Volume 16, Number 7
August/September 2021

EASTERN WATER LAW™

& POLICY REPORTER

CONTENTS

Continued on next page

Publisher's Note:

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

WWW.ARGENTCO.COM

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

EWL

EASTERN WATER NEWS

FEDERAL—STATE WATER SHARING: CALIFORNIA DEPARTMENT OF WATER RESOURCES AND U.S. BUREAU OF RECLAMATION SEEK TO ENTER INTO AN EXCHANGE OF FEDERAL AND STATE STORED WATER TO MEET DEMAND IN THE STATE'S KEY GROWING REGION

The California Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (Bureau) recently filed a petition with the State Water Resources Control Board (State Water Board) to temporarily consolidate the place of use for the State Water Project (SWP) and Central Valley Project (CVP) south of the Sacrament-San Joaquin Delta (Delta) for the purpose of exchanging water supplies in the San Luis Reservoir due to persistent dry conditions facing the region. Specifically, the petition requests that the place of use for SWP water be expanded to include a portion of the CVP service area so that water stored for the SWP in San Luis Reservoir can be used in the CVP service area. The maximum volume of water subject to the request is 200,000 acre-feet.

Background

Under a 1972 agreement, DWR and the Bureau may exchange water and power. Both the SWP and CVP store water in the San Luis Reservoir to, in part, accommodate demand during the summer months. However, the SWP and CVP provide water for different types of uses, such as irrigation, municipal, industrial, and wildlife uses, which in turn affects the demand for and stored water supplies available to each entity at different times of year.

For the CVP, which provides water primarily for irrigation uses, the Bureau typically fills its portion of the San Luis Reservoir by April, drawing against its share of stored water in the summer months to meet peak irrigation demands (and smaller municipal and refuge demands). In wetter years, the Bureau is frequently able to meet all of its south-of-Delta demands, with carryover storage in San Luis Reservoir. The Bureau can also re-divert upstream storage withdrawals (*e.g.* from Lake Shasta) to San Luis Reservoir as capacity becomes available from Delta pumping facilities when peak demands are lower.

The SWP has a flatter demand curve than the CVP because the SWP provides water primarily to municipal and industrial uses, which tend to have more consistent levels of demand throughout the year than agricultural uses. Accordingly, DWR does not reach its lowest annual storage levels until the fall. Thus, the SWP typically has more stored water available to it from San Luis Reservoir during the late summer and early fall.

In late June, DWR and the Bureau requested an additional exchange of 50,000 acre-feet of SWP and CVP water at the San Luis Reservoir under a 2020 order by the State Water Board consolidating the place of use for those water supplies. The State Water Board approved that request on July 8. The instant petition requests the return of that 50,000 acre-feet of water by the end of the year, as well as the additional 150,000 acre-feet of water to be exchanged between the SWP and CVP for use in the CVP service area.

The Petition

DWR and the Bureau's petition seeks an exchange of 150,000 acre-feet of stored SWP and CVP water in the San Luis Reservoir, as well as the return of 50,000 acre-feet of CVP water to the SWP before December 31, 2021. The petition does not purport to increase the total water supply available to the CVP through February 2022. It also does not purport to increase the total water supply available to the SWP.

In their petition, DWR and the Bureau indicate that the two agencies have both been taking actions to meet the operational requirements of the SWP and CVP, respectively, and to protect environmental resources. For instance, the Bureau has been closely coordinating its deliveries to customers in order to maximize the use of very limited CVP supplies by reducing contract deliveries by 25,000 to 35,000 acre-feet and promoting transfers of non-CVP water in ecologically sensitive ways. However, extreme drought conditions have necessitated exchanging

stored water in the San Luis Reservoir to meet peak demands in the CVP service area, which include water rights settlements with San Joaquin contractors and wildlife refuge, municipal, and industrial demands.

According to DWR and the Bureau, the water subject to the petition is part of the allocated supplies to SWP or CVP contractors in 2021 and 2022 diverted from the Delta, subject to various regulatory requirements. Moreover, absent the exchange, these supplies would have been stored in July as part of the SWP storage allotment and delivered to SWP contractors in the fall, while CVP water would have been stored to meet CVP demand in 2022. In other words, while pumping credits for Delta water are anticipated to change, there should not be any measurable change in streamflow, water quality, timing of diversions or use, or return flows, or any impact to other legal water users. Additionally, the exchange purports to avoid using water from Friant Dam to meet CVP contractor needs, and thus could avoid conveyance losses and potential temperature impacts on fisheries affected by Friant Dam.

Conclusion and Implications

The proposed exchange by DWR and the Bureau appear to be consistent with prior exchanges between the two agencies under their 1972 agreement to exchange water and power. The exchange is intended primarily to benefit irrigators and agricultural interests in the CVP service area. The comment period for the petition was recently closed. It is not clear whether or when the State Water Resources Control Board will consider DWR and the Bureau's petition, but given that the State Water Board has previously granted similar petitions by those agencies, the State Water Board may do so again. The Notice of Temporary Chang Petition available online at: https://www.waterboards.ca.gov/waterrights/water_issues/programs/applications/transfers_tu_notices/2021/14443tt210726_notice2.pdf.
(Miles Krieger, Steve Anderson)

NEWS FROM THE WEST

In this month's News from the West we report on drought in California. In particular, we focus on efforts by the state's water regulatory authority, the State Water Resources Control Board's issuance of emergency regulations for water right curtailments. Since this article went to print more curtailment orders were strongly being considered.

The California State Water Resources Control Board Approves Emergency Regulations for Water Right Curtailment Orders

On August 17, 2021, the State Water Resources Control Board (State Water Board) approved Emergency Regulations for the Establishment of Minimum Instream Flow Requirements, Curtailment Authority, and Information Order Authority in the Klamath Watershed (Emergency Regulations), authorizing curtailments of water rights on the Scott and Shasta rivers in Siskiyou County, to meet minimum instream flows for fish while allowing for necessary livestock watering and minimum human health and safety needs. The Emergency Regulations are part of the state's ongoing efforts to address one of California's worst drought on record. Along with establishing minimum stream flow requirements for fish and setting forth State Water Board enforcement authority, the Emergency Regulations also provide opportunities for local cooperative solutions and voluntary efforts that may reduce the need for direct curtailment orders.

Background

The Scott and Shasta rivers are tributary to the Klamath River, the second largest river in the state, and supply water necessary for agriculture, domestic uses, tribes, and recreational activities. The tributaries also provide spawning habitats and nurseries for the threatened coho salmon, culturally significant chinook salmon, and steelhead trout. Klamath Basin tribes have historically relied on the chinook and coho salmon for sustenance and spiritual wellbeing. However, dry conditions and low natural flows in the Klamath watershed for the past two years, further exacerbated by water demands in the system, have impaired the ability of newly hatched fish fry to emerge from their gravel beds and reach their summer

rearing habitats. Worsening drought conditions across California have prompted the State Water Board to evaluate what measures can be taken to protect the state's water supplies and the species and communities that depend on them.

Under existing law, the State Water Board is authorized to take enforcement actions to prevent unauthorized diversions of water or other violations of water right permits or licenses on an individual basis. Diversion of water in excess of a water right is considered a trespass against the State, with potential fines of up to $1,000 per day of violation and $2,500 per acre-foot of water diverted in excess of the diverter's rights. (Wat. Code, § 1052.) With a large-scale drought emergency and supplies dwindling, the State Water Board has utilized its emergency powers to limit diversions regionally. (*See*, Wat. Code, § 1058.5 [granting the State Water Board authority to adopt emergency regulations to prevent the unreasonable use of water, to require curtailment of diversions when water is unavailable, and to require related monitoring and reporting].)

In May of this year, Governor Gavin Newsom issued a drought emergency proclamation for most of California, including Siskiyou County. The proclamation directed the State Water Board and the California Department of Fish and Wildlife (CDFW) to analyze what level of minimum flows are needed by salmon, steelhead trout, and other native fish, and determine what protective steps could be taken to protect those species and their habitats through emergency regulations or other voluntary measures. Under the Governor's drought proclamation, the State Water Board considered and adopted emergency regulations for the Russian River watershed on June 15, 2021, and for the Sacramento-San Joaquin Delta watershed on August 3, 2021. On August 17, 2021, the State Water Board adopted the Emergency Regulations for the Scott and Shasta Rivers to respond to the severe drought conditions that may continue into 2022.

Curtailment Authority Under Emergency Regulations

The Emergency Regulations were adopted for the Klamath River Watershed to authorize curtailments in the Scott and Shasta rivers when natural flows are insufficient to support the commercially and culturally significant fall-run chinook salmon and threatened Southern Oregon/Northern California Coast coho salmon. (Emergency Regulations, § 875.) Upon a determination that flows in the Scott or Shasta river sare likely to fall below minimum stream flows specified in § 875(c), the Deputy Director of the State Water Board is authorized to issue curtailment orders based on diverter priority, in which water users subject to the order must cease diversions immediately. (Emergency Regulations, §§ 875, 875.5.) Similarly, curtailment orders may be issued upon a finding that flows in the Klamath River watershed are insufficient to support all water rights, under the provisions of § 875. (Emergency Regulations, § 875.4(b).) Where flows are found to be sufficient to support some but not all diversions, curtailment orders shall be issued, suspended, reinstated, and rescinded in order of priority as set forth in § 875.5. In deciding to subject some diversions to curtailment, the Deputy Director must consider "the need to provide reasonable assurance that the drought emergency flows will be met." (Emergency Regulations, § 875(b).)

Curtailments are to be issued in the Scott River and Shasta River based on respective grouped priority levels, as established in § 875.5 of the Emergency Regulations, taking into account the classes of diverters and diversion schedules established in various court decrees for surface water and groundwater adjudications, and the relative priorities of other water rights not contemplated in those decrees. (Emergency Regulations, § 875.5(a)-(b).)

Rescission of Curtailment Orders

To the extent that curtailment of fewer than all diversions in the priority groupings listed in § 875.5 would reliably result in sufficient flow to meet the minimum fisheries flows for the drought emergency, the Deputy Director is authorized to issue, suspend, reinstate, or rescind curtailment orders for partial groupings, based on the priorities set forth in the relevant decrees or by appropriative priority date. (*Id.* at subd. (a)(1)(D); § 875.4(c).)

For the purpose of rescinding curtailment orders, the Deputy Director must determine the extent to which water is available under a particular diverter's priority of right, including consideration of monthly demand projections based on annual diversion reports, statements of water use for riparian and pre-1914 water rights, and judicial decrees of water right systems, and decisions and orders issued by the State

Water Board. (Emergency Regulations at § 875.4(c)(1).) Precipitation forecast estimates, historical periods of comparable temperatures, precipitation, and surface flows, and available stream gage data are used to calculate water availability projections. (*Id.* at subd. (c)(2).) The Deputy Director may issue informational orders to some or all diverters or water right holders in the Scott River and Shasta rivers watersheds related to water use to support those determinations, taking into account the need for the information and the burden of producing it. (Emergency Regulations, § 875.8(a).)

Exceptions to Curtailments

Notwithstanding the issuance of curtailment orders, diversion under any valid basis of right may continue without further approval from the Deputy Director if the diversion and use does not act to decrease downstream flows. (Emergency Regulations, § 875.1.) Such non-consumptive use, such as diversion for hydropower generation, dedication to instream use for the benefit of fish and wildlife, or diversions in conjunction with approved releases of stored water, is not affected by the curtailment orders.

Like the other emergency regulations adopted this summer, the Emergency Regulations for the Shasta and Scott rivers provide an exception for diverters to draw water necessary for minimum human health and safety needs, despite the existence of curtailments. Section 875.2 provides certain water uses may qualify for this exception where there is no feasible alternate supply. Such human health and safety needs include domestic water uses for consumption, cooking and sanitation, energy sources necessary for grid stability, maintenance of air quality, wildfire mitigation such as preventing tree die-off and maintaining ponds or other sources for firefighting, immediate public health or safety threats, and other water uses necessary for human health and safety as determined by a state, local, tribal, or federal health, environment, or safety agency. (Emergency Regulations, § 875.2.) Such human health and safety diversions may be authorized to continue after receipt of a curtailment order.

Livestock Watering

The Emergency Regulations find that inefficient livestock watering—diverting more than ten times the amount of water needed to reasonably support the number of livestock—during the fall migration of fall-run chinook salmon and coho salmon results in "excessive water diversion for a small amount of water delivered for beneficial use," and declares such diversion unreasonable during those conditions. (Emergency Regulations, § 875.7.) However, limited diversions will still be allowed, upon self-certification that the water is necessary to provide adequate water to the diverter's livestock based on established standards, and is conveyed without seepage. (Emergency Regulations, § 875.3.)

Voluntary Actions that May Mitigate the Need for Curtailments

The Emergency Regulations also include provisions for voluntary actions that may mitigate the need for curtailments of water use for certain diverters. Benefits to fisheries such as cold-water safe harbors, localized fish passage, strategic groundwater management, or the protection of redds (the depressions in gravel stream beds fish create to lay eggs) may be proposed to the State Water Board's Deputy Director through a petition for cooperative solution. (Emergency Regulations, § 875(f).)

Petitions, supported by reliable evidence, may propose:

> (a) watershed-wide solutions that provide assurances that minimum flows for fish will be achieved for specified periods;
>
> (b) tributary-wide solutions that a pro-rata flow for a tributary will be satisfied or CDFW finds sufficient in-tributary benefits to anadromous fish;
>
> (c) individual solutions where a water user has agreed to cease diversions in a specified time frame or has entered into a binding agreement with CDFW to provide benefits to anadromous fish equal or greater than the protections provided by their contribution to flow for that time period;
>
> (d) groundwater-basin-wide solutions of continued diversions in conjunction with measures would result in a net reduction (of 15 to 30 percent) of water use during the irrigation season compared to the prior year and other assurances are adopted; or

(e) voluntary reductions to more senior rights in favor of continuing diversion under a more junior right otherwise subject to curtailment. (*Id.* at § 875(f)(4)(A)-(E).)

The Emergency Regulations were partially amended prior to the State Water Board's approval, in response to public requests to add increased flexibility for local solutions and an opportunity for CDFW and the National Marine Fisheries Service to revise the minimum instream flow recommendations if lower flows will be protective of fish.

Submission of a Certification for Water Rights Subject to Curtailment Orders

A water right user subject to a curtailment order is required to submit within seven calendar days of receipt of the order, a certification that water diversion under the curtailed right has ceased, or alternatively, continues to the extent that it is non-consumptive use, instream use, or is necessary for minimum human health and safety needs or necessary for minimum livestock watering as defined and limited in the Emergency Regulations. (Emergency Regulations, § 875.6.) Reporting on diversions during curtailment periods must provide sufficient information to ensure water is being used only to the extent necessary and consistent with the Emergency Regulations' constraints.

Conclusion and Implications

On August 20, 2021, the State Water Resources Control Board submitted its Emergency Regulations for the Klamath River watershed to the California Office of Administrative Law (OAL), commencing a brief comment and review period. Before curtailment orders can be issued in the Scott or Shasta rivers, the State Water Board must obtain approval by OAL and file the Emergency Regulations with the Secretary of State. The Emergency Regulations, as well as information and updates on the State Water Board's Scott River and Shasta River watersheds drought response, are available at: https://www.waterboards.ca.gov/drought/scott_shasta_rivers/.
(Austin C. Cho)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

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

Civil Enforcement Actions and Settlements—Water Quality

•July 1, 2021—EPA reached settlements with seven Massachusetts construction companies for violations of stormwater regulations that serve to reduce pollution from construction runoff. Under these settlements, the seven companies agreed to pay penalties for their noncompliance and, where applicable, obtain permit coverage and follow the terms of their permits for discharging stormwater. The recent enforcement actions include:

383 Park Street, LLC agreed to pay a $9,000 penalty for allegedly failing to obtain permit coverage, maintain adequate erosion controls, and store and contain petroleum products in a manner designed to prevent discharge of pollutants at the Shay Lane construction site in North Reading, Massachusetts

Dat Tieu Enterprises, LLC agreed to pay a $3,000 penalty for allegedly discharging stormwater without a permit at the Woodland Park construction site in Brockton, Massachusetts.

Egan Development, LLC agreed to pay a $7,200 penalty for allegedly failing to obtain permit coverage at the Heritage Park Development in Whitman, Massachusetts.

Harbor Classic Homes LLC agreed to pay a $4,200 penalty for allegedly failing to obtain permit coverage at the Elm Street construction site in Lunenburg, Massachusetts.

Mujeeb Construction Company, Inc. agreed to pay a $7,200 penalty for allegedly failing to obtain permit coverage at the Carpenter Estates Development in Northbridge, Massachusetts.

Otis Land Management, LLC agreed to pay an $8,700 penalty for allegedly failing to obtain permit coverage, implement adequate erosion controls, and for a turbid discharge at the Sturbridge Road Development in Charlton, Massachusetts.

Royal Haven Builders, Inc., based in Tyngsborough, Massachusetts, agreed to pay a $7,800 penalty for allegedly failing to obtain permit coverage and implement adequate erosion controls at the Mayflower Landing Development in Pelham, New Hampshire.

•July 20, 2021—EPA settled a series of alleged industrial storm water violations under the federal Clean Water Act by Fought & Company, Inc, located in Tigard, Oregon. Fought & Company, Inc. agreed to pay a civil penalty of $82,000 to resolve EPA's allegations. Fought & Company, Inc. fabricates structural steel components for large-scale construction projects such as bridges, high-rises, stadiums, and industrial buildings. An EPA inspection at the facility in 2019 found Fought & Company, Inc. had a deficient Stormwater Pollution Control Plan, failed to properly implement corrective actions and failed to monitor all storm water discharge points. In addition to paying a civil penalty, Fought and Company, Inc. has agreed to conduct a storm water evaluation period, revise and update its Storm water Pollution Control Plan, and install additional treatment capacity at its facility to address excess zinc discharges.

•July 26, 2021—EPA announced a settlement with Carl Grissom of West Richland, Washington for unauthorized suction dredge mining in the South Fork Clearwater River in central Idaho in 2018. The agency is proposing that Grissom pay a $24,000 penalty. Suction dredge operations can destroy fish eggs and newly hatched fish. The eggs and fish can be sucked out of the gravel into the dredge, and they can be smothered and crushed with sand, silt, and gravel from upstream dredging. The South Fork Clearwater River is home to Snake River fall Chinook salmon and Snake River Basin steelhead, both of which are listed as "threatened" under the Endangered Species Act. The river is also designated as "Critical

Habitat" for Snake River Basin steelhead under the ESA and as "Essential Fish Habitat" for chinook and coho salmon. To protect these fish and their habitat, in 2018, EPA issued an updated General Permit for Small Suction Dredge Miners In Idaho that limits suction dredge operations in the South Fork Clearwater.

• July 27, 2021—EPA announced a settlement with Starostka-Lewis LLC for alleged violations of the federal Clean Water Act, including unauthorized discharges of pollutants from the company's residential construction site in Lincoln, Nebraska, into an adjacent stream. Under the terms of the settlement, the company agreed to pay a civil penalty of $60,009. According to EPA, Starostka-Lewis LLC violated terms of a Clean Water Act permit issued to the company for its Dominion at Stevens Creek residential construction site. EPA inspected the site in 2019 and alleges that, among other permit violations, the company failed to implement practices to limit the release of construction pollution into streams and other waters. EPA says those failures resulted in discharges of sediment and construction-related pollutants into a tributary to Stevens Creek and Waterford Lake. In the settlement documents, Starostka-Lewis certified that it took the necessary steps to return to compliance.

• August 2, 2021—EPA announced settlement with Hussey Copper under which the company agreed to perform a comprehensive environmental audit, implement an updated environmental management system, and pay an $861,500 penalty to resolve alleged violations of the federal Clean Water Act (CWA) at its smelting facility in Leetsdale, Allegheny County, Pennsylvania. EPA alleged that the company had chronic exceedances of effluent limits for discharges of copper, chromium, nickel, oil and grease, lead, pH, total suspended solids and zinc. Under the settlement, along with payment of the penalty, Hussey Copper will:

Conduct a comprehensive review of its wastewater treatment system.

1) Hire third-party consultants to conduct a compliance audit and implement corrective measures; 2) Hire third-party consultants to review, update, and audit compliance with the facility's environmental management system; 3) Implement a process to prevent and correct violations of permit effluent limits; 4) Conduct annual compliance training of employees and contractors and 5) Pay agreed-upon penalties on demand for future violations.

• August 5, 2021—EPA announced a settlement with the City of Wapato, Washington for alleged violations of the Clean Water Act at its city wastewater treatment facility. Wapato lies in central Washington's Yakima County, within the external boundaries of the Confederated Tribes and Bands of the Yakama Nation Reservation and discharges to tribal waters. EPA alleged that the city failed to comply with its National Pollutant Discharge Elimination System (NPDES) permit at the facility. Alleged violations include: 1) 3,000 effluent limit violations for exceedances of ammonia, copper, and zinc; 2) Failure to update the facility's Quality Assurance Plan; 3) Failure to update the facility's Operations and Maintenance Plan.

As part of the settlement, the City agreed to pay a penalty of $25,750 and entered into an Administrative Order on Consent (AOC), which requires the City to take specific actions to prevent the continued discharge of pollutants in excess of its permit limits.

• August 9, 2021—EPA announced a settlement with the LPG Land & Development Corporation under which the company will pay a $125,000 penalty and pay more than $600,000 for stream restoration improvements. The settlement addresses alleged federal and state water pollution violations at the Mon Fayette Industrial Park in Morgantown, West Virginia.

• August 10, 2021—EPA and the Department of Justice announced that Noble Energy, Inc., Noble Midstream Partners LP, and Noble Midstream Services, LLC (collectively, Noble) have agreed to pay $1 million and implement enhanced containment measures and electronic sensors at tank batteries operating in Colorado floodplains. The agreement, lodged as a proposed consent decree with the U.S. District Court for the District of Colorado, resolves Clean Water Act claims at two oil and gas production facilities in Weld County, Colorado. The United States concurrently filed a civil complaint with the proposed consent decree detailing alleged violations of the Clean Water Act at the facilities. These violations

include a 2014 unauthorized discharge of oil from the state M36 Facility into the Poudre River and non-compliance with regulations issued to prevent and respond to oil spills at the state M36 Facility and the Wells Ranch Facility. The settlement requires installation of steel oil-spill containment berms and remote monitoring sensors, as well as tank anchoring at all of Noble's active tank batteries in Colorado floodplains. Noble Midstream must also implement and provide periodic reports on a facility response training, drills, and exercises program at the Wells Ranch facility.

• August 13, 2021—EPA announced that the John F. Kennedy Center for the Performing Arts in Washington, D.C. settled alleged Clean Water Act violations at its facility adjacent to the Potomac River. The Kennedy Center has a Clean Water Act permit regulating its discharges of condenser cooling water from the facility's air conditioning system into the Potomac River, which is part of the Chesapeake Bay watershed. This settlement addresses alleged violations of temperature and pH discharge permit limits required under the Kennedy Center's Clean Water Act permit. EPA also cited the Kennedy Center for failing to timely submit monitoring reports and failing to submit pH influent data. As part of the settlement, the Kennedy Center is required to submit a compliance implementation plan.

• August 24, 2021—EPA announced that Sixteen to One Mine, one of California's oldest operational gold mines, has agreed to an Administrative Order on Consent requiring the mine to install a new treatment system that will remove pollutants from mine drainage before entering local waters. The mine was found to be in violation of its permit under the Clean Water Act after consistently discharging mine-influenced water that exceeded limits on pollutants. The agreement addresses elevated pollutant levels by requiring the mine to install a system to treat total suspended solids, antimony, arsenic, cadmium, copper, lead, nickel, and pH to levels at or below permit limits. The Sixteen to One Mine has agreed to submit sampling and treatment plans, install an approved water treatment technology, repair stormwater management features in disrepair, update its stormwater management plan, and apply for coverage under the California Statewide Industrial General Permit. The Sixteen to One Mine has 220 days to complete this work. The facility will report sampling results to EPA for three years to demonstrate the treatment system's effectiveness, ensure compliance with the permit, and protect the water quality of Kanaka Creek.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

• July 22, 2021—EPA announced a settlement with PM Properties, Inc. under which the company will pay $27,483 in penalties for environmental violations associated with underground storage tanks of fuel at CrossAmerica Partners fuel stations in Verona and Weyers Cave, Virginia. The penalties stem from two settlements that address compliance with environmental safeguards protecting communities and the environment from exposure to petroleum or potentially harmful chemicals. PM Properties will pay a $25,603 penalty for alleged violations at the Verona location. These alleged violations included failure to have adequate spill prevention equipment and failure to conduct proper testing of the tanks, transmission lines and leak detectors. In a separate settlement, PM Properties will pay a $1,880 penalty for alleged violations at the Weyers Cave location that included failure to have adequate spill prevention devices on two underground storage tanks. The company has certified that both locations are now in compliance with environmental regulations.

• August 10, 2021—EPA announced a $29.5 million cost recovery settlement with Shell Oil Company for the ongoing cleanup of waste and contaminated groundwater at the McColl Superfund Site in Fullerton, California. Shell was found liable by a federal court for the cleanup and disposal of contaminated waste at the McColl Superfund Site. The principal contaminants of concern are benzene, metals, and a volatile chemical known as tetrahydrothiophene. As one of the responsible parties for the contamination, Shell has agreed to pay $29.5 million to resolve its share of costs that the federal government incurred through the cleanup process to date. Shell will also pay 58 percent of EPA's future cleanup costs.

Indictments, Sanctions, and Sentencing

• August 6, 2021—The Department of Justice filed criminal charges under the Clean Water Act against Summit Midstream Partners LLC, a North

Dakota pipeline company that discharged 29 million gallons of produced water from its pipeline near Williston, North Dakota, over the course of nearly five months in 2014-2015. The discharge of more than 700,000 barrels of "produced water"—a waste product of hydraulic fracturing—contaminated land, groundwater, and over 30 miles of tributaries of the Missouri River. \In addition to the criminal charges, the United States and the State of North Dakota filed a civil complaint against Summit and a related company, Meadowlark Midstream Company LLC, alleging violations of the Clean Water Act and North Dakota water pollution control laws. Under parallel settlements resolving the criminal and civil cases, the company has agreed to pay a total of $35 million in criminal fines and civil penalties. If the court accepts the plea agreement, Summit will pay $15 million in federal criminal fines for negligently causing the continuous spill, failing to stop it and deliberately failing to make an immediate report as required. Under the terms of the proposed plea agreement, Summit will serve three years of probation in which comprehensive remedial measures are required. Under the proposed civil settlement, Summit, Meadowlark, and a third related company, Summit Operating Services Company LLC, will pay $20 million in civil penalties, perform comprehensive injunctive relief, clean up the contamination caused by the spill and pay $1.25 million in natural resource damages to resolve the civil case. The civil settlement further requires Summit and Meadowlark to take concrete steps to prevent future discharges, including stringent pipeline installation, operation, and testing requirements; a centralized computational pipeline monitoring system; spill response planning and countermeasures; an environmental management system; and data management and training measures. Independent third-party audits are required to ensure that certain injunctive measures are properly developed and implemented. (Andre Monette)

LAWSUITS FILED OR PENDING

TEXAS V. NEW MEXICO INTERSTATE COMPACT LITIGATION UPDATE: TEXAS FILES MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT SEEKING TO ADD PARTIES WITHIN THE MIDDLE RIO GRANDE

On June 24, 2021, the State of Texas filed a motion for leave to file a supplemental complaint and a brief in support with the Office of the Special Master in *Texas v. New Mexico and Colorado*, Case No. 141 orig., Special Master's Docket No. 517 (June 24, 2021). According to Texas' most recent filings, the State of New Mexico has violated the delivery requirement of Article IV of the Rio Grande Compact "by diverting water for its own use even before it delivers the water in the [Elephant Butte] Reservoir for apportionment to Texas" by allowing entities such as the City of Santa Fe, the Middle Rio Grande Conservancy District and others to divert water when New Mexico is in debit status to Texas. *Id.* at 6. Texas also alleges that, in violation of Article VI of the Compact, New Mexico has failed to retain in storage the amount equal to its debit by enjoining Middle Rio Grande diversions.

Background

Prolonged drought conditions have played a significant role in all western states' interstate water issues. Certainly, ongoing severe drought seasons continue to implicate New Mexico's delivery obligations to Texas under both the Rio Grande Compact and the Pecos River Compact. In recent years, the trend has been for downstream states to increasingly seek to invoke the U.S. Supreme Court's original jurisdiction to address problems created in the event drought results in under-deliveries and municipal demand increases in the face of decreased supplies and storage. The Supreme Court has declined to accept jurisdiction over many of these requests. However, the Court accepted jurisdiction in this case.

On January 27, 2014, the Supreme Court granted the State of Texas' motion for leave to file a bill of complaint against New Mexico over alleged violations of the 1938 Rio Grande Compact, 53 Stat. 785 (1939). *See,* NMSA 1978, § 72-15-23 (1945). In effect, the Court ruled that Texas can proceed with its lawsuit against New Mexico. Texas seeks declaratory relief ordering New Mexico to cease alleged illegal diversions as well as damages incurred as a result of Compact violations. In ruling that the case should proceed, the Supreme Court evaluated "the nature of the interest of the complaining State" as well as the "seriousness and dignity of the claim" and "the availability of an alternative forum in which the issues tendered can be resolved." *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (citations omitted).

Now, after years of discovery, litigation and attempts at settlement, the case is poised for trial with an impending calendar setting. A trial on the merits is scheduled to begin on September 13, 2021. However, on August 19, 2021, Texas filed a motion for continuance to reschedule the current trial setting to a date at least six months in the future or after March 21, 2022.

The Rio Grande Compact

The 1938 Rio Grande Compact effects an equitable apportionment of the waters of the Rio Grande among Colorado, New Mexico and Texas by establishing delivery amounts due at specific gauges. The last gauge for delivery in the Rio Grande Compact is Elephant Butte Reservoir, which feeds Caballo Reservoir directly below it. Because of siltation and other practical problems, the gauge was moved to the outflow at Caballo Reservoir. As with most compacts, the Rio Grande Compact was developed out of a shared desire to remove all causes of present and future controversy with respect to the use of the waters of the Rio Grande. The Compact allocates water among the three states, and, in the case of the downstream state Texas, guarantees water by use of a set of indexing stations whereby when "x" quantity of water passes a station, then "y" must reach the lower point. The Compact, however, is silent about what happens below Elephant Butte Reservoir.

The final Compact agreed to by the states does two things: 1) it addresses the reliability of supply issues and the existing water uses through indexing stations; and 2) it addresses reservoir storage and optimum use issues by allowing flood storage in wet years and releases to meet downstream needs in future dry years. To provide the necessary flexibility under this accounting, the Compact provides credits for excess deliveries and debits for under-deliveries. Whether this flexibility is enough in times of drought and increased municipal demand remains to be seen. It is this issue that lies at the heart of the current interstate litigation between Texas and New Mexico.

The Proposed Supplemental Complaint

Texas' proposed supplemental complaint implicates several Articles of the Rio Grande Compact, notably Article IV, which establishes New Mexico's delivery schedule. Article VI provides Colorado and New Mexico flexibility to deviate from the delivery schedules with certain restrictions. A state delivering more water than required by the delivery schedule is given credit for the excess water. Likewise, a state that delivers less than the required amount accrues a debit. Article VII of the Rio Grande Compact provides that when there is less than 400,000 acre-feet of water in Project storage, Colorado and New Mexico may not "increase the amount of water in storage in reservoirs constructed after 1929.

In May 2021, the Texas Compact Commissioner sent the New Mexico Commissioner a letter alleging New Mexico was in violation of the Compact by not retaining water in storage to the extent of New Mexico's debit and that Article VII restrictions do not excuse that failure. New Mexico's Commissioner, who also serves as New Mexico's State Engineer, responded by explaining that New Mexico disagrees with Texas' interpretations of the operation of Articles VI, VII and VIII governing the release from and the amounts of water in storage.

Among the issues that the proposed supplemental complaint places before the Special Master is whether the Supplemental Complaint would take the litigation beyond what was reasonably anticipated when the Supreme Court granted Texas' Motion to File its Original Bill of Complaint. Texas argues that the new claims and allegations: "fall comfortably within the scope of what was reasonably anticipated by the Supreme Court." *See,* motion for leave at 8.

New Mexico's position is that the Special Master should refer Texas' Motion to the Supreme Court for a ruling on whether the new claims will be allowed or for other direction on how to proceed. *See,* State of New Mexico's limited response to Texas' motion. *Texas v. New Mexico and Colorado*. The State of Colorado filed a response arguing Texas' added claim is beyond the scope of the original suit, and therefore, the motion should be filed with the Supreme Court. *See,* State of Colorado's response to Texas' motion (July 15, 2021).

Amici Briefs

Several entities including the Albuquerque Bernalillo County Water Utility Authority, the City of Las Cruces, and New Mexico State University filed *amici* briefs and joint responses that point out new issues that are outside of the scope of the original litigation would have to be addressed were the supplemental complaint allowed to go forward. The *amici* parties also contend that the United States and the State of Colorado would need to be joined as indispensable parties.

Conclusion and Implications

The current case is focused entirely on Texas' claims that New Mexico's groundwater pumping below Elephant Butte Reservoir deprives Texas of water it is entitled to under the Compact. Texas' proposed amendment is focused entirely upstream of Elephant Butte Reservoir. The Supreme Court performs a gatekeeping function when it evaluates whether to accept a case invoking its original jurisdiction over controversies between states. *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995). Given the Supreme Court's views on invoking its original jurisdiction sparingly and its continuing gatekeeping role *vis-à-vis* amendments, it will be interesting to see how the Special Master and Supreme Court proceed. *See generally Illinois v. City of Milwaukee, Wisconsin*, 406 U.S. 91, 93 (1972); *see also Arizona v. New Mexico*, 425 U.S. 794, 797 (1976). The motion for leave to file supplemental complaint, the supplemental complaint, and the brief in support of motion is available online at: https://www.ca8.uscourts.gov/texas-v-new-mexico-and-colorado-no-141-original.

(Christina J. Bruff)

JUDICIAL DEVELOPMENTS

U.S. SUPREME COURT UPHOLDS EMINENT DOMAIN AUTHORITY FOR FERC 'CERTIFICATE' GAS PIPELINE COMPANY DESPITE NEW JERSEY'S SOVEREIGN IMMUNITY CHALLENGES

PennEast Pipeline Co., LLC v. New Jersey, ___U.S.___, 141 S.Ct. 2244 (June 29, 2021).

On June 29, 2021, an uncharacteristic majority of the U.S. Supreme Court upheld the right of Federal Energy Regulatory Commission (FERC) certificate holders to exercise federal eminent domain authority and bring condemnation actions against states to acquire necessary rights-of-way to construct pipelines. Despite New Jersey's defense that sovereign immunity protected the state against condemnation suits, the majority—a mix of liberal and conservative justices, Justices Roberts, Breyer, Alito, Sotomayor, and Kavanaugh—found that no such protection applied. Despite the subject matter involving natural gas and the NGA, the implications for construction projects for the interstate transfer of water—something severe drought in the nation has prompted renewed interest in—the case is highly instructive of the potential clash of the power of a federal agency and state's rights. Perhaps one day this federal power may tested under this decision with the U.S. Bureau of Reclamation and interstate water projects.

Background

In 1938, Congress authorized FERC to administer the Natural Gas Act (NGA), for the transportation and sale of natural gas in interstate commerce. Pursuant to NGA § 717f(e), in order to build an interstate pipeline, a natural gas company must first receive a certificate from FERC that the construction "is or will be required by the present or future public convenience and necessity." Congress further amended NGA after natural gas companies struggled to exercise their construction rights without a mechanism by which to secure property rights. That 1947 amendment authorized FERC certificate holders to exercise federal eminent domain power under NGA § 717f(h).

PennEast Pipeline's Exercise of Federal Eminent Domain Power

In 2015, PennEast applied to FERC for a certificate of public convenience and necessity, intending to construct a 116-mile pipeline from Pennsylvania to New Jersey. After FERC satisfied procedural requirements including public notice and comment and the environmental impact statement required by the National Environmental Policy Act (NEPA), FERC granted the certificate in January 2018.

After FERC certification, PennEast filed complaints in U.S. District Court in New Jersey to exercise its federal eminent domain power and begin establishing just compensation for affected property owners. The property PennEast sought to condemn included parcels in which New Jersey holds possessory and non-possessory interests (such as conservation easements). New Jersey (State) challenged the eminent domain complaints on sovereign immunity grounds. The District Court held that New Jersey was not immune from PennEast's federal eminent domain power. The Third Circuit Court of Appeals vacated and remanded to dismiss the claims against the State, reasoning that New Jersey's sovereign immunity protection shielded the State from condemnation actions brought pursuant to PennEast's NGA eminent domain power. The Third Circuit further reasoned that if Congress intended to abrogate state sovereign immunity, it would have been clearly stated in NGA. The U.S. Supreme Court granted certiorari.

The U.S. Supreme Court's Decision

Delegation of Federal Eminent Domain Power to Private Delegatees

The Supreme Court commented that the federal government has exercised its eminent domain authority since the founding of the country. Since that time,

the Court has repeatedly recognized that this includes the ability of the federal government to exercise such power over property owned by a state. The Court further explained that the federal eminent domain power may be delegated to private parties, inclusive of exercising federal eminent domain power within states. It was undisputed that Congress passed NGA § 717f(h) specifically to allow pipeline development by allowing FERC certificate holders to condemn any necessary rights-of-way. Therefore, it is well-established that NGA empowers FERC certificate holders to condemn property.

New Jersey's Sovereign Immunity Defense

New Jersey's principal defense was that sovereign immunity barred condemnation actions against non-consenting states, and that NGA did not abrogate sovereign immunity because the statute did not speak on the issue with sufficient clarity.

Sovereign immunity protects states from being sued unless: 1) the state unequivocally expressed consent to suit, 2) Congress clearly abrogated state sovereign immunity under the Fourteenth Amendment, or 3) the state waived sovereign immunity in "the plan of the Convention," referring to the structure of the original Constitution itself. In *PennEast*, New Jersey argued that its sovereign immunity remained intact because no exception applied.

The Court disagreed, explaining that states consented in "the plan of the Convention" to allow federal eminent domain power and condemnation proceedings by private delegatees when states entered the federal system and agreed to yield to the powers of the federal government. The Court further disagreed with New Jersey's attempt to divorce the power to exercise eminent domain from the ability to bring a condemnation proceeding. The court reasoned that eminent domain power is "inextricably intertwined" with the ability to bring condemnation proceedings.

Dissenting Opinions

Justice Barrett issued a dissenting opinion, joined by Justices Thomas, Kagan, and Gorsuch. The dissent argued that there was no textual, structural, or historical support for the argument that states surrendered to private condemnation suits in the plan of the Convention. Without such support, Justice Barrett argued that no other exception to sovereign immunity applied and as such New Jersey should be immune to suit in this case.

Justice Gorsuch joined Justice Barrett's dissent in full and authored a second dissenting opinion to clarify the difference between structural immunity and Eleventh Amendment immunity, both held by states. Justice Gorsuch explained that structural immunity is the constitutional entitlement that applies regardless of the type of suit, whereas the Eleventh Amendment provides immunity for a particular category of suits: suits filed against states, in law or equity, by diverse plaintiffs.

Conclusion and Implications

The U.S. Supreme Court ultimately held that NGA § 717f(h) authorizes FERC certificate holders to exercise federal eminent domain power and condemn all necessary rights-of-way, regardless of private party or state ownership. This federal eminent domain power is inextricably linked to the ability to bring condemnation actions against states. Further, sovereign immunity is not offended because the States consented to federal eminent domain power at founding when states agreed to submit to the federal government. The case resolved the important question of whether natural gas companies can acquire rights-of-way across state-owned property in order to construct pipeline systems. This clears a path for future development of energy infrastructure across the country. It too may portend development of water-transfer pipeline projects from states with an abundance of water to those that suffer from drought. (Alexandra L. Lizano, Darrin Gambelin)

FIRST CIRCUIT UPHOLDS MASSACHUSETTS' STATE LAW ENFORCEMENT AS BARRING CLEAN WATER ACT CITIZEN SUIT BUT REQUIRES OPERATORS TO OBTAIN NPDES PERMITS

Blackstone Headwaters Coalition, Inc. v. Gallo Builders, Inc., 995 F.3d 274 (1st Cir. 2021).

The U.S. Court of Appeals for the First Circuit recently determined that an enforcement action brought by the Massachusetts Department of Environmental Protection (Department) against a developer for sediment-laden stormwater discharges barred a citizen suit under the federal Clean Water Act (CWA) for the same violations. The court also determined that all operators on the project site were required to obtain a National Pollutant Discharge Elimination System (NPDES) CWA permit to discharge from the site.

Factual and Procedural Background

Robert and Janice Gallo and their son Steven Gallo (Gallos) served as the only officers, directors, and shareholders of Gallo Builders, Inc. (Gallo Builders) and as the only members of Arboretum Village, Inc. (Arboretum Village; collectively: Defendants). The Defendants have been involved in the construction of a large residential development in Worcester, Massachusetts, known as Arboretum Village Estates (Development).

Arboretum Village obtained an NPDES permit from the U.S. Environmental Protection Agency (EPA) for the Development (Construction General Permit). The Department monitored the Development for compliance with state regulations and discovered that the site was discharging silt-laden runoff from unstable, eroded soils into an unknown perennial stream, which ultimately ended up in the Blackstone River. As a result, the Department issued a Unilateral Administrative Order (UAO), which required Arboretum Village to undertake numerous remedial actions or face civil penalties. Following the issuance of the UAO, construction of the Development stopped. Arboretum Village appealed the UAO, resulting in Arboretum Village and the Department entering into a settlement agreement and the issuance of the Administrative Consent Order with Penalty (ACOP).

Despite approval of the ACOP, Blackstone Headwaters Coalition, Inc. (Blackstone) filed a citizen suit against Defendants, alleging that Defendants violated the CWA by failing to obtain and comply with the Construction General Permit conditions for the Development. Specifically, Blackstone brought two claims: 1) the Gallo Builders failed to obtain the Construction General Permit for the Development—despite Arboretum Village obtaining their own, and 2) Arboretum Village failed to adhere to the conditions in the Construction General Permit.

The CWA prohibits the discharge of pollutants from point sources into waters of the United States. The CWA's NPDES permit program authorizes discharges into waters of the United States from point sources. The State of Massachusetts regulates and enforces water protection programs through the Massachusetts Clean Water Act (MCWA), but the state has not received authorization under § 402(b) of the CWA to administer the NPDES permit program under the MCWA.

The CWA authorizes individuals to file complaints against those who violate the CWA when the EPA or an authorized state fails to perform an act or duty required by statute. The CWA, however, precludes citizen suits when a state is diligently prosecuting the violation under a comparable state law.

Defendants and Blackstone filed cross-motions for summary judgment to determine whether the ACOP barred Blackstone's citizen suit. Defendants also sought summary judgment on Count I of the complaint concerning Construction General Permit coverage and Count II concerning discharges of sediment-laden stormwater. The U.S. District Court granted summary judgment against Blackstone as to its claims in Counts I and II and denied Blackstone's cross-motion for summary judgment as to the applicability of the statutory preclusion bar for diligent prosecution. Blackstone appealed these determinations.

The Court of Appeals' Decision

Diligent Prosecution Bar to Citizen Suits

The court first addressed the issue of whether the CWA's "diligent prosecution" barred Blackstone's

claim that Defendants discharged sediment-laden stormwater in violation of the CWA. The court considered four distinct questions under this issue: 1) whether the Department's action was commenced and prosecuted under a state law comparable to the CWA, 2) whether the Department's action sought to enforce the same violation alleged by Blackstone, 3) whether the Department was diligently prosecuting its action when Blackstone filed its complaint, and 4) whether Blackstone's suit is a civil penalty.

On the first question, the court noted that the Department appeared to have commenced its enforcement action under the MCWA, at least in part. Based on prior case law, the court determined that the MCWA was a comparable state law to the federal CWA. Blackstone did not dispute this conclusion. Instead, Blackstone contended the Department's enforcement action was brought under the Massachusetts Wetlands Protection Act (MWPA) and not under the MCWA, and that the MWPA was not a comparable state law to the CWA. The court agreed with Blackstone that the MWPA is not a comparable state law to the CWA, because it is narrower in scope than the CWA. Nevertheless, the court concluded the Department's enforcement action was brought, at least in part, under a comparable law: the MCWA.

On the second question, Blackstone argued its action targeted the causes of Defendants' water pollution while the Department's action targeted only the Defendants' pollution *per se*, and that the particular violations referenced in the complaint occurred on different days than the violations alleged in the ACOP. The court rejected this argument, reasoning that the ACOP required Defendants to implement actions that would prevent sediment-laden discharges, and that this forward-looking course of action would remedy the violations alleged in Blackstone's complaint.

On the third question, the court reasoned that the ACOP included a series of enforceable obligations on Defendants designed to bring the project into compliance and to maintain compliance with promulgated standards, while at the same time reserving to the Department a full set of enforcement vehicles for any instances of future non-compliance. Thus, the Department was "diligently prosecuting" the same violation.

On the fourth question, Blackstone argued that the "diligent prosecution" provision only bars duplicative citizen suits for civil penalties but not claims seeking declaratory and injunctive relief. The court reasoned that because the CWA's citizen suit provision does not authorize citizens to seek civil penalties separately from injunctive relief, the preclusion bar extends to civil penalty actions and to injunctive and declaratory relief. As a result, the Court of Appeals upheld the award of summary judgment to Defendants on Blackstone's claim for sediment-laden stormwater discharges.

Finally, the court considered whether the Gallo Builders were required to obtain coverage under the Construction General Permit. Defendants contended that because Arboretum Village obtained coverage under the Construction General Permit and because both Arboretum Village and Gallo Builders were both owned by the Gallos, any failure by Gallo Builders, to also enroll under the permit was a nonactionable technical violation. The court rejected this argument, reasoning that the Gallo Builders was an operator of a construction project, and thus needed to obtain coverage under the Construction General Permit in order to discharge from the Development, regardless of Arboretum Village's coverage under the same permit. The court thus reversed the district court's decision and required all operators to obtain coverage under the Construction General Permit.

Conclusion and Implications

This case supports a diligent prosecution bar to citizen suits, as long as the state enforcement action was brought, at least in part, pursuant to a comparable state law. The case also appears to support a contention that every operator on a construction site may be required to obtain individual permit coverage to discharge from the site. The court's opinion is available online at: https://casetext.com/case/blackstone-headwaters-coal-inc-v-gallo-builders-inc-2.
(Kara Coronado, Rebecca Andrews)

FOURTH CIRCUIT FINDS STATE AGENCY DID NOT WAIVE CLEAN WATER ACT SECTION 401 CERTIFICATION

North Carolina Department of Environmental Quality v. Federal Energy Regulatory Commission, 3 F.4th 655 (4th Cir. 2021).

The U.S. Court of Appeals for the Fourth Circuit recently vacated a Federal Energy Regulatory Commission (FERC) order issuing a license for a hydroelectric project. The Fourth Circuit vacated FERC's finding that the North Carolina Department of Environmental Quality waived its federal Clean Water Act § 401 authority to issue water quality certification.

Factual and Procedural Background

The Federal Power Act (FPA) is a comprehensive regulatory scheme governing national water resources including hydroelectric power. Under the FPA, the construction, maintenance, or operation of any hydroelectric project located on navigable waters of the U.S. requires a license issued by the Federal Energy Regulatory Commission.

In addition, under § 401 of the federal Clean Water Act (CWA), applicants seeking federal licensing of projects that would result in a discharge to navigable waters must obtain state water quality certification verifying the project complies with state water quality requirements. If the state denies 401 certification, the federal license or project may not be granted. If a state deems additional conditions are necessary to ensure compliance with state water quality standards, the conditions must be set forth in the 401 certification and the federal licensing agency must incorporate the conditions into the federal license. A state waives water quality certification if the state "fails or refuses to act on a request for certification, within a reasonable period of time (*which shall not exceed one year*)" after receipt of the request.

On March 30, 2015, McMahan Hydroelectric applied to FERC for a license to operate the Bynum Hydroelectric Project (Project) on the Haw River in North Carolina. On March 3, 2017, McMahan applied for § 401 certification from the North Carolina Department of Environmental Quality (NCDEQ). After the initial application in March 2017, McMahan withdrew and resubmitted its application twice. NCDEQ ultimately issued 401 certification on September 20, 2019. The first withdrawal and resubmission was due, in part, to FERC's failure to complete an Environmental Assessment of the Project. The second withdrawal and resubmission was due in part, to NCDEQ's inability to issue the 401 certification by the one-year deadline because of time frames imposed by the public notice-and-comment process.

On the same day that NCDEQ issued 401 certification, FERC issued an Order granting McMahan a license to operate the Project. FERC concluded that NCDEQ had waived its authority to issue § 401 certification, determining that the statutory one-year period began on March 3, 2017 and was not restarted by the withdrawals and resubmissions. FERC argued that NCDEQ and McMahan coordinated on a withdrawal-and-resubmission scheme for the purpose of evading the § 401 one-year review period.

NCDEQ filed a rehearing request with FERC, seeking rescission of the waiver determination and asking FERC to incorporate the § 401 conditions into the license. FERC denied NCDEQ's rehearing request. NCDEQ petitioned the Fourth Circuit for review of FERC's Order.

The Fourth Circuit's Decision

NCDEQ argued two grounds for vacating the Order: 1) FERC's interpretation of the § 401 waiver provision was inconsistent with the plain language and purpose of the CWA; and 2) alternatively, even if FERC's interpretation of the statute was correct, the waiver finding must be set aside because FERC's key factual findings were not supported by substantial evidence. The Fourth Circuit discussed the meaning of the waiver provision extensively, but ultimately declined to rule on the first issue of statutory interpretation and decided NCDEQ's petition on the second question of substantial evidence review.

The statutory interpretation question presented is the meaning of a state's failure or refusal "to act" as provided in CWA § 401. The court characterized FERC's understanding of the waiver provision as requiring *final* agency action within the one-year

period. In other words, because NCDEQ did not issue or deny certification within one year of receiving the initial request, it waived certification authority. The court expressed doubt over FERC's interpretation. According to the Court of Appeals, if Congress had intended for states to take final action within the one-year period, the statute could have clearly required states to "certify or deny" the request. The language of the statute, however, hinges on a state's failure to "act," which plainly means something other than failing to certify or deny. Based on this reading, the court found that a state would not waive its authority if it took "significant and meaningful action" on a certification request within a year of filing.

The court reasoned that the legislative history and purpose of the CWA supported this reading of the waiver provision. The Conference Report on § 401 stated that the time limitation was meant to ensure that "sheer inactivity by the State . . . will not frustrate the Federal application." Given that the CWA carefully allocated authority between federal government and states, the purpose of § 401 was "to assure that Federal licensing or permitting agencies cannot override state water quality requirements."

Circuit Court Precedent on the One Year Rule

The Fourth Circuit acknowledged its understanding of the one-year requirement diverges from decisions in the D.C. Circuit and the Second Circuit. The D.C. Circuit considered a case where a license applicant entered into written agreement with Oregon and California to withdraw and resubmit its 401 certification application in order to avoid waiver. The state agencies failed to grant or deny the application for over ten years. The D.C. Circuit found Oregon and California's "deliberate and contractual idleness" defied the one-year requirement. The Second Circuit adopted a straightforward reading of the one-year period, finding the New York agency waived certification by failing to grant or deny certification within one year after the initial request.

The Fourth Circuit maintained that its interpretation is consistent with the D.C. Circuit Court's decision, reasoning that decision should apply in narrow circumstances, where a withdrawal-and-resubmission scheme coordinated by the license applicant and state deliberately stalled action. In NCDEQ's case, however, there was no "contractual agreement for agency idleness," and overall no idleness on the part of the agency. NCDEQ consistently took "significant action" on the certification application, including after each withdrawal and resubmission. For example, NCDEQ continued to meet with McMahan to develop the water-quality monitoring plan and moved forward with the notice-and-comment process after FERC issued its Environmental Assessment. Ultimately, NCDEQ granted 401 certification.

The court did not decide the statutory interpretation question, leaving it for resolution in a future case where the outcome depends on the precise meaning of the statute. Even assuming FERC's interpretation of the waiver provision was correct, the court nevertheless concluded that FERC's factual findings—that NCDEQ and McMahan engaged in improper coordination—were not supported by substantial evidence. The court vacated FERC's Order and remanded to FERC to incorporate NCDEQ's 401 certification conditions into the license.

Conclusion and Implications

In this case, the Fourth Circuit Court of Appeals opined that state authority under Clean Water Act § 401 is not waived when the state has failed to take *final* action on a certification request within the statutory one-year period. If the state has taken "significant action" on the certification request, it is deemed to have "acted" on the request. The Fourth Circuit's statutory interpretation of state action under the § 401 waiver provision diverges from decisions in the D.C. and Second circuits. The court's opinion is available online at: https://www.ca4.uscourts.gov/opinions/201655.P.pdf.
(Julia Li, Rebecca Andrews)

DISTRICT COURT OF HAWAI'I APPLIES THE CLEAN WATER ACT 'FUNCTIONAL EQUIVALENT' STANDARD SET FORTH BY THE U.S. SUPREME COURT

Hawai'i Wildlife Fund v. County of Maui, ___F.Supp.3d___, Case No. 12-00198 (D. HI July 26, 2021).

To determine if the County of Maui required a federal Clean Water Act permit, the U.S. District Court for the District of Hawai'i applied the "functional equivalent" standard set forth by the U.S. Supreme Court in *County of Maui v. Hawai'i Wildlife Fund*, 140 S.Ct. 1462 (2020). The standard includes criteria for courts to utilize when determining whether or not a discharge into navigable waters requires a National Pollutant Discharge Elimination System (NPDES) permit, as prescribed in the Clean Water Act (CWA).

Factual and Procedural Background

The County of Maui operates a wastewater reclamation facility on the island of Maui, Hawai'i. The facility collects sewage, treats it, and disposes of the treated water underground in four wells. This effluent then travels a further half mile or so, through groundwater, to the Pacific Ocean, although with certain components, like nitrogen, being reduced before the wastewater reaches the ocean.

Monitors at a handful of locations near the shoreline detected less than 2 percent of the wastewater from two of the four wells. No scientific study conclusively established the path of the other 98 percent of the wastewater. The 2 percent of treated wastewater reaching the ocean amounts to tens of thousands of gallons every day. While the parties and court could not point to the exact path of the rest of the 98 percent of wastewater, it is likely that that remainder enters the Pacific Ocean within a few miles of the facility.

With a few exceptions, the Clean Water Act requires a permit when there is the discharge of any pollutant to a navigable water. The Ninth Circuit previously heard this case and ruled that the County of Maui's discharges required an NPDES permit as the pollution and pollutants were "fairly traceable" to their injection wells. On *certiorari*, the U.S. Supreme Court ruled that the fairly traceable standard was too broad and replaced the standard with the functional equivalent standard. With the new standard, the Court provided a non-exclusive framework for other courts to utilize when reviewing this question:

> (1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point sources, (6) the manner by or the area in which the pollutant enters the navigable waters, [and] (7) the degree to which the pollution (at that point) has maintained its specific identify. Time and distance will be the most important factors in most cases, but not necessarily every case.

The District Court's Decision

On remand, the U.S. District Court applied the functional equivalent standard articulated by the Supreme Court to determine whether the discharges from the County of Maui's injection wells were the functional equivalent to a discharge from a point source. The court applied seven factors identified by the Supreme Court, one factor from U.S. Environmental Protection Agency (EPA) Guidance, and *added* its own factor as follows:

- *Time*—The court found that the time between the effluent leaving the injection wells and reaching the ocean was less than "many years." The court concluded the amount of time was within the window that the Supreme Court expected to require a permit, reasoning that "even if the court double[d] the longest time measured at the seeps" it would still be less time than the ceiling of this factor set forth.

- *Distance*—The court found that the distance from the injection wells to the ocean, when calculated both horizontally and vertically, was a "relatively short distance." Further the court found that even

when the pollutant arrived diluted, its journey to the ocean was short enough and less than the "50-mile extreme" set forth by the Supreme Court.

•*Nature of the Material the Pollutant Travels*—The court quickly found that this factor weighed in favor of no permit being required. The court found that the effluent travels and mixes with "other waters flowing through rock and other substances."

•*Extent to Which the Pollutant is Diluted or Chemically Changed as it Travels*—Similar to factor three, the court here found that while there is a pollutant entering the navigable waters, the pollutant is significantly diluted or otherwise removed. Despite the presence of pollutants, this factor weighed in favor of no permit being required as it was significantly diluted or otherwise removed.

•*Amount of the Pollutant Entering the Navigable Waters Relative to the Amount of the Pollutant that Leaves the Point Source*—The court found that this factor weighed in favor of requiring a permit. It reasoned that whether or not some of the pollutant is removed, pollutants still reach the ocean.

•*Manner By or Area in Which the Pollutant Enters the Navigable Waters*—The court reasoned that the manner by which the pollutant enters the ocean is partially known but not completely known. The court reasoned that the lack of complete information in this factor did not weigh in favor or against a permit.

•*Degree to Which the Pollution Maintains its Specific Identity*—The court weighted this factor in favor of needing a permit. Its reasoning being that, even if some of the pollutants are diluted or otherwise removed, the "wastewater maintains its specific identity as polluted water emanating from the wells."

•*System Design and Performance*—Following the Supreme Court decision, the EPA issued guidance on the application of the functional equivalent test. In its guidance, the EPA urged courts to review the design and performance of facilities as it pertains to the factors put forth by the Supreme Court. Ultimately, the District Court found that this factor did not weigh in favor or against the permit in this matter. The reason being is that the Supreme Court and all parties concur on the purpose of the treatment plants and from there to flow to the ocean.

•*Volume of Wastewater Reaching Navigable Waters*—The court added this factor to those provided by the Supreme Court and the EPA. The court stated that it was necessary to separately consider the volume of wastewater reaching the ocean as the other factors had not considered the "immensity of the wastewater volume." The court reasoned that the "raw volume [f wastewater] is so high that it is difficult to imagine why it should be allowed to continue without an NPDES permit."

The court ultimately found that even if the ninth factor were not considered, the balancing of all the other factors weighted heavily towards the County being required to have a NPDES permit.

Conclusion and Implications

This case is the first published case in which a court has applied the "functional equivalent" standard created by the U.S. Supreme Court. The fact-specific nature of the standard means this case will likely be the first of many to come. The District Court's opinion is available online at: https://casetext.com/case/haw-wildlife-fund-v-cnty-of-maui-5.
(Ana Schwab, Rebecca Andrews)

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

CHANGE SERVICE REQUESTED

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