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ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE

LAW AND REGULATION REPORTER

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LAW AND REGULATION REPORTER

RECENT STATE DECISIONS

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ENVIRONMENTAL NEWS

CALIFORNIA GOVERNOR NEWSOM ISSUES DROUGHT PROCLAMATIONS

On April 21, 2021, Governor Gavin Newsom issued a State of Emergency Proclamation for Mendocino and Sonoma counties due to extremely dry conditions in the Russian River Watershed. Less than a month later, on May 10, 2021, Governor Newsom issued an expanded drought emergency proclamation to include the 39 additional counties that encompass the Klamath River, Sacramento-San Joaquin Delta and Tulare Lake watersheds. While Governor Newsom stopped short of declaring a statewide drought emergency, he directed state agencies to take immediate action to bolster drought resilience and prepare for impacts on communities, businesses, and ecosystems should dry conditions continue into the coming years.

Background

Much of the West is experiencing severe to exceptional drought and California is in a second consecutive year of dry conditions. Governor Newsom issued the emergency proclamation for Mendocino and Sonoma counties while standing in the bottom of Lake Mendocino, describing his location as what "should be 40 feet underwater" but for the historic drought. (Governor Newsom's Drought Update, April 21, 2021.) Recent warm temperatures and extremely dry soils have depleted expected runoff water from the Sierra-Cascade snowpack resulting in a historic and unanticipated estimated reduction of 500,000 acre-feet of water supply—or the equivalent of supplying water for up to one million households for one year—from reservoirs and stream systems. Upon issuing the expanded drought emergency proclamation, Governor Newsom said:

> . . .[w]ith the reality of climate change abundantly clear in California, we're taking urgent action to address acute water supply shortfalls in northern and central California while also building our water resilience to safeguard communities in the decades ahead. (Governor Newsom Expands Drought Emergency to Klamath River, Sacramento-San Joaquin Delta and Tulare Lake Watershed Counties (May 10, 2021) Office of Governor Gavin Newsom.)

The drought emergency declarations follow a series of actions that California has taken since the 2012-2016 drought to strengthen drought resilience. The actions include investment in water management systems, establishment of the Safe and Affordable Fund for Equity and Resilience Program, and development of the Newsom Administration's Water Resilience Portfolio. Statewide urban water use is 16 percent less than it was at the beginning of the last drought and yet, according to the declarations, extreme drought conditions this year "present urgent challenges" including the risk of water shortages in communities, greatly increased wildfire activity, diminished water for agricultural production, degraded habitat for many fish and wildlife species, threats of saltwater contamination of large fresh water supplies conveyed through the Sacramento-San Joaquin Delta, and additional water scarcity if drought conditions continue into next year. Governor Newsom's proclamations declare that:

> . . .to protect public health and safety, it is critical the State take certain immediate actions without undue delay to prepare for and mitigate the effects of, the drought conditions statewide.

The Drought Emergency Proclamations

The drought emergency proclamations each contain a series of orders directing state agencies to take immediate action to bolster drought resilience across California. The proclamations encourage state agencies to take action as swiftly as possible by providing flexibility in complying with certain regulatory requirements, such as the California Environmental Quality Act and certain provisions of the California Water Code.

Among other things, the proclamations direct the State Water Resources Control Board to consider

modifying requirements for reservoir releases and diversion limitations to conserve water upstream later in the year to maintain water supply, improve water quality and protect cold water pools for salmon and steelhead. They direct state water officials to expedite review and processing of voluntary transfers in order to foster water availability where it is needed most.

The proclamations direct state agencies to work with local water districts and utilities to make all Californians aware of the drought, and encourage actions to reduce water usage by promoting the Department of Water Resources' Save Our Water campaign. They also direct state agencies to engage in consultation, collaboration, and communication with California Native American tribes to further existing partnerships and coordination, and assist tribes in necessary preparation and response to drought conditions.

The proclamations direct the State Water Resources Control Board, Department of Water Resources, the Department of Fish and Wildlife, and the Department of Agriculture to consult with the Department of Finance in order to accelerate funding for water supply enhancement, water conservation, and species conservation projects, as well as to identify unspent funds that can be repurposed to assist in drought projects and recommend additional financial support for certain groundwater substitution pumping. The proclamations further direct action to maintain critical instream flows, proactively prevent community drinking water shortages, support our agricultural economy and food security, and generally increase resilience of California's water supplies and water systems.

Conclusion and Implications

Governor Newsom officially issued the Proclamation of a State of Emergency for Mendocino and Sonoma counties on April 21, 2021. The full text can be found at: https://www.gov.ca.gov/wp-content/uploads/2021/04/4.21.21-Emergency-Proclamation-1.pdf. The expanded Proclamation of a State of Emergency including an additional 39 counties was issued on May 10, 2021. Its full text can be found at: https://www.gov.ca.gov/wp-content/uploads/2021/05/5.10.2021-Drought-Proclamation.pdf. On May 17, 2021, the Department of Water Resources and U.S. Bureau of Reclamation filed a temporary urgency change petition to modify certain water quality requirements and will continue to develop an operations plan in a final Drought Plan for 2021.

(Holly Tokar, Meredith Nikkel)

LEGISLATIVE DEVELOPMENTS

CALIFORNIA ASSEMBLY BILL SEEKS TO HEIGHTEN WATER CONSERVATION EFFORTS BY DECREASING URBAN WATER USE OBJECTIVES FOR INDOOR RESIDENTIAL WATER USE

California Assembly Bill 1434 was introduced by Assembly Member Friedman on February 19, 2021 and referred to the Assembly Committee on Water Parks and Wildlife. Recently, the bill was amended on April 19, 2021. If passed, the bill would amend § 10609.4 of the Water Code, relating to water

Assembly Bill 1434

Under existing § 10609 of the California Water Code, the California Legislature establishes a method to estimate the aggregate amount of water that would have been delivered in the previous year by an urban retail water supplier if all water actually used was used efficiently. In order to do this, the Legislature established Urban Water Use Objectives for several use types, including Indoor and Outdoor Residential uses. These Urban Water Use Objectives do not set any hard-limits on the amount of water urban retail water suppliers may actually provide. Instead, by comparing the amount of water actually used in the previous year with the urban water use objective, the idea is that local urban water suppliers will be in a better position to cut back on unnecessary or wasteful uses of water.

For Indoor Residential Water Use, the standard set by the Urban Water Use Objectives is currently 55 gallons per day per capita. This standard is slated to last through January 1, 2025 where the standard will then be dropped to 52.5 gallons per day per capita, then dropped again to 50 gallons per day per capita come January 1, 2030.

What the Bill Seeks to Change

While AB 1434 does not plan on making any radical changes to Urban Water Use Objectives as a general scheme, the proposed reduction for Indoor Residential Water Use may very well be a drastic enough change itself.

In its current state, AB 1434 looks to drop the Indoor Residential Water Use standards by up to 20 percent and implement a more staggered timeline for reducing the standard. The first change under AB 1434 would come January 1, 2023, where the Indoor Residential Water Use standard would be dropped to 48 gallons per day per capita. In 2025, this standard would drop again to 44 gallons per day per capita, and by 2030, the standard would be reduced to a mere 40 gallons per day per capita.

The first reduction, currently planned for January 1, 2023 under AB 1434, would lower the present standard from 55 gallons per day per capita to 48—a reduction of nearly 13 percent. Come 2025, when existing law would commence the lowering of Indoor Residential Water Use standards from 55 to 52.5 gallons per day per capita, AB 1434 would further lower this standard to 44 gallons per day per capita—a 16 percent decrease from the existing law's standards. Finally, by 2030, AB 1434 proposes to cut the existing law's standard for that same year by 20 percent, lowering the currently planned standard of 50 gallons per day per capita to only 40.

Conclusion and Implications

As noted above, these Urban Water Use Objectives do not set hard-caps on urban retail water suppliers when it comes to providing water for Indoor Residential Water Uses. What it does do, however, is keep the pressure on such urban retail water suppliers to engage their customers to achieve these standards. Further, the Legislature maintains that Local urban retail water suppliers should have primary responsibility for meeting standards-based water use targets, and that they are to retain the flexibility to develop their water supply portfolios, design and implement water conservation strategies, educate their customers, and enforce their rules.

What Assembly Bill 1434 proposes is an expedited schedule towards efficient water use for Indoor Residential uses. By cutting these standards so drastically with only a ten-year planning horizon, the Legislature

will be making clear its expectations for the future of water conservation and efficiency from water users across the state.

The bill can be tracked online at: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB1434.
(Kristopher Strouse, Wes Miliband)

CLIMATE CHANGE SCIENCE

RECENT SCIENTIFIC STUDIES ON CLIMATE CHANGE

Disturbance Suppresses the Aboveground Carbon Sink In North American Boreal Forests

Boreal forests, or forests growing at high latitudes, are considered a critical carbon sink within the global carbon cycle, because carbon dioxide (CO_2) uptake and storage by these forests helps balance the global carbon budget. Rising CO_2 levels and a warming climate may increase high-latitude productivity, a phenomenon considered "growth enhancement" whereby increasing rates of photosynthesis and longer growing seasons can result in increased carbon uptake. An intuitive conclusion would be that climate change increases the ability of boreal forests to act as a carbon sink; unfortunately, this conclusion does not represent the full story. Climate change also increases the frequency and severity of disturbances to boreal forests, defined as events such as fires, timber harvest, insect outbreaks, or droughts that decrease the aboveground biomass (AGB) storage of carbon. Understanding how disturbances impact AGB dynamics is crucial to understanding how climate change will actually influence the boreal forest terrestrial carbon stock.

A study published by Wang et al in "Nature Climate Change" sought to quantify the AGB dynamics within the boreal northwestern North America to understand this exact issue. Using satellite remote sensing data from NASA's Arctic-Boreal Vulnerability Experiment (ABoVE) coupled with historical data, researchers were able to identify changes in AGB stocks related to fires, timber harvest, and post-disturbance recovery (*i.e.* succession growth after fires, planting after harvesting, *etc.*). The researchers also used linear regression to understand the sensitivity of AGB dynamics to disturbance area and climate, analyzed recently disturbed areas to study the importance of the gross enhancement effect, and compared their estimates of AGB dynamics with Earth System Models (ESMs) to understand their efficacy.

Results from the satellite observations indicate that during the period of study (1984-2014) the AGB stocks increased by 434 Tg total. Fires accounted for a net loss of 147 Tg of AGB, the result of a much larger cumulative loss which was mostly offset by the post-disturbance recovery AGB gains. Timber harvest, which only impacted about 1 percent of the domain area, accounted for a net loss of 42 Tg of AGB, the result of a cumulative loss of about twice the net loss, offset by post-disturbance recovery.

For the domain area outside of the range of impact from fires and harvest, there was a net AGB gain of 633 Tg. Typically, this would be attributed to the effects from growth enhancement induced by climate change. However, the sensitivity analysis run by the study found that disturbance area was a much more sensitive parameter than climate, indicating that disturbance is the primary driver of interannual AGB changes. The study of recently disturbed areas similarly found that growth enhancement was likely not the cause of gains. The researchers suggest that the gains can instead be attributed to incomplete recordings of AGB losses.

The study also found that ESMs largely overestimated AGB stocks and gains compared to their satellite observations, which means that ESMs overestimate the ability of boreal forests to act as a terrestrial carbon sink. This is likely because ESMs don't always represent fire dynamics nor the increased frequency and severity of these fires resulting from climate change. Additionally, ESMs may be overestimating the impact of growth enhancement. These findings suggest that an improved understanding of the impact of disturbances on AGB dynamics is critical to more accurately defining the global carbon balance.

See: Wang, J.A., Baccini, A., Farina, M. et al.

Disturbance suppresses the aboveground carbon sink in North American boreal forests. Nat. Clim. Chang. 11, 435–441 (2021). https://doi.org/10.1038/s41558-021-01027-4.

Future of Woody-Biomass Carbon Storage in Sub-Saharan Africa

Forests are a critical part of the global carbon cycle. As trees and other plants grow, they sequester carbon from the atmosphere for long term storage in wood, bark, and other forms of biomass. The African continent is the second largest landmass and one of the largest carbon sinks on Earth. As both African development and climate change perturb the land, forests, and climate conditions, there is a lot of uncertainty with respect to the future carbon sequestration potential of the African continent. What is more certain, however, is that a reduction or elimination of this massive carbon sink could be detrimental to the global carbon cycle. Therefore, it is critical to investigate how anthropogenic and natural influences could impact biomass productivity over the next decade.

A group of scientists in New Mexico and Florida created a novel model for estimating the influences of climate change and anthropogenic forces on biomass growth throughout the African continent. Using a light detection and ranging (LiDAR) optical detection system to classify and quantify amounts of biomass in Africa in coordination with known socio-environmental data, the team built a machine-learning model to estimate how this known data influences biomass coverage. Once the model was validated using known historic training data, the scientists modeled two United Nations climate scenarios (also known as representative concentration pathways) to predict what African biomass would look like under these two potential climate change scenarios. Based on the results of the future models, total biomass in Africa is projected to decrease by as much as 2.5 percent as a result of climate forcing alone. When combined with anthropogenic influences, such as land development and intentional burning, woody biomass is expected to decrease even further, with up to 8 percent reduction across Africa. However, this statistic masks regional variations also highlighted in the model; for example, while the woody biomass in the Cape and Namib Desert areas is projected to decrease by as much as 33 percent from climate forcing alone, the woody biomass in East Africa is projected to increase by up to 78 percent.

The study points to a harrowing conclusion: when climate change is combined with population growth, economic development, and other forms of land-use change, Africa's potential to store carbon shrinks. While this study only evaluates the impacts on African biomass, this trend may be true in other regions of the world as well. Thus, it is critical to promote sustainable development and green infrastructure to preserve important carbon sinks without stifling economic growth and development.

See: Ross, C. W., et al. Woody-biomass projections and drivers of change in sub-Saharan Africa. Nature Climate Change, 2021; DOI:10.1038/s41558-021-01034-5

Climate-Amplifying Effects from Climate-Carbon Cycle Feedback

Carbon and climate have a critical impact on one another in what is known as the climate-carbon feedback cycle. The carbon-climate cycle has a positive feedback effect, meaning that a disturbance to the climate causes an amplified disturbance for carbon, which in turn causes an amplified disturbance for the climate, and so forth. This amplification effect has been analyzed in physical climate models, but hasn't previously been analyzed based on observational data. The use of observational data allows the feedback cycle analysis to include the impact of biophysical and ecological effects from land use change and carbon residence time, which could improve accuracy of climate model and carbon budget predictions.

A team of researchers led by Zhang, et al. studied the relationship between the carbon concentration feedback and carbon climate feedback parameters by reconstructing data from 1850 – 2017 and 1000 – 1850. The reconstructed and historical data for global surface temperature and atmospheric CO_2 was obtained using ice core and tree ring observations. The researchers then applied a Fourier analysis to the historical

and reconstructed data to quantify the variation in the two feedback parameters over different periods of time. The team also studied the gain factor used to describe the climate-amplifying effect resulting from the relationship between the two parameters. The results showed that the carbon-concentration feedback parameter had low variation (less than 10 percent) while the carbon-climate feedback parameter increased on a decadal scale. Combined feedback gain was nearly constant, and lower than what has been estimated previously using Earth system models. A lower gain indicates that the climate is less sensitive to changes in atmospheric CO_2.

The researchers note that the results of this study imply that the future global allowable CO_2 emissions, known as the carbon budget, could be higher than previously expected by 9 percent more. This finding could be used to more accurately model current and predicted future CO_2 emissions impacts on the climate.

See: Zhang, X., Wang, YP., Rayner, P.J. *et al.* A small climate-amplifying effect of climate-carbon cycle feedback. *Nat Commun* **12,** 2952 (2021). https://doi.org/10.1038/s41467-021-22392-w.

Spatial and Diurnal Variation of Tree Canopy Temperature in New York City

The Urban Heat Island effect leads to elevated temperatures in major metropolitan areas through heat absorption by built infrastructure. The excess heat can be mitigated through a variety of strategies, including increased planting of trees. Specific urban forest management strategies are required to ensure the trees are successful in mitigating excess heat. One key data point for management is canopy temperature, which is a measurement of the energy balance between tree leaves and the ambient atmosphere.

In a recent study published in Nature Scientific Reports by Vo and Hu of the University of Alabama in Huntsville, the spatial and temporal variation in canopy temperature in New York City was analyzed. In urban areas, trees are exposed to or shielded from heat through a variety of mechanisms, including heat radiating off nearby pavement or shadows cast by nearby buildings. Nearby bodies of water, known as bluespaces, also have an impact. In order to capture the diurnal variation in canopy temperature at a fine resolution, Vo and Hu relied on Land Surface Temperature thermal sensors from The Ecosystem Spaceborne Thermal Radiometer Experiment on Space Station (ECOSTRESS) project. These sensors provide temperature data on 70m resolution, detailed enough to capture specific clusters of trees within neighborhoods.

Vo and Hu found high spatial variation in daytime canopy temperature compared to nighttime canopy temperature, especially in the months of June through October. The variation is highest at noon, with a 5.6 degree Kelvin difference seen across New York City. This reflects the influence that surrounding urban structures have on the canopy's exposure to heat. Vo and Hu also illustrated that trees have a higher capacity to adsorb heat than man-made structures, with buildings at the same geographic location averaging several degrees higher than the local tree canopy. This trend is strongest during daytime hours but can still be observed at night. This study indicates that heat mitigation efforts must be highly localized, with strategic and deliberate decision making to improve outcomes of urban forest management and expansion efforts. Urban heat mitigation will become increasingly important in making sure that cities remain sustainable and inhabitable as the planet continues to warm.

See: Vo, T.T., Hu, L. Diurnal evolution of urban tree temperature at a city scale. *Sci Rep* **11,** 10491 (2021). https://doi.org/10.1038/s41598-021-89972-0.

(Abby Kirchofer, Libby Koolik, Shaena Berlin Ulissi, Ashley Krueder)

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REGULATORY DEVELOPMENTS

CALIFORNIA DEPARTMENT OF WATER RESOURCES RELEASES FINAL DROUGHT PLANNING REPORT FOR SMALL AND RURAL WATER SUPPLIERS

In March 2021, the California Department of Water Resources (DWR) released a final report with recommendations and tools to help small water suppliers and rural communities plan for drought and other events that may contribute to water shortages (Drought Planning Report).

Background

Only four years since the last drought emergency, California is once again experiencing critically dry conditions and is facing the possibility of another statewide drought. Small water systems (*i.e.* those with fewer than 3,000 service connections) and self-supplied rural communities (*i.e.* those communities delineated by U.S. Census Block Groups with one or more domestic wells installed within the last 50 years) are particularly vulnerable to water supply and quality issues and higher water costs during extended dry periods. However, unlike larger urban water suppliers, small and rural systems are not required to adopt and maintain drought contingency plans.

In 2018, the California Legislature passed Assembly Bill 1668 (AB 1668) in the wake of the last major drought, directing DWR to identify the small suppliers and rural communities at risk of vulnerability due to drought or water shortage and develop recommendations for improving drought contingency planning for those areas. DWR prepared its Drought Planning Report pursuant to the mandate in AB 1668 through stakeholder engagement and consultation with experts over the past couple years. The Drought Planning Report sets out detailed guidance for developing water shortage contingency plans and provides tools for the thousands of smaller water systems in the state to better understand and plan for their water shortage vulnerability risk factors.

Recommendations for Drought and Water Shortage Contingency Plans

Part 1 of the Drought Planning Report consists of DWR's recommendations for drought and water shortage contingency planning for small and rural water systems. Small water suppliers for 1,000 or more customers are strongly encouraged to create water shortage contingency plans akin to the Urban Water Management Plans developed for larger urban water systems. DWR recommends that contingency plans identify the resources needed in the event of water shortage emergencies and coordinated planning among suppliers, counties, and other regional entities to ensure those resources can be made available.

The Drought Planning Report includes a seven-step framework approach with key components that small water suppliers and rural communities can utilize to develop or improve their drought contingency plans.

- Step 1 calls for the formation of a water shortage response team that will establish the goals and objectives for managing drought-related problems and coordinate with other regional water planning groups. Key duties of a response team would include drought contingency planning and establishment of effective emergency notification and communication systems.

- Step 2 covers forecasting supply in relation to demand. This step requires suppliers to take inventory of existing and future water supply and demand, and become familiar with the impacts that water shortages and drought conditions have on the system.

- Step 3 involves balancing of projected supply and demand levels, identifying potential mitigation measures, and securing alternative water sources to improve supply vulnerabilities.

- Step 4 sets the threshold trigger mechanisms for drought or water shortage response actions, based

on the needs and vulnerability of each system or community.

•Step 5 calls for a staged program for demand reduction during a water shortage with criteria and triggers established at 10%, 25%, and 50% shortage levels. This step includes developing an approach to interface with the public to manage water user expectations.

•Step 6 is the plan adoption, in which the community and stakeholders would be asked to participate and necessary revenue programs are established.

•Step 7 covers implementation of the water shortage plan, with measures in place to determine actual water use reductions and criteria for returning to normal operation.

The Drought Planning Report also provides a template for drought contingency planning for tribal public water systems, developed by the Indian Health Service, California Area Office of Environmental Health and Engineer, and incorporating elements from existing drought contingency plans for urban suppliers in the state. Finally, the Drought Planning Report suggests several funding ideas for small water systems to finance contingency planning efforts, including state-level block grants, incentivized urban water system assistance, state reimbursements for interest and loan fees for capital construction projects to bolster the smallest water systems, and technical assistance programs focused on implementation of the recommendations in disadvantaged communities.

Water Shortage Vulnerability Risk Scores

Part 2 of the Drought Planning Report contains a scoring rubric for drought and water shortage risks and a Risk Explorer Tool that assesses the drought and water shortage risks for small water systems and rural communities through a more holistic, statewide lens. To inform these tools, DWR analyzed the relative risks for California's 2,419 small water suppliers and 4,987 rural communities based on 29 separate risk indicators. The risk indicators are broken down into three main classifications: 1) the exposure of systems to hazardous conditions or events such as drought, wildfires, and sea-level rise; 2) the relative physical and organizational vulnerability of the exposed communities and their infrastructures; and 3) the historical impacts of past drought events.

With a total scoring range of 0 to 100 (100 being the highest risk) the Risk Explorer Tool indicates a wide variety of risk vulnerability among water systems across the state, scaled so that some small water suppliers and rural communities have a score of zero while others reach 100. The small water suppliers have a mean and median score of 54, indicating a normal distribution. For rural communities, the mean and median scores were 42, also showing a normal distribution. The Drought Planning Report notes that the scaled scores should not be interpreted as a clear ranking among evaluated systems, nor does it forecast drought events or predict the severity of drought-related impacts. Rather, the tool and accompanying recommendations are intended to inform and support regional risk planning efforts.

Conclusion and Implications

DWR's Drought Planning Report builds on the state's ongoing efforts to make water conservation a new way of life and facilitate the resources and opportunities needed to ensure access to safe and secure water supplies throughout California. With the impending drought conditions for parts of California, the guidance and analytical tools contained in the Drought Planning Report will certainly be useful for identifying vulnerable systems and facilitating regional planning work. DWR acknowledges that for many of these smaller systems to implement the recommended measures, funding and financing are key, but in most cases, additional action from State will be needed for those funding resources to materialize.

The Department of Water Resources' Drought Planning Report and Risk Explorer Tool are available at: https://water.ca.gov/Programs/Water-Use-And-Efficiency/2018-Water-Conservation-Legislation/County-Drought-Planning.
(Austin C. Cho, Meredith Nikkel)

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IDAHO AGENCY DIRECTOR ISSUES CONTESTED ADMINISTRATIVE DECISION CONSIDERING WATER RIGHT IMPLICATIONS OF WASTEWATER REUSE

On May 3, 2021, the Director of the Idaho Department of Water Resources (IDWR) issued his *Order on Petition for Declaratory Ruling* (Order) addressing whether municipalities or their contracting agents need obtain a new and separate water right to land apply treated wastewater effluent to lands outside traditional municipal (domestic/potable) service areas. The question arose from a contractual arrangement between Nampa, Idaho and Pioneer Irrigation District whereby Nampa intends to discharge Class A Recycled wastewater from its publicly owned wastewater treatment plant (WWTP) to the District's Phyllis Canal for Pioneer landowner irrigation use (land application) within Pioneer's boundaries. Pioneer's boundary also overlaps, in significant part, with Nampa's municipal boundaries (including the city's area of impact).

The Nampa-Pioneer Relationship

Currently, Nampa discharges its treated WWTP effluent (approximately 18 cfs at present) to nearby Indian Creek pursuant to a federal Clean Water Act, National Pollutant Discharge Elimination System (NPDES) permit. Future constituent treatment compliance schedules under the permit require increased treatment of Phosphorus and temperature, in turn necessitating costly WWTP upgrades that can be avoided in part via redirection of Nampa's WWTP discharge to Pioneer's nearby Phyllis Canal instead of Indian Creek. Anticipated savings to Nampa's sewer utility ratepayers is estimated at roughly $20 Million.

Nampa and Pioneer entered into a contract where Nampa will deliver and Pioneer will accept up to 41 cfs of WWTP effluent (treated to Class A Recycled Water standards) annually over the life of the agreement. In furtherance of the agreement, Nampa obtained, with Pioneer's support, a recycled water Reuse Permit from the Idaho Department of Environmental Quality (DEQ) in January 2020. The 10-year permit authorizes the discharge of up to 31 cfs of Nampa WWTP effluent to the Phyllis Canal through 2030.

Pioneer has long provided irrigation water to Nampa and its citizens given their overlapping landmasses. Among other Nampa-related deliveries from Pioneer, Nampa owns and operates a municipal pressurized irrigation system, roughly 3,000 acres of which is served by deliveries from Pioneer Irrigation District. From a mass balance perspective, Nampa's Pioneer-based delivery entitlement (60 cfs for the irrigation of 3,000 acres) exceeds the permitted 31 cfs discharge under the Reuse Permit (and the up to 41 cfs discharge contemplated in the future under the parties' reuse agreement).

Regardless, concern over the redirection of Nampa's WWTP effluent from Indian Creek to Pioneer's Phyllis Canal led to IDWR's review of the matter under a petition for declaratory ruling filed by downstream Indian Creek water user Riverside Irrigation District, Ltd. (Riverside). Riverside alleged injury based on the Nampa-Pioneer project given its (Riverside's) reliance on Indian Creek flows for its own irrigation activities downstream of Pioneer.

The Declaratory Petition Contentions: Is a New Water Right Necessary?

Riverside's petition raised questions over traditional wastwater principles under Idaho's prior appropriation doctrine and the ultimate scope and flexibility of the more modern attributes of municipal water rights under Idaho's Municipal Water Rights Act. The petition also sought what is now IDWR's first formal agency decision under the 2012 enactment of Idaho Code § 42-201(8) relating to the disposal of WWTP effluent by municipalities and other WWTP-owning and operating entities in response to federal or state environmental regulatory requirements.

Nampa, Pioneer and several other municipal intervenors contended that neither Pioneer nor Nampa need obtain a new and separate water right to implement the recycled water reuse authorized under the DEQ permit. Riverside contended that Pioneer, at the least, required a new water right to accept and use Nampa's WWTP effluent to avoid an illegal enlargement of Nampa's municipal water rights (additional consumptive use of what would otherwise discharge to the creek) and to avoid an illegal diversion of

"groundwater" (the source of Nampa's potable system water rights, the residual of which is treated at by the Nampa WWTP) by Pioneer. Riverside also asserted that Pioneer's failure to proceed through the water right application process circumvented the senior water right injury analysis that is required under such proceedings.

Nampa, Pioneer, and the municipal intervenors argued otherwise based on prior IDWR administrative authority recognizing that municipal water rights are considered wholly consumptive as a threshold matter (thus there can be no enlargement in use); one (Riverside) cannot compel others to waste water for their downstream benefit under Idaho's prior appropriation doctrine; and, most specifically, Idaho Code § 42-201(8) governs in the context of WWTP effluent land application in response to federal or state environmental regulations and the statute makes clear that no new water right is necessary.

Pioneer and Nampa further contended that Pioneer cannot perfect a new water right even if one was applied for because Pioneer fails the first prong of Idaho's two prong perfection requirement: 1) physical diversion of water from a natural source; and 2) application of the water diverted to a recognized beneficial use. The parties all agree that the "source" of Nampa's WWTP effluent is "groundwater" first diverted by Nampa under its existing potable system groundwater-based water rights. But, those diversions (wellheads) are under the sole ownership, control, and maintenance of Nampa—Pioneer has no access to them or right to compel the diversion of water from them. Thus, while Pioneer landowner end irrigation use of the WWTP effluent is certainly a qualifying beneficial use under Idaho law, whether Pioneer is "diverting" that water by accepting the WWTP effluent via pipeline discharge to the Phyllis Canal was an open question under the IDWR petition.

The Director's Order

None of the parties to the proceeding requested a hearing on the matter, opting instead to submit the matter to the Director (as hearing officer) on the briefing which was, in turn, based on a joint stipulation of facts submitted by Nampa, Pioneer, and Riverside. The Director did not request oral argument either, and the matter was decided accordingly.

The Director determined that neither Pioneer, nor Nampa, need obtain a new water right to: (a) direct WWTP effluent to the Phyllis Canal (in the case of Nampa); or (b) accept and use (i.e., land apply) that WWTP effluent (in the case of Pioneer). The Director decided the matter almost entirely on application of Idaho Code § 42-201(8).

Though all-involved noted and conceded that Pioneer, itself, was not an entity capable of exercising any rights under § 42-201(8) (*e.g.*, Pioneer is not a municipal water provider, sewer district, or other qualifying entity named in the statute), there was equally no question that Nampa is an eligible entity. The Director ultimately found the contractual relationship between Nampa and Pioneer sufficient to bring Pioneer under the authority of the statute as an extension of Nampa—that "Nampa and Pioneer are so intertwined in this matter that Subsection 8's exemption applies to Pioneer." Order, p. 4. The Nampa-Pioneer reuse agreement expressly obligates both parties to perform various functions and tasks for the benefit of one another, and Nampa would not have access to Pioneer's Phyllis Canal for discharge purposes and Pioneer would, likewise, have no right to Nampa's WWTP effluent but for the contract between them.

The Director also found the DEQ Reuse Permit as a basis to bring Pioneer under the statute. The permit authorizes Nampa and Pioneer to recycle and reuse the WWTP effluent upon satisfaction of a variety of regulatory conditions shared by Nampa and Pioneer as a further outgrowth of their underlying contract. Order, pp. 4-5.

Finding that Pioneer was, essentially, an extension of Nampa and its authority under Idaho Code § 42-201(8), the Director held that subsection (2) of the statute relied upon by Riverside (that which requires one to obtain a water right before water is diverted and applied to land) did not apply. This is because subsection (8) is an express exception to the typical water right requirement, stating in relevant part: "Notwithstanding the provisions of subsection (2) of this section . . ."

Last, the Director upheld subsection (8) of the statute as constitutional because as pointed out by Pioneer, Nampa, and the other municipal intervenors, Riverside has no right to compel Nampa to waste water into Indian Creek for Riverside's down-

stream benefit. Order, p. 5. Though Riverside might be impacted in the future when Nampa redirects its WWTP effluent to the Phyllis Canal (owing to decreased flows in Indian Creek):

> Riverside is not entitled to Nampa's wastewater. . .Without that entitlement, there is no injury to Riverside. . .Without injury, there isn't a violation [of] the constitution. *Id.*

Conclusion and Implications

It remains to be seen if Riverside appeals the Director's Order to district court. In the meantime, Nampa and Pioneer continue their preparations under the DEQ Reuse Permit in hopes to be discharging WWTP effluent to the Phyllis Canal no later than

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—Air Quality

•April 15, 2021—The U.S. Environmental Protection Agency (EPA) announced a settlement with Winfield Solutions LLC, doing business as Omnium, to resolve an alleged violation of the federal Clean Air Act Risk Management Program regulations at the company's fertilizer manufacturing and distribution facility in Dodge City, Kansas. As part of the settlement, the company will pay a $83,975 civil penalty. Winfield Solutions LLC is a subsidiary of Land O' Lakes and operates multiple chemical manufacturing facilities throughout the country. In 2018, EPA fined another Winfield Solutions facility in St. Joseph, Missouri, for violations of the Risk Management Program regulations.

Omnium is subject to Risk Management Program regulations because of the location and storage of over 20,000 pounds of aqueous ammonia in concentrations over 20% at the facility. The regulations require facilities that use extremely hazardous substances to develop a risk management plan. After reviewing Winfield Solutions' facility records, EPA determined that the company failed to submit and implement a risk management plan to prevent the release of aqueous ammonia. In response to EPA's findings, Winfield Solutions took the necessary steps to return the facility to compliance.

•April 20, 2021—EPA announced a settlement with N&D Transportation Company, Inc. under which the company agreed to has correct alleged violations of chemical safety regulations and will pay a settlement penalty of $314,658 to settle claims that the company violated chemical accident prevention laws at its facility in North Smithfield, Rhode Island. The settlement resolves EPA claims that the company violated chemical accident prevention provisions of the Clean Air Act and chemical inventory reporting requirements of the Emergency Planning and Community Right-to-Know Act (EPCRA). EPA alleged that between 2015 and 2020, the company violated the Clean Air Act by failing to comply with chemical and process hazard safety requirements under both "general duty clause" (GDC) and "risk management program" (RMP) provisions, and violated EPCRA by failing to properly prepare and submit EPCRA chemical inventory reports for numerous chemicals present at its 100 Industrial Drive facility. "Extremely hazardous substances" (EHS) requiring reporting at the facility included formaldehyde, toluene diisocyanate (TDI), peracetic acid, and sulfuric acid. The N&D facility is situated near a tributary of the Blackstone River as well as many businesses and residences, the closest of which is under a tenth of a mile away. Significant allegations included the failure to ensure incompatible chemicals were stored separately and to keep water-reactive chemicals away from the sprinkler system, failure to submit a Clean Air Act risk management plan, failure to conduct a process hazard analysis for the warehouse operation, and failure to submit complete, timely EPCRA "Tier II" reports with all state and local planning and response authorities. The case is part of an EPA Chemical Accident Risk Reduction National Compliance Initiative.

•April 21, 2021—EPA announced that Adrenaline Performance LLC of Shelley, Idaho has agreed to pay a $48,600 Clean Air Act penalty for illegally selling and installing vehicle emissions-control defeat devices to businesses and individuals in southeast Idaho. EPA alleges that from approximately January 1, 2018 to June 17, 2020, the company sold, marketed, or installed at least 671 parts or components that bypass, defeat, or render inoperative the manufacturers' technology and design necessary to reduce vehicle

emissions to meet federal Clean Air Act standards and tampered with the emission control systems of at least 248 highway vehicles. The Agency estimates that the defeat devices led to 38,000 pounds of excess emissions from the tampered vehicles for each year of sales. EPA estimates that—in terms of oxides of nitrogen (NOx)—the emissions impact of removing emission controls from just one pickup truck is equivalent to putting about 300 new pickup trucks on the road. The penalty Adrenaline Performance agreed to pay reflects the company's demonstrated limited ability to pay a higher penalty. The parts were designed and marketed for use on makes and models of diesel pickup truck engines manufactured by Cummins Inc., General Motors Company and Ford Motor Company.

•May 4, 2021—EPA announced a settlement with CSL Behring, LLC of Bradley, Illinois, under which the company will pay a civil penalty of $527,144 to resolve alleged violations of the Clean Air Act. CSL Behring is engaged in the research, development and manufacturing of blood-plasma based medical therapies at its Bradley facility. After inspecting the facility, EPA alleged multiple violations of the Risk Management Program requirements under the Clean Air Act. Facilities that use certain hazardous substances are required to develop a Risk Management Plan and implement a Risk Management Program to protect human health and the environment. EPA alleged the company failed to develop written operating procedures for safely conducting activities, implement a mechanical integrity program, implement an emergency response program with instructions on the use of relevant equipment, and meet recordkeeping requirements.

•May 13, 2021—EPA issued an emergency order under § 303 of the Clean Air Act to New Indy Containerboard to reduce emissions of hydrogen sulfide from their pulp and paper mill in Catawba, S.C., to meet specific limits as monitored at the fence line. Simultaneously, EPA sent the company a formal request for information under CAA § 114 requiring the company to perform air monitoring in the communities surrounding the facility. EPA is also initiating its own air monitoring around the greater Rock Hill area extending into North Carolina this week in response to requests from state, local and tribal agencies. The order requires New Indy Containerboard to immediately begin taking steps to reduce hydrogen sulfide emissions to meet specific limits, as monitored at the fence line, of 600 parts per billion over a rolling 30-minute period and 70 parts per billion over a rolling seven-day average. The facility is required to install three fence line monitors to ensure that it is meeting the limits. Under the order, the company is required to submit a draft plan to meet these limits no later than May 18, followed by a final plan no later than May 24, and comply with the final plan within five days after EPA approval of the company's final plan.

•May 14, 2021—EPA ordered Limetree Bay Terminals, LLC and Limetree Bay Refining, LLC (Limetree Bay) to pause all operations at its St. Croix, U.S. Virgin Islands refinery due to multiple improperly conducted operations that present an imminent risk to public health. Under its legal authorities in Clean Air Act § 303, EPA may take this urgent measure when an entity's actions are substantially endangering public health, welfare, or the environment. Limetree Bay is located in a community that is disproportionately affected by environmental burdens and its repeated incidents raise significant environmental justice concerns, which are a priority for EPA.

Since February of this year, the refinery has experienced multiple major mishaps resulting in significant air pollutant and oil releases. The refinery operations must remain paused until the order terminates, unless EPA makes a determination that operations can safely resume before then. Once refinery operations resume, Limetree must operate the refinery in a manner that does not present an imminent and substantial endangerment to the public and protects the health and welfare of residents living near the facility.

Civil Enforcement Actions and Settlements—Water Quality

•April 21, 2021—The EPA announced a settlement with the U.S. Navy under which the Navy has agreed to make more than $39 million in repairs at the Newport Naval Station in Rhode Island to ensure the facility is in compliance with laws regulating the discharge of stormwater into Coddington Cove, an embayment of Narragansett Bay. Under the terms of the agreement, the Navy will complete stormwater discharge infrastructure improvements by 2030 at the former Derecktor Shipyard, settling EPA allegations

that the facility was in violation of the Clean Water Act. The repairs include seven specific projects along the bulkhead, a retaining wall along the waterfront.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

• April 15, 2021—EPA announced a settlement with St. Albans Creamery, LLC, a facility located in St. Albans, Vermont and a subsidiary of Dairy Farmers of America, Inc., processes milk and other dairy products. Under the settlement, St. Albans agreed to pay a penalty of $58,765 for three alleged violations of the federal Emergency Planning and Community Right-to-Know Act (EPCRA). (The EPCRA requires companies to file reports in EPCRA's Toxic Release Inventory (TRI) database.) A 2017 TRI report for nitric acid was due by July 1, 2018 and two 2018 TRI reports for nitric acid and nitrate compounds were due by July 1, 2019. St. Albans filed all three missing reports in May 2020, after being contacted by EPA.

• April 15, 2021—EPA announced a settlement with Westfield Electroplating Company, a Westfield, Mass. based company that electroplates, anodizes, colors, and finishes metals and formed products for the aerospace and defense industries. Under the settlement, the company agreed to pay a penalty of $55,862 to resolve claims by EPA that it violated the federal Emergency Planning and Community Right-to-Know Act (EPCRA). (The EPCRA requires companies to file reports in EPCRA's Toxic Release Inventory (TRI) database.) EPA alleged that the company failed to submit TRI reports for nitric acid, nitrate compounds and cyanide compounds at its facility for 2018.

• April 15, 2021—EPA announced a settlement with Nichols Portland, LLC under which the company agreed to pay a settlement penalty of $36,943 to resolve claims by EPA that it violated the federal Emergency Planning and Community Right-to-Know Act (EPCRA). (The EPCRA requires companies to file reports in EPCRA's Toxic Release Inventory (TRI) database.) EPA alleged that the company failed to timely submit TRI reports for both copper and nickel processed at its Portland, Maine facility in 2018. The facility uses powdered metals to manufacture small parts and pump components. Nichols Portland was required to file 2018 TRI reports for copper and nickel by July 1, 2019. The company filed the reports for their facility ten months later in April 2020 after being contacted by EPA.

• April 15, 2021—announced a settlement with First Light Technologies, Inc., a Poultney, Vermont based ultraviolet lamp production company, under which the company agreed to pay a settlement penalty of $23,558 to resolve claims by EPA that it violated the federal Emergency Planning and Community Right-to-Know Act (EPCRA). (The EPCRA requires companies to file reports in EPCRA's Toxic Release Inventory (TRI) database.) EPA alleged that the company failed to timely report more than ten pounds of mercury that the facility had processed in 2018. The company manufactures custom ultraviolet germicidal lamps and bulbs for the air and water purification industries. First Light was required to file a TRI report for mercury by July 1, 2019. The company filed the report ten months later in April 2020 after being contacted by EPA.

• April 19, 2021—EPA announced a settlement with announced Univar Solutions USA, Inc. of Portland, Oregon under which the company will pay a $165,000 penalty for violating federal pesticide laws when it failed to properly label its "Woodlife 111" pesticide which is used as a wood preservative. EPA cited the company for 33 violations of the Federal Insecticide, Fungicide, and Rodenticide Act when Univar sold and distributed the misbranded pesticide via bulk shipments.

• May 4, 2021—EPA announced a settlement with Brandt LLC dba All-Safe Abatement Services regarding allegations that the company failed to comply with Section 402(c) of the U.S. Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.* (TSCA)—the Lead Paint Rule. The EPA alleges that the company contracted to perform lead paint remediation services without holding the appropriate certifications. The penalty was $1,000.

• May 4, 2021—EPA announced a settlement with Mashtare Construction regarding allegations that the company failed to comply with Section 402(c) of the U.S. Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.*—the Lead Paint Rule. The EPA alleges that the company contracted to perform lead paint

remediation services without holding the appropriate certifications. The penalty was $1,000.

•May 4, 2021—EPA announced a settlement with Northwest Professional Services Inc regarding allegations that the company failed to comply with Section 402(c) of the U.S. Toxic Substances Control Act, TSCA—the Lead Paint Rule. The EPA alleges that the company contracted to perform lead paint remediation services without holding the appropriate certifications. The penalty was $1,000.

•May 4, 2021—EPA announced a settlement with Palmer Enterprises LLC dba All-Safe Abatement Services regarding allegations that the company failed to comply with Section 402(c) of the U.S. Toxic Substances Control Act—the Lead Paint Rule. The EPA alleges that the company contracted to perform lead paint remediation services without holding the appropriate certifications. The penalty was $200.

•May 6, 2021—EPA announced a settlement with Bear River Supply Inc., based in Rio Oso, Calif., under which the company has agreed to pay a $50,578 penalty to resolve claims that the company produced pesticides in an unregistered establishment, distributed and sold misbranded pesticides and failed to maintain equipment properly. The violations were discovered during a series of inspections conducted by the California Department of Pesticide Regulation (DPR) and EPA at two separate facilities in Rio Oso. Inspectors found that "Vistaspray 440 Spray Oil" and "Roundup PowerMax" were being repackaged and distributed with improper labeling. In addition, inspectors determined that Bear River Supply was producing pesticides in a facility that was not registered with EPA. While at the facilities, inspectors also found that a secondary containment unit and loading pad, both used to contain potential spills, were inadequate.

•May 10, 2021—EPA announced a settlement with Scranton Manufacturing Company Inc. under which the company has agreed to pay a civil penalty of $50,208 to resolve violations of the federal Resource Conservation and Recovery Act. The Scranton, Iowa, company manufactures truck equipment. According to EPA, Scranton Manufacturing qualified as a "large quantity generator" of hazardous waste but was failing to meet requirements of a facility producing that much waste. The company failed to prepare a contingency plan to respond to emergencies; failed to make arrangements with all local emergency responders in the event of a release or threat of a release of a hazardous waste; and failed to complete all staff training requirements. Because the company failed to meet these requirements, it was operating as an unpermitted hazardous waste treatment, storage, and disposal facility. As part of the settlement, the company agreed to correct all alleged violations.

Indictments, Sanctions, and Sentencing

•April 20, 2021—The federal district court for the Eastern District of Michigan issued an indictment charging two Italian nationals, along with a previously charged co-conspirators, for their alleged role in a conspiracy to defraud U.S. regulators and customers by making false and misleading statements about the air emissions controls and fuel efficiency of more than 100,000 diesel vehicles sold in the United States by FCA US LLC.

According to court documents, Sergio Pasini, 43, of Ferrera, Italy, and Gianluca Sabbioni, 55, of Sala Bolognese, Italy, two senior diesel managers at Fiat Chrysler Automobiles Italy S.p.A. (FCA Italy), a wholly owned subsidiary of Stellantis N.V.—along with a previously charged co-conspirator, Emanuele Palma, 42, of Bloomfield Hills, Michigan—were responsible for developing and calibrating the 3.0-liter diesel engine used in certain FCA diesel vehicles.

The superseding indictment alleges that Palma, Pasini, Sabbioni, and their co-conspirators, purposely calibrated the emissions control functions to produce lower NOx emissions under conditions when the subject vehicles would be undergoing testing on the federal test procedures or driving "cycles," and higher NOx emissions under conditions when the subject vehicles would be driven in the real world. Palma, Pasini, and Sabbioni also allegedly made and caused others to make false and misleading representations to FCA's regulators about the emissions control functions of the subject vehicles in order to ensure that FCA obtained regulatory approval to sell the subject vehicles in the United States.

Pasini and Sabbioni are each charged with one count of conspiracy to defraud the United States and to violate the Clean Air Act, one count of conspiracy to commit wire fraud, and six counts of violating the Clean Air Act. If convicted, Pasini and Sabbioni

each face up to five years in prison on the conspiracy count to defraud the United States and to violate the Clean Air Act, up to 20 years in prison on the conspiracy count to commit wire fraud, and up to two years in prison for each count of violating the Clean Air Act. A federal district court judge will determine any sentence after considering the U.S. Sentencing Guidelines and other statutory factors.

Palma is charged with one count of conspiracy to defraud the United States and to violate the Clean Air Act, one count of conspiracy to commit wire fraud, six counts of violating the Clean Air Act, and two counts of making false statements to representatives of the FBI and the U.S. Environmental Protection Agency's Criminal Investigation Division (EPA-CID). A federal district court judge will determine any sentence after considering the U.S. Sentencing Guidelines and other statutory factors.

•April 21, 2021—a federal grand jury in the Eastern District of New York unsealed the indictment of one fisherman, a wholesale fish dealer, and two of its managers for conspiracy to commit mail and wire fraud and obstruction in connection with a scheme to illegally overharvest fluke and black sea bass. All four defendants are from Montauk.

Christopher Winkler, 61, Bryan Gosman, 48, Asa Gosman, 45, and Bob Gosman Co. Inc. were charged with one count of conspiracy to commit mail and wire fraud as well as to unlawfully frustrate the National Ocean and Atmospheric Administration's (NOAA) efforts at regulating federal fisheries. Winker and the corporate defendant each face substantive fraud charges. In addition, each of the defendants was charged with obstruction.

The indictment alleges that between May 2014 and July 2016, Winkler, as captain of the New Age, went on approximately 70 fishing trips where he caught fluke or black sea bass in excess of applicable quotas.

Under federal law, a fishing captain is required to accurately detail his catch on a form known as a Fishing Vessel Trip Report (FVTR), which is mailed to NOAA. Similarly, the first company that buys fish directly from a fishing vessel is termed a fish dealer, and fish dealers are required to specify what they purchase on a federal form known as a dealer report, which is transmitted electronically to NOAA.

•April 27, 2021—Christopher Casacci plead guilty to to violating the Lacey Act and the U.S. Animal Welfare Act based on his trafficking of African wild cats in interstate commerce. According to court documents, Casacci, 38, of Amherst, was doing business as "ExoticCubs.com," through which he advertised, imported and sold exotic African cats.

People and businesses dealing in animals are required to comply with humane care standards under the Animal Welfare Act. Casacci failed to do so and failed to secure the necessary license from the U.S. Department of Agriculture. Casacci was charged with violating the Animal Welfare Act for selling animals without a license showing minimum compliance with humane treatment standards.

•May 14, 2021—The president and owner of Oil Chem Inc. was sentenced today to 12 months in prison for violating the Clean Water Act stemming from illegal discharges of landfill leachate — totaling more than 47 million gallons—into the city of Flint sanitary sewer system over an eight and a half year period.

Robert J. Massey, 70, of Brighton, Michigan, pleaded guilty on Jan. 14, to a criminal charge of violating the Clean Water Act. According to court records, Oil Chem, located in Flint, Michigan, processed and discharged industrial wastewaters to Flint's sewer system. The company held a Clean Water Act permit issued by the city of Flint, which allowed it to discharge certain industrial wastes within permit limitations. The city's sanitary sewers flow to its municipal wastewater treatment plant, where treatment takes place before the wastewater is discharged to the Flint River. The treatment plant's discharge point for the treated wastewater was downstream of the location where drinking water was taken from the Flint River in 2014 to 2015.

Oil Chem's permit prohibited the discharge of landfill leachate waste. Landfill leachate is formed when water filters downward through a landfill, picking up dissolved materials from decomposing trash. Massey signed and certified Oil Chem's 2008 permit application and did not disclose that his company had been and planned to continue to receive landfill leachate, which it discharged to the sewers untreated. Nor did Massey disclose to the city when Oil Chem started to discharge this new waste stream, which the permit also required. Massey directed employees of

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

RECENT FEDERAL DECISIONS

SECOND CIRCUIT DISMISSES CITY OF NEW YORK GLOBAL CLIMATE CHANGE LAWSUIT AGAINST MULTIPLE MULTINATIONAL OIL COMPANIES

City of New York v. Chevron Corporation, 993 F.3d 81 (2nd Cir. 2021),

In *City of New York v. Chevron Corporation*, the city brought state-law tort claims against Chevron Corporation, ConocoPhillips, Exxon Mobil Corporation, Royal Dutch Shell plc, and BP p.l.c. for damages caused by global greenhouse gas emissions. The Second Circuit Court of Appeals unanimously affirmed the dismissal of the action by the U.S. District Court for the Southern District of New York, where the case was initially filed. The Second Circuit held municipalities cannot use state tort law to hold such companies liable for damages caused by global greenhouse gas emissions. It stated that because climate change is an international matter dealing with federalism and foreign policy, federal common law should be applied rather than state law. The court also found the U.S. Environmental Protection Agency (EPA), not federal courts, is granted the authority under the federal Clean Air Act to regulate domestic greenhouse gas emissions, thus making federal common law actions inappropriate. Lastly, while the Clean Air Act is silent regarding regulating foreign emissions, the lack of congressional direction on the topic, along with foreign policy concerns and judicial caution, led to the barring of the city's claims and the dismissal of the complaint.

Claims Against the Five Multinational Oil Companies

Public nuisance, private nuisance, and trespass were asserted by New York City. While the city acknowledged the companies' conduct was a lawful commercial activity, it claimed the companies were aware for decades that the production, marketing, and sale of fossil fuels posed a severe risk to the planet's climate, and downplayed said risks while continuing to sell enormous amounts of fossil fuels. The city also stated it was especially vulnerable to the effects of global warming, like rising sea levels, and that its taxpayers should not have to carry the burden of financing the protection of the city from the effects of climate change. While the defendants did not dispute that greenhouse gas emissions from fossil fuels have been a contributor to global warming, they were successful at the lower court level, in which the district court held that New York City's claims arose under federal common law and were barred by multiple federal doctrines. U.S. District Judge John F. Keenan of the Southern District of New York dismissed the complaint in July of 2018. Judge Keenan found greenhouse gasses were governed by federal common law; the Clean Air Act displaced federal common law claims in regard to domestic greenhouse gas emissions; and, due to foreign policy considerations and the presumption against extraterritoriality as they relate to foreign emissions, the claims were barred.

The Second Circuit's Decision

The Second Circuit upheld the dismissal, acknowledging global warming as one of society's largest hurdles, and stating the topic presented a uniquely international problem of national concern. The court found the state law theories of public nuisance, private nuisance, and trespass could not be used against the large oil companies for injuries to the city due to global warming. It stated that while it may seem the decision went against recent opinions concluding that state law claims for public nuisance brought against producers of fossil fuels do not arise under federal law, the decision to dismiss the case came about because "the devil is in the (procedural) details." The plaintiffs in the earlier decisions brought state law claims in state court, which were later removed to federal court, while this case was initiated in federal court. For example, in *City of Oakland v. BP p.l.c.*, 969 F.3d 895 (9th Cir. 2020), the Ninth Circuit re-

manded the case back to state court because it found the city's claims did not raise substantial questions of federal law.

Here, the Second Circuit held that state law is preempted by federal common law, and federal common law claims relating to domestic greenhouse gas emissions are displaced by the Clean Air Act because it speaks directly to the issue and grants the EPA, not federal courts, the authority to regulate domestic greenhouse gas emissions. In regard to the claims concerning foreign emissions, the court found that while the Clean Air Act does not cover the topic:

> . . .federal courts must proceed cautiously when venturing into the international arena so as to avoid unintentionally stepping on the toes of the political branches.

With no direction from Congress regarding regulating foreign emissions, the city's claims were barred and its complaint dismissed.

Conclusion and Implications

This decision will support the position that torts related to climate change are preempted by federal law under the federal Clean Air Act. However, this issue is far from settled. The City of New York may appeal this case to the Supreme Court. There are also several other pending cases seeking similar relief, including the aforementioned City of Oakland, which has been remanded to state court by the Ninth Circuit, and *BP p.l.c. v. Mayor and City Council of Baltimore*, Case No. 19-1189 (U.S. May 17, 2021), which was remanded to the Fourth Circuit by the Supreme Court. The most recent decision in Baltimore, announced by the Supreme Court on May 17, 2021, vacated and remanded a Fourth Circuit order which had sent the case back to state court. In a 7-1 ruling, the Court did not directly address whether climate change torts belong in federal court, but found the Fourth Circuit's review of an order that sent the suit to state court was incorrectly limited. With the various outcomes seen at this stage, we may see one or more of these cases decided on the merits by the Supreme Court. The court's opinion is available online at: http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2021/20210401_docket-18-2188_opinion.pdf.

(Megan Unger, Darrin Gambelin)

D.C. CIRCUIT ADDRESSES PETITION CHALLENGING FERC DECISION ON HYDROPOWER LICENSE AND RELATED ENDANGERED SPECIES ACT CLAIMS

Shafer & Freeman Lakes Environmental Conservation Corporation v. Federal Energy Regulatory Commission, 992 F.3d 1071 (D.C. Cir. 2021).

The D.C. Circuit Court of Appeals has granted in part, denied in part, and dismissed in part a petition challenging the Federal Energy Regulatory Commission's (FERC) decision on an amended hydropower license for the Oakdale and Norway Dams in Indiana, and the related Biological Opinion from the U.S. Fish and Wildlife Service (FWS or the Service). The amended license increases flow below the Oakdale Dam during periods of drought, in order to protect threatened and endangered species of mussels. Petitioners challenged the scientific basis for mandating increased flows, which have the effect of lowering water levels in the lakes behind the dams. In line with petitioners, FERC would have required water levels in the lakes to be maintained, in line with the multiple-use considerations detailed in the Federal Power Act under which the dam license is issued. However, the FWS directed in its Biological Opinion on the amendment that flows below the dam meet certain minimum levels, as a reasonable and prudent measure to minimize incidental take.

The Court of Appeals found that the Service provided a reasoned and thorough justification for its conclusions in the Biological Opinion, supported by

substantial evidence, but held that neither FERC nor the Service had adequately considered whether this reasonable and prudent measure was more than a "minor" change to FERC's proposed license amendment and therefore in violation of Service regulations. Accordingly, the Court of Appeals remanded the case to FERC for further proceedings on that issue, without vacating the amended license or Biological Opinion.

Factual and Procedural Background

Northern Indiana Public Service Company (NIPSCO) operates the Oakdale and Norway Dams, built in the 1920s on the Tippecanoe River. The Oakdale Dam creates Lake Freeman, and further upstream, the Norway Dam creates Lake Shaffer. With more than four thousand private lakefront properties, the lakes have a significant recreational and economic nexus with the surrounding communities. NIPSCO's 2007 FERC license required operation of the dams in an instantaneous run-of-river mode. The license did not allow the water level of the lakes to fluctuate more than three inches above or below a specified elevation.

During a drought in 2012, the Service found several species of threatened or endangered mussels were dying downstream from the Oakdale Dam, at least in part from low water flows. At the Service's direction, NIPSCO increased water flow out of Oakdale Dam to avoid liability under the federal Endangered Species Act (ESA). NIPSCO concurrently obtained variances from FERC to lower water levels in the lake below the elevation dictated in the license.

The FWS issued a Technical Assistance Letter, outlining procedures for NIPSCO to avoid ESA liability by mimicking natural run-of-river flow. While both the FERC license and the Technical Assistance Letter required "run-of-river" operations, the FWS defined this differently than FERC. Using a linear scaling methodology to determine that the natural water flow directly below Oakdale Dam would be 1.9 times the flow measured above Lake Shaffer, the Service advised NIPSCO to meet this flow requirement and cease electricity generation during low-flow events. NIPSCO sought an amendment of its FERC license to implement the Technical Assistance Letter.

Carroll and White Counties and the City of Montecello, which border Lake Freeman, and the nonprofit that owns much of the land beneath the lakes, Shafer & Freeman Lakes Environmental Conservation Corporation (together: Coalition) intervened in the FERC proceeding to oppose the license amendment, objecting to the Service's formula for calculating river flow. The Environmental Assessment prepared by FERC under the National Environmental Policy Act (NEPA) analyzed NIPSCO's proposed alternative to operate in accordance with the Service's guidance and FERC's preferred alternative to cease diversion of water for the generation of electricity during periods of low flow, but maintain Lake Freeman's target elevation. FERC cited its obligation under the Federal Power Act to balance wildlife conservation with other interests.

After a contentious formal Endangered Species Act (ESA) consultation, the Service published a Biological Opinion which concluded that FERC's alternative was not likely to jeopardize threatened or endangered mussel species. However, the Incidental Take Statement included a "reasonable and prudent measure" to minimize incidental take that required NIPSCO to maintain water flows below the Oakdale Dam measuring 1.9 times that of the average daily flow above the dams. The Coalition objected to this measure, which would draw down lake levels, and NIPSCO expressed concern about the clear conflicts between the Biological Opinion and FERC's alternative, which required a minimum lake elevation. While FERC disagreed with the Service, it treated the Service's reasonable and prudent measure as "nondiscretionary" and issued an amended license consistent with NIPSCO's application and the Service's Biological Opinion. The Coalition brought suit to challenge the amended FERC license and the Biological Opinion.

The D.C. Circuit's Opinion

Challenges to the Biological Opinion

The Coalition raised numerous challenges to the scientific foundation of the Biological Opinion and argued that these errors required invalidation of both the Biological Opinion and the amended FERC license that incorporated the reasonable and prudent measure Biological Opinion. The court rejected each of these arguments.

The Court of Appeals considered whether the Service's issuance of the Biological Opinion, or FERC's licensing decision incorporating the Biological Opin-

ion, were arbitrary and capricious or unsupported by substantial evidence. The court noted that under the ESA, the Service and FERC are required to use the best scientific and commercial data available when making decisions. But, the court reviews scientific judgments of an agency narrowly, holding agencies to certain "minimal standards of rationality," and vacating a decision only if the agency:

> . . .relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

The Court of Appeal rejected the Coalition's argument that the Service's scientific conclusions did not deserve deference because the Service personnel who worked on the Biological Opinion lacked hydrological expertise. As the Service consulted hydrologists as part of its decision-making process, the court found that the Service' judgment merited the deference traditionally given to an agency when reviewing a scientific analysis within the agency's area of expertise.

The Coalition's arguments against the Biological Opinion centered on the Service's calculations of river flow using linear scaling methodology. Acknowledging the method's imperfections, the Service determined that this was the soundest available method for guaranteeing that water flow out of Oakdale Dam represented the natural flow of the river during low-flow periods. The court found that the Service provided a reasoned and thorough justification for its approach to managing the river's flow, explaining the scientific basis for its decision, identifying substantial evidence in the record buttressing its judgment, and responding to the Coalition's concerns. The court found the Service's analysis "comfortably passes" review under the standards of the Administrative Procedure Act.

Since the court found that the Service had acted reasonably in using the linear scaling methodology, it held that FERC had acted reasonably in relying on the Service's corresponding scientific judgments FERC's reliance on the determination that additional flows were needed to protect listed species of mussels, despite certain critiques of the methodology, was not arbitrary or capricious.

On other counts, the court held that it lacked jurisdiction because the Coalition had not raised the issues in its petition for rehearing before FERC. The Coalition had sufficiently raised the validity of the Biological Opinion itself on rehearing, but did not raise several specific objections it brought before the court. Because of this failure to exhaust its administrative remedies under the Federal Power Act with regards to these objections, they could not be considered by the court.

The Service's 'Reasonable and Prudent Measure' and Minor Changes to the FERC License

ESA regulations provide that any reasonable and prudent measures the Service proposes to reduce incidental take cannot involve more than a minor change to the proposed agency action for which the Service prepared the incidental take statement. A reasonable or prudent measure that would alter the basic design, location, scope, duration, or timing of the agency action is prohibited. Service guidance provides that substantial design changes are inappropriate in the context of an incidental take statement issued under a no jeopardy biological opinion. With a finding of no jeopardy, the project, as proposed by the action agency, would be in compliance with the statutory prohibition against jeopardizing the continued existence of listed species.

Here, the Service required a level of flow through Oakdale Dam that could materially reduce the water level in Lake Freeman during drought. The Coalition contended that this reasonable and prudent measure was not a minor change, and therefore a violation of ESA regulations. The Court of Appeals found that the Service and FERC had acted in an arbitrary manner, having failed to adequately explain why the Biological Opinion's reasonable and prudent measure qualified as a minor change.

FERC's proposed alternative for the NIPSCO license amendment provided that during low-flow periods, NIPSCO would cease electricity generation, but would continue to operate the Oakdale Dam to maintain a constant water elevation in Lake Freeman. The Service concluded this alternative would not jeopardize threatened and endangered mussels, yet established a reasonable and prudent measure that required NIPSCO to draw down Lake Freeman during low-flow periods, in direct conflict with the terms of the license as proposed by FERC. The court

found that the Service had failed to analyze whether it's reasonable and prudent measure complied with its own regulations on the scope of reasonable and prudent measures.

The Service argued that its proposal should be compared with NIPSCO's application, which incorporated the Service's requirement to provide downstream flows, rather than FERC's alternative. Against NIPSCO's application, the Service's reasonable and prudent measure did not represent a change. However, the court found that the alternative with which to compare the Service's proposal was FERC's proposed action, not NIPSCO's application. It was FERC's alternative that was analyzed in the Biological Opinion, and considered in formulating reasonable and prudent measures. Given the conflict between its alternative and the Incidental Take Statement, FERC adopted the NIPSCO alternative, reasoning that it considered implementation of the Service's reasonable and prudent measure as nondiscretionary. The court noted that FERC's treatment of the measure as nondiscretionary would be sensible in the normal course. But here, the Service's failure to address an important issue was apparent on the face of the Biological Opinion and infected FERC's license amendment as well.

With this flaw, the court remanded the case to FERC for further proceedings consistent with the opinion, without vacating the license amendment or the Biological Opinion and Incidental Take Statement, given that vacatur would leave NIPSCO again with conflicting directives in the original FERC license and the Service's Technical Advice Letter.

Conclusion and Implications

This case highlights the potentially contradictory mandates among federal environmental and energy laws that agencies and facilities must navigate. The Federal Power Act's provisions for hydropower licensing has a multiple use doctrine at its core, as we see in other federal laws governing the use of federal lands and resources. The ESA, on the other hand, has a focus on the protection of species and habitat, with incidental take permits available where consistent with conservation of the species. In this case, FERC felt unable to reject the Service's reasonable and prudent measure in the Incidental Take Statement for Oakdale Dam. NIPSCO itself urged the agencies to not saddle it with contradictory directives, preferring flow and generation restrictions in the FERC license to the prospect of ESA liability. With this opinion, the Court has hinted that the agencies may not have struck the right balance between the dictates of the ESA and the Federal Power Act, and reminded the Service that where it has found an agency action will result in no jeopardy to a protected species, it must consider whether further would amount to a substantial change in the proposed action itself.
(Allison Smith)

U.S. ARMY CORPS OF ENGINEERS' CLEAN WATER ACT SECTION 408 REQUIREMENTS UPHELD BY THE DISTRICT COURT

Russellville Legends, LLC v. U.S. Army Corps of Engineers,
___F.Supp.3d___, Case No. 4:19-CV-00524-BSM (E.D. Ark. Mar. 31, 2021).

The U.S. District Court for the Eastern District of Arkansas recently granted a motion for summary judgment by the U.S. Army Corps of Engineers (Corps) and denied a motion for summary judgment by the Russellville Legends, LLC (Russellville) in a federal Clean Water Act (CWA) Section 408 case. The District Court's ruling determined when a project proponent is required to obtain Section 408 review and approval.

Factual and Procedural Background

Section 408 of the Clean Water Act requires anyone seeking to alter, use, or occupy a civil works project built by the United States for flood control to obtain permission from the Corps. This permission can come in the form of a "consent." Section 408 policies provide that a consent is a written agreement between the holder of an easement and the owner of

the underlying property that allows the owner to use their land in a particular manner that will not interfere with the easement holder's rights. The Corps has guidelines providing that if any Corps project would be negatively impacted by a requestor's project, the evaluation should be terminated.

Russellville bought land located near a university from Joe Phillips (Phillips) in order to build student housing. Since 1964, the Corps held an easement over the land below the 334-foot elevation line that prevented structures from being constructed on the easement due to flooding risks. While Phillips owned the land, the Corps had given two consents for work within the easement: one to a nearby city, to remove dirt from within the easement, and one to Phillips, to replace the dirt that was removed.

After Russellville acquired the property, the Corps gave Russellville conflicting messaging about whether the consent the Corps gave to Phillips was still in effect such that Russellville could replace the dirt that had yet to be replaced by Phillips. The Corps first told Russellville that the consent was still in effect, but that Russellville could not build structures within the easement. Months later, the Corps told Russellville that the consent was only applicable to Phillips, so Russellville could not use it to replace any dirt.

Russellville submitted a Section 408 request, working with the Corps to provide environmental modeling satisfactory to the Corps, to determine the impacts Russellville's desired construction activity could have on water elevation and velocity in the Corps' easement. The Corps denied Russellville's request, pursuant to Corps' guidelines, because it determined the construction would negatively impact Corps projects. The Corps also denied the request because of an Executive Order that requires federal agencies to avoid modification of "support of floodplain development" when there is any practicable alternative.

Russellville sought judicial review of the Corps' denial and filed a motion for summary judgment. The Corps filed a cross-motion for summary judgment.

The District Court's Decision

The District Court began its analysis by explaining the relevant legal standards. It explained that summary judgment is appropriate when there is no genuine dispute of material fact, and that in the context of summary judgment, an agency action is entitled to deference. It also explained that the relevant standard for reviewing agency action under the federal Administrative Procedure Act (APA) is whether the agency action was arbitrary, capricious, or an abuse of discretion. An agency action is not arbitrary and capricious if the agency examined relevant data, stated a satisfactory explanation for its action, and included a rational connection between the facts and the decision made.

Declaratory Judgment Act Claim

Russellville first argued the consent the Corps granted to Phillips was reviewable as a contract under the Declaratory Judgment Act (DJA), such that the court could declare the rights granted under the consent. The court decided the consent was not a contract because it lacked consideration—a necessary element for every contract. Therefore, the court held the DJA did not apply, and did not allow the court to undertake such an interpretive review of the consent.

Corps Consent to Predecessor in Interest Didn't Apply to Successor in Interest

Russellville then argued that the consent the Corps granted to Phillips was still in effect to allow Russellville to undertake its desired construction, without any need for a new Section 408 consent. The court held that it did not matter whether the consent the Corps granted to Phillips was still in effect because Russellville's construction would impact Corps projects. As a result of this impact, the court held Russellville had to obtain Corps approval under Section 408 and Russellville could not use the old consent even if it were in effect.

Rational Basis/Analysis

The court then reviewed the Corps' decision under the APA standard for agency actions to determine whether the denial was valid. Ultimately, the court held that the Corps' actions had a rational basis and were not arbitrary and capricious because the Corps examined relevant data, stated a satisfactory explanation for its action, and included a rational connection between the facts and the decision made.

The court first determined that the Corps examined relevant data. The court pointed out that the Corps examined Russellville's memorandum accompanying its request for consent, which used hydraulic models to determine the impacts in the easement area

and on the Corps' projects, and determined that Russellville's construction would increase flood heights and water channel velocities. Russellville tried to argue that the Corps should have included some of its own studies and models to support its decision, but the court concluded that the Corps has no obligation to conduct its own studies, therefore its examination of Russellville's memorandum was sufficient.

The court next determined that the Corps stated satisfactory explanations to support its denial. The Corps had explained that its denial was because: (1) the project would increase flood risks to people and property, (2) the project would impair the usefulness of other Corps projects, and (3) the project would obstruct the natural flow of floodwater into a sump area that was an integral part of a Corps project. Taken together, the court found these specific explanations to be satisfactory.

Lastly, the court determined there was a rational connection between the Corps' factual findings and its ultimate decision. The Corps has an obligation to avoid adverse impacts associated with floodplain modification, and here the Corps denied Russellville's request for floodplain modification because the Corps found it would present an adverse impact.

Therefore, because the Corps' actions had a rational basis, and were not arbitrary and capricious, the court denied Russellville's motion for summary judgment and granted the Corps' cross-motion for summary judgment.

Conclusion and Implications

Section 408 cases are not very common. This case shows that a project proponent must go through the Section 408 request process if the project would impair Corps projects, regardless of whether consent was granted to a prior property owner. It also demonstrates that a project proponent carries the full burden of presenting all studies and analysis, and the Corps has no obligation to conduct its own studies or analysis. The District Court's opinion is available online at: https://casetext.com/case/russellville-legends-llc-v-us-army-corps-of-engrs.
(William Shepherd, Rebecca Andrews)

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RECENT STATE DECISIONS

CALIFORNIA COURT OF APPEAL REJECTS INVERSE CONDEMNATION CLAIM BY GEOTHERMAL POWER PLANT AGAINST LASSEN MUNICIPAL UTILITY DISTRICT FOR FAILURE TO DEMONSTRATE CAUSATION

Amedee Geothermal Venture I v. Lassen Municipal Utility District, *Unpub.*, Case No. CO86978 (3rd Dist. Mar. 26, 2021).

In an *unpublished* decision, the Third District Court of Appeal rejected an inverse condemnation claim filed against the Lassen Municipal Utility District (LMUD) by the operator of a geothermal power plant in Lassen County. The power plant failed to restart after LMUD replaced a 34.5 kilovolt power line at the plant with a 12.47 kilovolt line. Both the trial court and the Third District Court of Appeal determined that the power plant failed to demonstrate that LMUD's actions actually caused the plant failure. Several other factors, such as a lack of freon and inadequate maintenance, were equally or more likely to have caused the plant's failure.

Factual and Procedural Background

Amedee Geothermal Adventure (Amedee) operated a geothermal power plant in Lassen County, which utilized the energy from local hot springs to generate electricity for sale to the Pacific Gas and Electric Company (PG&E). For decades, the plant became less and less profitable and was characterized by operational problems including inadequate maintenance practices, and an inability to secure sufficient freon after manufacture of freon was banned in the 1990s.

In 2009, the Lassen Municipal Utility District developed a capital improvement plan involving the replacement of a 34.5 kilovolt with a 12.47 kilovolt line at the Amedee plant. After LMUD installed the 12.47 kilovolt line, workers at the Amedee plant were unable to restart it. After multiple attempts to restart, the plant's generator breaker failed and came apart. In 2014, after the plant was brought up and running again, the owners of the Amedee plant shut it down.

At the Trial Court

Amedee brought a lawsuit against LMUD alleging breach of contract, negligence, and inverse condemnation. On the breach of contract and negligence causes of action, the jury returned a defense verdict finding that LMUD was not liable for breach of contract, and that Amedee failed to "prove that it was harmed by a dangerous condition of LMUD's property.) " A bench trial then followed on Amedee's inverse condemnation claims. During the bench trial, the trial court made its own factual findings. The trial court noted that the Amedee plant ultimately failed due to one of three "chronic problems" that it had. First, it lacked adequate freon, the plant's operating fluid. Second, the plant suffered from aquification to the surface of the hot water around well casings, and the plant lacked the financial means to fix this problem. Third, the plant was plagued by inadequate maintenance and a failure to replace aging parts and components at the plant.

As to the causation required to establish an inverse condemnation claim, the trial court concluded that nothing in the evidence presented during trial established a causal connection between the line change and the failure of the plant. This included testimony by Amedee's two experts, who were unable to conclude that the line change performed by LMUD caused the plant to fail.

The Court of Appeal's Decision

On appeal, the court upheld the trial court's rulings as to Amegee's breach of contract and negligence claims.

Inverse Condemnation Claim

Regarding inverse condemnation, Amedee raised two arguments claiming that the trial court's ruling "on the inverse condemnation claim must be reversed because the court improperly relied on the jury's verdict on Amedee's [negligence] claim." Amedee argued that the jury's verdict was not relevant to the inverse condemnation claim and the trial court's reliance on the jury's verdict was also not proper because the jury included LMUD ratepayers. The Third District Court of Appeal rejected these claims, finding that the trial court made its own factual findings when upholding the trial court's rejection of Amedee's inverse condemnation claims.

The court upheld the trial court's decision regarding inverse condemnation by pointing to specific language in the lower court's decision indicating that the court:

> . . .intend[ed] to render its independent opinion on the matter giving due regard go the jury's findings as best they can be determined.

The trial court noted that the strongest evidence that LMUD's line change caused the breakdown of the Amedee plant was the fact that the plant's damage was more or less contemporaneous with LMUD's line voltage change. However, there were several other equally plausible reasons, that could have caused the plant to break down. These included: 1) the extended period of time that the plant was shut down; 2) fairly extensive plant maintenance had been performed at the same time as the line change; 3) Amedee started both of its large electrical brine pump engines at the same time, which was unusual; and 4) there had been ongoing problems related to a lack of freon and lack of maintenance at the plant.

Ultimately, the court reviewed the record and determined that Amedee never contended that there was any inherent inadequacy of a 12.47 kilovolt line at the plant, and they never showed evidence of how the line changed cause harm at the plant. Another large challenge was that after repairs were made to the Amedee plant after the line change, it had many of its most productive years while operating with LMUD's new 12.47 kilovolt line until closing in 2014.

Because Amedee failed to establish that LMUD's change of the power line to the plant caused its failure, the Third District Court of Appeal upheld the trial court's decision rejecting Amedee's inverse condemnation claims. The court determined that the trial court proceedings clearly indicated that the lower court performed its own independent analysis of the facts to determine that Amedee failed to show that LMUD's action caused a breakdown of the plant.

Conclusion and Implications

The *Amedee* decision highlights the key requirement of proving causation when bringing inverse condemnation actions against government agencies. In this case, Amedee was simply unable to show that LMUD's change of electrical lines was responsible for the power plant's failure. The court's *unpublished* opinioon can be found here: https://www.courts.ca.gov/opinions/nonpub/C086978M.PDF.
(Travis Brooks)

CALIFORNIA COURT OF APPEAL UPHOLDS MULTI-MILLION DOLLAR PENALTY AGAINST HOMEOWNER BLOCKING PUBLIC ACCESS TO THE COAST

Lent v. California Coastal Commission, 62 Cal.App.5th 812 (2nd Dist. 2021).

In April, California's Second District Court of Appeal upheld the California Coastal Commission's (Commission) over $ 4 million penalty assessed against homeowners who refused to remove a gate, deck, and stairway that encroached into an easement dedicated to the California Coastal Conservancy (Conservancy). This penalty was upheld even though the offending structures were constructed by a previous owner of the property and had been in place for decades. The plaintiffs challenged the fine, which was

much higher than the $950,000 penalty recommended by Commission staff on multiple grounds, including inadequate notice of the penalty amount, abuse of discretion on the part of the Commission in imposing the penalty, and constitutional grounds, among other arguments.

Background

At issue is a beachfront property in Malibu, California. A prior owner applied for a coastal development permit with the Commission in order to build a home in 1978. The Commission issued a permit, but required that the owner dedicate a five foot wide easement to the Conservancy. Such an easement was dedicated in 1980 and accepted by the Conservancy two years later. The prior owner built a deck and a stairway that encroached into nearly half of the five-foot easement. While the Commission approved a deck and stairway, it did not approve these specific structures.

Informal enforcement action began with a letter from the Conservancy to the owners of the property in 1993, which informed the owners of the encroachment and requested that the owners remove the structures and the gate blocking public access. Then in 2007, after the plaintiffs purchased the property, the Commission informed the plaintiffs that the offending structures were inconsistent with the easement and violated the California Coastal Act. The Commission asked the plaintiffs to remove the structures, but no agreement on removal was reached.

Finally, in 2015 the Commission notified the plaintiffs that it intended to issue a cease and desist order and impose penalties related to the offending structures. Two weeks before the hearing, Commission staff submitted a report with findings and recommendations for consideration by the Commission. With respect to penalties, the report noted that the Coastal Act authorizes penalties of up to $11,250 per day for 744 days, which yielded a maximum penalty of over $8 million. The report recommended a penalty in the $800,000 to $1.5 million range, and specifically recommended $950,000. Both the Commission staff and plaintiffs presented at the hearing on this matter. Ultimately, the Commission determined that the plaintiffs' actions were egregious and warranted a higher penalty than was recommended. The Commission settled on a penalty of $4,150,000.

The Court of Appeal's Decision

Due Process Claims

The plaintiffs argued that the hearing process before the Commission violated their due process, the fines were unconstitutional as excessive, and that the Commission abused its discretion in imposing the penalty. The court rejected all of the plaintiff's arguments, finding that substantial evidence supported the Commissions actions and that the plaintiffs failed to demonstrate how additional hearing procedures would be more protective of their rights.

The court held that the Commission did not violate the plaintiffs' due process rights because the plaintiffs had sufficient notice of the alleged violations and the hearing procedures, had an opportunity to present a defense and evidence, and had notice of the Commission staff's recommendations—including the potential range of penalties that could be assessed. While these procedures are not equivalent to a trial-like procedure, this is enough to satisfy due process requirements. Additionally, notice of the exact penalty amount to be imposed is not required, particularly in this situation where the range of penalties and formula for calculating such penalties was disclosed.

Penalty Was Constitutionally Appropriate

The court also held that the penalty was not unconstitutionally excessive. This was based on the Commission's and trial court's findings that the penalty was not "grossly disproportionate" to the plaintiff's conduct. The misconduct, according to this court, was the continued delay in the Conservancy's ability to construct a public access to the shoreline, and blocking public access generally. The court noted that there was no public access to the beach within at least a mile from the property.

Abuse of Discretion Claims

The court rejected the plaintiffs' arguments that the Commission abused its discretion in taking enforcement against the plaintiffs, primarily based on an argument that the plaintiffs had not "undertaken, or [were] threatening to undertake any activity. . ." without a permit or that is inconsistent with a previously issued permit. (Pub. Res. Code § 30810.) The court

rejected the position that a subsequent owner who purchases property that contains structures inconsistent with previous permits is absolved of liability for those structures. The court held that a person who maintains an offending structure "undertakes activity," and thus is subject to Commission enforcement.

Claim of Bias

The court also rejected the plaintiffs' arguments that the Commission members are biased adjudicators, but the court did so in part based on the fact that the plaintiffs failed to properly provide necessary evidence to show that there was an impermissible institutional interest on the part of the Commission. In a lengthy footnote, the court explained that if evidence, properly provided, showed that penalties directly fund the Commission's operations, there could be a concern about bias in favor of imposing higher penalties.

Conclusion and Implications

This case is the newest in a growing line of enforcement cases dealing with the California Coastal Act and coastal resources. The Lent case also shows that million-dollar plus civil penalties are being upheld even in the face of arguments that such high penalties are disproportionate to the alleged violation. The court's April 16, 2021 opinion is available online at: https://www.courts.ca.gov/opinions/documents/B292091M.PDF.
(Brenda Bass, Hina Gupta)

MARYLAND COURT OF SPECIAL APPEALS UPHOLDS CLEAN WATER ACT, MS4 PERMIT AGAINST CHALLENGE TO BROAD SCOPE OF REQUIREMENTS

Maryland Small MS4 Coalition, et al. v. Maryland Department of the Environment, Case No. 1865 (Md. Ct. Spec. App. Apr. 29, 2021).

The Maryland Court of Specials Appeal recently upheld, in part, a final determination of the Maryland Department of the Environment (Department) to issue a general storm water discharge permit to several operators of small municipal separate storm sewer systems (MS4s). In issuing the permit, the Department designated geographic areas outside the urbanized area and imposed surface restoration, mapping, outfall screening, and good housekeeping requirements.

Background

Section 1311(a) of the federal Clean Water Act (CWA) generally prohibits the discharge of pollutants from a point source into a navigable water. However, the U.S. Environmental Protection Agency (EPA) or an EPA-approved state agency can issue permits exempting operators from this prohibition under the CWA's National Pollutant Discharge Elimination System (NPDES) program. In Maryland, the EPA has charged the Department with administering the NPDES program and thereby issuing general discharge permits.

Generally, NPDES permits include "effluent limitations" which are limits on the type and quantity of pollutants that can be released into the water. But, for a point source discharge like MS4s, where the quantity and quality of storm water that is transferred into a waterway varies and where the many discharge points make it difficult to determine the amount of pollutant that an operator contributes, permits generally provide for flexible management programs as opposed to effluent limitations. The CWA mandates controls for storm water permits that include "management practices, control techniques and system, design and engineering methods" to "reduce the discharge of pollutants to the maximum extent practicable[.]"

Small MS4s

Small MS4s are required to obtain an NPDES permit to discharge storm water only if: 1) the small MS4 is located within an "urbanized area"; 2) the storm water discharge associated with the small MS4 is determined to "result in or has the potential to result in exceedances of water quality standards, includ-

ing impairment of designated uses, or other significant water quality impacts, including habitat and biological impacts"; or 3) the storm water discharge associated with the small MS4 is determined to contribute:

> . . .substantially to the pollutant loadings of a physically interconnected municipal separate storm water sewer that is regulated by the NPDES storm water program.

If the Department tentatively determines to issue a permit, it is required to comply with certain procedures. Those procedures entail published notice of permit applications, informal meetings, and publication of the Department's tentative determination. In the event that the Department receives comments adverse to its tentative determination, then the Department is required to publish a notice of its final determination.

Procedural Background

On December 22, 2016, the Department notified the County of its tentative determination to issue an NPDES general permit for discharges from small MS4s. Subsequently, the County participated in the public hearing and submitted written comments. On April 27, 2018, the Department issued a final determination to issue the general permit and provided a separate explanation for its actions and responding to public comments regarding the tentative determination.

Appellant Queen Anne's County (County) objected to the scope of permit, the delegated responsibility for nonpoint sources and third-party direct discharges, as well as the requirements imposed beyond the maximum extent practicable in the permit. The County filed a petition for judicial review of the Department's final determination. The circuit court affirmed the Department's decisions to issue the Small MS4 NPDES permit.

The Court of Special Appeals' Decision

The threshold issues on appeal pertain to: 1) the designation of the area subject to regulation:; the County argued that such a designation exceeded the Department's authority, was procedurally deficient, and was not supported by substantial evidence; 2) the requirement to commence restoration efforts for twenty percent of impervious acreage within the urbanized area: the County argued that this requirement unlawfully makes it responsible for third-party and nonpoint source storm water discharge;: and 3) whether the Department had authority to impose conditions that exceed the "maximum extent practicable standard": the County argued that the Department lacked such authority, therefore making the restoration requirement and any other permit conditions that exceeded this standard, invalid.

Designation of Area Subject to Regulation

In determining whether the County had ample opportunity to raise concerns regarding the area of designation subject to regulation, the court examined the justification proffered by the Department in its tentative determination. When the Department issued its tentative determination and published the draft general permit for public comment, it cited as grounds for designating all County-operated MS4s for regulation under the permit that all such MS4s were "located within an urbanized area." But, in the Department's final determination, its justification for designating all County-operated MS4s for regulation under the general permit was that:

> . . .[s]torm water discharges inside and outside of the County's urbanized area contribute to. . .water quality impairments[,] and future MS4 discharges have the potential to cause significant water quality impacts.

The court found that the County was not put on notice of the Department's determination that MS4s outside the County's actual urbanized area were subject to regulation. The court determined that remand was required to allow the County an opportunity to comment.

Responsibility for Nonpoint Source Runoff and Third-Party Discharge

In analyzing whether the Department unlawfully made the County responsible for discharges from independent third-parties and nonpoint source runoff that do not flow into or discharge from the applicable MS4s, the court examined prior case law involving a similar requirement. In the prior case, the court of appeals rejected the same argument made by the

County regarding the Department's authority and upheld the requirement. Similarly, the court here found that the requirement to commence restoration efforts on twenty percent of the impervious surface in the urbanized area was within the Department's authority because the general permit was an:

> . . .authorized water quality-based effluent limitation that represents a valid reallocation of pollutant loads from nonpoint sources to point sources and that implements a storm water waste load allocation in the Bay TMDL.

Conditions in Excess of the Maximum Extent Practicable

Addressing the Department's mapping requirement, outfall screening provision, and good housekeeping provision, the court determined that the Department did not act unreasonably or without a rational basis in exercising its discretionary authority to identify the minimum elements of a pollution prevention and good housekeeping program for property owners owned or operated by permittees. Because these mandates were previously explained by the Department as necessary, citing several reasons for their necessity, the court found that the Department supplied a rational basis for the requirements that exceeded the federal standards.

Conclusion and Implications

This case demonstrates the broad authority authorized states have to impose conditions in an MS4 that reach beyond federal law and beyond the operation of the MS4 itself. The court's opinion is available online at: https://mdcourts.gov/data/opinions/cosa/2021/1865s19.pdf.
(McKenzie Schnell, Rebecca Andrews)

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