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EASTERN WATER LAW™

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EASTERN WATER NEWS

NEW RESEARCH STUDY ATTEMPTS TO QUANTIFY THE COST OF FLOOD RISK IN THE UNITED STATES—FOR THE INDIVIDUAL HOMEOWNER

A new study, undertaken by First Street Foundation has been released in which the foundation attempts to quantify just how financially detrimental the ongoing risk of flooding—due to climate change—is within the United States.

Background

First Street Foundation (First Street) is a not-for-profit research and technology group which focuses on "America's Flood Risk." First Street finds that the financial toll of flood damage from climate change is and would continue to be enormous, and further finds that while:

> institutional real estate investors and insurers have been able to privately purchase flood risk information, the same cannot be said for the majority of Americans.

First Street goes on to detail the problem as follows:

> Flooding is the most expensive natural disaster in the United States, costing over $1 trillion in in inflation adjusted dollars since 1980. . . .the majority of Americans have relied on Federal Emergency Management Agency (FEMA) maps to understand their [flood] risk. However, FEMA maps were not created to define risk for individual properties. This leaves millions of households and property owners unaware of their true risk.

Addressing the issue, First Street's mission statement is to fill the need for:

> . . .accurate, property-level publicly available flood risk information. . . via a team of leading modelers, researchers and data scientists to develop the first comprehensive, publicly available flood risk model. . .[which is]. . .peer reviewed. . . .(https://firststreet.org/mission/)

The First Street Foundation's Study: 'Defining America's Flood Risk'

In the new research study, issued by First Street on February 22, 2021, it analyzes the "underestimated flood risk to properties throughout the United States." First Street emphasizes that while the insurance industry, for example, has access to risk assessment, the private real property owner generally does not. That theme is key to First Street: providing the tools for informed decision-making at the individual property owner level. It also suggests that at the city or county level, land use planning to assess risk from flood can benefit from its Study.

Methodology

First Street applies its "Flood Model" and marries that information to an "analysis of the depth-damage functions from the U.S. Army Corps of Engineers" in order to estimate "Average Annual Loss" for residential properties throughout the United States and "into the climate-adjusted future." The Flood Model of 2020 Methodology is available online at: https://firststreet.org/flood-lab/published-research/flood-model-methodology_overview/

The analysis referred to above, is to a scientific abstract done in the fall of 2020, entitled "Assessing Property Level Economic Impacts of Climate in the US, New Insights and Evident from a Comprehensive Flood Risk Assessment Tool" and is available online at: https://www.mdpi.com/2225-1154/8/10/116

Expanded Mapping of Economic Risk Associated with Flood Risk

First Street has found that a "great deal of flood risks exists outside of Federal Emergency Management Agency's designated Special Flood Hazard Areas (SFHAs)." This current First Street Study provides a:

> . . .vastly expanded mapping of economic risk

associated with flood risk, and demonstrates the extent to which information asymmetries on flood risk contribute to financial market asymmetries, specifically in the form of under-estimations of financial and personal risk to property owners. (https://firststreet.org/flood-lab/published-research/highlights-from-the-cost-of-climate-americas-growing-flood-risk/)

What the Study Revealed

The Study found that for the long-term impact of climate change, there were nearly 4.3 million homes (defined as 1-4 units) across the U.S. with *substantial* flood risk that would result in financial loss. The Study also found that if these homes were to insure against flood risk, the estimated risk through FEMA's National Flood Insurance Program (NFIP), the rates would need to increase 4.5 times to cover the estimated risk in 2021, and 7.2 times to cover the growing risk by 2051.

First Street found that the average estimated loss for the 5.7 million properties that have *any* flood risk and an expected loss from that flooding represents $3,548 per home. Using climate modelling projection for 30 years hence, yields a 67 percent increase in the average estimated loss per household. (*Ibid*)

Conclusion and Implications

The First Street Study contains a lot of fascinating and useful information including interactive models. In the end, the Study hopes to provide accurate and comprehensive estimated, to the general public, of annual flood damage in order to improve risk management and "cost-effective hazard mitigation planning." Emphasis is on the Study's availability to individual property owners, renters and communities—think city planners—to make informed decisions about risk reduction. For more information, with a wealth of information and inner statistical and methodology links, *see:* https://firststreet.org/flood-lab/published-research/highlights-from-the-cost-of-climate-americas-growing-flood-risk/
(Robert Schuster)

NEWS FROM THE WEST

In this month's News from the West, we first report on: a decision out of the Oregon State Court of Appeals addressing the correct forum for those seeking adjudication of water rights within the Klamath River Basin. The Basin extends from southern Oregon into California and contains many water rights holders, perhaps most notably, Tribal water rights. We also provide a summary of the water-related proposed legislation currently before the Colorado Legislature.

Oregon Court of Appeals Rules that Klamath Basin General Stream Adjudication Is the Only Viable Avenue for Judicial Review of Water Rights Issues within the Basin

TPC, LLC v. Oregon Water Resources Department, 308 Or.App. 177 (Or.App. Dec. 30, 2020).

The Oregon Court of Appeals ruled that water rights holders could not independently secure judicial review, outside the statutory process prescribed for general stream adjudications, of administrative orders curtailing their rights issued in response to calls the Klamath Tribes made on the basis of senior water rights determinations that the Oregon Water Resources Department (OWRD or Department) had reached in the ongoing Klamath Basin Adjudication.

Background

OWRD initiated the process for a general stream adjudication of the Klamath River Basin (Basin) in 1975 by issuing notices that it would begin an investigation for a proper determination of claims to water rights within the Basin. The administrative portion of that process culminated some forty years later when, in 2013, the Department issued Findings of Fact and an Order of Determination resolving the adjudication of some 730 surface water right claims within the Basin (KBA Order).

Included within the scope of the KBA Order is Claim 33, at and near the headwaters of the Williamson River with a priority date of 1864, as well as various claims of the Klamath Tribes and United

States, both for instream flows in the river and its tributaries and to maintain minimum water levels in Klamath Marsh, all of which have a priority date of "time immemorial" pursuant to the Tribes' 1864 Treaty. 308 Or.App. at 181-82. In 2005, to settle contests to Claim 33 that the United States and Klamath Tribes had brought in the Klamath Basin Adjudication, both of those parties, Claimants ("the Hydes"), and OWRD entered into an agreement (Hyde Agreement). In formulating the KBA Order, OWRD incorporated portions of the Hyde Agreement into its terms, but notably, declined to incorporate its "No-Call Provision." That provision expressly provides that the Hydes's ability to use their water right may not be curtailed in favor of any senior water right held by the United States or Klamath Tribes and that neither of those parties may place a call on Williamson River water that would result in the curtailment of such use, so long as the Hydes's exercise of their water right maintains a flow of at least one-half of the total flow in the river upstream of their property. *Id.* at 182-83. The OWRD Adjudicator demurred from incorporating the Hyde Agreement's No-Call Provision into the KBA Order based on his determination that it is "not pertinent to the determination of a water right claim." *Id.* at 184-85.

Pursuant to the Oregon General Stream Adjudication statute, ORS Chapter 539 (GSA Statute), many claimants filed exceptions to the KBA Order, including the Hydes, Klamath Tribes and United States. *Id.* at 182, All of these exceptions are currently undergoing judicial review in the Klamath County Circuit Court per the process laid out in the GSA Statute. *Id.* Notwithstanding these exceptions, because the GSA Statute provides that OWRD is to enforce its administrative determinations made in the course of a general stream adjudication pending judicial review and resolution of such determinations, the District is implementing its KBA Order, including only those provisions of the Hyde Agreement that were expressly adopted into that order, which, as noted above, does not include the No-Call Provision. *Id.* at 190-91 (citing ORS § 539.170).

As a result, in 2016 and 2017 the Klamath Tribes placed a call on the OWRD watermaster in reliance on the KBA Order to enforce their senior water rights in the upper Williamson River and Klamath Marsh given that water levels in those years were below or projected to fall below what was necessary to fulfill the Tribes' claims as determined in that order. *Id.* at 185. These calls in turn led to OWRD orders that curtailed the use of the Hydes's water right. The Hydes responded by filing petitions seeking judicial review of those curtailment orders in Marion County Circuit Court pursuant to the Oregon Administrative Procedure Act. ORS §§ 183.484 & 536.075.

The Marion County Circuit Court Ruling

In addressing the Hydes's petitions for review, the first and most salient issue before the Marion County Circuit Court was whether it lacked subject-matter jurisdiction over them and to review the curtailment orders because the issues they raise fall within the exclusive subject-matter jurisdiction of the KBA under the GSA Statute. The court found it did have jurisdiction under the Oregon Administrative Procedure Act (APA) to review the curtailment orders. 308 Or.App. at 187-88. On the merits, the court then ruled that the curtailment orders violated the terms of the Hyde Agreement and, on that basis, remanded them to the Department with instructions to comply with the agreement. Id. at 188. Both OWRD and the Tribes appealed from the court's judgment, and the United States was granted leave to participate as an *amicus curiae* in the appeal. *Id.* at 182.

The Court of Appeals' Opinion

Appropriately, as did the State Circuit Court, the Oregon Court of Appeals commenced its analysis by examining the issue of subject-matter jurisdiction. *Id.* at 188-91. In this regard it first noted that all of the parties properly acknowledged that, pursuant to the GSA Statute, the Klamath County Circuit Court has exclusive jurisdiction to perform judicial review of the KBA Order, but differed as to whether review of the curtailment orders for compliance with the separate Hyde Agreement entered into incidental to that adjudication fell within the ambit of that review. *Id.* at 192. The Appeals Court explained that it viewed its task as drawing a jurisdictional line:

> . . .between the exclusive review process for stream adjudications under ORS chapter 539 and review of orders in other than contested cases under ORS 536.075, such as the curtailment orders in this case. *Id.* at 193.

Analogizing to Land Use Statutes

To help inform its analysis, the court first looked to a rough analogue it found exists in the context of Oregon Land Use Law statutes that differentiate between matters to be determined exclusively by the Land Use Board of Appeals (LUBA) and those that otherwise fall within the jurisdiction of the county Circuit Courts of the state. *Id.* at 192-94.

The Appeals Court then trained its focus on "the allegations and requested relief in the [Hydes's] petitions as viewed through the lens of Oregon's water law." *Id.* at 194. In doing so, the court framed the core claim in those petitions as asserting that OWRD was legally precluded from issuing the challenged curtailment orders to satisfy the United States' and Klamath Tribes' water rights as determined by the Department in its KBA order, but rather was required to enforce such rights in accordance with the No-Call Provision of the Hyde Agreement, to which OWRD was also a party. *Id.* at 197. Upon examining that claim and the relief the Hydes sought, the Appeals Court determined that they were inextricably bound up with the KBA Order because they put the Marion County Circuit Court in a position where it was called upon to decide whether the Hyde Agreement placed a limitation on the Klamath Tribes' KBA-determined water right claims. *Id.* As a result, the Appeals Court determined that the Hydes's petitions sought to have the Marion County Circuit Court "interject itself into the water right determination process under ORS chapter 539," which runs afoul of the exclusive jurisdiction the GSA Statute confers on the court specifically prescribed to review such determinations, the Klamath County Circuit Court. *Id.*

Issue of Enforcement of the Hyde Agreement as a 'Rotation Agreement'

Having resolved the gravamen of the matter regarding whether the Hydes's petitions fell within the exclusive jurisdiction of the Klamath County Circuit Court under the GSA Statute, the Appeals Court turned to the subsidiary issue of whether the Hyde Agreement nevertheless should be separately enforced as a "rotation agreement." *Id.* at 198-99. These agreements, authorized by ORS § 540.150, allow "water users owning lands to which are attached water rights [to] rotate in the use of the supply to which they may be collectively entitled," and OWRD is then called upon to regulate the distribution of water in accordance with their terms. The Appeals Court made short shrift of this argument, concluding that, regardless of whether the Hyde Agreement qualifies as a Rotation Agreement under the statute, it is not segregable from the KBA Order, and therefore, any efforts to enforce it outside the exclusive judicial review process prescribed by the GSA Statute in Klamath County Circuit is improper as a jurisdictional matter. *Id.*

Finally, circling back to where it began its analysis, the Appeals Court was influenced by precedent arising in the context of Oregon's Land-use statutes holding that attempts to seek review of claims in Oregon Circuit Courts that raise issues regarding the validity of a specific land use proposal that is still pending in the land-use decision and review process were subject to dismissal because they fell exclusively within LUBA's jurisdiction. *Id.* at 200 (citing *Flight Shop, Inc. v. Leading Edge Aviation, Inc.*, 277 Or.App. 638 (2016)).

Conclusion and Implications

In summary, the Appeals Court held that the Hydes' petitions asking the Marion County Circuit Court to independently enforce the No-Call Provision of the Hyde Agreement effectively reflect an attempted end run around the ongoing KBA proceedings in the Klamath County Circuit Court in which exceptions to the KBA Order, including those related to Claim 33, are undergoing judicial review.

Although approximately two-thirds of Oregon waters are adjudicated, the Klamath Basin is

the only major basin to undergo an adjudication under the GSA Statute in around the last half-century. As a result, the Appeals Court's jurisdictional ruling can be viewed as largely discrete and limited to its particular facts. At the same time, it may make water rights holders even more leery of having their rights determined as part of a general stream adjudication, given that it establishes rather definitively that they will have no recourse to secure review of whatever determinations OWRD makes in its administrative orders other than the singular process prescribed by the GSA Statute, which the KBA proceedings have shown can prove to be rather protracted and cumbersome.

The Appeals Court opinion is at the following link:
https://ojd.contentdm.oclc.org/digital/pdf.js/web/viewer.html?file=/digital/api/collection/p17027coll5/id/27943/download#page=1&zoom=auto
(Stephen Odell)

Colorado Legislative Update of Water-Related Bills

The First Regular Session of the 73rd General Assembly convened on January 13, 2021. As has become the norm, several water-related bills have been introduced, covering a full spectrum of issues. In addition to the introduction of smaller bills, a sprawling state economic stimulus plan looks to allocate up to $75 million to water projects.

Colorado Recovery Plan

On the heels of the $1.9 trillion federal stimulus package, Colorado legislators have announced a $700 million Colorado Recovery Plan to bolster the state's recovering economy further. Although most of that money is slated to be allocated to more traditional stimulus sectors, initial drafts include as much as $75 million in water-related funding. Specifically, the stimulus package proposes to allocate $10-20 million in one-time additional funds to complete projects identified in the Colorado Water Plan, $10-25 million to protect and preserve Colorado's watersheds and defend against wildfires, $10-25 million for mountain watershed restoration, and $2-5 million for agricultural drought response.

A uniting theme of those expenditures is fire-related recovery and prevention. Last summer was the worst Colorado fire season on record, burning more than 625,000 acres, including the three largest fires in state history. Watersheds are particularly hard hit by wildfires because the deforested slopes allow significantly higher amounts of sediment, often including firefighting chemicals, fire debris, and elevated levels of nitrates, to infiltrate Colorado's streams. Revegetation and restoration of fire-scoured hills have become an annual project in Colorado, particularly after last season.

The stimulus package, and more particularly the water-related elements, has been introduced to wide bipartisan support. Although the details are almost certain to change before the final package is signed into law, legislators on both sides of the aisle have expressed support for significant water spending in Colorado.

Additional Fire-Related Bills

In addition to the measures in the Colorado Recovery Plan, the House has introduced two bills to protect forests and watersheds against wildfires. HB 21-1008, Forest Health Project Financing, is a bipartisan bill intended to help fund local wildfire mitigation and forest health efforts to protect watersheds. The bill allows for the creation of special improvement districts that would, in turn, be able to levy taxes to support these programs. Like all Colorado taxes, any new tax would require voter approval.

The bill would also extend a bond program's sunset under the Colorado Water Resources, Power, and Development Authority from 2023 to 2033. That program allows the issuance of bonds to fund watershed protection and forest health projects. Supporters of the bill cited studies that show that every $1 spent in mitigation saves between $3-6 in fire suppression and recovery costs. The bill passed the House Agriculture, Livestock, and Water Committee by unanimous vote.

A similar bill, HB 21-1042, would establish a water storage tank wildfire mitigation program. The program, run by the Colorado Forest Service, would award grants to local governments, counties, municipalities, special districts, tribes, and nonprofits. The grant money would be used to construct water storage tanks in rural areas to assist with wildfire prevention and suppression. To support the program, the bill proposes funding of $5 million, per year, through the 2024-25 fiscal year. In light of numerous other wildfire spending measures already on the table, the bill was postponed indefinitely by unanimous vote.

Underground Storage for Maximum Beneficial Use

HB 21-1043 would require the Colorado Water Conservation Board to contract with a state university to study various ways to maximize the beneficial use of state waters by storing excess surface water in aquifers. As a headwater state and a party to several interstate water compacts, Colorado must allow significant amounts of water to flow past its state lines to other neighboring states. Currently, any excess water that Colorado users do not divert is also allowed to

flow out of the state. The idea behind the study would be to divert the excess water and store it underground in aquifers, to be later pumped out when needed. The specific goals of the study would be to identify: 1) aquifers with storage capacity; 2) funds to pay for the storage; 3) specific storage projects; and 4) proposed language for legislation to implement such a program.

Several water suppliers, including Denver and Greeley, already implement underground storage for their domestic water supply. Those programs, as well as several other recent studies, have resulted in some minor opposition to the bill. Additional questions exist as to how such a program would work on a large scale and how it would operate within Colorado's water court system's confines. Supporters counter that these are the exact questions that can and should be answered by a study. The bill is currently in the House Agriculture, Livestock & Water Committee, where a 9-1 vote recently amended it.

Rights of Shareholders in Mutual Ditch Companies

Mutual ditch companies, in which water users share the costs and benefits of water supply infrastructure, and in turn own shares that entitle them to certain amounts of water, are an integral part of Colorado's water landscape. HB 21-1052 attempts to clarify the exact rights held by the ditch company shareholders. As Colorado's cities continue to grow, many municipalities have purchased ditch company shares and changed the decreed use of their water from irrigation to domestic or municipal. These types of changes can lead to conflict not only with other water users on the stream system, but also between shareholders within the ditch company. Specifically, if a shareholder chooses not to divert at certain times, may that water be used by other shareholders on the ditch? A 1975 Colorado Supreme Court case, *Jacobucci v. District Court*, suggested no by finding that "the benefit derived from the ownership of such stock is the right to exclusive use of the water it represents." 541 P.2d 667, 672 (Colo. 1975). However, the actual practice among Colorado ditch companies may vary.

The bipartisan bill seeks to clarify the rights of mutual ditch company shareholders, providing that, consistent with shareholder requests and available supply, the ditch company may provide water at higher or lower rates than each shareholder's pro-rata ownership. Additionally, when demand exceeds available supply, the company must provide a pro-rata amount to all shareholders requesting water. This pro-rata division can be accomplished by reducing deliveries, rotation, or any other equitable method determined by the ditch company.

Although the bill's general terms appear to be agreeable to many legislators, opponents of the bill take issue with its specific language, arguing that, instead of clarifying shareholder rights, the bill further muddies the waters. After one substantial amendment, the bill passed committee and is under consideration by the House.

Uniform Easement Relocation Act

Although the bill has been indefinitely postponed, the Senate Committee on Agriculture and Natural Resources initially considered a bill that could have drastically changed the procedure for relocating easements in Colorado. SB 21-164 would enact the "Uniform Easement Relocation Act," as drafted by the Uniform Law Commission. The Uniform Law Commission is a national, non-partisan group that drafts and works to enact uniform laws across the states. The new procedure would apply to relocation of easements established by any method, but explicitly would not apply to relocation of public utility easements, conservation easements, or negative easements.

Because the bill was tabled shortly after introduction, many details of the potential new procedure remain unknown. A revised relocation procedure would be especially relevant to Colorado water law because the Colorado Supreme Court has already established procedures for modification and relocation of ditch easements in *Roaring Fork Club, L.P. v. St. Jude's Co.*, 36 P.3d 1229 (Colo. 2001). Additionally, the Uniform Easement Relocation Act applies explicitly to relocations, it is unclear if such standards would also apply to easement modifications, specifically under *St. Jude's*. The *St. Jude's* process has become standard in Colorado, and any attempt to statutorily modify that process could have widespread ramifications for landowners burdened and benefitted by ditch easements.

Conclusion and Implications

The 2021 Colorado legislative season includes a wide variety of water-related bills, particularly those

authorizing and supporting additional water expenditures. The Colorado Recovery Plan is almost certain to become law, in some form, which will release badly needed money to new and existing water projects in the state. Many of the other bills have received bipartisan support, reinforcing the importance of Colorado's water resources as well as its water-related challenges. The Summer of 2021 is again forecasted to be an especially dry year, perhaps making it more likely that many wildfire-focused bills will be enacted. Finally, legislative efforts toward maximizing beneficial use and balancing the agricultural-to-city water transfers show increased awareness over Colorado's growing water scarcity and the need to plan for the future.
(John Sittler, Jason Groves)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

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

Civil Enforcement Actions and Settlements—Water Quality

•February 24, 2021 - EPA has announced settlements with Basin Marine, Inc. and Balboa Boatyard of California, Inc., to resolve Clean Water Act violations for discharging contaminants into Newport Bay. Under the settlements, Basin Marine and Balboa Boatyard will pay a combined $202,132 in penalties and will maintain preventative measures to reduce the discharge of pollutants through stormwater runoff into Newport Bay, an impaired water body for numerous pollutants. The violations pertained to discharges of paint solvents, fuel, oil, hydraulic fluid, and heavy metals, including lead, zinc, and copper. Stormwater discharges containing heavy metals have been found to harm aquatic life and sensitive marine ecosystems. EPA found Clean Water Act violations at Basin Marine during inspections in 2018 and 2019, and at Balboa Boatyard in 2019. The violations at both facilities related to regulations preventing the discharge of pollutants through stormwater as well as the failure to comply with California's industrial stormwater permit. At Basin Marine, EPA inspectors found the facility had failed to conduct required stormwater sampling, had not properly cleaned and disposed of identified debris near catch basins, and had exceeded limits for both copper and zinc levels in stormwater. The Balboa Boatyard facility had failed to conduct required stormwater sampling and had not identified sufficient storage capacity to contain the runoff generated during routine, seasonal rain events. Additionally, Balboa Boatyard lacked appropriate management practices to reduce pollutants associated with boat maintenance from being discharged into stormwater. Newport Bay was first identified by California in 1996 as an impaired water body due to an elevated presence of several toxic pollutants, including metals and pesticides. EPA has worked alongside the Santa Ana Regional Water Quality Control Board to reduce these pollutants through the development of Total Maximum Daily Loads in the bay and upstream watershed. Minimizing pollutants in stormwater discharges from boatyards is critical to meeting these long-term water quality objectives. EPA's settlements with Basin Marine for $142,224 and Balboa Boatyard for $59,908 resolve the CWA violations found at the facilities.

•March 1, 2021—EPA has settled with South Bend Products, LLC, over federal Clean Water Act violations at the company's South Bend, Washington, seafood processing facility. South Bend Products, LLC, a seafood preparation and processing facility, specializes in salmon and crab processing, and also periodically processes razor clams, black cod, rockfish and halibut. EPA inspected the South Bend facility in 2017. After reviewing facility records, EPA identified violations of the South Bend facility's wastewater discharge permit, including:

1) Exceeded discharge limits;

2) Insufficient monitoring frequency;

3) Incorrect sampling; and

4) Incomplete or inadequate reporting.

As part of the settlement, the company agreed to pay a penalty of $101,630. In addition to paying the penalty, the Company has implemented new processes and technologies to address compliance challenges at its South Bend plant. By improving its effluent treatment South Bend Products has taken steps to reduce the pollutant Total Residual Chlorine in its discharge. The company also established new sampling procedures to adequately monitor for other

pollutants such as Total Suspended Solids, Biological Oxygen Demand, and Oil and Grease. Collectively, these measures serve to improve South Bend Products' discharge to the waters of Willapa River and Bay.

•March 2, 2021—EPA, Region 8, announced it entered into seven Safe Drinking Water Act (SDWA) Administrative Orders on Consent (AOCs) with its tribal partners between December 1, 2020—February 12, 2021. Tribally owned or operated drinking water systems agreed to these AOCs to address violations of the National Primary Drinking Water Regulations to ensure public health protection in Indian County. AOCs illustrate substantial collaboration between EPA and the Tribes and Tribal utilities. The consensual agreements memorialize enforceable steps, and specific time frames, for drinking water systems to come into compliance with drinking water regulations. They demonstrate EPA and the Tribes' prioritization of safe drinking water in Indian country. Prior to negotiating the AOCs, EPA provided the systems extensive compliance assistance. EPA's compliance assistance varies depending on the needs of each system, but often includes support by phone calls and emails, as well as visits from technical assistance providers. The seven orders address different violations at each facility and include monitoring violations and violations related to addressing significant deficiencies; failure to notify the public of violations; and failure to prepare and distribute a Consumer Confidence Report to the systems' customers. EPA continues to work with these systems to address violations of drinking water regulations and ensure public health protection. Safe Drinking Water Act 1414 negotiated orders were finalized for the following systems:

1) Bedrock-Babb Water System; Blackfeet Indian Reservation, MT. Order finalized with the Blackfeet Tribe regarding the Bedrock-Babb Water System's uncorrected significant deficiencies and sanitary defect; failure to certify that an annual Consumer Confidence Report was distributed to its customers; failure to notify the public of certain violations; and failure to monitor for lead, copper, and total coliform bacteria.

2) Blackfoot Public Water System; Blackfeet Indian Reservation, MT. Order finalized with the Blackfeet Tribe regarding the Blackfoot Public Water System's uncorrected significant deficiencies and sanitary defect; failure to deliver the consumer notification of the lead sample results to the persons served at each sample site and submit to EPA a sample copy of the notification; failure to certify that an annual Consumer Confidence Report was distributed to its customers; failure to notify the public of certain violations; and failure to monitor for total coliform bacteria.

3) Starr School Public Water System; Blackfeet Indian Reservation, MT. Order finalized with the Blackfeet Tribe regarding the Starr School Public Water System's uncorrected significant deficiencies; failure to certify that an annual Consumer Confidence Report was distributed to its customers; failure to notify the public of certain violations; and failure to monitor for lead, copper, and total coliform bacteria.

4) Heart Butte Public Water System; Blackfeet Indian Reservation, MT. Order finalized with the Blackfeet Tribe regarding the Heart Butte Public Water System's uncorrected significant deficiencies; failure to certify that an annual Consumer Confidence Report was distributed to its customers; failure to notify the public of certain violations; and failure to monitor for lead, copper, and total coliform bacteria.

5) Arapahoe Industrial Park Public Water System; within the exterior boundaries of the Wind River Reservation, WY. Order finalized with the Northern Arapaho Utilities Department regarding the Arapahoe Industrial Park Public Water System due to uncorrected significant deficiencies; failure to notify the public of certain violations; and failure to monitor total trihalomethanes, haloacetic acids, total coliform, and nitrate.

6) Ethete Water System Public Water System; within the exterior boundaries of the Wind River Reservation, WY. Order finalized with Northern Arapaho Utilities Department regarding the Ethete Water System Public Water System due to uncorrected significant deficiencies; failure to meet the treatment technique requirement for Giardia lamblia inactivation; failure to notify the public

of certain violations; and failure to monitor lead, copper, total trihalomethanes, haloacetic acids, disinfection byproduct precursors, cyanide, volatile organic contaminants, sodium, total coliform, and nitrate. Fort Belknap Agency Public Water System (System);

7) Fort Belknap Indian Reservation, MT. Order finalized with the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community (FBIC) and Prairie Mountain Utilities (PMU) on February 1, 2021, to address the System's disinfection byproduct (DBP) maximum contaminant level (MCL) exceedances and failure to remove the required percentage of total organic carbon between the System's source and finished water.

•March 4, 2021—EPA has taken enforcement action on Kauai to direct the closure of seven large-capacity cesspools (LCCs) and collect $221,670 in fines from the Hawaii Department of Land and Natural Resources (DLNR). In 2005 EPA banned LCCs, which can pollute water resources, under the Safe Drinking Water Act. EPA is authorized to issue compliance orders and/or assess penalties to violators of the Safe Drinking Water Act's LCC regulations. EPA's enforcement action to close LCCs owned by DLNR is based on an August 2019 inspection and additional submitted information. The enforcement action includes the following DLNR properties:

1) Camp Hale Koa: Located in the Kokee Mountain State Park, EPA found three LCCs associated with the campgrounds. A non-profit organization leases the property from DLNR and operates the land parcel as a camping property that is available for daily or weekly group camping. These cesspools have been closed.

2) Waineke Cabins: Also located in the Kokee Mountain State Park, EPA found two LCCs serving the cabins. The United Church of Christ, under its Hawaii Conference Foundation body, leases the property from DLNR and operates the land parcel as a group camping property. These cesspools have been closed.

3) Kukui Street commercial property: Located in the town of Kapa'a, EPA discovered two LCCs serving 4569 Kukui Street. aFein Holdings, LLC, leases the property from DLNR and operates the land parcel as a multi-tenant commercial property. The Kukui property must close the cesspool by June 30, 2022.

Since the 2005 LCC ban, more than 3,600 LCCs in Hawaii have been closed; however, many hundreds remain in operation. Cesspools collect and release untreated raw sewage into the ground, where disease-causing pathogens and harmful chemicals can contaminate groundwater, streams, and the ocean. Groundwater provides 95% of all local water supply in Hawaii, where cesspools are used more widely than in any other state.

•March 4, 2021—EPA has reached settlements with three construction companies alleged to have violated the federal Clean Water Act (CWA) by unlawfully discharging pollutants into Mill Creek in western Johnson County, Kansas. As part of the settlements, the companies will pay a combined $122,000 in penalties. According to EPA, ABP Funding LLC, KAT Excavation Inc., and Pyramid Contractors Inc. each violated terms of the CWA permits to which the companies were subject. EPA alleges that, among other permit violations, the companies failed to implement practices to limit the release of construction pollution into streams and other waters. EPA says those failures resulted in discharges of sediment and construction-related pollutants into Mill Creek. The state of Kansas has designated Mill Creek as an "impaired" water body for excess sediment and other pollutants. According to EPA, ABP Funding LLC, KAT Excavation Inc., and Pyramid Contractors Inc. each violated terms of the CWA permits to which the companies were subject. EPA alleges that, among other permit violations, the companies failed to implement practices to limit the release of construction pollution into streams and other waters. EPA says those failures resulted in discharges of sediment and construction-related pollutants into Mill Creek. The state of Kansas has designated Mill Creek as an "impaired" water body for excess sediment and other pollutants. ABP Funding and KAT Excavation were involved in a joint residential construction project and Pyramid Contractors was involved in a separate road-widening project. Under the CWA, companies that propose to disturb an acre or more of land in proximity to protected water bodies are required to obtain stormwater construction permits and to follow the requirements outlined in the permits in order to reduce pollution runoff. Failure to obtain a permit or follow the requirements of a permit may violate federal law.

•March 11, 2021—EPA has reached a settlement with North Star Paving & Construction, Inc. for violations of federal drinking water protection laws at the company's paving and construction business in Soldotna, Alaska. EPA alleges that North Star violated the Safe Drinking Water Act's Underground Injection Control regulations aimed at protecting groundwater sources of drinking water. An unauthorized underground injection well, also known as a Motor Vehicle Waste Disposal Well, was located on North Star's property. To resolve the violations, the company has agreed to pay a penalty of $130,000 and permanently close and decommission the well. EPA's compliance investigation found that North Star failed to safely maintain, and failed to properly decommission, an unauthorized underground injection well at the company's auto repair shop. As of April 2000, all new construction of Motor Vehicle Waste Disposal Wells were banned. Subsequently, all existing Motor Vehicle Waste Disposal Wells in Alaska were required to be permanently closed by January 2005, to protect groundwater and drinking water sources. Vehicle shop floor drains flowing into underground wells have the potential to contaminate areas identified by the State of Alaska as drinking water source protection areas. An injection well could allow motor vehicle fluids -- and toxic chemicals or metals such as benzene, toluene, ethylbenzene, and xylenes, and lead-- to contaminate groundwater sources of drinking water. North Star's injection well was located above a protected drinking water aquifer for a community water system in Soldotna. EPA's preliminary groundwater sampling at the property found elevated concentrations of chemicals from motor vehicle fluids.

•March 15, 2021—Under a recent settlement with the U.S. Environmental Protection Agency (EPA), Cashman Dredging & Marine Contracting Co., LLC, based in Quincy, Mass., will pay a penalty of $185,000 for alleged violations of the Marine Protection, Research, and Sanctuaries Act (MPRSA, also known as the Ocean Dumping Act). EPA alleged that the violations occurred during the transport of dredged material from New Bedford Harbor in Mass. to the Rhode Island Sound Disposal Site (RISDS). On one occasion, a disposal vessel operated as part of the project dumped its load of dredged material 2.6 miles outside the authorized disposal site and on three separate occasions, dumped it in the wrong locations within the RISDS. The company's noncompliance was verified in part by the electronic monitoring devices onboard the disposal vessels. The company was cooperative with EPA and the U.S. Army Corps of Engineers (Corps) during the enforcement investigation and case settlement negotiations and has committed to making changes in its operations to ensure compliance with MPRSA in the future. This action was the result of a coordinated investigation by EPA and the Corps, which issues permits for the disposal of dredged material. Under the Ocean Dumping Act, EPA designates dredged material disposal sites for long-term use. Before designating these sites, EPA conducts an environmental review process, including providing opportunities for public participation. Each designated site has its own site management and monitoring plan. Disposal is strictly prohibited outside of these sites because of the potential of harm to the marine environment and the difficulty of assessing what the harmful impacts may be.

•March 18, 2021—EPA has reached a settlement with Swain Construction Inc. in Omaha, Nebraska, for alleged violations of the federal Clean Water Act. According to EPA, the concrete recycling and sales company discharged pollutants into protected waters adjacent to its facility without obtaining required permits. As part of the settlement, the company will restore the damaged streams and pay a $150,000 civil penalty. In the settlement documents, EPA alleges that Swain Construction used mechanized equipment to move concrete rubble, construction debris, and other pollutants into Thomas Creek and Little Papillon Creek, impacting approximately 1,300 feet of stream channel. Two EPA inspections at the company's facility in 2019 confirmed these unauthorized activities, as well as a lack of pollution controls that resulted in unauthorized stormwater discharges and wastewater runoff into Thomas Creek from the company's dust-suppression efforts. Both streams are designated as "impaired" by the state of Nebraska. Waters are assessed as impaired when an applicable water quality standard is not being attained. In addition to paying the penalty, the company also agreed to restore the impacted stream stretches and install facility controls to minimize or eliminate further discharges.

•March 18, 2021—The U.S. Department of Justice, EPA, and Bureau of Land Management (BLM) announced that they have reached a proposed settlement with John Raftopoulos, Diamond Peak Cattle Company LLC and Rancho Greco Limited LLC (collectively, the defendants) to resolve violations of the Clean Water Act (CWA) and the Federal Land Policy and Management Act (FLPMA) involving unauthorized discharges of dredged or fill material into waters of the United States and trespass on federal public lands in northwest Moffat County, Colorado. On Oct. 22, 2020, the United States filed suit in federal district court alleging that beginning in approximately 2012, and as recently as approximately 2015, the defendants discharged dredged or fill material into Vermillion Creek and its adjacent wetlands in order to route the creek into a new channel, facilitate agricultural activities and construct a bridge. These alleged unauthorized activities occurred on private land owned by the defendants and on public land managed by BLM, constituting a trespass in violation of the FLPMA. Vermillion Creek and its adjacent wetlands are waters of the United States and may not be filled without a CWA Section 404 permit from the U.S. Army Corps of Engineers (Corps), which was not obtained. EPA develops and interprets the policy, guidance and environmental criteria the Corps uses in evaluating permit applications. The United States' lawsuit further contended that the defendants' alleged trespass also included unauthorized irrigation, removal of minerals and destruction of numerous cottonwood trees on federal public land. The fill and related activities on BLM lands were conducted without BLM authorization. The defendants' trespass actions not only interfered with the public's right to current enjoyment of federal public lands, but also jeopardized the future health and maintenance of these lands for use by all. Under a proposed settlement filed in the U.S. District Court for the District of Colorado to resolve the lawsuit, the defendants agreed to: pay a $265,000 civil penalty for CWA violations; pay $78,194 in damages and up to $20,000 in future oversight costs for trespass on public lands managed by BLM; remove the unauthorized bridge constructed on public lands; restore approximately 1.5 miles of Vermillion Creek to its location prior to defendants' unauthorized construction activities; restore the 8.47 acres of wetlands impacted adjacent to the creek; and plant dozens of cottonwood trees to replace those previously removed from federal lands. Additionally, under the terms of the proposed settlement, the defendants will place a deed restriction on their property to protect the restored creek and wetlands in perpetuity. This proposed settlement will repair important environmental resources damaged by the defendants. The portions of Vermillion Creek and its adjacent wetlands impacted by the defendants' unauthorized activities provided aquatic and wildlife habitat, runoff conveyance and groundwater recharge. The straightening of Vermillion Creek contributed to erosion of the bed and banks of the stream and detrimental sediment deposition downstream of the channelization. Browns Park National Wildlife Refuge, which provides important habitat for the endangered Colorado pikeminnow, is located at the confluence of Vermillion Creek and the Green River, approximately one mile downstream from the impacted area. Similarly, the destruction of numerous cottonwood trees located adjacent to the creek eliminated nesting, perching, and roosting habitat for raptor species, including bald eagle, golden eagle and red-tailed hawk. Cottonwood galleries with riparian vegetation also provide nesting habitat for a variety of migratory birds.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•February 25, 2021 - The U.S. Department of Justice filed a complaint on behalf of EPA in the District of Puerto Rico that calls for the municipality of Toa Alta to stop disposing of solid waste at its landfill and take steps to address public health and environmental threats posed by dangerous conditions at the landfill, which is being operated in violation of federal and commonwealth solid waste laws. The complaint also asks the court to order the municipality of Toa Alta to pay civil penalties for its violations of a 2017 EPA order that addressed problems at the landfill. The complaint cites three central threats posed by the landfill:

The municipality of Toa Alta is taking inadequate action to prevent large quantities of leachate—water mixed with hazardous pollutants that seeps from the landfill—from escaping into nearby neighborhoods, surface waters and the underlying groundwater aquifer.

The landfill's slopes in certain areas are not stable and may collapse, potentially endangering people

working at the landfill and residents whose homes are near the foot of the landfill.

The Municipality has not consistently been placing required soil on top of the waste disposed at the landfill at the end of each day's disposal activities. Application of this soil cover—referred to as daily cover—cuts off access to landfill waste by insects, vermin, birds and trespassers and helps prevent the spread of disease, such as dengue and Zika viruses.

EPA is in communication with the Puerto Rico Department of Natural and Environmental Resources concerning the problems at this landfill. EPA is coordinating with the department in efforts to improve solid waste management in Puerto Rico.

•February 25, 2021—EPA announced the completion of another cleanup at the former Koppers Wood-Treating Facility at 1555 North Marion St. in Carbondale. The agency required the current owner, Beazer East Inc., to address dioxin/furan-contaminated soil on 16 acres of the site. Work crews cleared trees and brush to expand existing soil covers and excavated more than 34,000 tons of contaminated soil. The company also seeded native plants in accessible areas and will resume seeding remaining areas in the spring. Erosion controls will be maintained at site boundaries and around the ditches and creek until the seeding is done and vegetation is established. Previously, in 2010, Beazer East completed a six-year cleanup at the site under EPA's supervision. The discovery of remaining contamination made additional cleanup necessary. Both cleanups were ordered under the authority of the federal Resource Conservation and Recovery Act. From 1902 until 1991, Koppers treated railroad cross ties, utility poles and other wood products with chemical preservatives at its Carbondale facility which contaminated land and nearby waterways.

•March 3, 2021 - Chemical manufacturer UCT will pay a $44,880 penalty to settle hazardous waste violations at its Bristol, Pennsylvania, facility, the U.S. Environmental Protection Agency announced. EPA cited the company for violating the Resource Conservation and Recovery Act (RCRA), the federal law governing the treatment, storage, and disposal of hazardous waste. RCRA is designed to protect public health and the environment and avoid long and extensive cleanups, by requiring the safe, environmentally sound storage and disposal of hazardous waste. UCT manufactures a variety of chemical products at its facility at 2731 Bartram Road in Bristol. These include solid phase extraction products for hospitals, clinical and toxicology labs, food safety testing labs, pharmaceutical and biotech companies, and environmental testing facilities; and silane/silicone products used in the glass and fiber optic industries, medical device, cosmetics, paints and coatings, adhesives and electronics industries. According to EPA, the company violated RCRA rules including storing hazardous waste for more than 90 days without a permit, failure to properly mark hazardous waste containers, failure to keep hazardous waste containers closed, failure to make waste determinations and failure to provide annual RCRA training. The settlement reflects the company's compliance efforts, and its cooperation with EPA in the investigation and resolution of this matter. As part of the settlement, the company has certified its compliance with applicable RCRA requirements.

Indictments, Convictions, and Sentencing

•February 18, 2021 - A vessel operating company was sentenced in Hagatna, Guam, for illegally discharging oil into Apra Harbor, Guam, and for maintaining false and incomplete records relating to the discharges of oily bilge water from the vessel Kota Harum. Pacific International Lines (Private) Limited (PIL), Chief Engineer Maung Maung Soe, and Second Engineer Peng Luo Hai admitted that oily bilge water was illegally dumped from the Kota Harum directly into the ocean and into Apra Harbor, Guam, without being properly processed through required pollution prevention equipment. Oily bilge water typically contains oil contamination from the operation and cleaning of machinery on the vessel. The defendants also admitted that these illegal discharges were not recorded in the vessel's oil record book as required by law. Specifically, on Oct. 4, 2019, Hai, who was employed by PIL, used the Kota Harum's emergency fire/ballast pump to discharge oily bilge water directly overboard, leaving an oil sheen upon the water of Apra Harbor. Additionally, Soe, who was also employed by PIL, admitted that excessive leaks in the vessel caused oily bilge water to accumulate in the vessel's engine room bilge at a rate that exceeded the oil water separator's (required pollution prevention machinery) processing capacity.

Rather than repairing these leaks before continuing to sail or storing the oily bilge water in holding tanks to be discharged to shore-side reception facilities, it was the routine practice onboard the Kota Harum to discharge the oily bilge water directly overboard into the ocean. Soe then failed to record these improper overboard discharges in the vessel's oil record book. Additionally, Soe admitted that he altered the vessel's sounding log so that it would appear as though oily bilge water was being stored in the vessel's holding tank instead of being pumped overboard. PIL pleaded guilty to five felony violations of the Act to Prevent Pollution from Ships for failing to accurately maintain the Kota Harum's oil record book, and one felony violation of the Clean Water Act for knowingly discharging oil into a water of the United States in a quantity that may be harmful. The judge sentenced PIL to pay a total criminal penalty of $3 million and serve a four-year term of probation, during which all vessels operated by the company and calling on U.S. ports will be required to implement a robust Environmental Compliance Plan. Soe and Hai previously pleaded guilty and were sentenced to two years of probation and one year of probation, respectively. Additionally, both Soe and Hai are prohibited from serving as engineers onboard any commercial vessels bound for the United States during their respective terms of probation.
(Andre Monette)

LAWSUITS FILED OR PENDING

U.S. DISTRICT COURT PUSHES FEDERAL GOVERNMENT FOR SCHEDULE ON COMPLETING ENDANGERED SPECIES ACT REVIEW ON THE YUBA RIVER

The Yuba River is home to three fish species that are listed as either threatened or endangered under the federal Endangered Species Act (ESA). In 2016, Friends of the River brought an action in the U.S. District Court for the Eastern District of California against the National Marine Fisheries Service (NMFS) and the U.S. Army Corps of Engineers (Corps) to challenge the federal defendants' efforts to address impacts to those species in the operation of two federally owned dams on the Yuba River. On February 1, 2021, District Court Judge John A. Mendez ordered the federal defendants to commit to a timeline for taking action to address the impacts on the three species. The federal defendants subsequently announced a schedule extending through November 2021. [*Friends of the River v. National Marine Fisheries Service, et al.*, Case No. 2:16-cv-00818-JAM-EFB (E.D. Cal.).]

Background

The Yuba River, a major tributary of the Sacramento River, is a habitat for spring-run chinook salmon, steelhead, and green sturgeon. The spring-run chinook salmon and the steelhead are listed as threatened under the ESA, and the green sturgeon is listed as endangered. The Corps operates two dams on the Yuba River, Daguerre Point and Englebright dams. The dams were built in 1910 and 1941, respectively. Both dams were constructed for the purpose of capturing mining debris, which contain significant amounts of mercury. Unlike other federal dam projects, the two dams were not designed to generate hydroelectric power. But two privately owned hydroelectric facilities are located downstream of Englebright Dam. Each hydroelectric facility has an easement to operate on the Corps' land, and each facility operates pursuant to a Federal Energy Regulatory Commission (FERC) license. Several entities divert water at or near Daguerre Point Dam.

Section 7 of the ESA requires an agency taking certain actions to first consult with a "consulting agency"—here, NMFS—before taking any action that will jeopardize the existence of a threatened or endangered species. In 2009, such a consultation process began for Englebright and Daguerre Point dams. In 2012, NMFS issued a Biological Opinion regarding the Corps' operation of Daguerre Point dam, finding that the Corps' proposed operations would jeopardize the survival and recovery of the three listed fish species. NMFS' analysis was based in part on a finding that "agency action" by the Corps included the activities of the hydroelectric facilities near Daguerre Point dam.

In 2014, NMFS issued a new Biological Opinion finding of no jeopardy to the survival and recovery of the three listed species. At the same time, NMFS also issued a Letter of Concurrence agreeing with the Corps' assessment that the contemplated operations of Englebright Dam were not likely to have an adverse effect on the three listed species. The 2014 Biological Opinion and associated LOC reversed course from the 2012 Biological Opinion by finding that neither the independently operated hydroelectrical projects associated with Daguerre Point dam nor the diversion works associated with Englebright dams constituted "agency actions" subject to review under Section 7 of the ESA.

The 2016 Federal Lawsuit

In 2016, Friends of the River filed an action in the U.S. District Court for the Eastern District of California against NMFS and the Corps on the grounds that the 2014 Biological Opinion and Letter of Concurrence were issued in violation of the Administrative Procedure Act (APA) and the ESA. Among other grounds, Friends of the River asserted that NMFS acted arbitrarily and capriciously by finding that the hydroelectrical facilities and diversion works were not "agency actions" that required analysis in the 2014 Biological Opinion and LOC. In February 2018,

Judge Mendez denied Friends of the River's motion for summary judgment and granted summary judgment in favor of the federal defendants. The Ninth Circuit Court of Appeals reversed Judge Mendez' order, finding that NMFS' decision to adopt the 2014 Biological Opinion was arbitrary and capricious. The Ninth Circuit remanded to the District Court and ordered NMFS provide a more detailed explanation of why it reversed its position from the 2021 Biological Opinion that the hydroelectrical facilities and diversion works were not "agency actions."

District Court Orders Additional Information from Federal Defendants

On remand, in November 2020, Judge Mendez clarified that NMFS could either provide a reasoned explanation for its changed position or undertake an entirely new agency action. Judge Mendez refused the request by Friends of the River to impose a deadline for NMFS to take action. Pursuant to the District Court's order on remand, the parties submitted a joint status report on January 29, 2021. The federal defendants stated in the joint status report that they had hired a third-party contractor to review and analyze the available data to assist the federal defendants in making a decision whether to provide a reasoned explanation for the changed position or to reinitiate consultation. The federal defendants did not provide a date or a timeline for when such a decision would occur.

On February 1, 2021, Judge Mendez ordered the federal defendants to clarify within the next ten days whether and when it would either provide a more reasoned explanation for the disputed findings in the 2014 Biological Opinion or reinitiate consultation.

In a press release, Friends of the River touted the order as:

> . . .critical of [NMFS'] continued delay in making a decision that could seal the fate of the Yuba River's threatened fish species.

Friends of the River also indicated optimism that, with the new Biden administration, NMFS and the Corps will take on a more active role in managing the Yuba River.

On February 11, 2021, the federal defendants filed a supplemental status report reiterating their statement from the earlier status report that they had not yet made a decision on reinitiation and that they had hired a third-party contractor to assist in their review of the issue. The federal defendants further specified that they expected to make a decision by October 2021 for Englebright dam and November 2021 for Daguerre Point Dam.

Conclusion and Implications

After over a decade since initiating the consultation process for Englebright and Daguerre Point dams, the U.S. District Court is pressing the federal defendants to complete the process or undertake a new agency action. Friends of the River has expressed optimism with the change in federal administration. However, the federal defendants are not expected to take further action until the fall of this year. (Brian Hamilton, Meredith Nikkel)

U.S. EPA DISMISSES ITS APPEAL OF THE DISTRICT COURT'S MORE NARROW JURISDICTIONAL DELINEATION OF SALT PONDS

On February 26, 2021, the U.S. Environmental Protection Agency (EPA) filed a motion to voluntarily dismiss the agency's earlier appeal of a decision by the U.S. District Court for the Northern District of California rejecting a jurisdictional delineation in which the agency determined that a salt production complex adjacent to the San Francisco Bay was not jurisdictional and therefore not subject to federal Clean Water Act (CWA) § 404. The District Court's October 2020 decision found that EPA failed to consider whether salt ponds associated with the Redwood City Salt Plant fell within the regulatory definition of waters of the United States (WOTUS), and instead erroneously applied case law to reach a determination that the salt ponds were "fast lands," which are categorically excluded from CWA jurisdiction. "Fast lands" are those areas formerly subject to inundation, which were converted to dry land prior to enactment of the CWA. [*San Francisco Baykeeper, et al. v. EPA, et al.*, Case No. 20-17359 (N.D. Cal).]

By voluntarily dismissing the appeal, EPA appears to have conceded to the court's holding that the true measure of the jurisdictional extent of a WOTUS is the natural extent of such waters, absent any artificial components that limit the reach of an adjacent jurisdictional water body. Moreover, given the court's reliance on the "significant nexus" analysis, established by the *Rapanos* Supreme Court decision, in reaching its conclusion, EPA's decision to dismiss the appeal appears to be consistent with President Biden's January 20, 2021 Executive Order titled, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis."

Background

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

In 2012, Cargill requested that EPA evaluate the jurisdictional status of the salt ponds. In response, EPA Region IX developed a draft jurisdictional determination in 2016, which indicated that only 95 acres of the Redwood City facility had been converted to "fast land" prior to enactment of the CWA. According to Region IX, the remaining 1,270 acres of the facility's salt ponds were jurisdictional under the CWA. Ultimately, in March 2019, EPA headquarters issued a significantly different final determination, which found that the entire Redwood City facility was *not* jurisdictional based on Ninth Circuit case law regarding the scope of CWA jurisdiction, spurring a challenge by environmental organizations.

The District Court's Decision

In evaluating the challenge, the court found that:

1) EPA was bound to apply its regulatory WOTUS definition, rather than Ninth Circuit case law;

2) headquarters improperly applied judicial precedent on the issue of "fast lands"; and

3) the headquarters delineation was inconsistent with a 1978 Ninth Circuit Court of Appeals case that evaluated the jurisdictional status of the Redwood City Salt Plant ponds, and concluded differently than the March 2019 EPA jurisdictional determination. *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978) (*Froehlke*).

In *Froehlke*, the Ninth Circuit determined:

1) that CWA jurisdiction still extended at least to those waters no longer subject to tidal inundation merely by reason of artificial dikes; and

2) the fast lands jurisdictional exemption applies only where the reclaimed area was filled prior to adoption of the CWA.

On December 3, 2020, EPA timely appealed the decision of the U.S. District Court for the Northern District of California.

The Biden Administration's Executive Order

On January 20, 2021, President Biden signed an Executive Order titled, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis" (the Order), which directed federal agencies to review regulatory actions taken by the prior Trump administration. In addition to directing agency heads to consider revision, rescission, or suspension of regulations adopted between January 20, 2017, and January 19, 2021, the Order repeals and revokes Executive Order 13778 of February 28, 2017 (Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule), suggesting that a revision of the Navigable Waters Protection Rule, which became effective on June 22, 2020 (2020 WOTUS Rule), may be underway.

Conclusion and Implications

EPA's dismal of the appeal of the District Court's decision in *San Francisco Baykeeper v.U.S. EPA* likely signals that the agency will publish a new WOTUS definition in the near future. The court suggested that although operations at the Redwood City Salt Plant had remained largely unchanged since 1951, any evaluation of the facility's jurisdictional status should be updated to account for the three major U.S. Supreme Court decisions regarding the appropriate scope of CWA jurisdiction: *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); and *Rapanos v. United States*, 547 U.S. 715 (2006). According to the District Court's October 2020 decision, the fact that the salt ponds "enjoyed a water nexus to the Bay" was dispositive, thus triggering revision of the headquarters' delineation, and suggesting that the *Rapanos* decision's significant nexus analysis largely influenced the court's decision. However, the 2020 WOTUS Rule entirely eliminated the significant nexus framework from the WOTUS definition. Consequently, the dismissal may signal a tacit agreement by the Biden administration that application of the significant nexus analysis remains appropriate, and may foreshadow future rulemakings pertinent to the scope of CWA jurisdiction.
(Meghan A. Quinn, Hina Gupta)

JUDICIAL DEVELOPMENTS

U.S. SUPREME COURT FINDS FOIA'S DELIBERATIVE PROCESS EXEMPTION PROTECTED DRAFT BIOLOGICAL OPINIONS FROM PUBLIC DISCLOSURE

U.S. Fish & Wildlife Service v. Sierra Club, 592 U.S.___, 141 S.Ct. 777 (Mar. 4, 2021).

The Sierra Club brought a Freedom of Information Act (FOIA) action against the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), challenging their denial of a request for certain draft Biological Opinions generated during a rule-making process by the U.S. Environmental Protection Agency (EPA). After the Ninth Circuit Court of Appeals found that the documents should be produced, on March 4, 2021, the U.S. Supreme Court reversed, finding that the deliberative process privilege protected the documents from disclosure.

Factual and Procedural Background

In 2011, the EPA proposed a rule regarding the design and operation of "cooling water intake structures," which withdraw large volumes of water to cool industrial equipment. Because aquatic wildlife can become trapped in these structures and die, the EPA was required to "consult" with the FWS and NMFS (together: Services) under the Endangered Species Act (ESA) before proceeding. Generally, the goal of consultation is to assist the Services in preparing a Biological Opinion on whether an agency's proposal would jeopardize the continued existence of threatened or endangered species. Typically, these opinions are known as "jeopardy" or "no jeopardy" opinions. If the Services find that the action will cause "jeopardy," they must propose "reasonable and prudent alternatives" that would avoid harming the threatened species. If a "jeopardy" opinion is issued, the agency either must implement the alternatives, terminate the action, or seek an exemption from the Endangered Species Committee.

After consulting, the EPA made changes to the proposed rule, which was submitted to the Services in 2013. Staff members at the Services completed draft Biological Opinions, which found the proposed rule was likely to jeopardize certain species. Staff sent these drafts to the relevant decisionmakers within each agency, but decisionmakers at the Services neither approved the drafts nor sent them to the EPA. The Services instead shelved the drafts and agreed with the EPA to extend the period of consultation. After further discussions, the EPA sent the Services a revised proposed rule in March 2014 that significantly differed from the 2013 version. Satisfied that the revised rule was unlikely to harm any protected species, the Services issued a joint final "no jeopardy" Biological Opinion. The EPA issued its final rule that same day.

The Sierra Club submitted FOIA requests for records related to the Services' consultations with the EPA. The Services invoked the deliberative process privilege to prevent disclosure of the draft "jeopardy" Biological Opinions analyzing the EPA's 2013 proposed rule. The Sierra Club brought suit to obtain those records. The U.S. District Court agreed with the Sierra Club, and the Ninth Circuit affirmed in part. Even though the draft Biological Opinions were labeled as drafts, the Ninth Circuit reasoned, the draft "jeopardy" opinions constituted the Services' final opinion regarding the EPA's 2013 proposed rule and must be disclosed. The U.S. Supreme Court then granted *certiorari*.

The Supreme Court's Decision

Generally, FOIA mandates the disclosure of documents held by a federal agency unless the documents fall within certain exceptions. One of those exceptions, the deliberative process privilege, shields from disclosure documents reflecting advisory opinions and deliberations comprising the process by which governmental decisions and policies are formulated. The privilege aims to improve agency decisionmaking by encouraging candor and blunting the chilling effect that accompanies the prospect of disclosure.

The privilege distinguishes between predecisional, deliberative documents, which are exempt from disclosure, on the one hand, and documents reflecting a final agency decision and the reasons supporting it, which are not, on the other hand. As the Supreme Court observed, however, a document does not represent an agency's final decision solely because nothing follows it; sometimes a proposal dies on the vine or languishes. What matters is if the document communicates a policy on which the agency has settled and the agency treats the document as its final view, giving the document "real operative effect."

Draft Biological Opinions Reflected a Preliminary View of the Proposed Rule

Applying those general principles, the Supreme Court found that the draft Biological Opinions were protected from disclosure under the deliberative process privilege because they reflected a preliminary view—as opposed to a final decision—regarding the EPA's proposed 2013 rule. In addition to being labeled as "drafts," the Supreme Court explained, the administrative context confirmed that the draft opinions were subject to change and had no direct legal consequences. Because the decisionmakers neither approved the drafts nor sent them to the EPA, they were best described not as draft Biological Opinions but as drafts of draft Biological Opinions. While the drafts may have had the practical effect of provoking EPA to revise its 2013 proposed rule, the Supreme Court reasoned, the privilege still applied because the Services did not treat the draft Biological Opinions as final. The Supreme Court thus reversed the Ninth Circuit decision and remanded the case for further proceedings consistent with its holding.

Conclusion and Implications

The case is significant because it contains a substantive discussion of the deliberative process privilege, particularly in the context of the U.S. Endan-

FIFTH CIRCUIT ADDRESSES DIVERSITY JURISDICTION WHERE LANDOWNER SUED PETROLEUM COMPANY UNDER LOUISIANA STATE CONSERVATION LAWS OVER LEGACY SITE CONTAMINATION

Grace Ranch, L.L.C. v. BP America Production Company,
___F.3d___, Case No. 20-30224 (5th Cir. Feb. 26, 2021).

On February 26, 2021, the Fifth Circuit Court of Appeals ruled in *Grace Ranch, L.L.C. v. BP America Production Company, et. al.*: 1) reversing an order from the U.S. District Court for the Western District of Louisiana to remand the case to state court, and 2) remanding the case to the District Court for further proceedings on Grace Ranch's claims against BP America Production Company and BHP Petroleum Americas (collectively, BP) under Louisiana's conservation laws for the cleanup of legacy contamination on Grace Ranch's property from oil and gas operations. The Court of Appeals also denied Grace Ranch's motion to dismiss the case for lack of jurisdiction.

Background

This dispute relates to contamination from the disposal of drilling waste and other byproducts of oil and gas production in unlined earthen pits in Louisiana, before this practice was banned under state law in the mid-1980s. It is settled law in Louisiana that individuals purchasing such contaminated lands cannot sue oil and gas owners and operators in tort or contract for damage inflicted before the purchasers acquired the property. As a result, such landowners have attempted to obtain a remedy for this legacy contamination by enforcing state conservation laws. The Louisiana Department of Natural Resources Statewide Order 29-B requires the closure of these unlined oilfield pits and that "various enumerated contaminants in the soil be remediated to certain standards." A landowner can sue under Louisiana Statutes Annotated § 30.16 to force compliance with the Statewide Order if the Louisiana Office of Conservation fails to do so after receiving notice from the landowner adversely affected by a violation of the Order.

The District Court's Decision

The landowner in this case, Grace Ranch, filed suit in state court against BP for contamination on its property after the Louisiana Office of Conservation declined to enforce Statewide Order 29-B. BP removed the case to federal court, asserting jurisdiction based on diversity of citizenship. While Grace Ranch and BP are diverse parties, Grace Ranch maintained that the state's role in the case defeated that diversity jurisdiction. Under state law, any injunction obtained by Grace Ranch against BP would be entered in favor of the Louisiana Office of Conservation, which Grace Ranch argued made the state a real party in interest. Grace Ranch also urged the federal court to abstain from exercising jurisdiction under the abstention doctrine presented in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). The District Court ruled that there was diversity jurisdiction, but remanded the case to state court based on *Burford*, finding that abstention was appropriate because the state court offered a better forum for resolving unsettled questions about the application of state law.

BP appealed the District Court's order, and Grace Ranch filed a motion to dismiss BP's appeal for lack of jurisdiction, continuing to assert that the State of Louisiana's involvement in the case defeated diversity jurisdiction. On this appeal, the Fifth Circuit Court of Appeals ruled on the question of diversity jurisdiction, the jurisdiction of the Court of Appeals to hear the appeal, and whether the federal court should abstain from hearing the case and remand it to state court.

The Fifth Circuit's Decision

Diversity Jurisdiction

The Fifth Circuit Court of Appeals ruled that it has subject matter jurisdiction over the case, because the State of Louisiana is not a party to the lawsuit, nor a real party in interest. Federal District Courts have original jurisdiction over disputes between citizens of different states, where the amount in controversy exceeds the minimum threshold. When a state is a party to a lawsuit, or a real party in interest, diversity of citizenship does not exist, however. Federal statute vests federal courts with jurisdiction when a suit is between citizens of different states, but not when a state is one of the parties.

The Court of Appeals found that the State of Louisiana was not a party in this case, and therefore diversity jurisdiction existed. Grace Ranch argued that the state is a party to the lawsuit because Louisiana Statutes Annotated § 30:16 is a vehicle for landowners to enforce state conservation law where the state declines to act, with any injunction obtained entered *only in the name of the Louisiana Office of Conservation*. The Court of Appeals found that the state is not a proper party however, because it has not authorized landowners to sue in its name. Though some Louisiana laws expressly authorize non-state entities to sue to protect the state's interests in specific situations, or outline litigation authority that encompasses suit on the state's behalf, the Fifth Circuit found that § 30:16 does neither. The court explained that a private entity suing under § 30:16 does so on its own behalf. The language of the statute does not support that the plaintiffs are "vindicating the State's interest" through their suits, or that a plaintiff has been deputized to act on the part of the state.

The court also found that Louisiana is not a real party in interest. Under precedent, a state has a real interest in litigation if the relief sought will inure to it alone, so that a judgment for a private plaintiff will effectively operate in the state's favor. A state is just a nominal party if its only stake in a suit is a general government interest in securing compliance with the law. Based on these principles, the court held that Louisiana's interest in environmental regulation does not make the state a real party in interest to Grace Ranch's lawsuit. Otherwise, the state would be a party in interest in all litigation, because the state always has an interest in enforcing its laws. Here, Grace Ranch has a pecuniary interest in the outcome of the litigation, and the state does not. In addition, Louisiana has no real interest in the litigation because the U.S. District Court could fairly enter a final judgment without the state's involvement in the case.

Appellate Jurisdiction over Abstention Ruling

The Fifth Circuit Court of Appeals found that it has jurisdiction to review the abstention ruling from the District Court. While the Fifth Circuit hasn't addressed its jurisdiction to hear an abstention-based remand order since revisions to the statute governing this issue, § 1447(d) of Title 28 of the U.S. Code, the court agreed with the consensus among other Circuit Courts of Appeal that appellate courts can review

abstention-based remands. The revised statutory language limits review of remands based on a "defect other than lack of subject matter jurisdiction." Other Circuits have uniformly rejected the view that "defect" includes all non-jurisdictional remands. The Fifth Circuit explained that abstention involves a discretionary assessment of how hearing a case would impact the delicate state/federal balance, not a defect or deficiency. Accordingly, the court found that it had jurisdiction to hear BP's appeal of the remand order.

The doctrine of abstention under *Burford v. Sun Oil Co.* allows federal courts to avoid entanglement with state efforts to implement important policy programs. As the Court of Appeals noted, it will only abstain in the rare instances when hearing a case within its equity jurisdiction would be prejudicial to the public interest. *Burford* charges courts to carefully balance state and federal interests in exercising its authority to abstain, with abstention disfavored "as an abdication of federal jurisdiction." The five factors outlined in *Burford* for a court to analyze in considering abstention are: 1) whether the cause of action arises under federal or state law, 2) whether the case requires inquiry into unsettled issues of state law or into local facts, 3) the importance of the state interest involved, 4) the state's need for a coherent policy in that area, and 5) the presence of a special state forum for judicial review.

The Court of Appeals found here that the first and second factors tended to favor abstention, though were not dispositive. The cause of action involved a state law claim, though "federal courts hear state law claims all the time."

The case also involved an unsettled question of Louisiana law, namely whether landowners can sue under § 30:16 for past violations of conservation law, but this on its own did not justify a federal court's refusal to hear a case.

The Court of Appeals found that the third factor favored abstention as well, because the state has a strong interest in remediating contaminated lands, though under precedent, even powerful state interests will not always justify abstention.

But with regard to the fourth factor, Grace Ranch did not demonstrate to the Fifth Circuit that federal resolution of the lawsuit would disrupt Louisiana's efforts to establish a coherent policy for the remediation of contaminated lands. The Court of Appeals noted that it may have to reach the unsettled question of whether relief is available for past violations of State Order 29-B, but it did not find that federal jurisdiction over the case would risk interfering with the Officer of Conservation's enforcement of Louisiana's conservation laws in the future.

Finally, the Court of Appeals also found that the fifth factor weighed against abstention, given that Louisiana provides no special forum for judicial review of these conservation lawsuits.

Weighing all of the factors together, the court determined that there was not enough for it to refrain from its general duty to exercise the jurisdiction given by Congress to federal courts. Accordingly, it found that abstention was *not* warranted in this case, and reversed the remand order.

Conclusion and Implications

With this decision, the Fifth Circuit has limited landowners' ability to have § 30:16 claims heard in state court if the defendant oil and gas company is domiciled outside of Louisiana and would prefer to have the case heard in federal court. With this remand, Grace Ranch will have its substantive claims seeking cleanup of this lands under Louisiana's conservation laws heard by the U.S. District Court, rather than in state court. Whether a state court would have been more receptive to Grace Ranch's claims is speculative, but this ruling by the Fifth Circuit Court of Appeals is a win for BP in its efforts to keep the case in federal court. With this decision, diverse oil and gas companies defending against § 30:16 claims from landowners will have confidence that they can remove the case to be heard in federal court. The court's opinion is available online at: https://www.ca5.uscourts.gov/opinions/pub/20/20-30224-CV1.pdf
(Allison Smith)

DISTRICT COURT RULES EPA MUST DETERMINE WHETHER A CLEAN WATER ACT DISCHARGE 'MAY AFFECT' WATER QUALITY IN ANOTHER STATE

Fond Du Lac Band of Lake Superior Chippewa v. Wheeler, ___F.Supp.3d___, Case No. 19-CV-2489 (D. Minn. Feb. 16, 2021).

The U.S. District Court for the District of Minnesota recently granted in part and denied in part a motion to dismiss the Fond Du Lac Band of Lake Superior Chippewa's (Tribe) federal Clean Water Act (CWA) claims against defendants the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps). The court's holding determined whether the EPA may decline to object to a National Pollutant Discharge Elimination System (NPDES) permit and whether the EPA may decline to determine whether a discharge "may effect" the waters of another state under the CWA Section 404 permit process.

Factual and Procedural Background

The Fond Du Lac Band of Lake Superior Chippewa is a federally recognized Indian Tribe and is considered a "State" for CWA purposes. The Tribe's reservation waters are meeting all water quality standards except with respect to mercury. The primary source of mercury is alleged to come from existing mines in the vicinity of a proposed mining project at issue in this case. The proposed mining project would be upstream from the Tribe's reservation. The Tribe's complaint alleges the project would release significant amounts of mercury downstream.

The proposed mining project required a CWA § 404 "dredge and fill" permit and a § 402 NPDES permit. Minnesota administers the NPDES program, and EPA retains the right to prevent issuance of an NPDES permit by objecting in writing. EPA initially submitted letters indicating it would object to the proposed project, but EPA did not end up objecting to the state's permit issuance in the end.

The Corps issues § 404 permits. As a prerequisite to obtaining a permit, the applicant must obtain a CWA § 401 certification from the state that discharges will comply with applicable provisions of the CWA. A state issuing a § 401 certification must notify the EPA, and if EPA determines the proposed discharge "may affect" the water quality of another state (a "may affect" determination), the EPA must notify the affected state. The Tribe is a "State" for purposes of the CWA. Here, the EPA did not make a "may affect" determination and did not provide notice of any "may affect" determination to the Tribe. The § 404 permit was issued for the proposed project.

The Tribe brought action against EPA and the Corps challenging EPA's decision not to object to the state's issuance of an NPDES permit, EPA's decision not to provide notice to the Tribe, and the Corps' ultimate issuance of the § 404 permit. EPA and the Corps moved to dismiss the first four counts of the Tribe's complaint for lack of jurisdiction and for failure to state a claim.

The District Court's Decision

The NPDES Permit

The court first considered defendants' claim that the court lacked jurisdiction to consider EPA's failure to object to the NPDES permit. The CWA explicitly grants EPA the authority to waive its right to object to a proposed NPDES permit, therefore the main issue was whether EPA's waiver decision was subject to judicial review under the Administrative Procedure Act (APA), or whether it was "committed to agency discretion by law," and unreviewable. The Tribe did not dispute that the EPA's ultimate decision to waive its right to object was unreviewable, but instead took the position that a "limited review" of the EPA's decision-making process was permissible under a Fifth Circuit Court of Appeals case and an Eighth Circuit case.

The District Court ruled against the Tribe, determining that a "limited review" of the kind the Tribe was asking for would really not be different from a review of the EPA's ultimate decision, which is unreviewable. The court, therefore, granted defendants' motion to dismiss this cause of action.

The Section 404 Permit and Failure to Notify

In its second and third causes of action, the Tribe challenged EPA's failure to notify the Tribe of a "may affect" determination as part of the § 404 permitting process. The two relevant issues were: 1) whether the EPA could decline to make a "may affect" determination, and 2) whether EPA's "may affect" determination was judicially reviewable.

On the issue of whether the EPA could decline to make a "may affect" determination, the EPA argued the determination was discretionary and beyond judicial review under the APA. The court rejected EPA's and concluded the "may affect" determination was *not* a discretionary matter. The court reasoned the "may affect" determination was not discretionary because the language in context was unlike other discretionary matters under case law precedent. In other statutes that courts have held to grant discretionary authority, the language has granted open-ended, ongoing authority to the agency to take various types of actions. Here, the court observed that the statutory language for the "may affect" determination referred to a specific decision that must be made within 30 days. In other words, the statute contemplated that EPA would make a decision, one way or the other.

The court then addressed whether the "may affect" determination was reviewable under the APA. The court held that the determination was reviewable. The court reasoned that the APA embodies a general presumption of judicial review, and the exceptions to the general presumption are narrow. The exception that makes agency actions unreviewable when "committed to agency discretion by law" depends on whether the statute applies a "meaningful standard against which to judge the agency's exercise of discretion." Here, the court found that the standard to judge EPA's action regarding a "may affect" determination is whether the discharge may violate the water quality standards of another state.

Conclusion and Implications

This case determines that the EPA must make a "may affect" determination under the CWA Section 404 permitting process, and decides that EPA's failure to object to a state-issued NPDES permit is beyond judicial review because it is committed to agency discretion. The Tribe's remaining claims will continue to move forward against EPA and the Corps. (William Shepherd, Rebecca Andrews)

DISTRICT COURT ALLOWS CLEAN WATER ACT CITIZENS SUIT TO PROCEED DESPITE PREVIOUS SETTLEMENT WITH STATE AGENCY OVER THE SAME VIOLATIONS

Lower Susquehanna Riverkeeper and the Lower Susquehanna Riverkeeper Association v. Keystone Protein Company, ___F.Supp.3d___, Case No. 1:19-cv-01307 (M.D. Pa. Feb. 18, 2021).

The U.S. District Court for the Middle District of Pennsylvania denied a factory owner's motion for summary judgment, holding that the Pennsylvania Clean Streams Law (PCSL) and the federal Clean Water Act (CWA) are not "roughly comparable" statutes. As such, the plaintiffs' citizen's suit was allowed to proceed with its claims under the CWA, despite the fact that the factory had settled litigation with the Pennsylvania Department of Environmental Protection (PADEP) for the same violations under the PCSL.

Factual and Procedural Background

In March 2012, the PADEP issued Keystone Protein Company (Keystone) a National Pollutant Discharge Elimination System (NPDES) permit, authorizing the discharge of total nitrogen from the factory's wastewater treatment plant with specific daily and monthly maximum concentration limits. Because Keystone's wastewater treatment plant was not designed to meet these limits, Keystone violated the permit on a routine basis.

Within the same year, Keystone entered into a Consent Order and Agreement with PADEP to upgrade its wastewater treatment plant in order to comply with the set total nitrogen limits by October 2016. This order also imposed penalties for discharges that exceeded the permit nitrogen limits. By 2017,

Keystone entered into a second Consent Order and Agreement with PADEP, which superseded and replaced the previous Order. The second Consent Order allowed for a later date of June 2021 to complete the new wastewater treatment facility with the caveat that Keystone was subject to stipulated penalties if it failed to comply with effluent limitation guidelines. The public and the plaintiffs, however, did not receive notice, or have an opportunity to comment, prior to the signing of these consent orders.

Plaintiffs, Lower Susquehanna Riverkeeper and the Lower Susquehanna Riverkeeper Association, brought a citizen's suit under CWA against Keystone. Plaintiffs alleged that Keystone violated the CWA along with the conditions and limitations established by a related permit system. Keystone moved for summary judgment, arguing that the plaintiff's lawsuit is precluded by PADEP's own enforcement action, as seen in the two consent orders. Plaintiffs filed cross motions for summary judgment on the issue of standing, diligent prosecution, the number of days of violation, and the maximum civil penalty.

The District Court's Decision

Standing

The court first addressed whether the plaintiffs had standing in the matter. Under the Clean Water Act, any person who has an interest and adversely affected by the actions in question may bring a citizen suit under the CWA. After the court found that the plaintiffs demonstrated that their personal use of the environment was affected by the discharges, the discharge was in fact caused by Keystone, and the court could redress the issue, the court held the plaintiffs had standing. Additionally, the court found the plaintiffs met all three requirements for associational standing, effectively establishing their jurisdiction over the case.

Issue Preclusion—Diligent Prosecution

Next, the court turned to the issue of preclusion, addressing whether the PCSL and the CWA were comparable since the CWA prohibits citizen's suits when a state has already "commenced and is diligently prosecuting an action under a [comparable] State law." The court identified a circuit split on what finding is needed to determine whether the CWA and state law are comparable and noted that the Third Circuit Court of Appeals had not articulated which standard the court used. On one hand, courts apply the "overall comparability" which looks at the following key factors: 1) whether the state law contains comparable penalty provisions which the state is authorized to enforce, 2) whether the state law has the same overall enforcement goals as the federal CWA, 3) whether the state law provides interested citizens a meaningful opportunity to participate at significant states of the decision-making process, and 4) whether the state law adequately safeguards citizens' legitimate substantive interests. On the other hand, courts apply the "rough comparability" standard, which focuses on the penalty assessment, public participation, and judicial review.

The District Court opted to use the "rough comparability" standard because of its easier and more logical application along with a reduction in uncertainty for litigants, the legislature, and administrative agencies. The court then concluded that the CWA and the PCSL were *not* comparable statutes. Specifically, the court reasoned that the Clean Streams Law under the PCSL, unlike the CWA, did not provide the public with adequate notice and the opportunity to participate in PADEP's initial assessment of a civil penalty, which is expressed through the two consent orders in question. In doing so, the court denied Keystone's motion for summary judgment on the jurisdictional issue of preclusion.

Clean Water Act Violations

After resolving the threshold issues of standing and preclusion, the court turned to the issues of: 1) the number of days which Keystone faces liability for violating its NPDES permit and consequently violating the CWA; and 2) the maximum civil penalty that Keystone will be obligated to pay for the violations. As to the first issue, the court noted that plaintiffs alleged Keystone violated its monthly average concentration limit for total nitrogen for 73 months and the daily maximum concentration limit for total nitrogen on 288 days. Keystone did not dispute the total number of days in which it violated the daily maximum limit. The court granted plaintiff's motion for partial summary judgment concerning Keystone's liability for daily maximum violations. The court, however, deferred determination of the extent of Keystone's violations of the monthly average limit, noting that

district courts have discretion to determine how many violation days should be assessed for penalty purposes for violations of a monthly average limit, based on whether violations are already sufficiently sanctioned as violations of a daily maximum limit. As a result, the court will revisit Keystone's violations of the monthly average limit at the penalty phase of litigation.

On the issue of maximum civil penalty, the court denied summary judgment, opting to defer judgment until the penalty phase of this litigation for efficiency and fairness purposes.

Conclusion and Implications

This case nicely illustrates a current Circuit Court of Appeals' split on the issue of diligent prosecution bar under a comparable state law and, is one of the first cases to identify the "rough comparability" standard as the applicable standard within the Third Circuit Court of Appeals. This case might provide the right set of facts for the U.S. Supreme Court to review.

(Megan Kilmer, Rebecca Andrews)

MINNESOTA ENTERS INTO GROUNDWATER QUALITY VIA NPDES PERMITTING REGULATION

In re Reissuance of an NPDES/SDS Permit to United States Steel Corp., 954 N.W.2d 572 (Minn. Feb. 10, 2021).

The State of Minnesota's groundwater has been adjudicated to be a "Class 1 water" to which secondary drinking water standards apply as a matter of law by the Minnesota Supreme Court in *In re Reissuance of an NPDES/SDS Permit to United States Steel Corp*. The Court also held that a person whose holding basin discharges to the groundwater is held subject to federal Clean Water Act, National Pollutant Discharge Elimination System (NPDES) permitting. The Supreme Court limited its opinion to the issue of the meaning of state groundwater regulations and the authority of the Minnesota Pollution Control Agency to interpret its own rules. However, coming as it does in the aftermath of the Supreme Court's *Maui* decision about the application of NPDES permit requirements to discharges to groundwater, the decision has implications and importance far beyond the taconite tailings basin that generated the controversy.

The *Maui* Decision

In *County of Maui v. Hawaii Wildlife Foundation et al*, 140 S. Ct. 1462, 206 L. Ed. 2d 640 (Apr. 23, 2020) the U. S. Supreme Court issued a landmark holding about the receiving waters that are subject to the NPDES permit requirement of the Clean Water act. The Court held as follows:

> We hold that the statute requires a permit when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge. We think this phrase best captures, in broad terms, those circumstances in which Congress intended to require a federal permit. That is, an addition falls within the statutory requirement that it be "from any point source" when a point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means.

Background

In the Minnesota case reviewed here the facts are that U.S. Steel had for many years separated high grade iron ore from taconite it mined in northern Minnesota. Some 70 percent of the mined material was regularly discharged to a "tailings" basin after the purest ore was extracted. Along with the taconite tailings there were discharges of chemicals. The basin is unlined. Contaminants from the basin would leach to groundwater and also through the sides of the basin to the surrounding lake waters.

Originally, after the federal Clean Water Act went into effect, the company had obtained and still possessed an NPDES permit for its discharges to the basin. It had sought a timely permit renewal in the 1990s, but that renewal did not occur until much

more recently. In the interim, the state warned the company of concern over the sulfates seeping to groundwater, and the company has instituted control measures effecting some capture of sulfates. However, sulfate levels have continued to increase in the groundwater.

After notice and hearing, in 2018 the company was issued a new NPDES permit that contains a limitation on sulfate discharges to both groundwater and surrounding waters. The permit requires U.S. Steel to meet a sulfate limit of 250 mg/L in groundwater at the facility's boundary by 2025. It also requires U.S. Steel to reduce sulfate levels in the tailings basin itself to 357 mg/L by 2028. The 250 mg/L sulfate standard applied by the MPCA is set out in secondary drinking water standards promulgated by the U.S. Environmental Protection Agency (EPA), *see*: 40 C.F.R. § 143 (2020), which are incorporated by reference into Minnesota law, *see*: Minn. R. 7050.0220-.0221 (2019).

The Minnesota Supreme Court's Decision

In reaching its decision, the Minnesota Supreme Court noted that state law in Minnesota adopts the Clean Water Act programs for NPDES discharges, as well as a state system (SDS). It also classifies "waters of the State" according to their importance for human consumption. In describing water classifications, however, it does not expressly place groundwater in any classification. This latter fact had led to the Court of Appeals siding with the company in previously ruling that the groundwater contaminated by the tailings basin was *not* Class 1 water. However, on its *de novo* review of the state Court of Appeals, the Supreme Court of Minnesota noted that some sections of the related state law clearly do apply to underground waters. As a result, the Supreme Court found Minnesota state law ambiguous on the issue.

Having pronounced the law ambiguous, the Minnesota Supreme Court went on to rule in favor of the state's pollution control agency as having adopted a reasonable interpretation of the law. The Court of Appeals decision was reversed and the power of the Minnesota agency to apply permit requirements and set limits on concentrations in groundwater was upheld by the Court:

> We conclude that groundwater is a Class 1 water under Minnesota law. Accordingly, we hold that the MPCA correctly exercised its authority by applying the Class 1 secondary drinking water standards to the 2018 Permit. We therefore reverse the decision of the court of appeals on this issue and remand the case to the court of appeals for further proceedings.

Conclusion and Implications

It appears that the State of Minnesota has determined that Class 1 groundwater is a "water of the state" that is subject to discharge permission and standards, just as if it were a surface water. It should be noted that the result goes farther than the *Maui* decision's holding by applying the permit standard to groundwater irrespective of whether the given discharge inevitably and "functionally" is as if to navigable waters. Even if the tailings basin itself may be viewed as (and probably is) a discrete conveyance, the fact that an unlined basin may need a permit even where there are no surface waters immediately nearby is apparent and notable. This issue will probably be the subject of further judicial and legislative attention. The Supreme Court's opinion in this matter is available online at: https://mn.gov/law-library-stat/archive/supct/2021/OPA182094-021021.pdf
(Harvey M. Sheldon)

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