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FEATURE ARTICLE

U.S. CONGRESSIONAL REPRESENTATIVE SIMPSON'S PROPOSAL TO FREE THE SNAKE RIVER: A ONCE IN A GENERATION SOLUTION BUT FOR WHOM?

By Jamie Morin, Esq.

In a year of talk on the national stage about trillion-dollar stimulus packages, the Biden administration's New Deal, and Democrat led efforts to go big to fix what ails America, there is an intriguing proposal gaining momentum from a Republican out of Idaho to shuffle the deck on hydropower, agriculture, transportation and salmon recovery in the Northwest. U.S. Congress Representative Mike Simpson (R-ID) has a mission, to save Idaho's salmon, and maybe parts of the Northwest economy too, through breaching the four Lower Snake River Dams in Washington State in exchange for economic mitigation funding for the benefit of the Northwest power houses—energy, agriculture, and transportation—and benefit Idaho's iconic species in the process.

The total package is estimated at $33.5 billion. The costs are steep, but so too the scientist say, are the consequences for the lack of action.

Background

The Columbia River Basin (Basin) is the fourth largest river basin in the U.S., covering over 250,000 acres in the Northwest and Canada. According to the U.S. Army Corps of Engineers (Corps), there are more than 250 reservoirs and 150 hydroelectric projects in the basin, including 18 mainstem dams on the Columbia and Snake rivers. These dams provide power, flood protection, water supplies for municipal, industrial and irrigation uses, transportation and recreation benefits to the region and beyond.

The Columbia Basin was historically home to six species of salmon and steelhead, anadromous fish species which are born in freshwater, but live their lives in in the ocean until they return to spawn and continue the cycle. One Columbia River salmon species, pink salmon, have already become extinct. The other five are threatened or endangered through much of Basin.

Of the almost 1,800 river miles of habitat in the Columbia River System, 1,100 river miles are currently blocked to salmon migration by the Grand Coulee Dam, built in 1938 without any form of fish passage. This leaves just 677 river miles below Grand Coulee, including the Snake River System which starts in the mountains of Idaho and joins the Columbia River in southwest Washington. Salmon returning to their Idaho headwaters must pass eight dams, four on the lower Columbia and four on the lower Snake River. The dams affect salmon migration for both smolts heading out sea and adult salmon coming home to spawn, through a myriad of obstacles which includes physical blockage, slowing water velocities, rising river temperatures and increased predation.

After decades of litigation around operation of the Columbia River hydroelectric system to minimize the effects on migrating salmon and billions in funding for salmon recovery, salmon stocks remain in decline throughout the Basin. The annual news cycle grows increasingly dim, especially in the home headwaters of Rep. Simpson's district. All of Idaho's anadromous species are listed as threatened or endangered.

And while the dams are not the only risks to salmon—physical ocean conditions, climate change, harvest, among other threats also play their hands to lower the salmon's odds of returning home—returns to the lower regions of the Columbia River have a Smolt-to-Returning Adult ratio of between 3 and 4 percent, whereas Idaho salmon (which must cross

eight dams instead of four) have a Smolt-to-Retuning Adult ratio of less than 1 percent.

Removing the Lower Snake River dams has long been argued as a piece of the salmon recovery picture that before now was a nonstarter for the economic interests in the region. The dams are sacred infrastructure to power generation, agriculture, and transportation in the region. The factions are well bunkered in their defensive positions.

Into that fray comes Rep. Simpson with an ambitious proposal to breach the four Lower Snake River Dams and balance the economic loss through a complicated matrix of mitigation dollars, litigation moratoriums and restructuring of fish and wildlife management going forward.

Representative Simpson's Proposal

We all see the table most clearly from where we sit. Rep. Simpson sits at the Idaho headwaters and his proposal reflects what, I suspect, he sees from this vantage point. The deal he's laid out covers the spread—in card-playing poker vernacular. First, the "flop": breach of the dams to (hopefully) encourage the return of salmon to Idaho Second, the "turn": deal a generous package to maintain the northwest economic advantage and to encourage the economic interests (power, agriculture, transportation) to retool and modernize. Then, the "river": fund some of the wish list of conservation projects around the Basin and maintain a base level of fish and wildlife management into the future. Total anticipated price tag, $33.5 billion. But the ace in the hole of the reshuffling is removing the threat of litigation against hydropower facilities and agricultural dischargers for a generation. Total price tag, priceless.

First, the Flop: Breach the Lower Snake River Dams

The first card of the plan calls for breaching the four Lower Snake River Dams. This is a radical call for a Republican from Idaho. The dams have been long defended as vital to the region, salmon or no salmon. The timeline suggests two of the dams will be breached in the summer/fall of 2030, and two the following year in the summer/fall of 2031. Note, the proposal calls for breaching, not removal. The physical concrete structures would remain in place, "mothballed." Presumably, this is the faster, cheaper, and easier answer to the Damns. The proposal includes funding allocations to address the obvious collateral issues which often arise in the context of why dams are too hard to remove—sediment management and cultural resource protection.

As the key first piece, the relationship between the timing and other details remains a little fuzzy. Much of the structure behind the who and the how and the when does. It is a proposal; the details are yet to be worked out. While all the funding is anticipated to be available immediately, the breaching is not scheduled to occur until 2030 at the soonest and could be delayed based on the timing of replacement power coming online, among other potentials for delay. How the rest of the proposal remains stitched together through the process and how to overcome inevitable delays remains to be developed. And while ten years is an ambitious schedule for a federal dam breaching, it is also a long time for declining salmon runs to wait.

Next, the Turn: Protect, Mitigate and Enhance the Economies of the Region

•Energy Generation

The proposal directs roughly half the total funding investment toward energy generation and related issues. Although not their primary purpose, the lower Snake River dams have the capacity to generate 3,000 megawatts of power. Their average output is much less, 933 megawatts according to a 2019 Bonneville analysis. (One megawatt is enough for 800 northwest homes.) The primary value of these dams is in timing, they provide power to meet demand peaks keeping the transmission grid in balance during the hot dry summers of the Northwest. Removal of this peak capacity will require not just replacement sources of generation in order to maintain the Northwest's famously cheap power, but also optimization of the transmission system to accommodate the reshaping of supply with demand when new supplies have variable timing uploads of their own.

To these ends, the proposal directs $10 billion to fund clean power replacement projects throughout the region. Again, the who and how and where is yet to be played out. There is some guidance on when; these projects must be built and online by 2030 in order to proceed with the *breaching* of the Lower Snake River Dams.

In addition, the proposal directs an additional $4 billion as "salmon spill replacement generation" to replace power generation "lost" to meeting spill requirements; and $2 billion for efforts to optimize the transmission system to accommodate the already changing mix of power generation sources.

In addition to the funding, the Simpson proposal appears to settle some ongoing points of litigation through legislating a balance more favorable toward power production than salmon recovery, by setting Total Dissolved Gas levels at remaining dam locations by legislation rather than adaptive management, and by legislating the prioritization of power generation over salmon spill operations.

Bonneville Power Administration's formulas for power pricing are adjusted, its borrowing authority is increased, and accounting for credits are restructured. This presumably allows for stable power pricing structures benefiting long term power contracts and energy users throughout the region.

•Agriculture

In the West, one often thinks of dams as primarily for the purpose of impounding water for irrigation uses. Only one of the four dams provides water for irrigation. Funding ($750 million) is provided for replacement irrigation water supplies.

It's not entirely clear how to tie additional water quality funding back to the breaching. Funding ($1.6 million) is provided for Enhanced Nutrient Management programs to convert waste into biofuel and related products, and to fund containment systems to keep waste from entering water ways.

Creation of regional Watershed Partnerships ($3 billion), designed to make agriculture "partners in regionwide watershed improvement." Participation in the Watershed Partnerships provides one-time funding to "identify, develop and implement high value voluntary watershed / water quality improvement projects" while granting the agriculture interests who participate in the Partnerships with a 25-year exemption from all federal Clean Water Act (CWA) and Endangered Species Act (ESA) lawsuits in the basin. The programs in each state will be overseen by the State Departments of Agriculture.

•Transportation

The lower Snake River Dams provide the infrastructure necessary to move barge traffic into and out of Idaho. With the removal of the Snake-River Dams, Idaho loses its only seaport; barge traffic would be unable to travel upriver from the Tri-Cities in Washington. Approximately $4.2 billion is allocated to grain farmers and those in the grain and commodity supply chain—co-ops, handlers, grain elevators, and shippers—to encourage their adjustment to the changed landscape; and for significant investment to reconfiguring the Lewiston-Clarkston Port toward surface transportation and to expand the Tri-Cities Port into an intermodal transportation hub to take up the barge traffic.

•Community Development

In addition to the reconfigured transportation infrastructure, the local communities and economies of Lewiston-Clarkston and the Tri-Cities would see community development investments. These include funding for Waterfront Restoration ($150 million), Economic Development ($100 million), Tourism ($50 million), Recreational Boating Compensation ($50 million) and creation of the Pacific Northwest Laboratories Lewiston-Clarkston Research Park / Technology camps ($250 million for development and funding, plus funding as part of the Snake River Center for Advanced Energy Storage) on the Lewiston-Clarkston side. The Tri-Cities in likewise seeing funding, although in far lesser amounts outside of the transportation hub infrastructure, for Economic Development ($75 million), and Tourism ($75 million, shared with Spokane 90minutes North).

Then, the River: Managing Fish and Wildlife Going Forward

The proposal includes targeted funding for long standing fish projects including, Priority Salmon Fisheries Infrastructure Backlog ($700 million), Upper Snake and Columbia Basin Restored Non-Protected Salmon Runs (No ESA Protections) ($700 million), Salmon Conservation Corps ($75M), Hells Canyon Sturgeon Protection ($400 million), Yakima Basin Integrated Plan ($225 million), and Lamprey Passage ($200 million).

A large portion of the region's current funding for fish and wildlife efforts is directed by the Northwest Power Act through Bonneville and implemented at the direction of the Northwest Power and Conservation Council in consultation with the Basin's Fish and Wildlife Managers.

The proposal shuffles these pathways. Bonneville is removed from "all fish and wildlife management duties and responsibilities" going forward, except for meeting its "fish mitigation obligation."

Likewise, fish and wildlife program responsibilities are removed from the Northwest Power and Conservation Council, leaving the council's energy planning function in place.

The proposal shifts fish and wildlife duties from the council to the "Northwest State and Tribal Fish and Wildlife Council" (Council) with states and Tribes acting as "Co-Equal Primary Northwest Fish Managers," recognizing the importance and necessity of involving the Northwest Tribes in all aspects of managing fish and wildlife in the Northwest.

The Council operations would continue to be funded as Bonneville's "fish mitigation obligation," capped at $480 million (net) per year going forward. This funding level appears to be based on BPA's reports of its investments for 2018, the lowest year of BPA Fish and Wildlife Program funding since prior to 2007. https://www.bpa.gov/news/pubs/FactSheets/fs-201901-BPA-invests-in-fish-and-wildlife.pdf

Finally, the Ace in the Hole: No More Litigation

The most significant piece of the Simpson proposal could be the suspension of environmental laws in the Basin for a generation. Touted as the key to certainty in the basin for the economic interests.

All non-federal hydro-electric projects operating in the Basin greater than five megawatts (MW) will receive an automatic 35-year extension of their FERC license in addition to their currently licensed period with the total maximum extension length not to exceed 50 years. Non-federal hydroelectric dams include those operated by private developers, stockholder-owned utilities, municipal utilities, and public utility districts. The current license terms for FERC projects are 30 to 50 years. Essentially all operating hydro-electric projects would be allowed to continue operating under their current project terms for another generation in exchange for breaching the four Lower Columbia River Dams.

Litigation related to anadromous fish under the ESA, National Environmental Policy Act (NEPA), and the CWA for the 14 federal Columbia River System dams, the 12 federal projects on the Upper Snake River, and all FERC-licensed dams within the Columbia Basin greater than 5 MW would be immediately halted and stayed for a period of 35 years.

Finally, Agriculture interests participating in the "Partnership Programs" will receive a 25-year exemption from all CWA or ESA lawsuits related to water issues in their basin.

Conclusion and Implications

The usual path is to go from concept to legislation. Since the proposal was unveiled in February, there have been cheers and jeers from both sides. The Northwest Congressional delegations are poised with leadership positions in the key committees to give hope that some deck shuffling for the benefit of salmon could happen. And for sure, deck shuffling is in order if our iconic salmon stocks are to survive. But for anything to happen, we will need regional leadership. The Simpson proposal includes some great plays which could advance salmon policy and regional power resilience into a clean power future. There are also some plays which seems unnecessarily far reaching given that the rewards for breaching the lower Salmon River Dams are only part of what will be needed to save the species. I would suggest that the key beneficiary from the Simpson proposal is the regulated industries which would benefit far more than the Idaho salmon. Until we give up on the salmon entirely, regulated industries will continue to see restrictions in operation parameters and increased costs to maintain that status quo; or the potential loss of control entirely to judicial or regulatory management of the hydropower system. But at least Rep. Simpson is willing to put something out there as a starting point to start the conversation. Rep Simpson's website covering his plan is available online at: https://simpson.house.gov/salmon/.

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LEGISLATIVE DEVELOPMENTS

IDAHO WATER USERS CLOSELY FOLLOWING U.S. CONGRESSMAN SIMPSON'S COLUMBIA BASIN FUND PLAN

In February 2021, U.S. Congressman Mike Simpson representing Idaho's Second District, surprised many with the release of his Columbia Basin Fund Concept plan—an approximately $34 billion proposal attempting to end decades of salmon-related federal Endangered Species Act (ESA) litigation through the breaching of four dams located on the lower Snake River: Lower Granite, Little Goose, Lower Monumental, and Ice Harbor dams. Idaho water users, through the Idaho Water Users Association, are monitoring the Simpson proposal carefully concerned about implications for Idaho dam operations and stored water supplies. (This topic was also the subject of the Feature Article in this issue of the *Western Water Law & Policy Reporter*)

Background

The dam breaching topic is a volatile one in the Pacific Northwest. On the one hand the four Lower Snake River dams (LSRDs) provide significant benefits including reliable, clean, and low-cost hydropower generation and river barge navigability to the inland Idaho Port of Lewiston—infrastructure critical to inland northwest agriculture and commodities transportation. On the other hand, the LSRDs have long drawn the ire of environmentalists and conservationists as being the proverbial "straw that broke the camel's back" concerning anadromous fish passage and salmon run declines.

Endangered Species Concerns

Idaho salmon and steelhead runs have been particularly affected, with all species listed as threatened or endangered under the Endangered Species Act. Whether the blame cast on the LSRDs is justified is an open question because many variables are known to impact salmon survival. Poor ocean condition trends, predation, and warming inland waterways affected by climate change are significant examples. What is not questioned is the decades of ESA-related salmon litigation clogging federal courts in Oregon and Washington, coupled with many billions spent in the region already trying to recover listed salmon and steelhead.

Congressman Simpson's Vision

Citing the need to end the litigation treadmill, if possible, Idaho Congressman Simpson seeks to tap anticipated Biden administration energy and infrastructure spending initiatives to secure approximately $34 billion for a funding package that would breach the LSRDs and replace lost power generation and barge transportation with new clean power generation sources and significantly expanded rail and highway infrastructure improvements.

Idaho Governor Brad Little expressed appreciation for Congressman Simpson's desire to end the ongoing salmon litigation and efforts to secure billions in infrastructure improvements spending.

Governor Little reiterated Idaho's long-standing position against dam breaching fearing the effects breaching would likely have on the Idaho economy, particularly in and around the Port of Lewiston.

The Idaho Water Users Association responded likewise, ultimately questioning the utility and efficacy of dam breaching when so many other variables negatively impact salmon survival and return rates. Replacing the tangible benefits of the four LSRDs will be difficult and expensive, if not impossible to achieve. And, there is no guarantee that dam breaching will aid in the reversal of regional salmon recovery especially given other existing water quality and habitat challenges upstream of the dams in addition to climate change-related challenges.

Opportunity for Idaho Water Users

That said, significant funding availability might spur larger opportunities for Idaho water users, and dam breaching might cease demand and reliance upon Idaho stored water supplies for ongoing flow augmentation in the Snake and Columbia rivers under the landmark Snake River Water Rights Act of

2004 (also referred to as the Nez Perce Agreement). In many respects, Idaho already brokered long-term water and dam operations "peace" under the act, by agreeing to provide up to 487 kAF of flow augmentation water in exchange for 30-year term biological opinions governing Upper Snake River dam operations throughout Idaho. How Congressman Simpson's proposal may impact the 2004 Act and its reciprocal obligations is a key question at the forefront of Idaho water user concerns.

A Proposed Moratoria on Litigation

Congressman Simpson's plan also proposes to impose litigation moratoria in the region. But, what does this proposal include: ESA litigation only, or other Clean Water Act/water quality-related litigation as well? And, whether Congressman Simpson's proposal can effectively cease environmental litigation in the region is questionable. This is particularly concerning in Idaho—breaching the four LSRD would inevitably place a larger target on Idaho dams as a potential salmon recovery impediment whereas the LSRD have historically been the focus (*i.e.*, where do the dam breaching dominos stop; how far upstream will they continue to fall?).

Finally, Idaho water users have long (and fairly) been critical of salmon overharvest in the region—fishing practices that decimated salmon runs long before the first federal dam was constructed on the Columbia and Snake rivers. Perhaps an interim harvest moratorium would be a less disruptive, non-permanent, and far less expensive opportunity addressing salmon recovery than breaching the four LSRDs.

Conclusion and Implications

At this point, Congressman Simpson's proposal is too new to be thoroughly understood. To be fair, the Idaho Water Users Association seeks to better understand and digest the plan rather than offer knee-jerk reactions. But there are many, many questions and the Devil is always in the details. Frankly, the Simpson proposal caught many, including Idaho water users, by surprise. If nothing else, the proposal has quickly grabbed attention and spurred conversations among many. Where the plan ultimately winds up remains to be seen.

If history is any guide, the Idaho Water Users Association knows that you either have a collaborative seat at the table, or you and your interests oftentimes wind up on the menu. From that perspective, the Association is taking Congressman Simpson's proposal and its participation in the same seriously.
(Andrew J. Waldera)

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)

UTAH LEGISLATURE ADOPTS SECONDARY WATER METERING REQUIREMENTS

During the 2021 General Legislative Session, the Utah Legislature passed Senate Bill 199 (Bill), which requires, among other things, secondary water suppliers to begin implementation of metering requirements in order to track and evaluate water usage. Additionally, the Bill directs the Legislative Water Development Commission to support the development of a unified, statewide water strategy to promote water conservation and efficiency.

Background

Many parts of Utah have secondary water systems that supply irrigation water to areas that have become increasingly urban and populated. These secondary

water systems are often pressurized and deliver water at a rate that is often much cheaper that comparable municipal rates. A perceived issue with these systems is that the uses are not often metered and users likely apply much more water than is necessary. This Bill seeks to establish certainty in diversions and ultimately hopes to achieve efficiency gains by reducing the use of secondary water to that which is necessary.

Bill Details

The primary impact of the Bill is to extend metering requirements to "Small Secondary Water Retail Suppliers," which are defined to include companies that directly supply pressurized secondary water to end users and supplies 5,000 or fewer connections (or is a city, town or metro township). Beginning on January 1, 2022 all secondary water suppliers are required to establish a meter installation reserve fund. Connected with this fund, the supplier may not raise rates more than 10 percent, unless there is a good justification and/or there is a catastrophic failure that needs to be addressed.

Further, suppliers that serve commercial, industrial, institutional, or residential users are required to submit a plan to the Division of Water Resources by December 31, 2025 setting forth the process for financing and implementing the installation of meters. Additionally, the plan should set forth how long it will take to implement full metering by no later than December 31, 2040 (including a projected start and end date).

Finally, beginning on July 1, 2021 the Division of Water Resources is, subject to appropriation, allowed to make matching grants each year for the financing of the costs of secondary metering. These are matching grants and are prioritized in favor of small secondary water retail suppliers that can demonstrate the greatest need or greatest inability to pay the entire costs of installing meters. These grants may not exceed 50 percent of the total cost or supplant other grant monies allocated for this purpose. The Division is charged with creating an application process for these grants.

The Bill also encourages the creation of a "unified, state water strategy to promote water conservation and efficiency." This is meant to be an inclusive process and shall include many different stakeholders and respect the "different needs of different political subdivisions or geographic regions of the state." The goal of this strategy is to create and include model ordinances or policies that are consistent with the strategy and implement its goals.

Conclusion and Implications

This Bill attempts to secure more efficient use of water in secondary systems. The overall goal is admirable, but the financial burden on many smaller companies may prove to be prohibitive. The funding mechanism for this program will certainly aid in the process, but is dependent upon annual appropriation of funds. The initial request is for $2,000,000 for the period of July 1, 2021 to 2022 should go a long way, but may run out quite quickly. Accordingly, the success and viability of this process under this Bill will ultimately depend upon the continued appropriation of funds for this grant program.

Assuming that full implementation and compliance is achieved, the impact should greatly improve efficiency and will likely result in the reduction of water consumption by secondary users. As such, the goal of this Bill is well targeted. A full copy of this bill may be found at the following web address: https://le.utah.gov/~2021/bills/static/SB0199.html
(Jonathan Clyde)

REGULATORY DEVELOPMENTS

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD SETS INITIAL HEARING REGARDING COMPETING KINGS RIVER WATER RIGHTS CLAIMS

The State Water Resources Control Board (SWRCB or Board) recently conducted a pre-hearing meeting regarding a request to revise the Kings River's fully appropriated stream status (Order WR 98-08). The meeting included reference to a proposal from Semitropic Water Storage District to move a portion of Kings River water south into Kern County for potential use for recharging the aquifer(s) underlying the Semitropic service area and irrigating agriculture. In response, the Kings River Water Association (KRWA) opposed the proposal, and three of its members, the Fresno Irrigation District, Alta Irrigation District, and Consolidated Irrigation District, also filed a joint water-right application and petition to revoke or revise the fully appropriated stream status for the Kings River. An initial hearing on the matter before the State Water Resources Control Board Office of Administrative Hearings has been set for June 2, 2021. While dispute centers on Semitropic's proposed project, resolution of the matter could have lasting effects on water issues across the southern Central Valley and beyond.

The Kings River Adjudication

At issue is a request by Semitropic Water Storage District (Semitropic) to divert Kings River floodwater that it asserts runs unclaimed to the ocean in certain year types. Semitropic's proposal, if approved, would convey that water 70 miles south to its Kern County agricultural district in order to help alleviate a groundwater deficit of roughly 120,000 - 220,000 acre-feet a year in the Kern Subbasin. In 2015, Semitropic initially sought to build a water storage facility to capture Kings River floodwater and planned to move the captured water south through the California Aqueduct to the existing Semitropic water bank. In preparation for implementation of this project, Semitropic paid $40 million for an easement on lands near Kettleman City as a location to construct its water capture facility.

The KRWA challenged Semitropic's right to divert the floodwater. In the dispute, Semitropic argues that the floodwater is going to waste; therefore, Semitropic is lawfully planning to develop new and utilize existing facilities to provide for increased groundwater banking and beneficial use of Kings River water in Kern and Kings Counties. However, Kings River water interests (primarily, Alta, Consolidated and Fresno irrigation districts) (Alta group) claim that floodwater is only available in extreme flood years and, in any event, those three agencies already have the right and plans to construct recharge basins to capture those flows upstream.

A Call for Order—The Alta Group's Petition

Semitropic and the Alta group, briefly, but unsuccessfully negotiated the sale of some floodwater to Semitropic. However, these negotiations broke down in 2017, leading the Alta group to file a joint water rights application, claiming that the Kings River has no excess water. Alta pointed to State Board Decision (D-1290) which determined that the Kings River is fully appropriated (meaning there is no surface water available for diversion). But, if the SWRCB were to decide in the future that there is excess water, Alta asserted that the right to divert excess water should be granted to the upstream irrigation districts to facilitate their compliance with the Sustainable Groundwater Management Act (SGMA) in Kings County area subbasins. The Alta group also asserted that Fresno, Kings and Tulare counties intend to construct additional groundwater recharge projects that would also lawfully utilize any excess river flows.

Request to Revise—Semitropic Petition and Complaint

Shortly after the water appropriation application was submitted by the Alta group, Semitropic filed its own application seeking the right to divert up to 1.6 million acre-feet of Kings River floodwater. In its application, Semitropic provided data obtained

from the U.S. Geological Survey demonstrating that during periods of high flows, large quantities of Kings River flows have historically not been beneficially used and instead flowed out of the KRWA service area(s). The petition also asks the Board to determine whether it is proper to revoke and/or revise the Fully Appropriated Stream System Declaration for the Kings River System in light of evidence that there is Kings River water available for appropriation. Additionally, Semitropic's petition seeks the right to divert any unappropriated Kings River water, if the SWRCB determines in the future that any river water is available.

Later, in 2018, Semitropic also filed a complaint with the Board claiming the KRWA had forfeited two of its river licenses by not using the associated water. In 1967, SWRCB Water Rights Decision D-1290 granted appropriative water right permits to the Kings River Association and its member units. In 1984, these permits were converted into two licenses (Tulare Lake Licenses), which authorized the KRWA to divert, store, and beneficially use Kings River water in the bed of Tulare Lake. The complaint alleges that the KRWA failed to abide by the terms and conditions of the Tulare Lake Licenses by consistently and repeatedly directing Kings River water to areas outside of the places of use and storage authorized by the licenses. Semitropic maintains that these diversions to outside areas, particularly into the James Bypass (a flood control channel that conveys water out of the Kings River Watershed), constitutes a forfeiture, abandonment, and failure to perfect the right to divert and use Kings River water under the Tulare Lake Licenses. Additionally, the complaint asserts that members of the Kings River Association cannot make full use of water available under the Tulare Lake licenses without either flooding nearby farmland or constructing new facilities for water storage.

Who Controls the Floodwater? Kings River Water Association Answer to Complaint

In 2019, the Kings River Water Association filed an answer to Semitropic's complaint, claiming Semitropic's forfeiture argument was factually and legally without merit. According to the answer, the Pine Flat Dam and Reservoir was constructed in 1944 for flood control and other purposes for the Kings River and Tulare Lake Basin. KRWA's answer avers that the U.S. Army Corps of Engineers (Corps), pursuant to the "Manual" (the "water control plan" for Pine Flat Dam and Reservoir, and the Kings River), manages flood control on the Kings River, specifically by mandating flood flow to the North Fork via the James Bypass, rather than Tulare Lake. The KRWA asserts that the claims in the Semitropic complaint are factually inaccurate because the Corps, acting pursuant to federal flood control law and the Manual, directed flood flows away from the Kings River and Tulare Lakebed, not the respondent Kings River agencies. Second, the KRWA argues Semitropic's claims are legally deficient because there can be no forfeiture of water rights where water was not available for diversion. The Association asserts that flood flows that were routed at the direction of the Corps were not "available for diversion" because federal flood control law is superior to state law, thus respondents had no legal authority to usurp the Corps' flood control powers.

Current Status

In May 2020, the SWRCB Office of Administrative Hearings determined there was reasonable cause to conduct a hearing on the question of whether the fully appropriated status of the Kings River System should be revoked or revised. In January 2021, Administrative Hearing Officer Nicole Kuenzi met with representatives of the KRWA, Semitropic, and others for a pre-hearing conference to hash out procedures and next steps. An initial hearing has been set for June 2, 2021.

Conclusion and Implications

The State Water Resources Control Board's ultimate resolution of the competing Kings River water rights applications, the potential water rights forfeiture issue, and the related question of whether the stream has been fully appropriated are likely to have implications for water issues in the southern Central Valley and, potentially, for related legal issues statewide.
(Megan Kilmer, Steve Anderson)

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.

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 Envi-

ronmental 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. EPA DISMISSES ITS APPEAL OF U.S. DISTRICT COURT'S MORE NARROW JURISDICTIONAL DELINEATION OF SALT PONDS ADJACENT TO SAN FRANCISCO BAY

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. Endangered Species Act—and by a Supreme Court shaped in part by the Trump administration appointees. The decision is available online at: https://www.supremecourt.gov/opinions/20pdf/19-547_new_i42k.pdf
(James Purvis)

NINTH CIRCUIT REMANDS PUBLIC TRUST CASE TO DETERMINE ALTERNATIVE REMEDIES IN WALKER RIVER DECREE LITIGATION

U.S. v. Walker River Irrigation District, 986 F.3d 1197 (9th Cir. Jan. 28, 2021).

In a decades-long litigation, initiated by the United States and Walker River Paiute Tribe over contested water rights in the Walker River Basin, Nevada's Mineral County sought to intervene in the dispute, requesting the court to recognize the rights of the County and public under the public trust doctrine to have minimum levels of water maintained in Walker Lake—the terminus of the basin's flows. After dismissal by the U.S. District Court for Nevada and an appeals process involving the Ninth Circuit Court of Appeals and Nevada Supreme Court, Mineral County's appeal has come full circle to have its public trust questions resolved once and for all.

Mineral County's Public Trust Claim and the Nevada Supreme Court's Clarifications

The Walker River Basin spans more than 4,000 square miles between California and Nevada. Beginning in the Sierra Nevada Mountains in California and running north into Nevada, the interstate basin turns south outside Yerington, Nevada before reaching its end at Walker Lake. Running along Highway 95, Walker Lake is about 13 miles long, five miles wide, and 90 feet deep. While these numbers certainly indicate that Walker Lake is still a large lake by most standards, its size and volume have been rapidly deteriorating, with reports indicating the lake sat at a mere 50 percent of its 1882 surface area and 28 percent of its 1882 volume.

In seeking to protect this crown-jewel of Mineral County (County), the County filed a motion to intervene in the Walker River litigation, which was granted in 2013. The County's complaint alleged that roughly 50 percent of Mineral County's economy is attributable to the presence and use of Walker Lake. Under this preface, the County urged the court to exercise its continuing jurisdiction over the 1936

Walker River Decree—adjudicating the rights to appropriate water from the Walker River Basin—to recognize the County's public trust claims. The District Court dismissed the County's complaint for lack of standing.

On appeal, the Ninth Circuit held that Mineral County had standing with respect to its public trust claim, but certified two questions to the Nevada Supreme Court:

> [1] Does the public trust doctrine permit[s] reallocating rights already adjudicated and settled under the doctrine of prior appropriation?
>
> [2] If the public trust doctrine applies and allows for reallocation of rights settled under the doctrine of prior appropriation, does the abrogation of such adjudicated or vested rights constitute a "taking" under the Nevada Constitution requiring payment of just compensation?

In answering these questions, the Nevada Supreme Court held that the public trust doctrine is applicable to prior appropriative water rights, but that reallocation of such rights was an improper remedy and was inconsistent with Nevada state law. (*See: Mineral County v. Lyon County*, 473 P.3d 418, 425, 430 (Nev. 2020) (*en banc*).)

The Ninth Circuit's Decision

Following the Nevada Supreme Court's decision, the parties agreed that Mineral County's request for reallocation of water rights adjudicated in the Walker River Decree was foreclosed. Mineral County, however, identified two legal theories that would not require a reallocation of rights.

The first of these theories was rejected by the Ninth Circuit—that being the argument that the 1936 Walker River Decree itself violates the public trust doctrine. Having brought this challenge more than 80 years after the Decree was finalized, the Court held this first theory as untimely.

The court did, however, agree with Mineral County's second theory—that its public trust claim remains viable because the County can seek remedies that would *not* involve a reallocation of adjudicated water rights. Under this theory, the County argued that the Walker River Decree Court, having continuing jurisdiction over the water rights adjudication, also has a continuing affirmative duty to manage the resource for the benefit of future generations, albeit using remedies other than reallocation.

These alternative remedies, the County argued, could include: 1) a change in how surplus water is managed in wet years and how flows outside of the irrigation season are managed; 2) mandating efficiency improvements with a requirement that water saved thereby be released to Walker Lake; 3) curtailment of the most speculative junior rights on the system; 4) state issued funding mandates to fulfill the public trust duty to Walker Lake; and/or 5) mandating the creation of a basin management plan.

While appellee Walker River Irrigation District contended the viability of and authority of the District Court to implement these remedies, the Ninth Circuit left these issues for the District Court to address on remand. In sum, the Ninth Circuit found as follows:

> The district court properly dismissed Mineral County's public trust claim to the extent it seeks a reallocation of water rights adjudicated under the Decree and settled under the doctrine of prior appropriation. The County, however, may pursue its public trust claim to the extent that the County seeks remedies that would not involve a reallocation of such rights. The judgment of the district court, therefore, is affirmed in part and vacated in part, and the case is remanded for proceedings consistent with this opinion.

Conclusion and Implications

While the Ninth Circuit's remand puts the case back in the U.S. District Court for Nevada, the court's decision nonetheless leaves an important public trust question left to be answered by the U.S. District Court. In hearing this case on remand, the District Court will be offered an opportunity to provide further guidance in defining the scope of public trust issues and remedies available thereunder, particularly for water rights holders in the state of Nevada, but also as potentially persuasive authority in other states which use an appropriative or hybrid water system such as California. The Ninth Circuit's published Opinion is available online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2021/01/28/15-16342.pdf

(Kristopher Strouse, Wes Miliband)

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 § 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 § 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)

CALIFORNIA COURT OF APPEAL UPHOLDS REGIONAL WATER BOARD ORDERS REGARDING VIOLATIONS AT DELTA WETLAND MARSH ISLAND

Sweeney v. California Regional Water Quality Control Board, San Francisco Bay Region, 61 Cal.App.5th 1 (1st Dist. 2021).

A landowner filed petitions for peremptory writs of mandate contesting the Regional Water Quality Control Board, San Francisco Bay Region's (RWQCB or Regional Board) cleanup and abatement order and an administrative civil liability order regarding a levee that had been reconstructed on Point Buckler, a wetland marsh island. The Superior Court granted the petitions and the RWQCB appealed. The First District Court of Appeal reversed, finding the trial court improperly set aside the orders.

Factual and Procedural Background

Point Buckler is a 39-acre tract located in the Suisun Marsh. John Sweeney purchased the island and subsequently transferred ownership to Point Buckler Club, LLC (together: Sweeney). For months, Sweeney undertook various unpermitted development projects at the site, including but not limited to the restoration of an exterior levee surrounding the site that had been breached in multiple places. He began operating the site as a private recreational area for kiteboarding and also wanted to restore the site as a duck hunting club.

This case pertains to two administrative orders issued by the RWQCB against Sweeney. The first order was a cleanup and abatement order (CAO), which found that Sweeney's various development activities were unauthorized and had adverse environmental effects. These included, among other things, impacts on tidal marshlands, estuarine habitat, fish migration, the preservation of rare and endangered species, fish spawning, wildlife habitat, and commercial and sport fishing. The order directed Sweeney to implement actions to address the impacts of the work. The second order imposed administrative civil liabilities (ACL Order) and required Sweeney to pay about $2.8 million in penalties for violations of environmental laws.

At the Superior Court

Sweeney successfully challenged both orders in the Superior Court, which set aside the orders on multiple grounds. Regarding the CAO, the Superior Court found the Regional Board violated Water Code § 13627, the order failed to satisfy criteria for enforcement actions contained in the Porter-Cologne Water Quality Control Act, and the order conflicted with the Suisun Marsh Preservation Act. For the ACL Order, the Superior Court found, among other things, that the order violated the Eighth Amendment's prohibition against excessive fines, conflicted with the Suisun Marsh Preservation Act, and was the result of a vindictive prosecution. Throughout its analysis, it also found that the Regional Board's findings were not supported by the evidence. The RWQCB appealed.

The Court of Appeal's Decision

The Cleanup and Abatement Order

The Court of Appeal first addressed the Regional Board's arguments under Water Code § 13267, which generally authorizes a Regional Board to investigate the quality of the "waters of the state" within the region subject to its authority. This investigative power includes the right to ask anyone who has discharged waste to provide technical or monitoring program reports under penalty of perjury. The Superior Court set aside the CAO on the grounds that the CAO did not include a written explanation or otherwise explain why the burden of preparing technical reports would bear a reasonable relationship to the need. The Court of Appeal disagreed, finding that the CAO explained the need for the reports and identified the evidence supporting the demand. The court also found that the RWQCB was not required to conduct a formal cost-benefits analysis of the burdens in obtaining such reports, contrary to Sweeney's claim.

The Court of Appeal next considered enforcement under Water Code § 13304(a), which establishes a Regional Board's authority to issue a cleanup and abatement order to any person who has caused or permitted waste to be discharged. Upon order, the discharger must clean up the waste or abate the effects of the waste or take any other necessary remedial action. The Superior Court found the conditions for issuing a CAO were not satisfied, finding, among other things, that Sweeney did not "discharge waste" as defined in the Water Code, and that waste had not been discharged into "waters of the state." The Superior Court also found that Sweeney's activities did not create a "condition of pollution" at the site under the law.

Regarding "waste," the Court of Appeal found that the Superior Court employed an overly restrictive interpretation of the term, and that no rational fact finder could have reached a decision that the fill materials did not result in harm to beneficial uses. The evidence of harm associated with the fill used to repair the levee made it "waste." The court also rejected the argument that the fill constituted a "valuable improvement to the property," noting that even though a fill material may have commercial value, that does not preclude it from being waste under the relevant statutory provisions. Regarding "discharge," the Court of Appeal found that the Superior Court erred factually. Numerous activities not addressed by the Superior Court qualified as discharges, including the placement of fill for the levees. Regarding "waters of the state," the Court of Appeal found that there was no real dispute that a significant portion of the discharges occurred in such waters. Finally, regarding a "condition of pollution," the Court of Appeal found that the Superior Court made certain factual errors and construed the "condition of pollution" element far too narrowly.

The Suisun Marsh Preservation Act

The Court of Appeal next addressed the Suisun Marsh Preservation Act. The Superior Court found that the RWQCB undermined the policy and intent of the Suisun Marsh Protection Plan to preserve and protect duck hunting clubs as a legitimate use for wetlands, and thus the CAO was invalid. The Court of Appeal disagreed, finding that the Preservation Act has no impact on the regulatory authority of the Regional Board over wetlands, and it should not have been relied upon by the Superior Court to invalidate the CAO. Even if Sweeney was correct that the RWQCB's enforcement was subject to the Preservation Act, however, the Court found there still would be no violation. Nor does the Preservation Act, the Court found, otherwise direct state agencies to carry out activities in a manner favorable to duck hunting clubs.

The Administrative Civil Liability Order

The Court of Appeal next addressed the ACL Order, which was premised on discharges in violation of the Regional Board's Basin Plan and the federal Clean Water Act. Among other things, the Superior Court found that the ACL Order violated the Eighth Amendment's prohibition against excessive fines, conflicted with the Suisun Marsh Preservation Act, and was the result of a vindictive prosecution. Throughout its analysis, the Superior Court also found that the Regional Board's findings were not supported by substantial evidence.

The Court of Appeal first addressed the RWQCB's findings, concluding that those findings were supported by substantial evidence. Many of the same errors made with respect to the Superior Court's consideration of the CAO (*e.g.*, whether fill was discharged

into waters of the state) also were made with respect to the ACL Order.

The Court of Appeal then addressed the Eighth Amendment, which generally prohibits excessive fines, noting that the "touchstone" of constitutional inquiry under the excessive fines clause is proportionality. The Superior Court found the penalty was "grossly disproportional" based on the court's own consideration of Sweeney's culpability as low. The Court of Appeal disagreed, finding there was substantial evidence in the record to support the Regional Board's findings. Regarding culpability, for example, it found there was evidence that, among other things, Sweeney had past experience with governmental agencies with jurisdiction over Suisun Marsh at another property, and his levee work there had resulted in illegal discharges of fill and direction from the relevant agencies. Regarding the relationship between the harm and the penalty, the Court of Appeal found there was ample evidence that Sweeney's levee construction converted the site from tidal marshland and adversely impacted beneficial uses at the site. The court also found evidence that the $2.8 million penalty was not disproportionately high. Finally, the Court of Appeal found that there was substantial evidence supporting the conclusion that Sweeney could pay the fine.

The Court of Appeal also disagreed with the Superior Court's conclusion that the Board's penalties were imposed for vindictive reasons. In particular, the Superior Court found the penalties were imposed in retribution for Sweeney's lawsuit challenging an earlier order. The Court of Appeal first noted that the vindictive prosecution doctrine has not yet been held to apply to proceedings before administrative bodies. Even assuming it would apply, the court found there was substantial evidence that rebutted any finding of vindictive prosecution. The RWQCB, for example, had contemplated imposing civil liability months before Sweeney filed a lawsuit, and the court found that the evidence was sufficient to dispel the appearance of vindictiveness.

Fair Trial Issue

Finally, the Court of Appeal reversed the trial court's finding that Sweeney had not received a fair trial. The Court of Appeal found it had no reason to conclude Sweeney received an unfair hearing. The Regional Board, for instance, separated functions (*e.g.*, advisory, prosecutorial, *etc.*), it was not required to respond in writing to every issue raised, there is no requirement that hearings last for any particular amount of time, the Board adhered to procedures governing adjudicatory hearings, and the Regional Board's expert did not evidence any particular bias against Sweeney.

Conclusion and Implications

The case is significant because it contains a substantive discussion of numerous issues pertaining to administrative orders, in particular cleanup and abatement orders and administrative civil liability orders issued by a Regional Water Quality Control Board. The decision is available online at: https://www.courts.ca.gov/opinions/documents/A153583M.PDF

(James Purvis)

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