

EASTERN WATER LAW™

& POLICY REPORTER

C O N T E N T S

FEATURE ARTICLE

As the Climate Changes, So Will Natural Resource Damage Claims by Steve Goldberg, Esq., Darrin Gambelin, Esq. and Holly Tokar, Esq., Downey Brand, LLP, California 79

WATER NEWS

News from the West 86

PENALTIES AND SANCTIONS

Recent Investigations, Settlements, Penalties and Sanctions 91

LAWSUITS FILED OR PENDING

Environmental Groups in Tennessee File Suit in Federal Court Seeking to Stop Oil Pipeline, Alleging Drinking Water Contamination Concerns 94

RECENT FEDERAL DECISIONS

Second Circuit Determines Clean Water Act, Section 401, Deadline Cannot Be Modified by Agreement 96
New York State Department of Environmental Conservation v. Federal Energy Regulatory Commission, ___F.3d___, Case No. 19-1610 (2nd Cir. Mar. 23, 2021).

District Court Denies Preliminary Injunction against Big Sky Water and Sewer District for Alleged Clean Water Act Violations 97
Cottonwood Environmental Law Center, Montana Rivers, and Gallatin Wildlife Association v. Edwards and Big Sky Water and Sewer District, ___F.Supp.3d___, Case No. 2:20-cv-00028-BU-BMM (D. Mt. Mar. 23, 2021).

Continued on next page

EXECUTIVE EDITOR

Robert M. Schuster, Esq.
Argent Communications
Group
Fairfield, CA

EDITORIAL BOARD

Rebecca Andrews, Esq.
Best, Best & Krieger
San Diego, CA

Travis Kaya, Esq.
Venable
Los Angeles, CA

Andre Monette, Esq.
Best Best & Krieger, LLP
Washington, D.C.

Deborah Quick, Esq.
Morgan Lewis
San Francisco, CA

Harvey M. Sheldon, Esq.
Hinshaw & Culbertson
Chicago, IL



RECENT STATE DECISIONS

New Mexico Supreme Court Quashes Writs of *Certiorari* in San Juan River Adjudication Appeal that Upheld the Navajo Nation Settlement Decrees 99
State of New Mexico ex rel. State Engineer v. United States of America, Case No. S-1-SC-37068 (N.M. Supreme Ct. April 13, 2021).

Publisher’s Note:

Accuracy is a fundamental of journalism which we take seriously. It is the policy of Argent Communications Group to promptly acknowledge errors. Inaccuracies should be called to our attention. As always, we welcome your comments and suggestions. Contact: Robert M. Schuster, Editor and Publisher, 530-852-7222; schuster@argentco.com.

WWW.ARGENTCO.COM

Copyright © 2021 by Argent Communications Group. All rights reserved. No portion of this publication may be reproduced or distributed, in print or through any electronic means, without the written permission of the publisher. The criminal penalties for copyright infringement are up to \$250,000 and up to three years imprisonment, and statutory damages in civil court are up to \$150,000 for each act of willful infringement. The No Electronic Theft (NET) Act, § 17 - 18 U.S.C., defines infringement by "reproduction or distribution" to include by tangible (i.e., print) as well as electronic means (i.e., PDF pass-alongs or password sharing). Further, not only sending, but also receiving, passed-along copyrighted electronic content (i.e., PDFs or passwords to allow access to copyrighted material) constitutes infringement under the Act (17 U.S.C. 101 et seq.). We share 10% of the net proceeds of settlements or jury awards with individuals who provide evidence of illegal infringement through photocopying or electronic distribution. To report violations confidentially, contact 530-852-7222. For photocopying or electronic redistribution authorization, contact us at the address below.

The material herein is provided for informational purposes. The contents are not intended and cannot be considered as legal advice. Before taking any action based upon this information, consult with legal counsel. Information has been obtained by Argent Communications Group from sources believed to be reliable. However, because of the possibility of human or mechanical error by our sources, or others, Argent Communications Group does not guarantee the accuracy, adequacy, or completeness of any information and is not responsible for any errors or omissions or for the results obtained from the use of such information.

Subscription Rate: 1 year (11 issues) \$845.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 1135, Batavia, IL 60510-1135; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc., a California Corporation: President/CEO, Gala Argent; Vice-President and Secretary, Robert M. Schuster. *Eastern Water Law & Policy Reporter* is a trademark of Argent Communications Group.

FEATURE ARTICLE

AS THE CLIMATE CHANGES,
SO WILL NATURAL RESOURCE DAMAGE CLAIMS

By Steve Goldberg, Darrin Gambelin, and Holly Tokar

The effects of climate change present new challenges to the government and private sector. This will mean new policies and regulations, particularly at the federal level. Rejoining the Paris Climate Accord, renewed emphasis on evaluating greenhouse gas (GHG) emission impacts and potential changes to the Securities and Exchange Commission Environmental, Social and Governance reporting for public companies are just a few examples. There are also well-established existing regulatory frameworks and related policies that are, and will increasingly need to adapt to the effects of climate change. This article examines the impacts of climate change on Natural Resource Damages (NRD)—an established regulatory program at the intersection of climate change science, economics, planning and their application to the legal remedies provided by the Oil Pollution Act (OPA) and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)—to recover damages for injuries to natural resources from oil spills and releases of hazardous substances.

CERCLA NRD claims have increased in recent years and creative remediation projects are looking at restoration of injured resources as a remedial component at federal Superfund sites. Examples of CERCLA sites with NRD include sediment contamination in a river or bay or discharges from inactive mining sites. Evaluating the effects of climate change at CERCLA sites is complicated by multiple factors. Injuries to resources from hazardous substance releases at these sites typically occur over extended periods of time with changes in the climate impacting baseline conditions—increasing the difficulty of differentiating the injury to resources that were caused by climate change from the effects of exposure and injury caused

by the release of hazardous substances. Contrast this with the effects of an oil spill, covered by OPA, which are typically sudden events of shorter duration with impacts to resources from climate change, as well as the spill, more easily measurable. Accordingly, while this article focuses on the effects of climate change as applied to NRD for oil spills, similar NRD concepts apply to NRD claims under CERCLA.

First, we provide an overview of climate change impacts and the key legal and regulatory concepts of NRD that invoke climate change considerations. Next we provide examples from recent NRD settlements that considered the effects of climate change in the selection and planning for restoration projects—a key component of NRD discussed further below. Last, we consider how climate change factors will be a more substantial factor in future NRD settlements and the selection, planning and implementation of restoration projects.

Climate Change Background

There is scientific consensus that “human interference with the climate system is occurring, and climate change poses risks for human and natural systems.” Field et al., *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects*, Intergovernmental Panel on Climate Change, 3 (2014) https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-PartA_FINAL.pdf. Climate change includes changes to the climate system that are evolving over a longer period of time (e.g., sea level rise or gradual increases in ocean temperature), as well as an increase in the frequency of extreme weather events. These climate change effects complicate NRD claims arising from oil spills because they

The opinions expressed in attributed articles in *Eastern Water Law & Policy Reporter* belong solely to the contributors and do not necessarily represent the opinions of Argent Communications Group or the editors of the *Eastern Water Law & Policy Reporter*.

may impact the same resources. For example, coastal wetlands ecosystems and marine life may be impacted by an oil spill, but they may also be impacted by climate change. Indeed scientists predict with very high confidence that, throughout the 21st century and beyond, coastal systems and low-lying areas will increasingly experience adverse impacts such as submergence, coastal flooding, and coastal erosion due to sea level rise. Further, sea level rise, ocean warming, and ocean acidification impact marine ecosystems. For example, warmer ocean temperatures can raise the metabolism of species exposed to the higher temperatures, and in some cases can be fatal. It is these climate changes and impacts—including the increased frequency and intensity of extreme weather events—that may harm the same wetland ecosystems and marine life injured by an oil spill. This complicates both the injury assessment and restoration planning components of NRD claims.

Key Legal and Regulatory Concepts of NRD

The goal of NRD is to make the public whole for injuries to natural resources and services resulting from an incident involving a discharge of oil (OPA 1002(a)) or from injuries caused by the releases of hazardous substances. (CERCLA 107(a)(4)(c)). The NRD process involves two important steps: 1) determination of the nature, degree, and extent of any injury to natural resources and services, the NRD Assessment or NRDA; and 2) development of a suite of cost-effective projects to restore any lost resources or services to baseline, *i.e.* pre-incident conditions, and to compensate for interim losses to the damaged resources. 15 C.F.R. § 990.50-990.53; *see also*, Injury Assessment, Guidance Document for Natural Resource Damage Assessment Under the Oil Pollution Act of 1990, prepared for the Damage Assessment and Restoration Program, National Oceanic and Atmospheric Administration (hereinafter *Injury Assessment*), p. 1-4, available at: <https://darrp.noaa.gov/sites/default/files/Injury%20assessment.pdf>; Restoration Planning, Guidance Document for Natural Resource Damage Assessment Under the Oil Pollution Act of 1990, prepared for the Damage Assessment and Restoration Program, National Oceanic and Atmospheric Administration (hereinafter *Restoration Planning*), p. 1-5, available at: <https://darrp.noaa.gov/sites/default/files/Restoration%20Planning.pdf>

Various environmental statutes designate federal

and state agency trustees to bring NRD claims on behalf of the public. Federal agency trustees typically include the National Oceanic and Atmospheric Administration (NOAA) and the Department of the Interior U.S. Fish & Wildlife Service. In California, the lead agency is generally the California Department of Fish & Wildlife, however other agencies also serve in trustee roles depending on the jurisdiction for the state resources affected by the incident. Examples include the California Department of Parks and Recreation and the State Lands Commission.

Causal Link between the Incident Injuries to Natural Resources

The effects of climate change on the affected resources should be a critical factor in assessing whether, and to what extent, a resource has been injured. A successful NRD claim requires a causal link between the injury to a natural resource and the release of oil or hazardous substances. *See, e.g., Gen. Elec. Co. v. U.S. Dep't of Commerce*, 128 F.3d 767, 777 (D.C. Cir. 1997). What is considered injury to a natural resource? Injury is “an observable or measurable adverse change in a natural resource or impairment of a natural resource service.” 15 C.F.R. § 990.30. Natural resource damages assessment then involves “collecting and analyzing information to evaluate the nature and extent of injuries *resulting from* an incident.” *Id.* (emphasis added). Implicit in that analysis is that the adverse change in a natural resource or impairment of services is not attributable to another cause—for example, a climate change related event. 15 C.F.R. § 990.51. Injuries attributable to natural causes are not compensable under NRD.

Determination of the causal link between the release and injury to resources may be complicated by climate change and related extreme weather events. Climate related changes, including changes in temperature, precipitation, and sea level rise are causing rapid changes to habitat. Often there are data gaps on the abundance of a species or the health of a habitat resulting from these changes. Thus when an incident occurs, it is difficult to determine whether degradation to habitat or species results from the incident or climate change.

Injuries Are Measured against the Baseline

Even where a causal link is found between resource injury and the incident, damages are only found and

measured against the injury to resources above “baseline.” Baseline is the condition of natural resources and services that would have existed if the incident had not occurred. 15 C.F.R. §§ 990.30, 990.52. NRDA allows compensation for total injury in relation to baseline. This is a function of the magnitude of the injury and the time it takes for the resource to recover to baseline.

Climate change events also make it more difficult to determine the extent and duration of the injury. First, the magnitude of the injury may be difficult to determine when the baseline may have recently shifted due to climate change. For example, determination of the baseline for marine mammals injured in the Refugio Beach Oil spill was effected by an anomalous stranding year for California sea lion pups, tied to reduced prey availability and climate events.

Second, if the baseline is not well known or is changing, it is difficult to determine when the resource has recovered to baseline. In addition, if the resource was in a vulnerable condition such that the incident was the tipping point, the resource may not recover or recovery to baseline may be extended for a longer period.

Restoration Planning and Climate Change

Following the determination of injury, the Trustees must develop a suite of restoration projects to restore the injured resources and services. 15 C.F.R. § 990.53(a). The Trustees develop a range of feasible alternative projects and evaluate each for several key factors. 15 C.F.R. § 990.54. These projects may be primary, which return the resource to its pre-incident condition, and compensatory, which compensate for interim losses pending recovery to baseline. 15 C.F.R. § 990.53

In comparing alternative restoration projects, the trustees evaluate several key factors in accordance with NRD regulations. Factors relevant to climate change, in particular, include (1) the cost to carry out the projects, (2) the extent to which each alternative is expected to return the injured natural resources and services to baseline and compensate for interim loss, (3) the likelihood of success of each alternative, and (4) the nexus between the project and the injured resource, including location. *See*, 15 C.F.R. § 990.54.

Climate change can affect the selection and potential success of restoration projects. For example, following an oil spill, sea level rise and coastal erosion

may make shoreline habitat restoration projects a less preferred alternative. Considering the key factors, such as likelihood of success, trustees may determine that there are greater long-term benefits in engaging in more inland projects.

NEPA and CEQA

Federal and state law and guidance directing trustee actions in implementing restoration plans for NRD also require consideration of climate. The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.* and Council on Environmental Quality (CEQ) regulations implementing NEPA, 40 C.F.R. Chapter V, apply to restoration actions by federal trustees, except where a categorical exclusion or other exception to NEPA applies. 15 C.F.R. § 990.23 (a). As trustees develop restoration plans, they must also prepare an Environmental Assessment or Environmental Impact Statement. 15 C.F.R. § 990.23 (c). Federal courts have held that NEPA requires federal actors to disclose and consider climate impacts in their environmental reviews. *See, e.g., Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172 (9th Cir. 2008). In 2016, the CEQ issued guidance to help federal agencies consider greenhouse gas emissions and climate change in such reviews. 81 Fed. Reg. 51866 (Aug. 5, 2016). Although this guidance was withdrawn in 2017, on January 20, 2021, President Biden issued Executive Order 13990, “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,” which in part directed CEQ to review, revise, and update its 2016 Greenhouse Gas Guidance. 86 Fed. Reg. 7037 (Jan. 25, 2021). It can be expected that in the near future all restoration alternatives will be evaluated for climate impacts through the environmental review process.

Similarly, California agencies evaluating restoration projects must consider both the impact of the project on climate change and the impacts of climate change on the project under the California Environmental Quality Act (CEQA). 14 Ca. Code Regs. § 15064.4. The analysis must reasonably reflect evolving scientific knowledge of climate change.

The Trustees publish the results of their assessment of the injuries to natural resources as well as the selection of restoration projects for each incident, in a Damage Assessment and Restoration Plan (DARP) which typically includes an assessment of the selected

restoration projects under NEPA and, for California incidents, under CEQA.

Climate Change and NRD Claims

The regulations governing the NRD process do not mention climate change. When OPA was passed, the focus was on preventing and responding to oil spills. At the time, climate change was perhaps not an obvious consideration. See, *Summary of the Oil Pollution Act*, United States Environmental Protection Agency (last updated July 28, 2020) <https://www.epa.gov/laws-regulations/summary-oil-pollution-act>. But, as discussed above, the effects of climate change on NRD can affect both the assessment of injury to resources as well as restoration projects.

There is little evidence to date that climate change has played a significant role in injury assessment. Most DARP's will include a discussion of baseline as required by OPA and the NRD regulations, but little to no discussion of the effects of climate change on the injured resources. Although there is scant evidence in published DARPs of the effects of climate change, it is possible that this has been, (and if not, will be), a topic discussed by technical experts for the Trustees and the responsible parties in evaluating the extent of injury.

In contrast to the lack of evidence of climate change effects on the injury assessment component of NRD, it appears climate change is being considered more frequently when evaluating restoration projects. We expect this will only become more common as climate change studies, data and policies become more prevalent.

Recent Restoration Plans Considering Climate Change

Several NRD claims and related DARPs from the last few years illustrate the increasing consideration of the effects of climate change on restoration planning and implementation.

Below we discuss three oil spill incidents, including two in California, and one chemical release site in Michigan that involved NRD claims and illustrate how climate changes are being considered in the assessment of resource injuries (very few with minimal consideration) and in the selection and implementation of restoration projects (still few but increasing).

Deepwater Horizon

The Deepwater Horizon oil spill resulted in a NRD settlement of \$8.8 billion, the largest settlement of an NRD claim under OPA or CERCLA. Deepwater Horizon also has influenced other NRD claims in the past decade. Restoration projects have and will continue to be implemented over many years. The impact of climate change on restoration projects remains to be considered and studied, but still merits discussion here. The scientific studies and the magnitude of the settlement and restoration project efforts are precedents being considered by trustees and responsible parties at all other NRD related incidents. As the restoration projects are designed and implemented, the effects of climate change and extreme weather events on such efforts must be watched.

On April 20, 2010, the *Deepwater Horizon* mobile drilling unit exploded, caught fire, and sank in the Gulf of Mexico. This incident resulted in a massive oil spill, as 3.19 million barrels of oil were released into the Gulf. During the injury assessment and restoration planning stages, the Trustees determined that injuries caused by the spill were so widespread that the entire Northern Gulf of Mexico ecosystem was injured.

The Trustees identified five overarching goals to address the suite of injuries that occurred at both local and regional scales: restore and conserve habitat, restore water quality, replenish and protect living coastal and marine resources, provide and enhance recreational opportunities, provide for monitoring adaptive management, and administrative oversight to support restoration implementation. Several public comments raised the issue of climate change. For example, one comment urged implementation of both habitat restoration plans with a shorter lifespan and long-term adaptation plans. In their response, the Trustees acknowledged "the systemic threats of climate change" and said they would consider key ecological factors such as connectivity, size, and distance between projects, as well as factors such as resiliency and sustainability in project selection, design, and implementation. The Trustees further explained that restoration planning, project development, and an "appropriate level of tiered NEPA analysis" would "consider climate change and resiliency planning." *Deepwater Horizon Oil Spill: Programmatic Damage Assessment and Restoration Plan and Final Programmatic Environmental Impact Statement*, <https://www.>

gulfspillrestoration.noaa.gov/restoration-planning/gulf-plan.

Kalamazoo River (Michigan)

From the late 1950s to the 1970s, releases of polychlorinated biphenyls from Kalamazoo-area paper mills caused the contamination of sediments, flood-plain soils, water, and living organisms in and near Portage Creek and the Kalamazoo River in Michigan. During the restoration planning process, the Trustees considered which projects would provide maximal benefits overtime. The Trustees gave preference to projects that incorporated resiliency to the impacts of climate change, and therefore provided longer-term benefits.

In the Environmental Impact Statement (EIS) for Restoration Resulting from the Kalamazoo River NRDA, there was a particular focus on climate change. The EIS examined how climate change might interact with proposed restoration projects. It notes increases in temperatures, shifts in timing and intensity of precipitation events, increases in the duration of the growing season, and decreases in the amount and duration of snow cover and lake ice formation. The analysis further discusses greenhouse gas emissions, and the uncertainty in underlying relationships and feedback loops. The Trustees, while identifying the various aspects of climate change, also recognized the high degree of uncertainty regarding the effects of climate change on restoration. The Trustees considered climate change adaptation principles such as prioritizing habitat connectivity, reducing existing stressors, protecting key ecosystem features, and maintaining diversity to lessen the compounding effects of climate change. See *Final Restoration Plan and Programmatic Environmental Impact Statement for Restoration Resulting from the Kalamazoo River Natural Resource Damage Assessment*, August 2016, <https://www.fws.gov/midwest/es/ec/nrda/KalamazooRiver/pdf/RestorationPlanPEISKalRiverAugust2016Final.pdf>.

Castro Cove (Richmond, California)

From 1902 to 1987, Chevron USA Inc. (Chevron) owned and operated a petroleum refinery in Richmond, California that discharged hazardous substances in Castro Cove, a portion of San Pablo Bay in northern California. A Final DARP/EA was released in 2010. After estimating the total resource injury

caused by contamination in Castro Cove, the Trustees analyzed a suite of alternative restoration projects. In making their project selections, the Trustees considered the future effects of global sea level rise on coastal resources in the San Francisco Bay, recognizing that climate change could affect the long-term success of restoration projects.

The Trustees devoted a subsection of the Final DARP/EA to uncertainties behind global sea level rise and how this affected project alternatives. The Trustees acknowledged the 2007 Intergovernmental Panel on Climate Change (IPCC) report that projected estimated global average sea level rise between 0.6 and 2 feet, and the Pacific Institute report projecting a 1.4 meter average sea level rise along the California Coast, by the end of the 21st century. The Trustees considered the effects of sea level rise on coastal flooding, wetland habitats, salinity of estuaries and freshwater aquifers, tidal ranges in rivers and bays, transport of sediment and nutrients, and contamination patterns in coastal areas. Ultimately, the Trustees selected the preferred restoration projects with an eye to these climate uncertainties. *Castro Cove/Chevron Richmond Refinery Damage Assessment and Restoration Plan/Environmental Assessment*, June 2010, <https://repository.library.noaa.gov/view/noaa/3874>.

Refugio (Santa Barbara, California)

In May 2015, an underground oil pipeline running parallel to Highway 101 accidentally released approximately 2,900 barrels of crude near Refugio State Beach in Santa Barbara County, California. About 20 percent of the released oil reached the Pacific Ocean and adjoining shorelines. Eighty percent of the released oil remained in the upland area between the oil pipeline and the ocean, where it evaporated, biodegraded in the soil, or was recovered by responders. Although only a draft DARP/EA has been released, there is some consideration of climate change in both the injury assessment and the selection of restoration projects.

In the 2020 Draft DARP/EA, the Trustees noted that the injury analysis may be complicated by the 2015 El Nino event and the presence of a warm water mass, known as “the blob.” These events took place within the same time frame as the oil spill, and had their own distinct impact on marine life and resource health. The blob, as an atmospheric anomaly, impact-

ed ocean productivity and food availability for marine species, while El Nino conditions were associated with warmer sea surface temperatures.

In the restoration planning section of the draft DARP/EA, the Trustees identified “[m]ajor anthropogenic stressors” that effect the shoreline environment as a factor when considering shoreline restoration projects. These stressors include sediment deficit, coastal armoring, beach nourishment, beach grooming, invasive species, and changing environmental conditions. The Trustees noted that future climate scenarios predict rising sea levels, which results in increased overall coastal erosion, as well as ocean acidification and large storms. The shoreline restoration projects proposed by the Trustees aim to reverse and portion of the negative effects of these stressors, and have long-term beneficial effects. <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=178526&inline>.

The Future of Climate Change in NRD

Consideration of climate change is likely to become more prominent in future NRD analyses and settlements. Determining causation of resource injury—as a result of the release of oil or hazardous chemicals or linked to climate change—will become more difficult in areas impacted by climate change. For example, it may be difficult to determine whether and to what extent coastal habitat is damaged by an oil release versus a recent storm event, such as a hurricane. Determining when resources have recovered also may become more difficult where climate change has impacted habitat. Areas subject to prolonged drought may no longer support habitat requiring frequent precipitation, so this habitat may not recover to pre-incident conditions. Developments in climate change science and development of more comprehensive baseline data should assist with the determination of causation and when a resource has recovered.

More flexibility on the selection of restoration projects also will be necessary for many incidents. Typically, Trustees will select restoration projects closely linked to the type of resources damaged and in close physical proximity to the incident. However, another factor that must be considered in the selection of projects, likelihood of success, may force Trustees to consider other projects. Where climate change has impacted habitat such that a damaged resource or species is no longer viable in the area of incident, Trustees must either consider projects that restore habitat or species other than those damaged by the incident, or projects located outside the area of the incident.

Conclusion and Implications

As studies about climate change become more widespread, the existing regulatory framework for NRD claims will need to adapt. Currently, the regulations governing NRD claims do not mention climate change, but this also may change. Nevertheless, even within the existing regulatory framework, we expect technical experts engaged in the NRDA process will focus more on climate change evaluating the extent of injury to resources. Climate change has already been a factor in the selection and implementation of restoration projects, particularly within the last decade. We can expect climate changes and the effects of extreme weather events will get more attention in future NRD assessments, settlements, and the selection, planning and implementation of restoration projects, particularly with additional study on the effectiveness and resiliency of restoration projects in the fact of climate change and extreme weather events.

**Editor’s Note:* Steve Goldberg and Darrin Gambelin served as counsel for Plains Pipeline, L.P. during the Refugio NRD. The views expressed in this article are those of the authors and do not reflect the views of Plains Pipeline, L.P.

Steve Goldberg is a Partner at the law firm of Downey Brand, LLP, resident in the firm's Sacramento, California office. Steve negotiates and resolves complex disputes with a special focus on groundwater contamination and CERCLA matters. Steve has handled some of the largest contamination cases in California and has worked with technical experts throughout the United States on MTBE, solvents, perchlorate, PCBs, asbestos, and sediment contamination issues.

Darrin Gambelin is a Partner at Downey Brand, LLP, resident in the firm's San Francisco, California office. Darrin works with clients in the agriculture, food processing, manufacturing, pipeline, and energy sectors to navigate complicated state and federal environmental regulatory schemes, including those created by the federal Clean Air Act, Clean Water Act, California Porter-Cologne Water Quality Control Act, Oil Pollution Act, and the Resource Conservation and Recovery Act. Darrin advises clients on compliance with environmental and safety rules affecting all phases of energy pipelines, from permitting and operation to emergency response planning. Darrin is a member of the Editorial Board of the *Environmental, Energy & Climate Change Law and Regulation Reporter*.

Holly Tokar is an Associate at Downey Brand, LLP, resident in the firm's Sacramento office. Holly's practice encompasses a broad range of matters including surface and groundwater rights, flood liability and protection, endangered species issues, and compliance under the California Environmental Quality Act and National Environmental Policy Act.

WATER NEWS

NEWS FROM THE WEST

In this month's News from the West we report the unusual effort by the State of Nevada to determine if its current system of water rights resolution is adequate. Recently, surface water users and groundwater users have gone head-to-head in protecting their respective water rights in a state that is increasingly dry. The Nevada State Engineer currently oversees water rights and issues decisions. These are reviewable in the state's District Courts. Most recently, the Nevada Supreme Court has ordered a commission to study if establishing a system of specialty courts—water law courts—might be a better solution.

We also report on a decision out of the California Court of Appeal in one of the state's longest running water rights adjudications—the *Antelope Valley Groundwater Cases*.

Upon Petition of Chief Justice Hardesty, the Nevada Supreme Court Establishes a Commission to Study Water Rights Cases and Determine if a Water Court is Advisable

On March 9, 2021, the Nevada Supreme Court issued an order that established a commission to study the adjudication of water law cases. The stated purpose for the commission is “to improve education, training, specialization, timeliness, and efficiency of Nevada's District Courts in the judicial review process.”

The Court's order offered few specifics to guide the commission's work other than to provide a list of stakeholders who should be represented, require that the commission's meetings be public, and set an April 2022 deadline for submitting a final report of findings and recommendations. The commission plans to explore how water matters go through agency determination and judicial review, identify shortcomings in the process, and provide suggestions for how to create greater predictability, consistency, and efficiency. [Nevada Supreme Court Administrative Docket No. 0576, Mar. 9, 2021]

Current Nevada Process for Determining Water Matters

In Nevada, the Division of Water Resources (DWR), headed by the State Engineer, is generally the first stop for all water-related matters. By statute, DWR adjudicates pre-statutory rights and renders decisions on post-statutory water rights applications. DWR has a hearings section by which a hearing officer, supported by technical staff, conducts regulatory hearings to hear exceptions to preliminary orders of determination and protests to applications. Generally, only contested matters are set for administrative hearings. DWR employs engineers, hydrologists and hydrogeologists to address key technical issues, including surface-groundwater interactions, evapotranspiration, and modeling.

Judicial review of the State Engineer's decisions occurs first in Nevada's District Courts before general jurisdiction judges:

[A]ny person feeling aggrieved by any order or decision of the State Engineer ... affecting the person's interests, ... may have the same reviewed by a proceeding for that purpose, insofar as may be in the nature of an appeal.... NRS 533.450(1).

The action to seek judicial review must be initiated in the county in which the affected water rights are situated.

For the adjudication of pre-statutory rights, following an administrative hearing on objections to a preliminary order, the State Engineer must file a final order of determination in the District Court for the county in which the pertinent water source is located. The District Court hears exceptions to the final order and may employ experts on technical information. The District Court may also refer matters back to the State Engineer to hear further evidence. Thereafter, the District Court enters a final decree and judgment. District Courts maintain jurisdiction to enforce any water decree they enter.

The State's general jurisdiction judges have varying degrees of knowledge and experience in the area of water law, from none to considerable. They must consider technically complex water law cases that have sizeable administrative records along with all other matters that appear on their docket. The result has been sometimes variable and inconsistent decisions and long delays in case dispositions.

Genesis of the Water Commission

In 2017, the Nevada Legislature passed legislation that imposed a December 31, 2027 deadline by which claimants of pre-statutory rights must file proofs of claims. NRS 533.087. Because of this cut off, the State Engineer anticipates a flood of filings, along with the resulting demand for adjudications to determine the respective rights on various unadjudicated water sources. The predicted increase in complex water cases, along with the growing number of disputes between surface and groundwater users, created a sense of urgency that Nevada should explore the creation of a specialty Water Court.

To that end, the State Engineer submitted a bill draft request in the 2021 legislative session that proposed to amend the Nevada Constitution to give the state's Court of Appeals original jurisdiction over certain cases relating to water. The idea was to make the Court of Appeals a *de facto* specialty court with expertise in the highly technical and somewhat arcane field of water disputes.

Before the Legislature completed its first day of the session, the State Engineer scrapped the request, indicating, instead, that his office was working with the Nevada Supreme Court's Chief Justice James Hardesty to request that the Supreme Court appoint a commission to evaluate whether a specialty court for water-related disputes might be appropriate.

Chief Justice Hardesty then petitioned the Nevada Supreme Court to create such a commission. The petition noted, "Water law is a unique and complex area of the law and judicial review of water cases frequently involves, among other matters, an assessment of lengthy records, geologic and hydrologic concepts, conflicting expert testimony, and years of relevant Nevada history. And just as frequently, water cases take years to adjudicate, which adversely delays water law decisions in our state."

Observing that four of the 16 western states surveyed have implemented some form of specialized

water court, including three states by rules adopted by their supreme court and a fourth that provides for the appointment of water judges and staff by its supreme court, a study of what is being done elsewhere could inform Nevada regarding the potential creation of a water specialty court. The petition suggested that the proposed commission consider the authority of the Chief Justice under § 19 of Article 6 of the Nevada Constitution and NRS 3.040 to designate duly trained District judges to serve on water cases throughout Nevada. It also could identify education and training needs.

After holding a hearing to receive public comment, the court created the commission.

Commission Membership

The court appointed 24 members to the commission. They include a Deputy Administrator from the Division of Water Resources (DWR), a retired state engineer and retired chief hydrologist from the agency, representatives of municipal water purveyors, farmers and ranchers, mining interests, environmental/NGO's, tribes, irrigation districts, and rural counties. Four of the commission members are District Court judges. Chief Justice Hardesty is serving as Commission Chair and is joined by Associate Chief Justice Ron Parraguirre as a commission member.

The Public Process and First Steps

The commission held its first meeting on April 16, 2021, at which Chief Justice Hardesty emphasized that the commission is prioritizing public participation in the process. Although the commission is not subject to the Nevada Open Meeting Law, it is emulating that law's requirements by making its meetings public, inviting public comment, and posting on the court's website its agendas, meeting materials and meeting recordings.

The initial meeting included introductions, a presentation by the Acting State Engineer that summarized the agency's primary water resource management challenges, a discussion of water specialty courts in other states and input from members regarding the potential direction of the commission. The group also discussed a 2016 article by John E. Thorson in the Idaho Law Review titled, *A Permanent Water Court Proposal for a Post-General Stream Adjudication World*.

Chief Justice Hardesty indicated that he shares the view that the area of water law could warrant

the appointment of specialized judges and wants the commission to address that concept. He noted that there is considerable precedent in Nevada for specially trained judges in certain cases in that the State already has specialized family courts, business courts, and drug courts.

He also asked the commission to consider what education should be demanded of District Court judges in that water law involves engineering, hydrology, the environment, and the law, among other topics. Chief Justice Hardesty expressed concern that a judge's lack of information and knowledge could cause the parties to incur unnecessary costs for experts to help explain concepts.

Chief Justice Hardesty emphasized "This is not a commission that is designed to rewrite Nevada water law." The commission might identify gaps in existing law and procedure and make recommendations to the supreme court and the legislature, but its focus will be on how to make DWR and judges better able to process water rights matters in an effective, timely and efficient manner. Noting that water law cases often raise issues of first impression, he queried whether some could be fast tracked so that a State Engineer's decision could be appealed directly to the state's Supreme Court, thereby bypassing the District Courts.

The commission noted that the Dividing the Waters program at the National Judicial College in Reno is a resource that could be useful on the issue of education. Chief Justice Hardesty plans to have representatives from that program present to the commission at future meetings.

A written public comment that was submitted to the court resonated with Chief Justice Hardesty and other members, which suggested that the commission take a close look at existing water cases to evaluate the issues they raise, the time it has taken to wend their way through the agency and court proceedings, and whether they present any common themes that need to be addressed.

Another public commenter observed that the commission membership does not reflect the demographics of Nevada, suggesting that members of the Legislature should be involved. The same commenter also criticized the commission composition as under-representing environmental interests because there is no purely environmental group representative on the commission.

Conclusion and Implications

Chief Justice Hardesty tasked certain members and the State Engineer to gather additional data and information to be presented at future meetings of the commission. The meetings will be held every other month, with the next ones scheduled for June 25 and August 27.

Although the court is making a laudable effort to engage many stakeholders, the size of the commission may be somewhat unwieldy. It remains to be seen whether the commission can engage in a robust dialogue on the important issues with which it is tasked and cohere around agreed-upon findings and recommendations. For more information online, see the Nevada Supreme Court's website link at: <https://nvcourts.gov/AOC/Templates/NewsArticle.aspx?id=328713> and https://nvcourts.gov/AOC/Committees_and_Commissions/Water_Law/Overview/. (Debbie Leonard)

California Court of Appeal Limits Dormant Overlying Rights in Ongoing Antelope Valley Groundwater Cases

In response to a challenge of the "Physical Solution" crafted for the critically overdrafted Antelope Valley Groundwater Basin, California's Fifth Appellate District issued an opinion subordinating future uses by dormant overlying rights holders to existing uses by other holders of equivalent priority. The opinion of the court addressed for the first time the power of the court to limit overlying landowners' right to extract groundwater from a basin they have never before extracted from. [*Antelope Valley Groundwater Cases*, ___ Cal.App.5th ___, Case No: F082469 (5th Dist. Apr. 6, 2021).]

Background

The court laid out the long procedural background of these cases and issues raised, as follows:

Over 20 years ago, the first lawsuits were filed that ultimately evolved into this proceeding known as the Antelope Valley Groundwater Cases (AVGC). Numerous parties asserted that, without a comprehensive adjudication of all competing parties' rights to produce water from and a physical solution for the aquifer, the continuing overdraft of the basin would nega-

tively impact the health of the aquifer. After the Judicial Council ordered all then-pending lawsuits coordinated into this single adjudication proceeding, the trial court embarked on an 11-year process, employing phased proceedings, to adjudicate how to accommodate the rights and needs of competing users while protecting the threatened alluvial basin. The parties asserting competing usufructuary claims to pump water from the alluvial basin included numerous entities or agencies that pumped water to supply their thousands of customers (for largely domestic use) within the Antelope Valley Adjudication Area (AVAA), the federal government, and scores of owners of overlying lands who pumped water primarily to use for agricultural, industrial, commercial and domestic uses on their overlying properties. . . . By 2009, the litigation had evolved into a complex array of dozens of separately filed actions and cross-actions, with thousands of Doe and Roe defendants. The litigation was eventually tried in six separate phases. The third phase of trial had bifurcated and scheduled for decision the issues of the basin-wide annual safe yield and whether the aquifer was in overdraft. Shortly before the “Phase 3” trial, the court consolidated all the then-pending actions.

The Court of Appeal summarized the key issue before it as follows:

[all the actions]. . .involved the primary core common issue—the competing claims to draw groundwater from the aquifer—which required an *inter se* adjudication of all claims by all parties to the available groundwater.

The Court of Appeal’s Decision

In reaching its conclusions in this recently published opinion, the Court of Appeal applied water law principles from the cases of *City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224 (2000) and *In re Waters of Long Valley Creek Stream System*, 25 Cal.3d 339 (1979).

Analysis under the *Barstow* Decision

In the first instance, the Court of Appeal used

the authority in *Barstow* to uphold the lower court’s employment of equitable apportionment principles to allocate available supply among competing claimants with equivalent priorities. Citing to *Barstow*, the Court wrote that:

Barstow appears to uphold (at least by negative implication) the use of equitable apportionment principles when considering how to apportion water among correlative rights holders.” *Willis v. LA County Waterworks District No. 40*, F082469, JCCP No. 4408 (Cal.App. 5th Mar. 16, 2021) at 43.

Analysis under the *Long Valley* Decision

Furthermore, the court upheld the subordination of dormant overlying rights in the Antelope Valley Physical Solution on the grounds that *Long Valley* is aptly analogous to a comprehensive groundwater adjudication. In reaching this conclusion, the court elaborated that:

Long Valley court held that prospective future uses of significant unexercised correlative water rights may be conditioned and subordinated to protect existing uses and reliance interests as part of a comprehensive water rights adjudication that allocated a limited water supply among competing claimants. *Id.* at 45.

Equitable Apportionment May Be Used in Determining Allocations

Accordingly, the Court of Appeal concluded that under *Barstow* and *Long Valley*, such equitable apportionment principles may be used in determining allocations for competing claimants with equal priority rights as part of a Physical Solution for an overdrafted basin. It is from this line of reasoning that the Court of Appeal ultimately concludes that those cases permit a Physical Solution to subordinate future uses by dormant rights holders to existing uses by other holders of equivalent priority.

Conclusion and Implications

The implications this case may have on unexercised overlying rights to groundwater are profound, particularly now that this case has been certified for publication. The court’s subordination of one co-

equal right over another presents serious questions for overlying rights holders in a time where effective groundwater management has become increasingly prioritized. While the opinion takes care to preclude such Physical Solutions from “wholly disregarding” the rights of overlying landowners who have yet to extract groundwater, the opinion sets a precedent

moving forward that dormant overlying rights can be treated differently currently exercised rights for purposes of determining groundwater allocations. The court’s opinion is available online at: <https://www.courts.ca.gov/opinions/documents/F082469.PDF>. (Wes Miliband)

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**

- 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 federal 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 October 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. 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.

- March 22, 2021 - The EPA has ordered Detry Pumping Services, Inc. to adopt environmentally responsible practices for disposing and storing of fats, oils and grease (FOG) and upgrade its facility to address Clean Water Act violations at their Piti-Santa Rita facility. An EPA inspection in 2017 found that Detry had not prepared an adequate Spill, Prevention, Control, and Countermeasure Plan (SPCC) to prevent discharge of oil to surface waters nor implemented all requirements of the Clean Water Act. Furthermore, the inspection found the facility mixed FOG with powdered-lime mineral to create a slurry and then dumped it on the facility grounds, 300 feet from the Antantano river. In 2019, a second site visit by EPA found no significant improvements. According to the Guam Water Authority, FOG blockages cost Guam residents over \$500,000 annually and cause raw sewage spills. Installing grease traps or grease interceptors and/or collecting used FOG in containers for proper disposal at facilities designed and operated to manage this waste can reduce impacts to the environment.

- March 24, 2021 - The EPA recently reached an agreement with LKQ Northeast, Inc., a national owner and operator of auto salvage yards, to bring its three Massachusetts salvage yards into compliance with the Clean Water Act and pay penalties for alleged violations of the federal storm water requirements at the facilities. Under the agreement, LKQ Northeast paid the following penalties for the alleged storm water noncompliance: \$129,425 for its Web-

ster facility, \$83,000 for its Leominster facility, and \$81,000 for its Southwick facility. All of the facilities had either not identified or incorrectly identified stormwater conveyance paths and/or discharge points (outfalls). Additionally, the facilities had conducted inadequate corrective actions to try and mitigate the monitored pollutants as required. Discharge of stormwater associated with industrial activities, including auto salvaging, is regulated under the Clean Water Act's Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Discharges (MSGP) and state water protection laws.

•March 24, 2021 - In a settlement agreement with the United States and the Commonwealth of Pennsylvania, Chesapeake Appalachia LLC (CALLC) has resolved a federal-state lawsuit, alleging Clean Water Act violations disclosed by CALLC at 76 locations in Pennsylvania. In a consent decree, lodged in the U.S. District Court for the Middle District of Pennsylvania, CALLC has agreed to pay a \$1.9 million penalty for violating federal and state clean water laws, and to restore or mitigate harm to the impacted water resources. Under Clean Water Act Section 404, as well as state permit requirements, permits from the U.S. Army Corps of Engineers (Corps) and the Pennsylvania Department of Environmental Protection (PADEP) are required before dredged or fill material may be discharged into wetlands or waterways. In 2014, CALLC informed EPA, the Army Corps and PADEP that an internal audit had identified potential unauthorized discharges of fill material without applicable permits at multiple sites in the Commonwealth. Following lengthy negotiations and multiple site visits by EPA, PADEP and the Corps, the company ultimately disclosed potential unauthorized discharges at a total of 76 sites across Pennsylvania, impacting about 26 acres of wetlands and 2,326 linear feet of streams. As part of the settlement, CALLC (or its successor) will either seek after-the-fact authorization from the Army Corps and/or PADEP as appropriate to leave the fill in place, or CALLC will restore the impacted wetlands or waterways. In all cases, the impacted water resource either will be restored or the environmental harm will be offset through off-site compensatory mitigation.

•March 30, 2021 - The EPA ordered the City of New York to construct and operate two Combined

Sewer Overflow (CSO) retention tanks to control contaminated solids discharges at the Gowanus Canal Superfund site in Brooklyn, New York, which is a key component of the Gowanus Canal cleanup. The EPA's order follows previous orders that EPA issued in 2014 and 2016 to require the city to find a location for and design the two tanks.

The 2013 cleanup plan for the Gowanus Canal Superfund site includes dredging to remove contaminated sediment from the bottom of the canal, which has accumulated because of industrial activity and CSO discharges. More than a dozen contaminants, including polycyclic aromatic hydrocarbons, polychlorinated biphenyls, and heavy metals, including mercury, lead, and copper, are present at high levels in the Gowanus Canal sediments.

•April 5, 2021 - EPA announced a Clean Water Act settlement with Burlington Northern Santa Fe Railway Company (BNSF) in which the company has agreed to pay \$140,000 for alleged Clean Water Act violations associated with a discharge of oil into the North Platte River near Guernsey, Wyoming. The discharges occurred on February 4, 2019, in Wendover Canyon, northwest of Guernsey; due to a derailment of three locomotives and five rail cars owned by BNSF. The sources of the diesel and oil were two of the derailed locomotives. BNSF reported the spill to the National Response Center (NRC) and an EPA On-scene Coordinator was dispatched to the spill site. BNSF worked with the State of Wyoming and EPA to clean up the spill.

•April 12, 2021 - EPA announced a proposed Clean Water Act (CWA) settlement with Texas-based Arrow Midstream Holdings, LLC (Arrow Midstream) in which the company has agreed to pay \$106,500 for alleged Clean Water Act violations associated with two releases of produced water from pipelines into tributaries of Lake Sakakawea near Mandaree, North Dakota on the Fort Berthold Indian Reservation. The company has also taken action to reduce the likelihood of similar releases in the future, by removing the pipeline material involved in the releases from other pipelines on the Reservation.

•April 21, 2021 - The US Navy has agreed to make more than \$39 million in repairs at the Newport Naval Station in Rhode Island that will ensure

the facility is in compliance with laws regulating the discharge of stormwater into Coddington Cove, an embayment of Narragansett Bay. Under the terms of a recent agreement with the EPA, the Navy will complete stormwater discharge infrastructure improvements by 2030 at the former Derecktor Shipyard, settling EPA allegations that the facility was in violation of the Clean Water Act. The repairs include seven specific projects along the bulkhead, a retaining wall along the waterfront. The Naval Station, located in the Rhode Island towns of Newport, Portsmouth, Middletown, and Jamestown, operates under a municipal storm water permit issued by Rhode Island Department of Environmental Management. The facility includes the former Derecktor shipyard, a Superfund site. The inspection focused on the presence of sinkholes and the condition of stormwater infrastructure covered under the site's stormwater permit. The Navy has also identified numerous holes in the bulkhead wall. The Navy is collecting soil and sediment samples in the area to assess the potential risks to human health and the environment from soil exposed by the sinkholes or from soil erosion into Coddington Cove.

Indictments, Sanctions, and Sentencing

- April 14, 2021 - The Algoma Central Corporation (Algoma), headquartered in St. Catharines,

Ontario, was fined \$500,000 after pleading guilty to dumping wastewater into Lake Ontario. Algoma operated a fleet of dry and liquid bulk carriers on the Great Lakes. One of the vessels in the defendant's fleet was the M/V Algoma Strongfield (Strongfield). Built in China, the Strongfield was delivered to Canada on May 30, 2017, by a crew from Redwise Maritime Services, B.V. (Redwise), a vessel transport company based in the Netherlands. During the Strongfield's delivery voyage, while manned by a Redwise crew, the oily water separator and oil content monitor malfunctioned or failed on multiple occasions, which resulted in an accumulation of unprocessed oily bilge water. Because Algoma had negligently failed to inform the 3rd officer and the captain what the wash water tank contained, approximately 11,887 gallons of unprocessed oily bilge water were released into Lake Ontario. The discharge was stopped when another Algoma employee learned of the discharge and informed the 3rd officer and captain that the wash water tank contained unprocessed oily bilge water and instructed them to stop the discharge immediately. After the incident, Algoma contacted Canadian and U.S. authorities to report the discharge. In addition to the fine, Algoma was put on probation for a period of three years during which it must implement an environmental compliance plan.
 (Andre Monette)

LAWSUITS FILED OR PENDING

ENVIRONMENTAL GROUPS IN TENNESSEE FILE SUIT IN FEDERAL COURT SEEKING TO STOP CRUDE PIPELINE ALLEGING DRINKING WATER CONTAMINATION CONCERNS

Memphis environmental groups are suing to overturn federal approval of a planned 49-mile-long crude oil pipeline that they say unfairly targets black and low-income communities and threatens drinking water aquifers across the region. The furor in Memphis adds to the growing national controversy over oil and gas projects—including the paused Keystone XL Pipeline in Montana—approved by the U.S. Army Corps of Engineers (Corps) under the blanket “Nationwide Permit 12” (NWP 12), which was issued in 2017 to fast-track environmental review for oil and gas pipelines. The lawsuit was filed in the U.S. District Court for the Western District of Tennessee. [*Memphis Community Against Pollution, Inc., et al. v. U.S. Army Corps of Engineers, et al.* (W.D. Tenn.)]

Background

The subject of the lawsuit is the proposed Byhalia Connection Pipeline, running from the Mississippi River, through southwest Memphis and eventually into Marshall County, Mississippi. The pipeline is being constructed by Byhalia Pipeline, LLC, a Texas-based joint venture between Plains All American Pipeline, builder and operator of more than 4,000-miles of crude oil pipelines across North America, and Valero Energy Corporation, an international manufacturer and marketer of fossil fuels and petrochemical products. Project proponents say the pipeline would provide a critical link between the Diamond Pipeline, which supplies crude oil from oil fields across the American Mid-South region to Memphis-area refineries, and the Capline Pipeline, which transports fuel between key hubs in Central Illinois and the Gulf Coast. (Source: <https://byhalia-connection.com/about-project/>).

Environmental groups, however, claim the pipeline’s proposed route would endanger local drinking water supplies of hundreds of thousands of people while threatening the health and property values of low-income and predominantly black neighborhoods in southwest Memphis.

Water Contamination Concerns

As one of the largest cities in the world to rely exclusively on artesian wells, Memphis has long been protective of its underground water reserves. (Source: <http://www.mlgw.com/images/content/files/pdf/WQR%202018-sm.pdf>). For that reason, pipeline opponents are particularly concerned about those portions of the Byhalia Pipeline’s route that would cross over the Memphis Sand Aquifer, the sole source of water for the region. (Source: <https://www.mlgw.com/about>).

The developer and environmental groups are at odds over just how much of a risk crude oil spills would pose to the City’s water supply. Geological surveys show that the aquifer is separated from the surface by a layer of dense clay, averaging 500-foot-thick, through which the City’s utility extracts water via its extensive network of wells and pump stations. (Source: <https://caeser.memphis.edu/resources/memphis-aquifer/>). The developer has assured residents that, since the pipeline would sit just four feet below ground, there would be minimal risk that any crude oil spills or seepage would reach water supplies. (Source: <https://byhaliaconnection.com/wp-content/uploads/2021/04/Byhalia-Connection-Overview-3-21-6.pdf>). Maps published by the Southern Environmental Law Center, however, show breaches, holes and leaks in the clay layer that could allow contaminants to penetrate underwater reservoirs, even from pipelines buried just below ground level. (Source: <https://www.southernenvironment.org/news-and-press/news-feed/what-you-need-to-know-about-how-the-byhalia-pipeline-impacts-memphis>).

The Boxtown Neighborhood

In addition to water concerns, environmental justice advocates claim the pipeline’s proposed route unfairly targets poor and minority communities in southwest Memphis. In particular, the lawsuit focuses on the pipeline’s proposed path through the neigh-

borhood of Boxtown, where the poverty rate today exceeds 32 percent, with cancer risk at four times the national average. Boxtown is already home to a number of significant pollution sources, including from local oil refineries, steel mills, a retired coal-fired power plant and newly constructed natural gas plant. (Complaint at page 41.)

The developer claims the proposed route was drawn to avoid Memphis landmarks and major population centers. (Source: <https://wreg.com/news/cbs-this-morning-puts-national-spotlight-on-byhalia-pipeline-fight/>) As currently drawn, the pipeline would cut through a number of privately owned lots in the Boxtown neighborhood, along with at least two parcels owned by Shelby County. (Source: <https://wreg.com/news/byhalia-pipeline-whats-next-after-county-votes-not-to-sell-vacant-land/>). As of early April 2021, the developer said that it had successfully secured easements with 95 percent of private landowners along the proposed route, but was dealt a blow earlier in the year when the Shelby County Commission voted down a resolution to sell County land for pipeline construction. (Source: <https://wreg.com/news/byhalia-pipeline-whats-next-after-county-votes-not-to-sell-vacant-land/>).

In recent weeks, the Byhalia Pipeline dispute has drawn national attention, with Vice President Al Gore and 28 members of Congress, including Rep. Steve Cohen who represents the Memphis area, joining calls for a complete federal government review of the pipeline's potential environmental impacts—this time, with full input from the impacted communities. (Source: <https://cohen.house.gov/media-center/press-releases/representatives-cohen-and-ocasio-cortez-urge-biden-administration>).

Section 404 and Nationwide Permit 12

The Byhalia Pipeline controversy has renewed scrutiny of Nationwide Permit 12 (or “NWP 12”), which gives blanket environmental approval for fast-tracking development of oil and gas pipelines across the country.

Pursuant to Section 404 of the Clean Water Act, a federal permit is required for the discharge of any dredged or fill materials into federal navigable waters. 33 U.S. Code § 1344. However, Section 404(e) allows the Army Corps of Engineers to issue general permits, or “nationwide permits”—valid for a maximum of five years and broadly applicable to projects

nationwide—which authorize activities with minimal individual and cumulative adverse environmental effects. *Id.* Previous “nationwide permits” have provided blanket permits under the Clean Water Act for residential developments, wetland and stream restoration activities, and commercial shellfish aquaculture. (EPA [website link](#)).

The U.S. Army Corps of Engineers re-issued NWP 12 in March 2017, allowing the Corps to approve permits for construction of utility pipelines across rivers, streams and wetlands without being subject to the normal environmental processes under Section 404 of the Clean Water Act, the National Environmental Policy Act and Endangered Species Act. (Source: <https://www.federalregister.gov/documents/2017/01/06/2016-31355/issuance-and-reissuance-of-nationwide-permits>). Since 2017, NWP 12 has been applied to a number of controversial pipeline projects across the country, including the Keystone XL Pipeline through Montana which was paused by the Biden Administration in early 2021.

In March, the Corps issued new Nationwide Permits that split NWP 12 in four, and separated out the portion of NWP 12 that applies to oil and gas pipelines. (Source: <https://www.natlawreview.com/article/us-army-corps-engineers-revises-nationwide-permit-12>). This means that, should the Biden Administration decide to rescind NWP 12 as it pertains to pipelines like Byhalia and Keystone XL, the Corps would still retain authority to fast-track non-fossil fuel projects.

Conclusion and Implications

Mounting legal and political pressure by local environmental groups and their allies in Washington have posed major obstacles to what just two months ago seemed like a smooth path to approval for the Byhalia Pipeline. While revocation of the Byhalia permit would be a major win for environmental justice advocates in Memphis, the Biden administration's decision on this issue would also reverberate nationally and could affect the viability of fossil fuel pipeline projects across the country for years to come. The lawsuit is available online at: <https://wreg.com/wp-content/uploads/sites/18/2021/04/MEMPHIS-COMMUNITY-AGAINST-POLLUTION-VS-ARMY-CORPS-OF-ENGINEERS.pdf>.

(Travis Kaya)

JUDICIAL DEVELOPMENTS

**SECOND CIRCUIT DETERMINES CLEAN WATER ACT, SECTION 401,
DEADLINE CANNOT BE MODIFIED BY AGREEMENT**

New York State Department of Environmental Conservation v. Federal Energy Regulatory Commission,
___F.3d___, Case No. 19-1610 (2nd Cir. Mar. 23, 2021).

The U.S. Court of Appeals for the Second Circuit recently determined that the one-year time period for issuing a federal Clean Water Act, Section 401 water quality certification is mandatory, and a certifying agency cannot enter into an agreement or otherwise coordinate with an applicant to alter the time period. If the certifying agency does not act within the provided statutory time period the authority is waived.

Factual and Procedural Background

Section 401 of the Clean Water Act requires an applicant for a federal permit to obtain a certification that the proposed project complies with state water quality standards and other requirements of state law. It also requires the state to “act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request,” or their certification authority is waived. If a state denies certification within the statutory time period, then no license or permit shall be granted. If a state issues a certification contingent on the applicant’s satisfaction of various conditions, the appropriate federal agency must incorporate those conditions into the final license.

National Fuel proposed to construct a 99-mile long natural gas pipeline from western Pennsylvania to up-state New York known as the Northern Access 2016 Project. Before proceeding with this type of project, the Natural Gas Act required a certificate of public convenience and necessity from the Federal Energy Regulatory Commission (FERC). Because construction and operation of the pipeline could result in discharges into New York waterways, National Fuel was also required to obtain a Section 401 water quality certification.

Accordingly, in March 2015, National Fuel applied to FERC for a certificate of convenience and necessity and, the following year, applied to the New York

Department of Environmental Conservation (DEC) for a Section 401 water quality certification. At some point after National Fuel was asked to supplement the second time, it became clear that the DEC would not be able to make a final determination within one year of the date of the initial application because it had not completed the notice-and-comment process required by the Clean Water Act and by state regulations.

In an attempt to extend the one-year deadline, the DEC and National Fuel entered into an agreement revising the date on which the application was deemed received by the DEC to April 8, 2016, extending the deadline for the DEC to issue or deny the required certification by 36 days. Subsequently, DEC denied National Fuel’s application and National Fuel petitioned for review. While the petition was pending, National Fuel filed with FERC a motion for expedited action. FERC concluded that Section 401 established a deadline that could not be extended by private agreement. DEC petitioned for review of FERC’s decision as well.

The Second Circuit’s Decision

The threshold issue for the petitions is whether a state and a project applicant may extend the one-year deadline for acting on a Section 401 water quality certification application. The circuit court previously determined that a statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision. The court determined that Section 401’s one year deadline is mandatory in that it does not merely “spur” the agency to action but it bars untimely action by depriving the agency of its authority after the prescribed time limit.

The court next considered whether DEC’s denial

of National Fuel's certification request should be regarded as untimely because the agreement to change the receipt date must be deemed void. To make this determination, the court examined the legislative history of Section 401. In examining the legislative history the court concluded "with a good deal of clarity" that limiting a certifying state's discretion and eliminating a potential source of regulatory abuse was what the one-year limit in Section 401 was intended to achieve. The original version of the House Bill did not set any time limit for state action, but was later amended to require affirmative state action "within a reasonable period of time" in order to prevent delay due to a certifying state's passive refusal or failure to act. Eventually, that language was refined and the one-year time limit was included in the final version of the bill after the Senate bill was combined with the House bill. The legislative history, the court determined, showed that Congress was not primarily concerned with protecting the rights of individual applicants. Rather, Section 401's time limit was meant to protect the regulatory structure, particularly in situations involving multiple states: in other words, to guard against one state "sitting on its hands and doing nothing" at the expense of other states that are also involved in a multi-state project.

Accordingly, the court held that it was bound by Congress' intention expressed in the text of Section 401 and reinforced in its legislative history to reduce flexibility in favor of protecting the overall federal licensing regime. The court therefore held that Section 401 prohibits a certifying agency from entering into an agreement or otherwise coordinating with an applicant to alter the beginning of the review period, and that the DEC waived its certification authority by failing to act within one year of the actual receipt of the application.

The court upheld the FERC's conclusion that the DEC waived its authority under Section 401.

Conclusion and Implications

This case provides that the one-year deadline for a state to act on an application for a Clean Water Act Section 401 water quality certification cannot be extended by agreement with a project applicant. Such an agreement may waive a state's authority to review and act on such an application. The Second Circuit's opinion is available online at: <https://casetext.com/case/ny-state-dept-of-envtl-conservation-v-fed-energy-regulatory-commn-1>.

(Henry Castillo, Rebecca Andrews)

U.S. DISTRICT COURT DENIES PRELIMINARY INJUNCTION AGAINST BIG SKY WATER AND SEWER DISTRICT FOR ALLEGED CLEAN WATER ACT VIOLATIONS

Cottonwood Environmental Law Center, Montana Rivers, and Gallatin Wildlife Association v. Edwards and Big Sky Water and Sewer District, ___F.Supp.3d___, Case No. 2:20-cv-00028-BU-BMM (D. Mt. Mar. 23, 2021).

The U.S. District for the District of Montana, Butte Division, denied the three nongovernmental organizations' (plaintiffs) request for a preliminary injunction against Big Sky Water and Sewer District's (BSD) discharging practices within the West Fork of the Gallatin River. After carefully reviewing the circumstances, the court held that a preliminary injunction would be inappropriate based on the record before the court, allowing BSD to continue these discharge practices until further proceedings.

Factual and Procedural Background

BSD provides wastewater and sewer services by

collecting water from district water users within the resort community at Big Sky, Montana. This water is collected for treatment at its Water Resources Recovery Facility (WRRF), which removes debris and grit, treats nitrogen through aerobic and anaerobic conditioning, filters the water, and finally disinfects the water. After treating this water and placing it in holding ponds at the WRRF, BSD disposes all of its treated effluent water through irrigation—primarily by irrigating the neighboring Meadow Village Golf Course during the summer months.

Plaintiffs allege that BSD over-irrigated the Meadow Valley Golf Course, allowing for nitrogen

and other pollutants to flow downhill and leach into the groundwater. The groundwater is hydrologically connected to the West Fork of the Gallatin River. If groundwater rises too high, the holding pond liners may float, which leads to effluent spillover from the holding pond. BSD diverts groundwater under its holding ponds into the West Fork of the Gallatin River using an underdrain pipe system to prevent such spillover. Plaintiffs argued that BSD must obtain a permit under the federal Clean Water Act (CWA) for the discharge of nitrogen originating in its holding ponds and entering the West Fork of the Gallatin River via the underdrain pipe system. In doing so, Plaintiffs requested a preliminary injunction to halt these discharge practices.

The U.S. District Court's Decision

In order to obtain a preliminary injunction, a court considers and balances four elements: 1) the likelihood of success on the merits; 2) the likelihood of irreparable harm in the absence of preliminary relief; 3) the balance of equities; and 4) the public interest served by the injunction.

First, BSD argued that plaintiffs were unlikely to succeed on the merits on two grounds: 1) the court lacks subject matter jurisdiction because plaintiffs failed to provide adequate notice of suit under the CWA, and 2) plaintiffs failed to allege a valid CWA violation. Turning to the first argument, the court held Plaintiffs provided adequate notice by providing the appropriate 60-day notice. Furthermore, the court reasoned that BSD had superior access to information regarding the violation, specifically on the hydrology of the area. As to the second argument, the court determined that the mere conveyance of pollutants from one part of a hydrologically interconnected system to another is not a clear violation of the CWA and that the path of pollutants from the ponds, to a golf course, to groundwater and then to the river was not the functional equivalent of a direct discharge. The court thus agreed with BSD in holding that

plaintiffs were unlikely to succeed based on the record since Plaintiffs did not present strong enough evidence to show that BSD's practices were "additions" of pollutants from a "point source" to "navigable waters" within the meaning of the CWA.

Second, plaintiffs argued that an injunction is necessary to prevent harm to the waters of the West Fork of the Gallatin River, specifically with the potential for algal blooms. However, the court noted there was factual uncertainty regarding whether pollutants from the WRRF holdings ponds reach the West Fork of the Gallatin River. Plaintiffs' member impact statements were useful for a standing analysis but failed to point to irreparable harms that would warrant extraordinary and drastic injunctive relief requested.

Third, BSD argued that the public has a strong interest in maintaining a functional waste treatment and sewage system. Plaintiffs responded that the public retains a strong interest in preserving the water quality of the river. The court determined the public interest did not favor either party.

Finally, the court noted that a preliminary injunction represents an extraordinary remedy—one that should not be awarded as a matter of right, but only upon a clear showing that the plaintiff is entitled to such relief. Based on the above analysis, the court held that a preliminary injunction would be inappropriate since serious questions remained regarding the success of plaintiffs' case.

Conclusion and Implications

This case demonstrates that a high showing on the likelihood of success on the merits is required to obtain a preliminary injunction to stop alleged discharges from the operation of a publicly owned wastewater treatment plant. A preliminary injunction will only be awarded in extraordinary circumstances. The District Court's opinion is available online at: <https://casetext.com/case/cottonwood-envtl-law-ctr-v-edwards>.

(Megan Kilmer, Rebecca Andrews)

NEW MEXICO SUPREME COURT QUASHES WRITS OF CERTIORARI IN SAN JUAN RIVER ADJUDICATION APPEAL THAT UPHELD THE NAVAJO NATION SETTLEMENT DECREES

State of New Mexico ex rel. State Engineer v. United States of America,
Case No. S-1-SC-37068 (N.M. Supreme Ct. April 13, 2021).

On March 29, 2021, the New Mexico Supreme Court issued an Order quashing the writs of *certiorari* it previously granted on August 13, 2018 regarding review of a New Mexico Court of Appeals' Decision upholding the Settlement Agreement between the Navajo Nation (Nation), the United States and the State of New Mexico relating to the Navajo Nation's claims to water in the San Juan River Basin. *State ex rel. State Engineer v. United States*, 2018-NMCA-053, 425 P.3d 723 (2018 Opinion). The 2018 Opinion held, *inter alia*, that the federal government, and not the State of New Mexico, controls the public waters of New Mexico. The Office of the State Engineer, the Albuquerque Bernalillo County Water Utility Authority (ABCWUA) and the City of Gallup filed Motions For Reconsideration on April 13, 2021. The ABCWUA and the City of Gallup both receive water through the San Juan Chama diversion project. The City of Gallup also serves areas of the Navajo Nation.

Background

The Settlement Agreement was executed on April 19, 2005 representing the culmination of many years of negotiations between the Navajo Nation, United States, State of New Mexico and others. Congress passed legislation to approve and implement the Settlement Agreement as part of the Omnibus Public Land Management Act of 2009, Northwestern New Mexico Rural Water Projects Act, Pub. L. No. 111-11 § 10301, 123 Stat. 991 (2009) (Settlement Act). Further negotiations among the parties were held to conform various provisions of the Settlement Agreement to the new legislation before a final Settlement Agreement was signed in December, 2010. On August 16, 2013, the presiding judge overseeing New Mexico's San Juan River Adjudication entered his Order granting the Settling Parties Settlement Motion, in effect approving a multi-million-dollar settlement approved by Congress. *State of New Mexico ex rel. State Engineer v. United States*, D-1116-CV-75-184 (N.M. 11th Dist. Ct., August 16, 2013).

The Settlement Agreement provides increased certainty regarding water rights in New Mexico's San Juan River Basin while paving the way for the Navajo Nation to expand its agricultural operations. The Agreement aims to satisfy of all the Navajo Nation's water rights claims in the San Juan River Basin by providing for an additional 130,000 acre-feet over the Nation's current water entitlement of 195,000 acre-feet. The Settlement Agreement provides the Navajo Nation with a degree of certainty regarding its water rights entitlement and supply from the San Juan Basin, which quantification existed in legal theory, but was an unknown, and therefore, uncertain quantum.

Before the New Mexico Supreme Court

The 2018 Opinion states:

[f]irst, water is a commodity that can move in interstate commerce, and does so as the San Juan River crosses several state boundaries. Thus, it is ultimately subject to the control of the federal, not the state, government. *See Oneida Indian Nation v. City of Oneida*, 414 U.S. 661, 667, 670 (1974); *cf. City of El Paso ex rel. Pub. Serv. Bd. v. Reynolds*, 597 F.Supp. 694, 704 (D. N.M. 1984). Although the state has an interest in regulating water within its boundaries, it lacks any ownership claim in such water. 2018 Opinion at 8.

The pending Motions For Reconsideration argue that the 2018 Opinion did not adhere to New Mexico's long-established water law precedents regarding the state's ownership and regulatory control over New Mexico's surface and groundwater. Movants contend that if the 2018 Opinion stands, its language will result in confusion over New Mexico's permitting authority and adversely affect water managers' administration of water rights.

Movants argue that the 2018 Opinion conflicts with New Mexico law and the New Mexico Consti-

tution. Under the prior appropriation system, water rights are generally quantified by present use. Most western states that have adopted the doctrine of prior appropriation have the principal codified in their constitutions. In New Mexico, for example, “beneficial use shall be the basis, the measure and the limit of the right to the use of water.” N.M. Const. art. XVI, § 3.

The State of New Mexico also argues that it will be prevented from obtaining federal funding for critical water supply projects in Indian water rights settlements if the 2018 Opinion’s faulty preemption analyses stands. The State of New Mexico notes that:

. . . [w]hile the [2018 Opinion] upheld entry of the Navajo Nation Settlement Decrees, its rationale improperly eviscerates the primacy of the State over its water resources, in the face of 150 years of unwavering federal deference to State authority. *See* State of New Mexico’s Mo-

tion to Reconsider Order Quashing Writ of *Certiorari*, *State of New Mexico ex rel. State Engineer v. United States of America*, No. S-1-SC-37068 (N.M. Sup. Ct. April 13, 2021).

According to the pending Motions For Reconsideration, resolution of the conflicts in the 2018 Opinion’s reasoning with state law precedent is necessary in order for the state and the judiciary to adjudicate and administer water rights in New Mexico.

Conclusion and Implications

The moving parties request that the New Mexico Supreme Court reconsider its Order quashing the writs of *certiorari* it previously issued and subsequently quashed as “improvidently granted” so that the legal and policy ramifications of the case can be fully evaluated. Oral argument on the motions for reconsideration has been requested.
(Christina J. Bruff)

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

CHANGE SERVICE REQUESTED

FIRST CLASS MAIL
U.S. POSTAGE
PAID
AUBURN, CA
PERMIT # 108