faster than the climate can change.

### Engineering Solutions

The consortium will be led by the MIT School of Engineering and engaging students, faculty, and researchers from across MIT. The consortium will include companies from a broad range of industries, including aviation, agriculture, consumer services, electronics, chemical production, textiles, infrastructure and software.

The inaugural members of the MCSC are companies with intricate supply chains that may be well-positioned to help lead the way towards climate solutions. The goal of the consortium will be to foster solutions that can be utilized across industries and borders, to create a global response to the worsening climate catastrophe.

### Inaugural Members

The inaugural members of the MCSC are: Accenture, a global professional services company; Apple, a technology innovator; Boeing, the world's largest aerospace company; Cargill, a global food manufacturer; Dow, a global manufacturer; IBM, an artificial intelligence company; Inditex, a fashion retailer;

LafargeHolcim, the world's global leader in building materials; MathWorks, a mathematical computing software company; Nexplore, a technology company; Rand-Whitney Containerboard (RWCB), a manufacturer of linerboard; PepsiCo, a global food and beverage company; and Verizon, a communications company.

### Corporate-Based Solutions

The MCSC faces criticism from some environmental activists due to its membership, some of the largest companies—and thus, some of the largest creators of carbon emissions—in the world. The consortium is formed among allegations that corporations should not, by themselves, be leading the fight against climate change and that government regulations are better positioned to create these solutions.

### Conclusion and Implications

Whether the MCSC can fundamentally change the private sector's approach to pollution and carbon emissions remains to be seen. At its best, the consortium may develop innovative solutions to the climate crisis in a cost-effective manner. However, activists' concerns over the consortium's makeup, which includes large companies some environmental activists argue are not well positioned to pivot to a green future, may stymie its success. There is little downside to more brain power being put toward the problem of climate change, though whether the MCSC can make progress that will satisfy environmentalists and foster actual global change remains to be seen. (Jordan Ferguson)

## NEWS FROM THE WEST

In this month's News from the West we report on a water rights settlement from the State of Colorado addressing Colorado River water. We also report on the progress of the California State Water Resources Control Board—the state's water rights agency—addressing groundwater sustainability in critically overdrafted water basins.

### Rio Blanco Water District Fails to Acquire Augmentation Water Rights to Protect against Compact Call—Water Court Leaves Possibility Open for Future Users

*Concerning the Application for Water Rights of the Rio Blanco Water Conservancy District*, Case No. 2014CW3043 (Water Court Div. 6 2020).

Colorado's Rio Blanco Water Conservancy District (RBWCD) recently settled a case in which it sought, among other things, augmentation water rights to protect against a Colorado River Compact call. Although the case ultimately settled on the eve of trial, resulting in RBWCD withdrawing its claim for compact call augmentation water, this case raises novel legal questions and may presents a foundation for future applicants to attempt to secure similar water rights.

#### Background

RBWCD is a water conservancy district created in 1990 for the express purpose of "protection, conservation, use, and development of the water resources of the White River Basin." In general, Colorado water conservancy districts protect and conserve the waters of the state, often through water supply projects and reservoirs.

To that end, RBWCD filed an application in the Division 6 Water Court in December 2014, seeking conditional storage rights for the Wolf Creek Off-Channel Dam and Reservoir. Although RBWCD already owns and manages the Wolf Creek Mainstem Dam and Reservoir, the existing reservoir is silting in and approaching the end of its lifespan. Therefore, RBWCD requested a conditional storage right of 90,000 acre-feet for municipal, industrial, commercial, irrigation, domestic, recreation, piscatorial, augmentation, wildlife habitat, maintenance and recovery of federally listed threatened and endangered species, hydroelectric power generation, and all other beneficial uses. RBWCD also requested a 400 c.f.s. water right to fill and refill the new reservoir.

Multiple parties opposed, including the U.S. Bureau of Land Management, the Exxon Mobil Corporation, and the Colorado Water Conservation Board (Board). In November 2019, the State Engineer and

Division 6 Engineer (collectively: Engineers) intervened in the case and trial was set to begin January 4, 2021.

### Pre-Trial Litigation

On May 4, 2020, RBWCD filed a proposed Ruling and Decree revising its claimed amounts and uses. One notable change was the clarification of augmentation use to include:

> . . .augmentation (for use in a future blanket augmentation plan for water users within the District, including the replacement of depletions that are out of priority due to any Colorado River Compact curtailment).

Specifically, RBWCD claimed 11,887 acre-feet, annually, (or 35,661 acre-feet for a three-year drought) for storage to augment a future Colorado River Compact call. That 11,887 acre-feet reflects the amount of water rights on the White River junior to the 1922 Colorado River Compact. Although augmentation is a recognized beneficial use of water within the state, RBWCD's proposed augmentation for a future Colorado River Compact call triggered a strong objection from the Engineers.

### Motion for Summary Judgment

On October 9, 2020, the Engineers moved for summary judgment, challenging the majority of RBWCD's claimed uses of water. The Engineers argued principally that the RBWCD's claimed uses were speculative. According to the Engineers, the White River usually experiences "free river" conditions (*i.e.*, no calls) and therefore storage of water against the in-state Taylor Draw power call (augmentation for the Yellow Jacket Water Conservancy District) would be speculative. For its other claimed municipal, commercial, domestic, irrigation, and hydropower uses, RBWCD only provided a preliminary agreement to serve the Town of Rangely with 2,000 acre-feet. Because the other uses lacked specificity and detailed need, the Engineers argued that storage for those uses was also speculative. The court agreed with the Engineers and subsequently dismissed RBWCD's claimed uses of municipal, irrigation, domestic, in-reservoir piscatorial, and commercial.

Regarding the endangered species use, RBWCD proposed to release water from its reservoirs to be measured at a gauge on the White River in Utah, in support of the Upper Colorado Endangered Fish Recovery Program. The amount of water RBWCD claimed was based on the Recovery Program's estimated targets, although RBWCD admitted those numbers were only preliminary. The Engineers argued against the claim on two fronts: 1) because delivering water out of state requires several specific procedures that RBWCD did not follow, and 2) because the exact amount of water needed was not known and inherently speculative. RBWCD countered that the water, although measured in Utah, would be used on the White River in Colorado. The Utah gauge was only mentioned because no other gauges exist along that stretch of river.

The court ultimately denied summary judgment on this claim based on the disputed facts to be determined at trial.

With respect to the Colorado River Compact call augmentation use, the court also denied the Engineers' motion for summary judgment and found:

> . . .there is sufficient legal authority supporting the Applicant's broad powers to develop augmentation plans in general and no authority under Colorado statutes precluding storage to augment depleted diversions in the event of a compact call.

To support this finding, the court pointed to the broad statutory powers of conservancy districts to develop augmentation plans, as well as numerous Colorado Supreme Court decisions confirming that power. Further, the court explained that conservancy districts are encouraged under the state's laws to "[s]ecure water to which the state is entitled under is interstate water compacts and equitable apportionment decrees," and the Engineers are directed to:

> . . .exercise the broadest latitude possible in the administration of waters under their jurisdiction to encourage and develop augmentation plans… to allow continuance of existing uses and to assure maximum beneficial utilization of the waters of this state.

Therefore, the court found sufficient legal authority exists for conservancy districts to develop augmen-

tation plans, including those to augment depletions and protect against a Colorado River Compact call. But the court declined to rule on whether such a plan at this current time would be speculative as a matter of law. A Colorado River Compact call has not occurred to date; and even in the face of recurring drought, it remains unknown when and if it will happen. The court found "there is no legal authority on this issue and it has not been sufficiently addressed by the parties." Augmentation plans by definition are not speculative because they are designed to address specific calls that are known to occur on specific sections of river in time and amount to prevent injury to other water rights. While the court in this case declined to opine on whether an augmentation plan for a *potential* compact call would be speculative, the court did say that:

> . . .it is tempting for the court rule, as a matter of law, that the requested augmentation use is speculative because it is based on an event that may or may not occur.

However, because non-moving parties, in this case RBWCD, are entitled to all favorable inferences under the summary judgment standard, the court elected to allow the claim to proceed to trial.

### Pre-Trial Settlement

On January 5, only two days before the two-week trial was scheduled to begin, RBWCD and the Engineers agreed to a stipulation. The stipulation replaced part of the court's Summary Judgment Order, allowing RBWCD to acquire water for some of its claimed uses, in exchange for withdrawing claims that the Engineers believed were too speculative. As a result of the stipulation, RBWCD withdrew its claims for Compact call augmentation and endangered fish uses. Instead, RBWCD was granted a storage right of 66,720 acre-feet for municipal use for the Town of Rangely, augmentation (to augment depletions through a future blanket augmentation plan for water users within the District Boundaries and within the Yellow Jacket Water Conservancy District boundaries pursuant to leases or exchanges of water under C.R.S. § 37-83-106), mitigation of environmental impacts of the Wolf Creek Reservoir project, hydroelectric power generation exercised only in conjunction with releases for other decreed beneficial uses, and in-reservoir uses for recreation, piscatorial, and wildlife habitat. The court entered the Final Decree on January 7, 2021.

### Conclusion and Implications

The stipulation between RBWCD and the Engineers was a compromise settlement in every sense of the word. RBWCD was able to secure a portion, but not all of its desired water rights, while the Engineers were able to defeat claims they believed to be speculative and contrary to established Colorado water law and policy. Although the trial court did not reach a final decision on the novel legal question concerning the Colorado River Compact call augmentation use, the question could arise again in the future, as similar projects and disputes are likely to recur in Colorado.

The Division 6 Water Court's Summary Judgment Order in this case simultaneously supports and casts doubt on future compact call augmentation as a non-speculative, beneficial use under current law. On one hand, the court found legal authority to potentially recognize the use. However, the court also indicated that Colorado River Compact call augmentation is inherently speculative at this point in time. As the State continues to develop its drought contingency plans and demand management program, a more concrete framework could emerge to resolve that issue. Until then, we will have to wait for another test case or the legislature to answer the question.
(John Sittler, Jason Groves)

## California State Water Resources Control Board Provides Ongoing Comments on 'Critically Overdrafted' Basin Groundwater Sustainability Plans

On December 8, 2020, the California State Water Resources Control Board (State Water Board or SWRCB) submitted comments to the California Department of Water Resources (DWR) and to individual Groundwater Sustainability Agencies (GSAs), providing preliminary input on Groundwater Sustainability Plans (GSPs) for certain "critically overdrafted" basins pursuant to the Sustainable Groundwater Management Act (SGMA). As the agency that would step in to regulate basins that fail to comply with SGMA, the State Water Board's input is being (and should be) carefully considered by local GSAs.

## Background

SGMA is designed to achieve long-term sustainability of the state's groundwater basins by as early as 2040. All high- and medium-priority groundwater basins must be managed under a GSP. Of the more than 500 groundwater basins in California, 21 were designated critically overdrafted by DWR. For those basins, GSPs had to be submitted to DWR by January 2020. DWR has two years to review the GSPs and evaluate whether they meet SGMA requirements. Following the statutory 60-day public comment on GSPs that were submitted to DWR, the SWRCB provided additional input on some of the GSPs.

## State Water Board Preliminary Comments

The State Water Board provided comments on GSPs for multiple critically overdrafted basins. A few notable examples and a summary of the SWRCB's input on those GSPs is as follows:

### The Salinas Valley—Paso Robles Area Subbasin (DWR Basin No. 3-004.06)

The GSA should include analysis of domestic wells and public water systems in setting its minimum threshold (MT) for declining water levels.

The GSP's MTs for degraded groundwater quality should include sustainable management criteria (SMC) and monitoring for arsenic in public water supply wells and domestic wells, which are not currently included in the water quality monitoring network.

Subbasin models should be evaluated against historical groundwater elevations trends, not current overdraft estimates.

Implementing some of the projects identified in the GSP may require new or amended water rights; however, approval timelines for water right permits or petitions can vary, if approval is obtained at all. Due to this uncertainty, the GSP should clarify its proposed timelines for projects and management actions and consider how changes to those timelines could impact achieving sustainability by 2040.

While the GSA delivered an invitation letter to California Native American Tribes (Tribes) in the Subbasin, there is no record that these Tribes responded. The GSA should consult with the Native American Heritage Commission (NAHC) to obtain information about current or ancestral Tribes in the Subbasin.

### The Cuyama Valley Basin (DWR Basin No. 3-013)

The GSP should include SMC and monitoring for nitrate and arsenic. The GSP reasons that the GSA cannot set SMC for arsenic because concentrations are localized and vary from well to well; however, the State Water Board states that SGMA does not preclude a GSA from addressing localized water quality issues that may be exacerbated by pumping or management actions.

The GSP does not identify interconnected and disconnected stream reaches when defining SMC for depletions of interconnected surface water.

While the GSP states that no Tribes are present in the Basin, the GSP does not describe the GSA's process for identifying or reaching out to tribes with potential interests in groundwater management in the basin. Thus, it is difficult for the State Water Board to determine whether the GSA appropriately considered the interests of Tribes in developing the GSP as required by SGMA. The GSA should consult with NAHC for information regarding Tribes with current or ancestral ties in the basin.

### The Salinas Valley—180/400 Foot Aquifer Subbasin (DWR Basin No. 3-004.01)

The GSP fails to consider other sustainability indicators (such as localized water level requirements for beneficial users and uses, and seawater intrusion) in its estimation of sustainable yield. The GSP's estimation of sustainable yield is based only on groundwater storage. The GSP should evaluate the potential for causing other undesirable results when defining sustainable yield.

The GSP states that only water quality impacts caused by GSP implementation are unacceptable, but it does not explain how SGMA-related water quality changes will be distinguished from other water quality changes. The GSP should outline the process the GSAs would use to decide whether or not an exceedance of an MT for water quality degradation was caused by GSP implementation.

GSP implementation may require new or amended water rights, which involve uncertain timelines for related approvals, if approval is obtained at all. The

GSP should clarify its proposed timelines for projects and management actions and consider how changes to those timelines could impact achieving sustainability by 2040.

The GSP does not describe any process for identifying or reaching out to Tribes with potential interests in groundwater management in the Subbasin. Thus, it is difficult for the SWRCB to discern if the GSA appropriately considered Tribes in developing the GSP as required by SGMA. The GSA should consult with NAHC for information regarding Tribes in the subbasin.

## Conclusion and Implications

Carefully establishing sustainable management criteria, appropriately tailoring projects and management actions, and ensuring necessary stakeholder engagement were consistent areas of focus by the State Water Board. Though State Water Resources Control Board's comments were made to support DWR's review of GSPs, it is interesting (and alerting to GSAs) that the SWRCB would provide comments on GSPs following the statutory public comment period, as the State Water Board is the regulatory enforcement agency that would manage non-compliant groundwater basins through interim plans.

The Department of Water Resources' evaluation of the first wave of GSPs is due around January 2022—the same time that dozens of high- and medium-priority basin GSPs will be submitted to DWR. Many GSAs that received SWRCB comments have already responded to the feedback, including providing explanatory responses and also commitments to address any deficiencies through updates and amendments. For GSAs still developing their GSPs, the SWRCB's input should be carefully reviewed and considered to guide their own GSP development.
(Gabriel J. Pitassi, Derek R. Hoffman)

REGULATORY DEVELOPMENTS

# U.S. EPA RELEASES 'FUNCTIONAL EQUIVALENT' GUIDANCE MEMORANDUM IN RESPONSE TO *COUNTY OF MAUI V. HAWAII WILDLIFE FUND* DECISION

On January 14, 2021, the United States Environmental Protection Agency (EPA) released its "Guidance Memorandum" (Guidance) regarding the U.S. Supreme Court's "Functional Equivalent" test to be used to determine whether pollutant discharges to groundwater that is ultimately tributary to regulated waters of the United States (WOTUS) require a National Pollutant Discharge Elimination System (NPDES) permit regulating the discharge. While the Supreme Court provided some guidance on factors to consider under a "functional equivalent" analysis (*i.e.*, groundwater discharges are regulated and require a permit when the discharge is the "functional equivalent" of a point source discharge to WOTUS (or waters tributary to WOTUS)) in *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), the Court warned that its listed factors was a non-exclusive one. Instead, the Court expected further refinement of the factors (and/or additions to the list) to occur through a combination of common law development and agency administrative actions or guidance.

## The *County of Maui* Decision—Point Source Discharges to Groundwater Are on the Table for Permitting Purposes

Prior to the *Maui* decision, there was a fairly distinct Circuit Courts of Appeal split on the question of federal Clean Water Act (CWA) groundwater regulation. The Fifth, Sixth, and Seventh circuits took the clear position that the CWA *does not* regulate point source discharges to groundwater. *See*, *e.g.*, *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001) ("The law in this Circuit is clear that ground waters are not protected waters under the CWA."); *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994) ([T]he Clean Water Act [does not] assert [ ] authority over ground waters."); *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, 905 F.3d 925 (6th Cir. 2018); and *Tenn. Clean Water Network v. TVA*, 905 F.3d 436 (6th Cir. 2018) (the CWA only applies to point source discharges directly to WOTUS rather than through some other intermediary mechanism such as groundwater). The First Circuit also holds this view (albeit in the § 404 dredge and fill context). *Town of Norfolk v. U.S. Army Corps. Of Engineers*, 968 F.2d 1438, 1451 (1st Cir. 1992).

The Fourth and Ninth circuits held otherwise. *See*, *e.g.*, *Upstate Forever v. Kinder Morgan Energy Partners*, 8876 F.3d 637 (4th Cir. 2018) (discharge to groundwater with a "direct hydrological connection" to WOTUS triggers application of the CWA); and *Hawaii Wildlife Fund v. Cty. Of Maui*, 886 F.3d 737 (9th Cir. 2018) (holding that point source discharges to groundwater that are "fairly traceable" are regulated).

At the U.S. District Court level, the divergence of opinions ran rampant. For its part, Idaho's U.S. District Court has taken the position that hydrologically connected groundwater is regulated by the CWA. For example, in *Idaho Rural Council v. Bosma*, 143 F. Supp.2d 1169, 1180-81 (D. Idaho 2001), Judge Winmill (in the context of allegations of dairy lagoon seepage into groundwater) held that the CWA:

> . . .extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States. *Id.* at 1180.

He acknowledged the Fifth and Seventh circuit authority to the contrary (as well as other U.S. District Courts) holding otherwise, but concluded that the CWA legislative history analysis contained in those cases only supported the:

> . . .unremarkable proposition that the CWA does not regulate 'isolated/nontributary groundwater' which has no effect on surface water. *Id.*

Judge Winmill stated that the legislative history:

> . . .does not suggest that Congress intended to

> exclude from regulation discharges into hydrologically connected groundwater which adversely affect surface water. *Id.*

Upon holding that the CWA regulates connected groundwater, Judge Winmill admonished that the burden of proof on the issue of connectedness is a difficult one. It would not be sufficient for one assert generalized groundwater pollution and interconnection of flow. Rather, "pollutants must be traced from their source to surface waters in order to come within the purview of the CWA." *Id.*

The U.S. Supreme Court in *Maui* took a position very similar to that of Judge Winmill in *Bosma*—adopting a "functional equivalent" standard. The Court identified time and distance as the primary factors for determining whether a discharge is the "functional equivalent" of a direct discharge, but also cited a number of other factors that would be material to a decision, including:

- Transit time,
- distance traveled,
- the nature of the material through which the pollutants travels,
- the extent to which the pollutant is diluted or chemically changed as it travels,
- the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source,
- the manner by or area in which the pollutant enters the navigable waters, [and]
- the degree to which the pollution (at that point) has maintained its specific identity.

Given the "non-exclusive" nature of the foregoing list, EPA's Guidance issued to:

> . . .inform how the Court's 'functional equivalent' analysis may be applied within the framework of the longstanding NPDES permit program. Guidance, p. 3.

### EPA's Guidance Memo

EPA's Guidance begins by outlining the history of the groundwater regulation question and the circuit level split on the question. It further reiterates that the *Maui* decision does not modify the core findings requiring an NPDES Permit; there still must be: 1) the discharge of a "pollutant"; 2) from a "point source"; 3) to "navigable waters." Absent these finding the need for a permit does not attach regardless of the presence of intermediary groundwater.

As it relates to the agency's "longstanding NPDES permit program" process, the *Maui* decision suggests that permit applicants perform and provide a technical analysis (engineering, modeling, or other technical information) in support of applications under circumstances where there is a reasonable expectation or suspicion that groundwater discharges could reach "functional equivalent" status. The Guidance identified several considerations such as the nature of a pollutant's mobility through soils, the receiving soil profile, the groundwater elevation, its flow direction, and its proximity to WOTUS, among others could trigger the request of applicant support study to either confirm or rule out "functional equivalent" potential. No doubt, such analyses will further increase the expense and time it takes one to obtain an NPDES permit where necessary.

Conversely, the Guidance acknowledges that the burden of proof (and need for such analyses) is borne by the agency in the context of enforcement actions. The Guidance correctly (in the author's opinion) makes clear that mere public comment-based allegations or suspicion are not good enough—actual data and evidence would be required to trigger legitimate investigation into the question. This admonishment should, hopefully, balance and temper the respective actions of environmental advocacy groups and the regulated community alike.

For its part, EPA also issued an additional factor to those listed in *Maui*—the "system design and performance" factor. The Guidance theorized examples where systems intentionally discharging to the subsurface may not rise to the level of a "functional equivalent" discharge because of potential pre-discharge storage holding time, diffuse discharges (*i.e.*, percolation) as opposed to injection methods, and other forms of discharge attenuation. The Guidance opines that system design and performance is a key consid-

eration "affect[ing] or inform[ing] all seven factors identified in *Maui*." Guidance, p. 7.

### Conclusion and Implications

The *Maui* Guidance provides insight into how the EPA will apply its current NPDES Permit program framework to groundwater discharges, confirmed by the establishment of the new "design and performance" factor. Moreover, the *Maui* Guidance crafts a distinction between the Ninth Circuit's "fairly traceable" standard and the Supreme Court's "functional equivalent" test by indicating that the fact that a pollutant associated with a point source discharge to groundwater reaches surface waters is not enough to trigger NPDES Permitting.

What value the Guidance ultimately provides remains to be seen. This is especially true in terms of its long-term validity given the results of the November presidential election. A Biden administration is likely to have the Guidance within its sights for modification or elimination. The Guidance is available online at: https://www.epa.gov/npdes/releases-point-source-groundwater.
(Andrew J. Waldera)

PENALTIES & SANCTIONS

# RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

## Civil Enforcement Actions and Settlements—Water Quality

•December 23, 2020—EPA, the U.S. Department of Justice, and the state of Illinois announced an agreement with the city of Peoria and the Greater Peoria Sanitary District (GPSD) that will yield significant reductions of sewage discharges from Peoria's wastewater systems into the Illinois River and Peoria Lake. The settlement resolves federal Clean Water Act violations by the city of Peoria and GPSD related to combined sewer overflows (CSOs) and National Pollutant Discharge Elimination System (NPDES) permit exceedances. Under the proposed consent decree Peoria will implement a remedial measures program that will significantly reduce CSO discharges to the Illinois River and Peoria Lake. Peoria's combined sewer system is currently overwhelmed by stormwater runoff during heavy rain or snow, causing CSO discharges to the Illinois River and Peoria Lake. These discharges consist of untreated human waste mixed with stormwater and contain high concentrations of bacteria, sediment, and other pollutants that impair water quality in the Illinois River and Peoria Lake. The proposed consent decree provides Peoria flexibility to choose and build projects at periodic intervals as necessary to meet performance standards, reducing the number and volume of CSO discharges over time as projects are implemented. Peoria plans to use a high proportion of green infrastructure (*e.g.*, permeable pavement, rain gardens, and bioswales) to achieve its performance criteria. Peoria's overall CSO controls are estimated to cost approximately $129 million and will be completed by Jan. 1, 2040, with four interim milestones to ensure progress. The settlement also requires GPSD to implement improvements to maximize the flow of combined sewage from Peoria to its Wastewater Treatment Plant (WWTP), including cleaning its portion of the combined sewer system. GPSD will also eliminate the discharges from two remote treatment units within its sanitary sewer system by July 1, 2028. GPSD's work will cost approximately $25 million and will be fully completed by 2032. After the implementation of both Peoria and GPSD's CSO controls, the average annual CSO discharges will be reduced by approximately 92 percent. In addition, approximately 696,000 pounds of pollutants will be prevented from being discharged to the Illinois River and Peoria Lake each year. The proposed consent decree also requires Peoria to develop a public participation plan that will involve Peoria's residents in the implementation of the CSO remedial measures program and an enhanced CSO notification system to alert the public when a CSO occurs through a personal email address, if provided, or Peoria's publicly available website. Finally, the settlement requires Peoria to pay a $100,000 civil penalty and perform a state supplemental environmental project. For the civil penalty, Peoria will pay the United States $75,000 and pay Illinois $25,000.

•January 7, 2021—EPA recently concluded an Expedited Settlement Agreement with Aspen Homes and Development, LLC located in Coeur d'Alene, Idaho, resolving violations of the federal Construction General Permit for preventing stormwater pollution. Aspen Homes and Development is the owner and operator of the Riverview Heights construction site in Coeur d'Alene, where numerous alleged violations occurred. The Company agreed to pay a $20,325 penalty as part of the settlement. EPA's enforcement action followed an inspection by Idaho Department of Environmental Quality, on EPA's behalf, responding to a citizen's complaint received in September 2019. According to documents associated with the case, Aspen Homes and Development compiled a long list of violations by:

Failing to install and maintain erosion and sediment control measures, which resulted in muddy stormwater runoff leaving the property

Failing to conduct and document over 25 inspections, and

Failing to update and maintain Stormwater Pollution Prevention Plan (SWPPP) records.

Since, in this case, erosion leads to sediment and other pollutants entering the nearby, already-impaired Spokane River, EPA estimates that this action prevented just over 170,000 pounds of sediment from migrating offsite. This action was concluded under an Expedited Settlement Agreement. According to EPA officials, Expedited Settlement Agreements offer business and industry a faster, more streamlined process to resolve permit violations with monetary penalties commensurate to the severity of the violations. This wasn't the developer's first contact with EPA's enforcement program. EPA reached an earlier Clean Water Act settlement with Aspen Homes on July 13, 2017, when the Company paid $11,000 for similar stormwater violations.

### Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•December 21, 2020—EPA, U.S. Department of Justice (DOJ), the Kalamazoo River Natural Resource Trustee Council, and Michigan Department of Environment, Great Lakes, and Energy (EGLE) announced entry of a consent decree on December 2, that requires NCR Corp. to clean up and fund future response actions at a significant portion of the Allied Paper Inc./Portage Creek/Kalamazoo River Superfund site. The consent decree also includes payments related to natural resource damages and past cleanup efforts at the site. The federal District Court judge entered the consent decree after a public comment period on the proposed agreement. The Allied Paper Inc./Portage Creek/Kalamazoo River Superfund site is in Allegan and Kalamazoo counties and is divided into six segments, or operable units (OUs), that require cleanup. According to the settlement terms, NCR Corporation will spend approximately $135.7 million cleaning up three areas of OU 5. OU 5 includes 80 miles of the Kalamazoo River and three miles of Portage Creek. In addition, NCR will pay:

A) $76.5 million to EPA for past and future costs in support of river cleanup activities.

B) $27 million to natural resource trustees of the Kalamazoo River Natural Resource Trustee Council for Natural Resources Damage Assessment and claims.

C) $6 million to State of Michigan for past and future costs. In the early 1970s, PCBs were identified as a problem in the Kalamazoo River.

In 1990, in response to the nature and extent of PCB contamination, the site was added to the National Priorities List, which includes the nation's most serious uncontrolled or abandoned hazardous waste releases. EPA, working along with EGLE, has cleaned up three of the six operable units, removed nearly 470,000 cubic yards of contaminated material from the site, cleaned up and restored about twelve miles of the Kalamazoo River and banks, and capped 82 acres worth of contaminated material.

### Indictments, Convictions, and Sentencing

•January 14, 2021—The president and owner of Oil Chem Inc. pleaded guilty in federal court in Flint, Michigan, to a criminal charge of violating the Clean Water Act stemming from illegal discharges of landfill leachate — totaling more than 47 million gallons — into the city of Flint sanitary sewer system over an eight and a half year period. Robert J. Massey, 69, of Brighton, Michigan, pleaded guilty before U.S. District Judge Stephanie Dawkins Davis in the Eastern District of Michigan. Sentencing has been scheduled for May 14. Oil Chem, located in Flint, processed and discharged industrial wastewaters to Flint's sewer system. The company held a permit issued by the city of Flint under the auspices of the Clean Water Act, which allowed it to discharge certain industrial wastes within permit limitations. The city's sanitary sewers flow to its municipal wastewater treatment plant, where treatment takes place before the wastewater is discharged to the Flint River. The treatment plant's discharge point for the treated wastewater was downstream of the location where drinking water was taken from the Flint River in 2014 to 2015. According to an agreed upon factual statement in the plea agreement filed in federal court, Oil Chem's permit prohibited the discharge of landfill leachate waste. Landfill leachate is formed when water filters downward through a landfill, picking up dissolved materials from decomposing trash. Massey signed and certified Oil Chem's 2008 permit application and did not disclose that his company had been and planned to continue to receive landfill leachate, which it discharged to the sewers untreated. Nor did Massey disclose to the city when Oil Chem started to discharge this new waste stream, which the permit also required.

Massey directed employees of Oil Chem to begin discharging the leachate at the close of business each day, which allowed the waste to flow from a storage tank to the sanitary sewer overnight. From January 2007 through October 2015, Massey arranged for Oil Chem to receive approximately 47,824,293 gallons of landfill leachate from eight different landfills located in Michigan. One of the landfills was found to have polychlorinated biphenyls (PCBs) in its leachate. PCBs are known to be hazardous to human health and the environment.

•January 19, 2021—A California agricultural developer has agreed to pay a civil penalty, preserve streams and wetlands, effect mitigation, and be subject to a prohibitory injunction to resolve alleged violations of the Clean Water Act on property near the Sacramento River located in Tehama County, California, the Justice Department announced. Roger J. LaPant Jr. purchased the property in this case in 2011 and sold it in 2012 to Duarte Nursery Inc. which, in turn, sold it that same year to Goose Pond Ag Inc. Goose Pond's activities on the property were the subject of a settlement announced by the Justice Department in September 2018 and approved by a federal judge in June 2019. Duarte's activities on an adjoining site were the subject of a settlement agreement announced by the Justice Department in August 2017 and approved by a federal judge in December 2017. LaPant has agreed to pay $250,000 in civil penalties; purchase $100,000 worth of compensatory mitigation credits; dedicate another ten credits at a vernal pool conservation bank; effect long-term preservation streams, wetlands, and buffer areas on two sites with a total acreage of over 400 acres; and be subject to a prohibition on certain new activities in waters or wetlands absent pre-clearance from the U.S. Army Corps of Engineers. In total, the approximate cost of LaPant's obligations under the settlement is $1.2 million. This case stems from agricultural development activities LaPant conducted during his brief ownership of the property, which prior to his ownership had laid fallow and unfarmed for more than 20 years. LaPant's conduct in this case, part of an effort to convert the property to orchard use, contributed to the destruction or significant degradation of streams and wetlands at the site. Even before LaPant purchased the site, he received information that alerted him to the presence of federally protected streams and wetlands on the property. Despite that information, he conducted earthmoving activities in streams and wetlands without a CWA dredge-or-fill permit. The settlement agreement reached secures a significant penalty and mitigation for these violations, while providing fairness for agricultural developers who comply with the applicable laws.

•January 19, 2021—A developer and his companies have agreed to effectuate $900,000 in compensatory mitigation, preserve undisturbed riparian areas, conduct erosion-control work on streams, and be subject to a prohibitory injunction to resolve alleged violations of the Clean Water Act on property north of Houston, Texas, the Justice Department announced. The case stems from activities Thomas Lipar conducted to create the Benders Landing Estates housing development on property containing streams and wetlands that feed into Spring Creek and the West Fork of the San Jacinto River, which, in turn, flow into Lake Houston. Beginning in 2005, the defendants operated earthmoving machinery and filled substantial segments of streams and acres of abutting wetlands. Despite receiving information about the aquatic condition of the property, Lipar did not seek a CWA dredge-or-fill permit. The settlement agreement reached secures significant mitigation for these alleged violations, while providing fairness for developers who comply with the applicable laws. (Andre Monette)

JUDICIAL DEVELOPMENTS

## NINTH CIRCUIT REJECT'S DISTRICT COURT HOLDING THAT ENVIRONMENTAL ASSESSMENT AND FINDING OF NO SIGNIFICANT IMPACT FOR ROAD PROJECT VIOLATED NEPA

*Bair v. California Department of Transportation*, 982 F.3d 569 (9th Cir. 2020).

In a December 2, 2020 decision, a three-judge panel from the Ninth Circuit Court of Appeals rejected a U.S. District Court's ruling that the California Department of Transportation's (Caltrans) Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) related to a proposed road widening project through Richardson Grove State Park violated the National Environmental Policy Act (NEPA). The decision is the latest development in several years of state and federal litigation over the road improvement project. The Ninth Circuit panel concluded that the hundreds of pages of environmental analysis and mitigation measures by Caltrans constituted a sufficient "hard look" at the project's potential environmental impacts as required by NEPA.

### Factual and Procedural Background

Highway 101 bisects Richardson Grove State Park (the Grove) and is lined with redwood forests in southern Humboldt County, California (County). Because several old-growth redwoods abut Highway 101 in the Grove, the highway is a two-lane highway "on nonstandard alignment." This means that through the Grove, Highway 101 was restricted to certain trucks that exceed the length of 65 foot long "California Legal Trucks." These longer trucks are known as industry-standard Surface Transportation Assistance Act of 1982 trucks (STAA).

In 2010, Caltrans proposed a strategic widening project that would make the roadway accessible to STAA trucks. The project would involve slightly widening the roadway and straightening some curves along a one mile stretch of Highway 101 within the Grove.

Caltrans assumed responsibility to obtain environmental approval of the project under NEPA. In 2010, the County prepared an Environmental Analysis that included "extensive analysis" of the project's environmental effects and included efforts to minimize those effects.

Caltrans determined that the project's impacts on the Grove would be minor and would not remove any old-growth redwoods. Although the project would involve construction of roadways in the structural root zones of redwoods, according to Caltrans' experts, sufficient plans and reduction measures were included to mitigate these effects. After determining that the project would not significantly harm old-growth redwoods within the Grove, Caltrans issued the EA and a FONSI for the project in May of 2010.

Plaintiffs filed suit in 2010 challenging the project. During the 2010 lawsuit, the U.S. District Court granted partial summary judgment in favor of plaintiffs and required Caltrans to undertake additional studies, including new maps of each redwood tree, its root health zone, and the environmental impacts to each tree. In response, Caltrans commissioned a new tree report, took public comments, responded to comments, and then issued a NEPA revalidation of the project in January 2014.

Plaintiffs filed a second suit in 2014 alleging similar claims to the 2010 suit. The 2014 case was dismissed after Caltrans withdrew the FONSI in response to an adverse ruling in a parallel state court action. In response to the state court order, Caltrans reduced the scope of the project and prepared an additional report on the project's impacts on nearby trees.

In 2017, Caltrans returned with a modified project designed to reduce its environmental impact, primarily by narrowing the project's proposed roadway shoulder widths. Plaintiffs again sued raising seven claims, including alleged violations of NEPA, the Department of Transportation Act, the Wild and Scenic Rivers Act, and a violation of the Administrative Procedure Act. The District Court granted plaintiffs' partial summary judgment on their NEPA claims

and specifically identified the following issues that it claimed Caltrans had not adequately considered in the EA:

> . . .whether (1) redwoods would suffocate when more than half of their root zones were covered by pavement; (2) construction in a redwood's structural root zone would cause root disease; (3) traffic noise would increase because of the larger size of the STAA trucks or because of additional numbers of trucks; and (4) redwoods would suffer more frequent and severe damage as a result of strikes by STAA trucks.

As a result of these alleged shortcomings, the District Court found that Caltrans had not taken the necessary "hard look" at environmental impacts of the project, and that the EA was therefore inadequate. The District Court held that given the "substantial questions" raised by the above, Caltrans should prepare an EIS. The District Court then enjoined Caltrans from proceeding with the project until an EIS was prepared.

## The Ninth Circuit's Decision

### The NEPA Claim and Alleged Need for an EIS

The Ninth Circuit noted that agency decisions that allegedly violate NEPA are reviewed under the Administrative Procedure Act, and courts will set aside decisions: ". . .only if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

A determination of whether an agency's decision not to prepare an EIS was arbitrary and capricious requires courts to determine whether an agency has:

> . . .taken a hard look at the consequences of its actions, based on its decision on a consideration of the relevant factors, and provided a convincing statement of reasons to explain why a project's impacts are insignificant.

Although a court's review is "searching and careful" it is narrow and "courts cannot substitute [their] own judgment for that of the agency." Courts ask whether an agency's decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment" when finding whether an EA and FONSI were appropriately issued.

Based on these standards, the court rejected the District Court's finding that Caltrans violated NEPA when it issued the EA for the project. The 2017 FONSI was based on the analysis contained in Caltrans' revised EA, which incorporated the analysis of the 2010 EA and the 2013 revised supplemental EA. Here, because the 2010 EA as supplemented and revised constituted a "hard look" at the project's environmental effects, Caltrans' issuance of the 2017 FONSI was reasonable and sufficient under NEPA.

### Claim of Tree Suffocation

Regarding redwood tree suffocation, the court noted that Caltrans sufficiently considered the effect of paving over tree root zones. The project incorporated measures to reduce this effect, for example the project would use special paving material to allow for greater porosity and promote air circulation under the asphalt. Caltrans' tree expert determined that the project would not cause extreme stress to the redwoods "or overwhelm their natural resilience." The court found that Caltrans reasonably concluded, based on its analysis, that the project would not significantly impact the health of protected redwoods in the grove.

### Claim of Construction within Root Zones

Regarding construction within root zones, the court similarly found that Caltrans performed the necessary "hard look" the project's effects on these root zones. Although the California State Parks handbook recommended that "no construction should take place in the structural root zone of a protected tree," it was not clear whether this guidance applied to the project. Moreover, Caltrans was not required to adopt the State Parks' opinion of the project. NEPA anticipates the administrative record may contain conflicting and contradictory opinions. Here Caltrans could and did reasonably refuse to follow the State Parks handbook, especially where it relied on evidence specifically pertaining to the effects of the project.

### Traffic and Noise Analysis

Regarding traffic and noise, the court again found that Caltrans had taken a sufficient hard look at the project's environmental effects. The court rejected the District Court's finding that STAA trucks would be noisier than California Legal trucks because the District Court cited no specific evidence in support of this assumption and in effect was stepping into the agency's shoes to perform its own factual analysis.

### Claim of Increased Vehicle Collisions

Last, the court rejected the District Court's findings as to an alleged increase in the number and severity of collisions with trees. Regarding collision frequency, the purpose of the project was to widen the road to provide more room for trucks and traffic. Caltrans reasonably concluded that the project would reduce the frequency of vehicle collisions with trees. Regarding crash severity, the court did not find any documentation in the administrative record indicating that STAA trucks would cause more damage when they strike trees. Accordingly, plaintiffs failed to administratively exhaust this issue, and even if it had, the court found that Caltrans' analysis included a sufficiently hard look into this issue.

### Conclusion and Implications

The Ninth Circuit reversed the District Court's judgment requiring Caltrans to prepare an EIS, and directed the District Court to resolve the other unresolved issues in the case consistent with its decision.

The Ninth Circuit's decision in *Bair* is the latest development in multi-year litigation related to Caltrans' proposed roadway improvements through the environmentally sensitive old-growth redwood groves in Richardson Grove State Park. It is unclear whether this decision will allow the project to move forward, or whether ongoing litigation will continue to slow the project. A copy of the decision can be found at: http://cdn.ca9.uscourts.gov/datastore/opinions/2020/12/02/19-16478.pdf
(Travis Brooks)

## NINTH CIRCUIT FINDS FEDERAL AGENCIES VIOLATED NEPA AND THE ENDANGERED SPECIES ACT IN APPROVING OFFSHORE OIL FACILITY

*Center for Biological Diversity v. Bernhardt*, 982 F.3d 723 (9th Cir. 2020).

Various conservation groups brought suit challenging the U.S. Department of the Interior's Bureau of Ocean Energy Management's (BOEM) approval of an offshore oil drilling and production facility, claiming that the approval failed to comply with the National Environmental Policy Act (NEPA), the federal Endangered Species Act (ESA), and the Marine Mammal Protection Act (MMPA). After holding that it had original jurisdiction over the claims, the Ninth Circuit Court of Appeals found that BOEM acted arbitrarily and capriciously by failing to quantify the emissions resulting from foreign oil consumption in its Environmental Impact Statement (EIS). The Ninth Circuit also held the U.S. Fish and Wildlife Service (FWS) violated the ESA by relying on uncertain, nonbinding mitigation measures and failing to estimate the project's amount of nonlethal take of polar bears. In all other respects, the Ninth Circuit denied the petition.

### Factual and Procedural Background

Hilcorp Alaska, LLC sought to produce crude oil from Foggy Island Bay, which is located along the coast of Alaska in the Beaufort Sea. To extract the oil, Hilcorp would need to construct an offshore drilling and production facility. That facility—referred to as "the Liberty project," or "the Liberty prospect"—would be the first oil development project fully submerged in federal waters. Hilcorp estimates that the site contains about 120 million barrels of recoverable oil, which it would plan to extract over the course of 15 to 20 years.

The site is located within the outer Continental Shelf of the United States and thus governed by the

Outer Continental Shelf Lands Act (Act). Under that Act, BOEM oversees the mineral exploration and development of the Outer Continental Shelf. This may include, among other things, leasing federal land for oil and gas production. The Act requires BOEM to manage the outer Shelf in "a manner which considers [the] economic, social, and environmental values" of the Shelf's natural resources. Relying on a Biological Opinion prepared by the Service, BOEM approved the project. Various environmental groups then sued, alleging that the BOEM failed to comply with NEPA, the ESA, and the MMPA. Under the Outer Continental Shelf Lands Act, the Ninth Circuit had original jurisdiction over the challenge.

## The Ninth Circuit's Decision

### The NEPA Claims

The Ninth Circuit first addressed petitioners' claims that BOEM's EIS was arbitrary and capricious because it: 1) improperly relied on different methodologies in calculating the lifecycle greenhouse gas emissions produced by the "no action" alternative and the other project alternatives, thus making the options incomparable; and 2) failed to include a key variable (foreign oil consumption) in its analysis of the "no action" alternative.

First, with respect to the methodologies used, the Ninth Circuit disagreed and found that BOEM had not applied a different methodology in estimating emissions among the alternatives. While the EIS used a "market simulation model" in connection with its analysis of the "no action" alternative, the "lifecycle" analysis conducted for other alternatives implicitly took this analysis into account. This analysis, the Ninth Circuit concluded, was a relative comparison, sufficient for making a reasoned choice among alternatives.

Second, with respect to the omission of emissions associated with foreign oil consumption, the Ninth Circuit agreed that such omission violated NEPA. This issue, as the court framed it, was essentially one of economics—if oil is produced at the project site, the total supply of oil in the world will increase; increasing global supply will reduce prices; once prices drop, foreign consumers will buy and consume more oil. The model used in the EIS, however, assumed that foreign oil consumption would remain static, whether or not oil is produced at the project site. The EIS, the Ninth Circuit concluded, should have either given a quantitative estimate of the downstream greenhouse gas emissions that would result from consuming oil abroad, or explained more specifically why it could not have done so, and provided a more thorough discussion of how foreign oil consumption might change the carbon dioxide equivalents analysis. Having failed to do so, the court found that the alternatives analysis was arbitrary and capricious.

### The Endangered Species Act Claims

The Ninth Circuit next addressed petitioners' claims that the FWS violated the ESA by: 1) relying on uncertain mitigation measures in reaching its conclusions in the Biological Opinion; and 2) failing to specify the amount and extent of "take" in the incidental take statement included within the Biological Opinion.

First, while the Ninth Circuit acknowledged that the record reflected a "general desire" to impose mitigation, it agreed that any mitigation proposed by the FWS was too vague to enforce. The generality of the measures also made it difficult to determine the point at which the agency may renege on its promise to implement the measures. The Ninth Circuit also found that, while the FWS did not appear to have relied on any of these measures in its "no jeopardy" conclusion, it had relied on such measures in its "no adverse modification" finding (in which it concluded that the polar bear's critical habitat would not be adversely affected by the project). Accordingly, it found that the FWS' reliance on these uncertain mitigations measures was arbitrary and capricious, and that the FWS' Biological Opinion therefore violated the ESA.

Second, the Ninth Circuit agreed that, while the FWS contemplated that the harassment and disturbances polar bears would suffer could trigger re-consultation, the Biological Opinion failed to quantify the project's amount of nonlethal take to the polar bear (or explain why it could not do so). "Take" under the ESA, the court explained, can occur via injury or death, as the Biological Opinion recognized, but it can also occur via nonlethal harassment. On this basis, the Ninth Circuit found that the FWS' incidental take statement violated the ESA.

### Conclusion and Implications

The case is significant because it contains a substantive discussion of both NEPA and the ESA, particularly as they relate to the analysis of alternatives under NEPA and reliance on mitigation measures under the ESA. The decision is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2020/12/07/18-73400.pdf
(James Purvis)

## ELEVENTH CIRCUIT FINDS MERE ALLEGATIONS OF A HYDROLOGICAL CONNECTION ARE INSUFFICIENT FOR A CRIMINAL CONVICTION UNDER THE CLEAN WATER ACT

*United States v. Coleman*, *Unpub.*, Case No. 19-15127 (11th Cir. Dec 21, 2020).

The U.S. Court of Appeals for the Eleventh Circuit, in an *unpublished* decision, recently vacated an accepted guilty plea for knowingly violating the federal Clean Water Act. The court determined that the government failed to provide a sufficient factual basis to demonstrate a discharge significantly affected the chemical, physical, and biological integrity of a navigable water through allegations of a hydrological connection alone.

### Factual and Procedural Background

Plaintiff, Coleman, drove a fuel truck that provided fuel to gas stations. When he realized his truck was loaded with 3,000 gallons of the wrong type of diesel fuel, he dumped the fuel on the ground near Highway 319 in Thomas County, Georgia. In 2019, plaintiff was charged by information with one count of violating the federal Clean Water Act by knowingly discharging 3,000 gallons of diesel fuel into a water of the United States.

The Clean Water Act prohibits the discharge of pollutants into "navigable waters" and defines this term as "the waters of the United States, including the territorial seas." Under *Rapanos v. United States*, 547 U.S. 715 (2006), a plurality of the U.S. Supreme Court determined that a water is navigable if the waters are navigable in fact or there is a significant nexus between the water or wetland and a navigable water. There is a significant nexus when there is a significant impact to the chemical, physical, and biological integrity of a navigable water. A "mere hydrologic connection" alone is insufficient.

Plaintiff waived indictment and pled guilty without a plea agreement. The plea colloquy alleged:

> The diesel fuel dumped on the ground migrated into adjacent storm water drainage that flows directly into a creek. That unnamed creek is a tributary of Good Water Creek which flows into Oquina Creek and then into the Ochlocknee River, a traditionally navigable water of the United States.

Plaintiff was sentenced to an 18-month imprisonment, followed by a year of supervised released and was required to pay a fine of $5,000. Plaintiff appealed.

### The Eleventh Circuit's Decision

Plaintiff appealed on three grounds—all related to how navigable waters are defined. Plaintiff first claimed the U.S. District Court erred by failing to establish a sufficient factual basis for the navigable waters element during the plea colloquy as specified in Federal Rules of Criminal Procedure Rule 11(b)(3). Rule 11 requires a factual basis before entering a judgment of guilty, so as to be sure that a factually innocent defendant does not mistakenly plead guilty. To satisfy Rule 11, the government must present the trial court with evidence from which it could reasonably find that a defendant was guilty. The key issue in Coleman's appeal was whether the government provided a sufficient factual basis to determine that Plaintiff was guilty of knowingly discharging a pollutant into a navigable water.

#### Applying the *Rapanos* Decision

The court reasoned that the plea colloquy only established that the diesel fuel migrated into an

adjacent storm water drainage that flows directly into a creek and that the unnamed creek is a tributary of other creeks that eventually flow into a traditionally navigable water of the United States. Because the Eleventh Circuit follows the *Rapanos* "significant nexus" test, the government was required to demonstrate that the fuel entered water that "significant affect" the "chemical, physical, and biological integrity" of a navigable water. Allegations of a hydrologic connection alone were inadequate to establish this showing on a "four-steps-removed" navigable water in light of the standard imposed by Rule 11.

The court vacated its prior ruling based on plaintiff's first argument and declined to discuss the two remaining arguments.

### Conclusion and Implications

This *unpublished* case cannot provide any precedential authority in other criminal cases; however, its reasoning suggests that a criminal conviction for knowingly discharging to a water of the United States under the Clean Water Act may not be legally supportable under Federal Rules of Civil Procedure Rule 11 without facts showing there is a significant chemical, physical, and biological impact on a navigable water. Allegations of a "mere hydrologic connection" may not provide such a sufficient factual basis. The court's decision is available online at:
https://media.ca11.uscourts.gov/opinions/unpub/files/201915127.op2.pdf
(Anya Kwan, Rebecca Andrews)

## MONSANTO PCB CLEAN WATER ACT CLASS ACTION SETTLEMENT REJECTED BY THE DISTRICT COURT

*City of Long Beach v. Monsanto Company, et al.*,
___F.Supp.3d___, Case No. CV 16-3493 FMO (C.D. Cal. Nov. 25, 2020).

The U.S. District Court for the Central District of California recently denied plaintiffs' Renewed Motion for Certification of Settlement Class, Preliminary Approval of Class Action Settlement, Approval of Notice Plan, Appointment of Class Action Settlement Administrator, and Appointment of Class Counsel in a Clean Water Act class action lawsuit against Monsanto. The court enabled plaintiffs to file a renewed motion by December 31, 2020.

### Background

Monsanto Company manufactured polychlorinated biphenyls (PCBs) between the 1930s and 1977. The City of Long Beach and twelve other governmental entities (plaintiffs) filed a class action citizen suit against Monsanto under the Clean Water Act seeking funds for PCB remediation and monitoring programs. Plaintiffs allege PCBs contaminated their stormwater systems and environmental resources.

Plaintiffs recently filed a motion to certify the class and approve a settlement agreement for this class action lawsuit. The court must approve these proposals to ensure all class members are adequately protected before the case can settle.

### The District Court's Decision

The court considered and rejected the proposed settlement agreement for five reasons. First, the court assessed the settlement agreement's release of claims. The release provided, in part, language that sought or suggested the claims of persons or entities who were not parties to the case would be barred. The release also referenced claims under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The court reasoned that Monsanto is only entitled to the release of claims plaintiffs asserted, or could have asserted, in the current case. Monsanto cannot have class members indemnify it for other claims asserted in future cases by non-class members. Similarly, the court determined it was improper to release Monsanto from CERCLA claims because there were no such claims in the operative complaint. Finally, the court was especially concerned about the release's breadth in relation to the "very modest payout" most class members would receive under the settlement.

Second, the court considered a provision that would reduce class members' payments if a state attorney general filed a future action against Monsanto.

Plaintiffs argued this clause was intended to prevent double payment by Monsanto. The court saw no reason why class members' payments should be reduced because of government law enforcement conduct, because the class members and the government had different interests that should not affect each other's potential recovery.

Third, the court considered a cancellation provision. The provision provided that the settlement fund (which funds payments to class members) would be reduced if any class members opted out of the settlement. The court reasoned such a provision could unfairly affect settlement fund allocation, which would be determined by a Special Master in the future, after applications were made for such allocations.

Fourth, the court considered the attorneys' fees provision, which required Monsanto to pay $98 million for attorneys' fees. The court considered the fee amount to be excessive for this stage in the proceedings, especially because plaintiffs had included fees and costs of a Special Master and consulting experts to assist the Special Master, which Plaintiff should not have included.

Fifth, the court considered the settlement agreement's lack of specificity regarding how the agreement would be monitored and implemented over time. Estimating that this settlement would take several years and would be complex to administer, the court required that the parties appoint a Special Master to report to the court and implement the settlement.

Based on these critiques of the settlement agreement, the court denied plaintiffs' motions for Certification of Settlement Class, Preliminary Approval of Class Action Settlement, Approval of Notice Plan, Appointment of Class Action Settlement Administrator, and Appointment of Class Counsel, without prejudice. Plaintiffs' had until December 31, 2020 to filed renewed motions that took the court's criticisms into account.

### Conclusion and Implications

This decision rejects the proposed settlement agreement between plaintiffs and Monsanto in the longstanding dispute over PCB contamination. It also provides guidance on what terms are acceptable and unacceptable in a class action settlement agreement under the Clean Water Act. Importantly, a settlement agreement should operate to settle disputes between the parties and should not act as a broad shield that extends to protect a defendant from actions by non-parties. The court's rulings are available online at:
https://www.courtlistener.com/recap/gov.uscourts.cacd.648298/gov.uscourts.cacd.648298.254.0.pdf
(William Shepherd, Rebecca Andrews)

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