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WWL

FEATURE ARTICLE

ARE 'WETLANDS' REALLY 'WATERS OF THE STATE' UNDER CALIFORNIA'S PORTER-COLOGNE ACT?

By David Ivester, Esq.

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

The Porter-Cologne Act

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

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

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

Legislative Intent

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

In 1969, the Legislature undoubtedly understood "surface water" in keeping with its ordinary meaning and then existing law to refer not just to any H_2O on the ground surface, but rather to an actual body of water, either flowing or still, that "encompasses both natural lakes, rivers and creeks and other bodies of water, as well as artificially created bodies such as reservoirs, canals, and dams." (*People ex rel. Lungren*

v. Superior Court, 14 Cal.4th 294, 301-302 (1996).) "But by surface waters are not meant any waters which may be on or moving across the surface of the land without being collected into a natural watercourse." (*Horton v. Goodenough*, 184 Cal. 451, 453 (1920).)

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

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

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

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

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

That rightly marks the end of the inquiry:

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

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

State Water Resources Control Board Claims over Wetlands

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

This claim does not withstand scrutiny. Disregarding the first principle of statutory interpretation, the SWRCB failed even to attempt the fundamental task necessary to understanding the Porter-Cologne Act, *i.e.*, read it with the aim of ascertaining the Legislature's intent. In the Procedures and accompanying materials, the SWRCB spoke much about why it regarded including wetlands within its regulatory

purview to be a good idea, but said almost nothing about what the Legislature intended. The act's meaning though is not a question of policy for the SWRCB to decide as if writing on a clean slate, but rather a question of statutory interpretation. The SWRCB's responsibility is to faithfully ascertain and implement the Legislature's intent, and not to arrogate to itself the authority to decide what it thinks should be the scope of its own regulatory jurisdiction.

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

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

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

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

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

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

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

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

Conclusion and Implications

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

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

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

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WESTERN 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)

LEGISLATIVE DEVELOPMENTS

CONGRESS PASSES CONSOLIDATED APPROPRIATIONS ACT, HR 133, WHICH INCLUDES FUNDING FOR SEVERAL CALIFORNIA WATER PROJECTS

In December 2020, the Consolidated Appropriations Act of 2021, HR 133, 166th Congress (2020) was passed and signed into law. The bill provides for the implementation of the Water Resources Development Act of 2020, outlining significant support provisions and guidelines for water infrastructure projects nationwide. Additionally, the bill provides federal funding for several California water projects, with a majority of the projects located in the San Joaquin-Sacramento River Delta, potentially providing for increased water supplies.

Background

On December 21, 2020, Congress released a 5,500-page comprehensive appropriations package in advance of the vote on the matter. The "Consolidated Appropriations Act of 2021" (HR 133) includes 12 appropriation bills, containing a $900 billion COVID-relief package and a $1.4 trillion government funding package that gives pandemic aid to Americans, while also securing federal agency operations through September 2021. HR 133 was approved with a 359-53 vote in the House of Representatives and a 92-6 vote in the Senate. President Donald Trump signed the measure into law on December 27, 2020.

HR 133 provides for appropriations for a large variety of governmental projects. For example, the measure provides $3.9 billion for rural development programs while also providing over $33 billion for law enforcement grants. In addition to myriad projects, HR 133 also contains a large number of provisions that will have a potential impact on water projects throughout the country. Specifically, HR 133 contains several provisions authorizing funding for several California water projects as well as incorporating the Water Resources Development Act of 2020 (WRDA).

The Appropriations Act, the Water Resources Development Act and Water Projects in California

The WRDA authorizes $9.9 billion in federal funds for 46 U.S. Army Corps of Engineers (Corps) projects, including those designed to achieve flood control, environmental restoration, coastal protection and other water infrastructure goals, as well as 27 feasibility studies and six comprehensive river basin studies. Additionally, the WRDA unlocks the Harbor Maintenance Trust Fund (HTMF) by providing the authority to appropriate up to $1.5 billion annually in additional funds for harbor maintenance needs as well as providing additional federal resources for the construction of inland waterways projects. The WRDA also reaffirms a commitment to greater use of natural and nature-based projects by ensuring that natural alternatives are fully evaluated by the Corps and are provided the same cost-share as structural alternatives.

In addition to the implementation of the WRDA, HR 133 also provides for funding for the following California water projects.

The Sites Reservoir Project

Under HR 133, the Sites Reservoir Project was awarded $13.7 million in federal funds. Situated on the west side of the Sacramento Valley, the Sites Reservoir Project seeks to substantially increase water supply flexibility and reliability in years of drought. Specifically, the Sites Reservoir does not rely on snowmelt, but instead seeks to capture winter runoff from uncontrolled streams below the existing reservoirs located in the Sacramento Valley. The project has previously received approximately $449 million from the USDA and $816 million from the State of California.

The Friant-Canal Repair Project

The Friant-Kern Canal is an aqueduct managed by the U.S. Bureau of Reclamation to convey water to augment irrigation capacity in Fresno, Tulare, and Kern counties. In November 2020, the Federal Government authorized nearly $5 million to study and begin pre-construction work on repairing the Friant-Kern Canal, a move that will significantly augment irrigation capacity in Fresno, Tulare, and Kern counties. The repairs seek to remedy a 33-mile stretch of the canal which has lost over half of its original capacity to convey water due to subsidence, also known as the sinking of earth from groundwater extraction. Under HR 133, $206 million in federal funding is being set aside for the repairs, covering almost half of the estimated $500 million in repairs.

The Delta-Mendota Canal Repair Project

Located in central California, the Delta-Mendota Canal is a 117-mile-long aqueduct that supplies freshwater to uses downstream of the San Joaquin River. Much like the Friant-Kern Canal, the Delta-Mendota Canal faces issues caused by subsidence. Specifically, the repairs seek to remedy cracks in the Delta-Mendota Canal caused by subsidence. The funds provided by HR 133 may allow the project to proceed.

The San Luis Low Point Improvement Project

Jointly owned and operated by the Bureau of Reclamation and the California Department of Water Resources, the San Luis Reservoir stores water taken from the San Joaquin-Sacramento River Delta. The San Luis Low Point Improvement Project seeks to address problems that occur when the reservoir falls below 300,000 acre-feet, typically in the summer and late fall. The low water level fosters algae growth, making the water unsuitable for municipal and industrial use. The funding provided by HR 133 may provide the first step in implementing the project.

The Los Vaqueros Reservoir Expansion Project

Owned and operated by the Contra Costa Water District, the Los Vaqueros Reservoir provides drinking water for approximately 550,000 customers in Contra Costa County. The Expansion Project would increase the reservoir's capacity by more than 70 percent when complete. The project is estimated to cost $895 million, with $494 million covered by Proposition 1, which was approved in 2018. The federal government is expected to cover around 25 percent of the project's costs, with the remaining expenses to be covered by local agencies that will benefit from the project. Funding provided by HR 133 will significantly help cover the costs of the project.

The Sacramento Regional Water Bank

Water providers in the Sacramento Region are developing the Sacramento Regional Water Bank, a groundwater storage program that seeks to improve regional water supply reliability. The water bank is intended to operate by coordinating the use of surface and groundwater. When surface supplies are plentiful, water providers in the region will draw more water from Folsom Lake or local rivers and use it to offset existing demand for groundwater. During dry years, recovery of stored groundwater will occur through additional pumping, resulting in a withdrawal from the water bank. Implementation of the project will occur in two phases. Local water providers have secured funding for Phase 1, which is currently underway. Federal funding may significantly cover the remaining $2.12 million to fully complete the project.

The Del Puerto Canyon Reservoir

The Del Puerto Water District and San Joaquin River Exchange Contractors Water Authority supply federal Central Valley Project (CVP) supply water to farmlands in Stanislaus, San Joaquin, Merced, Fresno, and Madera counties. CVP water is pumped south from the San Joaquin-Sacramento River Delta through the Delta-Mendota Canal. The Del Puerto Canyon Reservoir Project seeks to construct a new reservoir, where water from the Delta-Mendota Canal will be stored and released on a managed basis. The funding provided by HR 133 will provide for the initial stages of the project.

Conclusion and Implications

The Consolidated Appropriations Act may have had at its origin funding for Covid-19 related need– but over the months of wrangling the act took on omnibus proportions to achieve the votes needed for its passage. However, the Appropriations Act's implementation of the WRDA demonstrates a federal commitment to improving water infrastructure nation-

wide. A majority of the projects outlined above seek to address water use in the San Joaquin-Sacramento River Delta area and tributary areas. While some of these projects may be years away from completion, the funding provided by HR 133 may ultimately have a notable impact on water use in California in the future. With a Biden administration now at the nation's helm it will be interesting to see if any new or additional funding is appropriated for water projects in the state.
(Geremy Holm, Steve Anderson)

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 U.S. 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 consideration "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)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD PROVIDES COMMENTS ON 'CRITICALLY OVERDRAFTED' BASIN GROUNDWATER SUSTAINABILITY PLANS

On December 8, 2020, the California State Water Resources Control Board (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 SWRCB 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 SWRCB 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 SWRCB 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 the 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 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)

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 dis-

close 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 FINDS FEDERAL AGENCIES VIOLATED THE NATIONAL ENVIRONMENTAL POLICY ACT AND 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 know-

ingly 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 Adminis-

trator, 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)

CALIFORNIA COURT OF APPEAL HOLDS REGIONAL WATER BOARD, ACTING AS RESPONSIBLE AGENCY UNDER CEQA, COULD IMPOSE ADDITIONAL MITIGATION MEASURES UNDER THE PORTER-COLOGNE ACT

Santa Clara Valley Water District v. San Francisco Bay Regional Water Quality Control Board, 59 Cal.App.5th 199 (1st Dist. 2020).

California's First District Court of Appeal has held that the California Environmental Quality Act (CEQA) did not preclude a responsible agency–the San Francisco Bay Regional Water Quality Control Board (RWQCB)–from imposing additional waste discharge requirements via the Porter-Cologne Water Quality Control Act—beyond the mitigation measures the lead agency–Santa Clara Valley Water District–set forth in its project Environmental Impact Report (EIR).

Factual and Procedural Background

The Upper Berryessa Creek (Creek) in Santa Clara County, drains from the Diablo Range Hills to the Coyote Creek tributary, and ultimately into the San Francisco Bay. Every 10-20 years, the Creek historically flooded the nearby areas of Milpitas and San Jose, CA. In the 1980s, the U.S. Army Corps of Engineers (Corps) began working on plans to build a flood control project on the Creek. The project did not move forward until 2013, when renewed interest was sparked by construction of a nearby Bay Area Rapid Transit (BART) station that could be impacted by flooding.

In 2014, the Corps conducted federal environmental review for the proposed flood control project under the National Environmental Policy Act (NEPA). The Corps' Environmental Impact Study (EIS) named the Santa Clara Valley Water District (District) as the project sponsor. An agreement between the Corps and the District articulated that the Corps was responsible for the design and construction of the project, while the District was responsible for land acquisition, operating, and maintaining the project.

In early 2015, staff from the San Francisco Bay Regional Water Quality Control Board submitted comments on the Corps' design of the project. The comments suggested various changes to mitigate the project's impacts on wetlands. The Corps rejected the changes, citing they exceeded the scope of the Corps' environmental review. In September 2015, the District, acting as CEQA lead agency, issued a Draft EIR for the project. That same month, the Corps applied to the RWQCB for a § 401 federal Clean Water Act certification for the project. The RWQCB notified that the Corps' application was incomplete because it lacked compensatory mitigation to address the project's impacts on waters and wetlands. This action prompted pressure from both the Governor's office and the California Congressional delegation, based on concerns that the BART station was already under construction and could lose federal funding absent the board's § 401 certification. In an effort to compromise, the RWQCB agreed to quickly issue the § 401 certification so that the Corps could proceed with

project construction. However, the board informed the District that it would issue Waste Discharge Requirements (WDRs) under the Porter-Cologne Act to address project impacts that were not handled by the § 401 certificate.

In January 2016, the District issued its Final EIR on the project. In March 2016, the RWQCB's executive officer issued the § 401 certification. As a CEQA responsible agency, the board found that all impacts within its purview would be mitigated to less-than-significant levels, but qualified that the Board would later consider WDRs to "compensate for temporal and permanent losses of functions and values."

In April 2017, when project construction was nearly complete, the RWQCB issued a WDR order requiring the Corps and the District to provide off-site mitigation of the project's effects by enhancing about 15,000 linear feet or 15 acres of waters of the state. The order suspended and replaced the board's prior 401 certificate, and addressed CEQA by stating the board had considered the EIR and found that with mitigation, project impacts would be less than significant.

In May 2017, the District appealed the RWQCB's order to the State Water Resources Control Board (SWRCB). During the pendency of their appeal, the District filed a petition for writ of mandate against the RWQCB, challenging the WDR order under CEQA. The SWRCB failed to take action on the District's appeal, thereby denying it by operation of law. The District amended its petition to add causes challenging the order under § 401 of the Clean Water Act, the Porter-Cologne Act, and other state laws. The trial court denied the District's petition in February 2019, and the District timely appealed.

The Court of Appeal's Decision

On appeal, the District claimed the trial court erred in denying the administrative writ petition challenging the RWQCB's WDR. As to its CEQA claim, the District argued: 1) the board's failure to impose mitigation requirements as part of the board's CEQA review of the project barred it from imposing mitigation via the WDR order; and 2) the board prejudicially abused its discretion by failing to support the mitigation requirements with substantial evidence.

The First District Court of Appeal affirmed the trial court's judgment, finding that the District failed to demonstrate reversible error. The appellate court begun its analysis of the District's CEQA claim by reviewing the role of a responsible agency. Citing to CEQA Guidelines § 15096, the court reiterated that a responsible agency that disagrees with the adequacy of a lead agency's final EIR must either timely sue the lead agency, be deemed to have waived any objections to the EIR, prepare a subsequent EIR if legitimate grounds exist, or, assume the role of a lead agency as provided by Guidelines § 15052, subdivision (a)(3).

Regional Board Had Authority under Porter-Cologne

Accordingly, § 15096 prohibits a responsible agency from requiring additional environmental review after a lead agency completes its CEQA review, so long as the responsible agency does not have separate independent authority to enforce or administer a different environmental law. However, the savings clause in Public Resources § 21174, makes clear that CEQA does not prevent an agency from exercising independent authority under a separate statute. Here, the court found that RWQCB did not violate CEQA by issuing the WDRs against the District because it did so pursuant to its duties under the Porter-Cologne Act. Although the District, acting as lead agency, had not formulated CEQA mitigation measures requiring WDRs, the board, as a responsible agency, was not precluded from separately discharging its authority under the Porter-Cologne Act. The appellate court conceded that while unified CEQA review and environmental regulation should be the norm, there may be times when an agency's own environmental regulation can take place after CEQA review, as permitted by Public Resources Code § 21174. Towards this end, the RWQCB and District could be subject to legal challenges by a third party on grounds that the agencies divided their CEQA approval process "into two stages." But, that situation did not arise here, and the District agreed to the board's two-stage approval process due to the hurried 401 certification.

Issue of 'Excessive' Mitigation

Finally, the Court of Appeal rejected the District's claim that the RWQCB's WDR order imposed "excessive" mitigation. The court concluded that the District failed to engage in sufficient analysis of the evidence support the trial court and board's conclu-

sions. By failing to cite to the evidence that the trial court relied on and explain why such evidence was insufficient to support the board's decision, the District failed to carry its burden to rebut the presumption, as required under the substantial evidence standard of review.

Conclusion and Implications

The First District Court of Appeal's opinion clarifies the effect of an agency's overlapping responsibilities under CEQA and other environmental statutes. CEQA's savings clause does not prevent a responsible agency from discharging its duties under separate environmental laws, even if the exercise of that authority does not neatly align with its duties under CEQA. The court of appeal's decision will likely play an important role in future matters between local, regional, state, or federal agencies, particularly where a lead agency's authority under CEQA must heed to a responsible agency's other statutory duties to mitigate a project's potential effects. To avoid miscommunication, lead and responsible agencies should collaborate early in the environmental review process and identify potential mitigation measures promulgated by other statutes to ensure they are appropriately included in all draft and final CEQA documents. The court's decision is available online at: https://www.courts.ca.gov/opinions/documents/A157127.PDF
(Bridget McDonald)

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 augmentation 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)

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