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EASTERN WATER LAW™

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EASTERN WATER NEWS

NEWS FROM THE WEST

In this Month's News from the West we stay firmly planted in California. Like other state's in the West, California is experiencing unprecedented drought. This has prompted curtailment orders by the State Water Resources Control Board. What follows are several articles that address water rights, drought and agency responses.

Drought in California: South Fork Disconnected from Eel River—State's Reservoirs Are Currently Holding Significantly Less Water

If you drive north on Highway 101 past Sonoma County, you'll eventually reach California's world-famous Avenue of the Giants, a 30-plus mile stretch of ancient redwoods towering hundreds of feet over residents and tourists alike. Slithering along below these lumbering beauties, however, the South Fork Eel River is experiencing record low flows, so low in fact that the South Fork has been cut off entirely from the Eel River.

USGS Flow Gauge Results

As of September 17, the US Geologic Survey flow gauge results at Leggett showed flows had dropped to 6.98 cubic feet per second (cfs). Before that, the previous historic low of 8.86 cfs was set back in 2002. Just south of Leggett, flows at the South Fork's tributary Elder Creek were only 0.5 cfs. Disturbingly enough, however, these flows weren't even the most concerning along the South Fork: flow gauge results at Bull Creek, which feeds into the South Fork just above Dyerville, reached a record low flow of a pitiful 0.03 cfs. This virtual non-flow at Bull Creek unsurprisingly comes just before the point of disconnect between the South Fork and the Eel River.

While flows at the Miranda gauge also dipped to a record low of 7.07 cfs—down from the previous record low of 12.1 cfs in 2008—some weekend rainfall following September 17's gauge readings was able to revive the South Fork's flows, bringing them back up to around 30 cfs. For reference, wet years normally lead to flows around 40 to 80 cfs around this time of the year.

Timber Industry and Groundwater Extraction Impacts

Adding to the problems brought on by the recent droughts, the South Fork is also suffering from the effects of the timber industry and groundwater extractions from nearby wells. The historical clearcutting practices and development in the area has led to a lack of riparian coverage, allowing for increased evaporation from the creeks and therefore resulting in lower flows.

As for groundwater extractions, the only confined aquifer in the area lies underneath the lower Eel River. Accordingly, wells along the South Fork, for example, that do not pump from this confined aquifer can have a significant impact on surface water flows. Over time, these groundwater extractions along the river have made it so that the South Fork is no longer a "gaining stream," as geologists call it. Rather, contributions from both groundwater extractions and the loss of riparian coverage have led to the South Fork becoming a losing stream.

California's Reservoirs are Also in a Dire State

Diminished river flows also implicate the storage of precious water in the state's largest reservoirs. The California Department of Water Resources has reported recently the following percentage information *for September* for the following reservoirs:

- *Trinity*: The Trinity Reservoir has historically been at 43 percent capacity and currently is at 30 percent of total capacity;

- *Shasta*: The Shasta Reservoir has historically been at 40 percent capacity and currently is at 24 percent of total capacity;

- *Oroville:* The Oroville Reservoir has historically been at 36 percent and currently is at 22 percent of total capacity;

- *Melones:* The Melones Reservoir has historically

been at 63 percent and currently is at 35 percent of total capacity;

•*Folsom:* Folsom Reservoir has historically been at 41 percent and currently is at 24 percent of total capacity;

•*San Luis:* San Luis Reservoir has historically been at 27 percent and currently is at 13 percent of total capacity;

•*Don Pedro*: Don Pedro Reservoir has historically been at 74 percent and currently is at 50 percent of total capacity;

•*Millerton*: Millerton Reservoir has historically been at 139 percent and currently is at 57 percent of total capacity. (*See:* https://cdec.water.ca.gov/resapp/RescondMain)

All the other key state reservoirs, with the exception of Perris Reservoir [which is at 84 percent currently, are down substantially as well. (Ibid)

Conclusion and Implications

The Eel River is California's third largest watershed and is designated as a Wild and Scenic River at both the state and federal level. It supports one of the California's largest salmon and steelhead runs as well as its largest remaining old-growth redwood forests. The South Fork Eel River has also been a recreational hot spot for Californians, providing recreation among its thousands of acres of protected wilderness and hundreds of miles of river.

Unfortunately for this northern Californian gem, not much can be done to aid the South Fork other than to just wait and see when the next rains will come. The recent spurt of rain was a huge help in bring flows back up to near-normal conditions, but it is looking more and more like these dry conditions are the new normal. The disconnection of the hundred-plus mile stretch of the South Fork is reflective of the state's current battle with the persistent drought conditions, and California regulators will need to continue to improve the state's response to this ongoing threat. Reservoirs, too, are feeling the pain of this record drought.
(Wesley A. Miliband, Kristopher T. Strouse)

Santa Clara Valley Water Users Falling Short of Water Conservation Goals

As with many others across the state, Santa Clara Valley Water (SC Valley Water) has been operating under a state of drought emergency since June 2021. In declaring this state of drought emergency, SC Valley Water established mandatory conservation goals throughout the district, tasking the residents of the Silicon Valley with reducing their water use by 15 percent when compared to their 2019 water usage. When July came and went, Stanford was the only retailer able to accomplish this feat.

Santa Clara Valley Water's Dwindling Supplies

With ten reservoirs and around 5,000 groundwater wells, SC Valley Water acts a wholesaler to several retailers in the area. SC Valley Water's local supply, however, is quickly drying up. Back in April of 2017, Valley Water's reservoirs were sitting around a healthy 85 percent capacity. As of early September, the reservoirs are down to a mere 12 percent of their total unrestricted capacity. On top of the already worrying storage levels, the Federal Energy Regulatory Commission (FERC) has ordered SC Valley Water to drain Anderson Lake just outside Morgan Hill for public safety reasons. This order is expected to put the largest reservoir in the county out of commission for almost a decade as Valley Water completes a seismic retrofitting.

In supplying local retailers, SC Valley Water also customarily receives over half of its water from imported water from other regions of the state. That being said, the grass has not been greener outside of the Silicon Valley. Lakes and reservoirs across the state have dropped to historically low levels. To the north, for example, Lake Shasta has dropped to 25 percent of its capacity. Furthermore, neither Oroville nor Folsom have fared as well as Shasta, with Folsom sitting at 24 percent capacity and Oroville at a meager 22 percent capacity.

SC Valley Water holds an annual allocation of 100,000 acre-feet from the State Water Project. While the district rarely receives its full allotment, this year it is expected that they will only get 5,000 acre-feet.

In addition to its usual allocation from the State Water Project, SC Valley Water also receives an allocation from the federal Central Valley Project of

up to 152,000 acre-feet. As with the reservoirs to the north, however, the San Luis reservoir has struggled this year, dipping down to just 12 percent of its capacity. Because of this, SC Valley Water's initial allocation of 55 percent of that 152,000 acre-feet was cut back in May down to 25 percent for manufacturing and industrial purposes and a whopping zero percent for agriculture.

Conservation Efforts within the Silicon Valley

Looking back at SC Valley Water's conservation goals, Stanford was the only retailer within the district to achieve the 15 percent conversation figure required by SC Valley Water as part of its response to the drought emergency. While Palo Alto also made respectable efforts in conservation, achieving 13 percent conservation compared to their 2019 usage, these two retailers were the only ones to breach even 10 percent conservation.

Here is how the other retailers in the area fared in their conservation efforts: Milpitas (8 percent), California Water Service (6 percent), Great Oaks (6 percent), San Jose Water Company (6 percent), San Jose Municipal Water (6 percent), Sunnyvale (6 percent), Purissima Hills Water (5 percent), Morgan Hill (5 percent), Gilroy (3 percent), Mountain View (2 percent), City of Santa Clara (2 percent).

Although these numbers are still well below where SC Valley Water had hoped, they are at least an improvement on water use from earlier this year, where water use in March was up 25 percent from 2019's figures.

In response to the seemingly perpetual drought, SC Valley Water has implemented several conservation programs, including rebates for water conscious landscaping and Graywater "laundry-to-landscape" systems. Promisingly, interest in these programs has been steady: in August, for example, SC Valley Water received 360 applications for the landscape rebate, 965 orders for water-efficient devices from its website, and 230 water waste reports. More notably, San Jose Water Company filed a proposal with the state that would require customers to reduce water use by 15 percent and pay a surcharge for every unit of water they use in excess of that amount.

Conclusion and Implications

Water conservation goals by localities are nothing new in California. Fortunately, rebates and other more direct conservation programs are being implemented as well. San Jose Water's proposal to impose surcharges on those who use water in excess of these water conservation requirements, however, shifts the onus—at least in part—to the user to meet these requirements. Likely an unpopular move by the company, it will certainly be worth keeping an eye on how many others will follow suit and take the same approach to reducing water use in California. (Wesley A. Miliband, Kristopher T. Strouse)

San Joaquin Tributaries Authority Files Lawsuit Challenging State Water Board Diversion Curtailment Order for Sacramento-San Joaquin Delta

In response to ongoing drought conditions that show no sign of letting up, the California State Water Resources Control Board (State Water Board or SWRCB) issued an emergency drought order on August 20, 2021 (Curtailment Order), ordering approximately 4,500 water rights holders to cease diversion of water in the Sacramento-San Joaquin Delta (Delta). The Curtailment Order follows the State Water Board's adoption of Resolution No. 2021-0028 and the Emergency Curtailment and Reporting Regulation for the Sacramento-San Joaquin Delta Watershed (Curtailment Regulation) of August 3, 2021, which provides the authority for issuance of the Curtailment Order. Not surprisingly, litigation challenging those directives has begun. [*San Joaquin Tributaries Association, et al., v. State Water Resources Control Board,* Case No. 21CECG02632, *filed* September 2, 2021 (Fresno County Super Ct.).]

Background

The Delta watershed is the state's largest source of surface water, supplying a substantial portion of the water supply for two-thirds of Californians and millions of acres of farmland. The Curtailment Regulation and Curtailment Order state that they seek to protect drinking water supplies for 25 million Californians and irrigation supplies for over three million acres of farmland. Any diversion of water in violation of the Curtailment Order may be subject to administrative fines of $1,000 per day and $2,500 per acre-foot of water diverted, cease and desist orders, and other severe penalties. According to the SWRCB, the Curtailment Order impacts approximately 4,500 of the 6,600 water right holders in the Delta. The

Curtailment Regulation and Curtailment Order do not provide a specific date that irrigation districts and others may resume diverting and storing water. In early September 2021, the San Joaquin Tributaries Association (SJTA), comprising Oakdale Irrigation District, South San Joaquin Irrigation District, Turlock Irrigation District, Modesto Irrigation District, and the City and County of San Francisco, filed a petition for writ of mandate and verified complaint for declaratory and injunctive relief in the Fresno Superior Court seeking to set aside the Curtailment Regulation and the Curtailment Order.

Suit Claims State Water Board Lacks the Authority over Pre-1914 Rights

The complaint asserts that while the SWRCB has exclusive jurisdiction to issue post1914 appropriative permits and licenses, only the courts have jurisdiction to adjudicate disputes between and among pre-1914 and riparian water right holders. SJTA further asserts that the State Water Board lacks authority and jurisdiction to administer, oversee or regulate riparian and pre-1914 water rights or the diversion of water pursuant to those rights.

Further Allegations

The SJTA asserts that the Curtailment Order is unlawful, and that the Curtailment Regulation is flawed and invalid on further grounds, including that:

- It is based on deficient methodology;

- It violates the Due Process clauses of the United States and California Constitutions because it does not require the State Water Board to provide notice and a hearing before depriving water right holders of rights to divert water and put it to beneficial use;

- It is an unlawful adjudicatory action conducted without a hearing because it determines the validity of numerous unverified water right claims in the Delta, it determines the relative priority of water rights across multiple sub-watersheds within the Delta watershed, and it unlawfully takes property rights without due process or just compensation;

- It violates the rules of water right priority by excepting certain beneficial uses by junior water right holders from curtailment; and

- Unless invalidated and/or enjoined, the Curtailment Regulation will unlawfully injure the water rights and impair the operations of the SJTA member agencies.

The complaint seeks several forms of relief, including that the court set aside the Curtailment Regulation and make a determination that it: 1) exceeds the SWRCB's authority and jurisdiction; 2) violates the due process rights of the SJTA; 3) violates the rules of priority; (4) is arbitrary, capricious and not supported by evidence; and (5) amounts to an unauthorized amendment to the Water Quality Control Plan. The complaint further requests that the Superior Court issue a judicial declaration that the Curtailment Regulation violates various provisions of the Government Code and Water Code, as well as the Governor's Drought Emergency Proclamation of May 10, 2021.

Conclusion and Implications

California is enduring yet another year of historic drought conditions. This, in turn, has again prompted the State Water Board to take aggressive management measures. Rather than beginning with the curtailment of junior water rights holders and phasing in later curtailment of senior water rights holders, the State Water Resources Control Board's curtailment directives immediately include pre-1914 and riparian water rights holders without providing any delay for seniority. This appears to be even more aggressive than curtailment orders previously issued by the State Water Board during the last drought, and has, not surprisingly, drawn prompt legal challenges.
(Gabriel J. Pitassi, Derek R. Hoffman)

LEGISLATIVE DEVELOPMENTS

BIPARTISAN U.S. SENATE INFRASTRUCTURE BILL INCLUDES $2.3 BILLION TO IMPROVE OR REMOVE DAMS

On August 10, 2021, the Senate adopted a $1 trillion infrastructure bill that includes over $2.3 billion for the rehabilitation, retrofit, or removal of America's dams. The $2.3 billion proposal comes less than four months after a $63.17 billion proposal submitted by a diverse group of non-governmental organizations, companies, trade associations, and academic institutions.

Background

There are more than 90,000 dams across America, of which only 2,500 currently generate electricity. Dams throughout the nation provide flood control, electricity generation, navigation, irrigation, water supply, and recreation. However, where dams are improperly maintained or exist beyond their useful life, they can also pose safety hazards.

In the last few years, the U.S. hydropower industry and environmental and river conservation organizations have convened to address the nation's dams. The coalition has focused on the role U.S. hydropower plays as a renewable energy resource, and to integrate variable solar and wind power into the U.S. electric grid. The group has also focused on the need to maintain the nation's waterways, and the biodiversity and ecosystem services they sustain.

On October 13, 2020, a group of organizations, companies, government agencies, and universities issued the "*Joint Statement of Collaboration on U.S. Hydropower: Climate Solution and Conservation Challenge*" (Joint Statement). The Joint Statement provides a commitment by the group to chart hydropower's role in a U.S. clean energy future, while also supporting healthy rivers. The Joint Statement focused on what it terms the "3Rs" of U.S. dams: rehabilitation for safety; retrofit for power; and removal for conservation. Driven to address the dual challenges of climate change and river conservation, the parties identified seven areas for joint collaboration and invited other key stakeholders, including tribal governments and state officials, to join the collaboration and address implementation priorities, decision-making, timetables, and resources.

'Climate Change, River Conservation, Hydropower and Public Safety: An Infrastructure Proposal for the Biden Administration and Congress'

About six months after the Joint Statement was issued, on April 23, 2021, a group of non-governmental organizations, companies, trade associations, and academic institutions released a proposal entitled the "Climate Change, River Conservation, Hydropower and Public Safety: An Infrastructure Proposal for the Biden Administration and Congress," which builds on the Joint Statement by providing specific spending recommendations for the federal infrastructure package and related legislation. The spending recommendations aim to advance both the clean energy and electricity storage benefits of hydropower, and the environmental, safety, and economic benefits of healthy rivers. The recommendations do not focus on any particular U.S. dam, river, or region, but rather aim to accelerate the "3Rs" across all of America's 90,000 dams.

If enacted in whole, the proposal would result in $63.17 billion in spending over ten years for what it classifies as four, tightly-related U.S. infrastructure needs. The first need is federal financial assistance to improve dam safety. This includes building on existing state regulatory oversight capacity, expanding funding for the rehabilitation of existing dams, mapping the potential consequences of dam failure, and reimagining the National Dam Safety Program. The proposal recommends $19.46 billion for this first category of spending over ten years.

The second category of spending focuses on leveraging the federal tax code to incentivize investments in dam safety, environmental improvements, grid flexibility and availability, and dam removals. The proposal suggests a 30 percent tax credit for investment at qualifying facilities in dam safety, environ-

mental improvements, grid flexibility and availability, and dam removals, with a direct pay alternative. This program would cost $4.71 billion over ten years.

The third category of spending focuses on creating a public source of climate resilience and conservation funding for the removal of dams that have reached the end of their useful life. The proposal recommends that Congress authorize a mandatory annual grant that would fund the removal of 2,000 U.S. dams over a decade. The proposal further recommends that the Biden Administration issue an executive order establishing an inter-agency and stakeholder advisory committee to coordinate agency assistance in dam removal planning and funding, harmonize agency permitting to ensure a predictable regulatory process, and serve as a forum to address programmatic challenges. This program would cost $15 billion over ten years.

Finally, the fourth category of spending focuses on investing in existing federal dams and relevant research programs to accelerate decarbonization, increase renewable power generation, enhance environmental performance, improve dam safety, and leverage innovative technologies. This program would cost $24 billion over ten years.

Senate Adopts Amended Infrastructure Bill HR 3684

Less than four months after the proposal, on August 10, 2021, the Senate adopted its $1 trillion infrastructure bill by amendment to the House Bill HR 3684. As amended, the bill includes over $2.3 billion to improve and remove dams. The bill includes $753 million for safety and environmental improvements at existing hydropower facilities, adding hydropower generation to dams that currently do not produce power and for "pumped storage" projects; $800 million for rehabilitation and repair of high hazard dams and safety projects; and $800 million for the removal of dams in the interest of safety and the environment. While $2.3 billion is only a fraction of the $63.17 billion proposed by the coalition of stakeholders, the parties to the proposal are encouraged by this "federal down payment" to address the nation's dams. (*See:* $2.3 billion to improve or remove U.S. dams included in new federal infrastructure bill in wake of a Stanford Uncommon Dialogue agreement, *Stanford News* (Aug. 30, 2021).)

Conclusion and Implications

The Senate Infrastructure Bill is currently being considered in the House of Representatives and was scheduled for a vote on September 27, 2021. Meanwhile, in July of 2021, the bipartisan Twenty-First Century Dams Act was introduced in by Senator Dianne Feinstein (D-Calif.), Representative Annie Kuster (D-NH), and Representative Don Young (R-Alaska). This bill would invest over $25 billion for the rehabilitation, retrofit, and removal of America's dams.

The full text of the Senate Infrastructure Bill can be found at: https://www.congress.gov/bill/117th-congress/house-bill/3684/text?r=1&s=2. The full text of the proposal entitled "Climate Change, River Conservation, Hydropower and Public Safety: An Infrastructure Proposal for the Biden Administration and Congress" can be found at: hydropower-proposal.pdf (documentcloud.org). The full text of the Twenty-First Century Dams Act, as introduced in the Senate can be found at: Text - S.2356 - 117th Congress (2021-2022): Twenty-First Century Dams Act | Congress.gov | Library of Congress.
(Meredith Nikkel)

REGULATORY DEVELOPMENTS

U.S. BUREAU OF RECLAMATION DECLARES FIRST-EVER WATER SHORTAGE FOR THE COLORADO RIVER, MANDATING REDUCED DELIVERIES TO THE STATES OF ARIZONA, NEVADA AND TO MEXICO

Due to historically low water levels in Lake Mead due to punishing drought, on August 16, 2021, the U.S. Bureau of Reclamation (Bureau) declared a first-ever water shortage for the Lower Colorado River Basin. Starting in January, Lake Mead will operate in what is known as a Level 1 Shortage Condition, significantly reducing the amount of water that will be delivered to Arizona, Nevada and Mexico. Additional cuts will ensue should Lake Mead's water level continue to decline.

The Historic Drought

Most of the Colorado River's flow originates in the Rocky Mountains. As the river makes its way to Mexico, its water is stored in Lake Powell and Lake Mead.

Since the early 2000s, the Colorado River Basin has faced its worst drought in recorded history. The water level of Lake Mead, which serves as the source of most of the Las Vegas area's drinking water, has dropped more than 130 feet since January 2000. To address the ongoing conditions, in 2019, after lengthy negotiations, the seven states that use Colorado River water—California, Nevada and Arizona in the lower basin, and New Mexico, Utah, Colorado and Wyoming in the upper basin—developed Drought Contingency Plans for the Upper and Lower Basins.

Thereafter, the drought worsened, and the Upper Basin experienced an exceptionally dry spring in 2021. April-to-July runoff into Lake Powell totaled just 26 percent of average despite near-average snowfall last winter. Researchers attributed this decline to a warming climate. Soils are so dry that they soak up melting snow before it reaches the river.

As of August 2021, the Bureau projected that for the 2021 water year (which ends September 30), unregulated inflow into Lake Powell—the amount that would have flowed to Lake Mead without the benefit of storage behind Glen Canyon Dam—was approximately 32 percent of average. Total Colorado River system storage as of August was 40 percent of capacity, down from 49 percent at the same time in 2020.

In August, the Bureau issued its study of the Colorado River's water outlook for the ensuing 24 months. That forecast showed that by the end of 2021, Lake Mead would reach a level of 1,066 feet above sea level, a level not seen since the reservoir began to fill after completion of Hoover Dam in the 1930s. At that level, the lake will be at 34 percent of capacity. A shortage can be declared at an elevation of 1,075 feet.

The Tier 1 Shortage Declaration

Lake Mead's low water levels and the dismal forecast prompted the Bureau to issue a first-ever water shortage declaration for the Lower Basin, referred to as Tier 1. The required shortage reductions, which begin in January 2022, are:

- Arizona: 512,000 acre-feet, which is approximately 18 percent of the state's annual apportionment;

- Nevada: 21,000 acre-feet, which is 7 percent of the state's annual apportionment; and

- Mexico: 80,000 acre-feet, which is approximately 5 percent of the country's annual allotment.

What The Shortage Declaration Means for Nevada

Southern Nevada gets about 90 percent of its water supply from the Colorado River. In some respects, it has been planning for this moment for the last two decades.

In 2002, the Colorado River experienced its lowest recorded flows on record. Yet that same year, Southern Nevada used more water than it ever had

before. Recognizing the need to reduce water use, the Southern Nevada Water Authority (SNWA) implemented an aggressive water conservation program that resulted in significant water reductions.

Mandatory conservation measures adopted in 2003 included seasonal watering restrictions, golf course water budgets, a grass replacement program in which customers are paid to remove grass, water waste penalties, and changes to municipal development codes that significantly reduced the impact of new development on the water supply.

As a result of these measures, the Las Vegas area used 23 billion gallons less water in 2020 than in 2002, despite a population increase of more than 780,000 residents during that time. This represents a 47 percent decline in per capita water use since 2002.

Adding to these efforts, in the 2021 legislative session, the Nevada Legislature passed AB 356, which prohibits the use of Colorado River water to irrigate nearly 4,000 acres of "nonfunctional" turf by the end of 2026. This includes grass in medians, roundabouts, business centers, homeowners association entrances and along parking lots and streets. In that decorative grass consumes about 10 percent of the Las Vegas Valley's annual water supply, the legislation is projected to save nearly 9.5 billion gallons (or 30,000 acre-feet) of water annually.

In addition to these conservation measures, SNWA's 2020 Integrated Resource Planning Advisory Committee (IRPAC) recommended specific actions to achieve further reductions in water use. Key focus areas include:

- Reducing non-functional turf and limiting turf installation in new development;
  Limiting cool-season turf installation in public spaces and expediting conversion to warm-season turf in public facilities;
- Enhancing landscape watering compliance through implementation of smart controller technology;
- Speeding repairs of leaks through implementation of advanced metering infrastructure;
- Reducing consumptive water losses associated with evaporative cooling, primarily in commercial and industrial buildings;
- Encouraging water-efficient development and discouraging consumptive use by new large water users; and
- Making infrastructure investments.

The Las Vegas Valley Water District has urged its customers to dial back their irrigation clocks in the fall and winter to ensure watering only occurs on assigned water days. According to a statement on the Water District's website, customer compliance with cool weather watering days would result in a 7-billion-gallon savings, which is the entire reduction required under the shortage declaration.

Conclusion and Implications

Nevada's existing conservation measures will likely allow it to achieve the reductions mandated by the Tier 1 declaration. The bigger question is what comes next. Will the Tier 1 cuts be enough to halt Lake Mead's decline, even as climate change continues to affect the river's hydrology? Bureau projections suggest that additional tier-level shortage declarations could go into effect. Even a robust Rocky Mountain snowpack this year may not be enough to reverse the current downward trend.
(Debbie Leonard)

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

•August 31, 2021—The U.S. Department of Justice (Justice Department) and the U.S. Environmental Protection Agency (EPA) announced a settlement with the Northern Cheyenne Utilities Commission (NCUC) resolving alleged violations of the federal Clean Water Act (CWA) and National Pollutant Discharge Elimination System (NPDES) regulations at the Lame Deer Wastewater Treatment Facility (facility) in the Northern Cheyenne Reservation in Lame Deer, Montana. The settlement, set forth in a consent decree lodged in the U.S. District Court for the District of Montana, requires the NCUC to make significant physical and operational improvements to the facility, some of which have already been implemented, and to improve the financial capacity of the NCUC to ensure sustained public health and environmental compliance. The settlement also includes a civil penalty to address past violations, adjusted downward to $1,500 based on an inability to pay determination, and stipulated penalties to resolve any future violations during the five-year minimum effective period of the consent decree.

•September 2, 2021—The United States, together with the State of Indiana, announced that the U.S. District Court for the Northern District of Indiana has approved the revised consent decree requiring U. S. Steel Corporation (U.S. Steel) to address alleged violations of the Clean Water Act and other federal and Indiana laws by undertaking substantial measures to improve wastewater treatment and monitoring systems at its steel manufacturing and finishing facility in Portage (known as its Midwest Plant) and to strengthen and broaden U.S. Steel's public and stakeholder notification procedures in the event of a spill or release to ground, soil or water. The consent decree approved by the court also requires U. S. Steel to pay $601,242 as a civil penalty, to be split evenly between the United States and the State of Indiana, and to reimburse the U.S. Environmental Protection Agency ($350,653) and the National Park Service ($12,564) for response costs incurred as a result of an April 2017 spill of wastewater containing pollutants that flow into Lake Michigan. In addition, the decree requires U.S. Steel to pay the National Park Service's calculation of damages ($240,504) resulting from beach closures along the Indiana Dunes National Park shoreline, and the National Oceanic and Atmospheric Administration's natural resource damage assessment costs ($27,512).

•September 15, 2021—EPA settled an enforcement action with the Union Pacific Railroad for Clean Water Act violations near the Columbia River in Oregon. The violations allegedly occurred when a UPRR train derailed and released approximately 47,000 gallons of Bakken crude oil in Mosier, Oregon. Most of the released oil discharged to the Mosier wastewater treatment plant. An estimated ten gallons of the Bakken Crude oil passed through the treatment plant and caused a sheen on the Columbia River. Final estimates of environmental impact included: 47,000 gallons of oil released, with 16,000 gallons burned or vaporized. Federal, state and UPRR cleanup actions included installing several wells to monitor and treat contaminated shallow groundwater. A total of 2960 tons of oil-contaminated soil was excavated and transported off-site for disposal. As part of the agreement, UPRR will pay a civil penalty of $52,500 to the U.S. Treasury. UPRR will also pay a $30,000 civil penalty to the State of Oregon for discharging oil to the Columbia River according to a settlement agreement with Oregon DEQ. In addition, UPRR has also reimbursed cleanup costs for Oregon DEQ, the Washington Department of Ecology and EPA.

•September 15, 2021—EPA issued a new emergency drinking water order to the Oasis Mobile Home Park, located on the Torres Martinez Desert Cahuilla Indians Reservation in California. This order requires the current management of Oasis, as well as the U.S. Bureau of Indian Affairs (BIA) land allotment trustees, to comply with federal drinking water requirements by correcting ongoing problems with Oasis' drinking water system that endanger residents.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•September 16, 2021—EPA penalized Owens-Brockway Glass Container, Inc. $38,900 for violating the Emergency Planning and Community Right-to-Know Act's Toxic Release Inventory provisions when it failed to report information about toxic chromium compounds at its Portland facility. Owens-Brockway Glass Container uses iron chromite to make green glass at the facility. When super-heated in a furnace, iron chromite produces new chromium compounds which are then incorporated into green glass bottles. Under TRI, facilities that store, process, or manufacture certain toxic chemicals above threshold amounts must file annual reports of their chemical releases and transfers with EPA and appropriate state agency. In this case, EPA found that in 2017 and 2018 Owens-Brockway Glass Container failed to file required reports indicating it manufactured and processed chromium compounds in quantities that exceeded the threshold reporting amounts of 25,000 pounds. (Andre Monette)

JUDICIAL DEVELOPMENTS

THE *SACKETT* SAGA SEQUEL—NINTH CIRCUIT CONTINUES TO UPHOLD THE SIGNIFICANT NEXUS TEST FOR NAVIGABLE WATERS UNDER THE FEDERAL CLEAN WATER ACT

Sackett v. United States Environmental Protection Agency, ___F.4th___, Case No. 19-35469 (9th Cir. Aug. 12, 2021).

For the last 13 years, the U.S. Environmental Protection Agency (EPA) and the Sacketts, Michael and Chantell, have been engaged in what can only be described as a federal Clean Water Act (CWA) saga, that has generated largely procedural CWA case law. For instance, in 2012, upon hearing one of the Sacketts' cases, the U.S. Supreme Court determined that issuance of a jurisdictional determination by the U.S. Corps of Engineers (Corps), that identifies jurisdictional "Waters of the United States" (WOTUS), constituted final agency action subject to challenge in federal court. (*Sackett v. U.S. Environmental Protection Agency*, 566 U.S. 120 (2012).) In the most recent case, the Ninth Circuit Court of Appeals primarily considered whether the Sacketts' Idaho property contained wetlands subject CWA Section 404 dredge and fill permitting requirements. (*Sackett v. U.S. Environmental Protection Agency*, (9th Cir. 2021); 33 U.S.C. § 1344.) To reach a conclusion, the Ninth Circuit examined which of the now-many WOTUS definitions controlled the character of wetlands in this case, as well as which opinion, in the notoriously fractured *Rapanos v. United States*, (547 U.S. 715 (2006)), applies. Ultimately, the Ninth Circuit found that the WOTUS definition in place at the time of agency action controls the analysis, and that, pursuant to the holding in *Northern California River Watch v. City of Healdsburg*, (496 F.3d 993 (9th Cir. 2007)), Justice Kennedy's significant nexus test is the controlling case law in the Circuit.

Back in 2012 many were surprised by a holding from the U.S. Supreme Court deciding that an administrative compliance order from the U.S. Environmental Protection Agency (EPA) to a property owner was "final administrative action" under the federal Clean Water Act sufficient to entitle the owner to a pre-enforcement hearing.

This holding was contrary to the then accepted meaning of language of the Clean Water Act and prior caselaw in most Circuit Courts of Appeal. It was a major moment of joy for those worried that the government's ability to compel expensive activity on private property without a merits hearing threatens fundamental principles of fairness and property rights under the Constitution. Cf. *Sackett v. EPA*, 566 U.S. 120 (2012).

On August 12, 2021 the U.S. Court of Appeals for the Ninth Circuit issued a ruling on the result of the intervening nine years of proceedings on remand

Background

In 2004, the Sacketts purchased a residential lot near Priest Lake in Idaho, which they intended to develop. In 2007, after obtaining county building permits, the Sacketts placed sand and gravel fill on the property, prompting EPA to issue a compliance order requiring restoration of the property's jurisdictional wetlands, and spurring a challenge by the Sacketts, which has been winding through the federal courts in a myriad of ways ever since. Moreover, in 2008, the Corps issued a jurisdictional determination (JD) indicating that the property contained wetlands subject to regulation under the CWA and supporting the compliance order.

On the eve of a 2020 EPA briefing deadline, which the court had twice extended, EPA issued a letter to the Sacketts withdrawing the amended compliance order issued 12 years prior. Consequently, EPA moved to dismiss the case as moot. However, the court did not find EPA's mootness arguments persuasive in light of the agency's ongoing modification of the WOTUS definition, among other issues. The Ninth Circuit explained that one EPA administration's decision not to enforce a compliance order did not bind the

agency in the future under different leadership. Ultimately, the court determined the case was not moot, as enforcement of the compliance order could resume with a new administration, and proceeded to hear oral argument.

Background of the WOTUS Definition

As the Sacketts' case made its way through the federal courts, the EPA and Corps (Agencies) modified the WOTUS definition on a number of occasions: in 2015, under the Obama Administration, the Agencies issued the Clean Water Rule (80 Fed. Reg. 37054); in 2019, the Agencies, under the Trump administration, restored the pre-2015 WOTUS definitions as a part of its repeal and replace effort (84 Fed. Reg. 56626); in 2020, the Agencies, again under the Trump administration, issued the Navigable Waters Protection Rule (85 Fed. Reg. 22250); and most recently, a U.S. District Court in Arizona vacated the Navigable Waters Protection Rule, (*Pascua Yaqui Tribe v. United States Environmental Protection Agency*, ___F.Supp.4th___,Case No. CV-20-00266-TUC-RM (D. Ariz. 2021)), prompting the Agencies' to issue a statement that the earlier pre-2015 regime applies once again for the time being. The Agencies, under the Biden administration, also intend to place their stamp on the WOTUS definition; however, the timing of a new WOTUS definition is uncertain. (86 Fed. Reg. 41911.)

In addition to the Agencies' ongoing modification of the WOTUS definition, Supreme Court case law has shaped the interpretation of WOTUS over the years. In 1985, the Court held that wetlands abutting traditional navigable waterways were considered WOTUS in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985). In 2001, the Court clarified that "non-navigable, isolated, intrastate waters" did not constitute WOTUS subject to regulation, and effectively eviscerated the "migratory bird rule" in *Solid Waste Agency of Northern Cook County v. U.S. Corps of Engineers*, 531 U.S. 159 (2001). And perhaps most famously, in 2006, the Supreme Court issued a notoriously fractured opinion in *Rapanos v. United States*, which articulated no clear majority interpretation of the WOTUS definition. Justice Scalia, writing for the plurality, articulated that jurisdictional wetlands are confined to those with a "continuous surface connection" to "relatively permanent, standing or flowing bodies of water." While, Justice Kennedy issued a separate concurrence, establishing the "significant nexus test," which turns on whether wetlands, "alone or in combination with similarly situation lands" would "significantly affect the chemical, physical, and biological integrity" of more traditional navigable water bodies.

On Remand at the District Court

What happened after remand of the case from the Supreme Court is that the Sacketts wound up back in U.S. District Court with an amended complaint that took account of an amended compliance order from EPA. (The amended compliance order was based on a Jurisdictional Determination giving more detailed examination of the Sackett property by an EPA scientist than had been the basis of the original order some sixty days earlier. Substantively it was identical to the original in declaring their property to be within EPA jurisdiction, although it provided more time for compliance.) For whatever reason, the District Court proceedings lasted seven years, culminating in a decision that upheld the EPA's amended compliance order. The Sacketts appealed

The Ninth Circuit's Decision

The Ninth Circuit held that an attempt by the EPA in 2020 to moot the case by declaring the compliance order withdrawn was ineffective, and the court reaffirmed with a thorough discussion that its decisional law on the scope of "waters of the United States" under Section 404 of the Clean Water Act is governed by the opinion of Justice Kennedy in the *Rapanos* case, not by Justice Scalia's plurality opinion.

The court found that EPA was within its jurisdiction, despite the Sackett arguments that the Clean Water Act's definition of "waters" was not inclusive of their property. The discussion by the court is important for its holding alone, given the continuing regulatory back and forth over the reach of the Clean Water Act as to wetlands. It is also instructive as to the scope of courts' jurisdiction where a governmental party changes its enforcement approach in a specific case without making a fundamental rule change.

Shortly before filing its Response Brief in the Ninth Circuit appeal in 2020, the DOJ and EPA sought to moot the amended compliance order by withdrawing it, indicating they had no intention of enforcing it. Probably to some consternation within

the EPA, neither the Court nor the Sacketts accepted this assertion of mootness. The Ninth Circuit explained at length that mootness is not present if the controversy is still alive and the court can provide effective relief, even thought the original relief sought is not needed. The EPA refused to renounce its authority to enforce the law against the Sacketts, despite its withdrawal of the order. Given that was not a binding decision or law change, the court refused to go along, citing precedent from the political arena where a state that previously threatened a party with prosecution had said it changed its mind.

As a last gasp, EPA argued that its new 2020 operative definition of "waters of the United States" meant any decision by the Ninth Circuit would be advisory only, and thus improper. Remarkably, the Sacketts, through counsel, would not accept that olive branch. The Sackett argument was that no matter what regulatory version applied to the scope of wetlands, the express language of the Clean Water Act protected them from a prosecution. The Ninth Circuit concluded it must rule on the Sacketts' interpretation of the Act.

The Ninth Circuit then reviewed the Sacketts' argument. It characterized them as indicating the plurality opinion of Justice Scalia in *Rapanos v U.S.*, 547 U.S. 715 (2006) (*Rapanos*) should apply, because "adjacency" under the Clean Water Act should only be deemed jurisdictional where it deals with wetlands having a continuous surface connection to permanent traditional "waters." Even though the 2007 Ninth Circuit opinion in *Northern California River Watch v. City of Healdsburg,* 496 F.3d 993 (2007) concluded the opinion of Justice Kennedy, concurring in *Rapanos* sets out the standard, the Sacketts contended a 206 opinion (*U.S. v Davis* 825 F.3d 104) undercut that ruling, and a "results-based analysis applies. Sacketts further argue that a result-based analysis made their property non-jurisdiction, *i.e.* not wetlands.

Put succinctly, the Ninth Circuit panel disagreed. They parsed their relevant decisions and references to another Circuit to conclude the Sacketts' arguments all failed. "The Kennedy concurrence is still the controlling opinion from *Rapanos*." From there, the facts revealed in the record of the Sackett case make it clear to the court that the nexus required by the Kennedy concurrence could readily be found to exist respecting the Sackett property. They therefore upheld the jurisdictional determination of the EPA, even attaching pictures from the record to their decision that show standing water abutting the Sackett property physically.

Conclusion and Implications

The 2020 Navigable Waters Protection Rule attempted to do away with the significant nexus test, initially making *Sackett v. U.S. EPA* notable for the continued application of the significant nexus test in the Ninth Circuit. However, the import of *Sackett v. U.S. EPA*, in terms of applying the significant nexus test despite adoption of the Navigable Waters Protection Rule, has likely been diminished by the Agencies' purported return to the pre-2015 WOTUS definition, which includes application of the significant nexus standard. Additionally, in *Sackett,* the Ninth Circuit Court of Appeals found that the WOTUS definition in place at the time of the challenged agency action (here, issuance of the compliance order and JD) controlled, allowing the court to apply the significant nexus test without controversy, to determine the status of Sacketts' property. Taken together, recent developments confirm that the significant nexus test is likely the law of the land in the Ninth Circuit, at least for now. The Ninth Circuit's opinion of August 18, 2021 is available online at: https://www.govinfo.gov/content/pkg/USCOURTS-ca9-19-35469/pdf/USCOURTS-ca9-19-35469-0.pdf.
(Harvey M. Sheldon)

NINTH CIRCUIT UPHOLDS U.S. ARMY CORPS PLAN TO DREDGE NAVIGATIONAL CHANNELS IN SAN FRANCISCO BAY UNDER THE COASTAL ZONE MANAGEMENT ACT

San Francisco Bay Conservation & Development Commission v. U.S. Army Corps of Engineers, 8 F.4th 839 (9th Cir. 2021).

The Ninth Circuit Court of Appeals in *San Francisco Bay Conservation and Development Commission v. U.S. Army Corps of Engineers* affirmed summary judgment in favor of the U.S. Army Corps of Engineers (Corps) in an action challenging the Corps' 2017 plan to dredge 11 navigational channels in the San Francisco Bay. The San Francisco Bay Conservation and Development Commission (Commission), which approved the plan subject to conditions, claimed the Corps violated the Coastal Zone Management Act (CZMA) by failing to adhere to dredging disposal conditions. The Ninth Circuit rejected the Commission's claim on grounds that the conditions were not enforceable under the governing CZMA management program.

Facts and Procedural Background

The Coastal Zone Management Act (CZMA) was enacted in 1972 to protect the nation's coastal zone resources. The act facilities cooperative federalism by encouraging states to develop management plans for their coastal zones, for submission and approval by the National Ocean and Atmospheric Administration (NOAA).

Before a federal activity may be conducted in a state's coastal zone, the federal agency must obtain the state's approval in the form of a "consistency determination" (CD). The CD must explain how the federal activity is consistent with the enforceable policies of the state-approved management program. The implementing state agency may concur, conditionally concur, or object to the CD. If the state conditionally concurs, it must set forth conditions for compliance and explain why those conditions are necessary to ensure consistency with the program's enforceable policies. The federal agency may reject the state's conditions, but doing so renders the concurrence an objection. The federal agency is prohibited from proceeding with a project over a state's objection, unless the federal agency concludes that the action is fully consistent with the management program's enforceable policies, or, that full consistency is prohibited by existing law. The federal agency generally cannot evade an enforceable program policy solely based on cost.

Dredging in the San Francisco Bay

The U.S. Army Corps of Engineers oversees the dredging of navigable waterways in the San Francisco Bay. Dredging removes sediment that accumulates in the Bay's channel beds via one of two methods: hydraulic dredging, which uses suction to remove material from the channel floor; or mechanical (clamshell) dredging, which scoops sedimentary material from the channel to remove it. The dredged sedimentary material is then deposited in one of three alternative sites: 1) in-Bay disposal sites, which are the least expensive but environmentally disfavored; 2) beneficial reuse sites, which are environmentally favored but more costly; and 3) ocean disposal sites.

The San Francisco Bay area is managed by the San Francisco Bay Plan. The Bay Plan was adopted in 1965 and created the San Francisco Bay Conservation and Development Commission to oversee its implementation and management. Because the Bay Plan was adopted prior to the enactment of the CZMA, NOAA formally approved the Bay Plan and wholly incorporated it into the CZMA's federal scheme in 1977. Therefore, any amendments to the Plan must be approved by NOAA in order to render it legally enforceable against the federal government.

The Bay Plan is one of many federal-state cooperative efforts that has shaped how dredged material in the San Francisco Bay area is disposed of. Another effort, the Long-Term Management Strategy (LTMS), was released in 1999 through a collaboration between several regional, state, and federal agencies. The LTMS was created to guide agency decisions about the placement of dredged material in the Bay Area over the next 50 years. The LTMS endorsed a "long-term approach" of low in-Bay disposal (approximately 20 percent), medium ocean disposal (approximately

40 percent), and medium upland/wetland reuse (approximately 40 percent) (the 20/40 Goal). In 2001, the LTMS was used to inform several NOAA-approved amendments to the Bay Plan, including three policies that envisioned reducing the disposal of dredged material back into the Bay and increasing reuse of such material for environmentally friendly purposes.

The Army Corps' 2017 San Francisco Bay Dredging Plan

In March 2015, the Corps submitted proposal to the Commission and the Regional Water Quality Control Board (RWQCB) to dredge 11 of the Bay's navigational channels. The Corps submitted a CD to the Commission that proposed dumping up to 48 percent of the Corps' dredged material back into the Bay. The Corps concurrently applied to the Regional Water Board for a related Water Quality Certification (WQC).

In June 2015, the Commission responded to the Corps with a Letter of Agreement (LOA) that conditionally concurred with the CD. The LOA set forth two conditions of approval: 1) the "20/40 Disposal Condition," which reduced the volume of material deposited in the Bay to meet the 20/40 goal of the LTMS; and 2) the "Hydraulic Dredge Condition," which limited the Corps to using one hydraulic dredge in certain channels. Citing the Corps' regulations, the LOA directed the Corps to obtain funding to accomplish these conditions. A Corps representative signed the LOA on June 23, 2015.

In November 2015, the Corps rescinded its acceptance of the LOA and conditions, citing funding limitations and the costs associated with complying with the Disposal and Dredge Conditions. The Corps sent a similar letter to the RWQCB, which disavowed a WQC condition that limited hydraulic dredging to a maximum of one federal in-Bay channel per year.

After consulting with the Commission and RWQCB, the Corps proposed four potential courses of action (COA): (1) status quo dredging and placement; (2) dredging in accordance with the WQC, but not the LOA; (3) dredging in accordance with the LOA, but not the WQC; and (4) defer all maintenance dredging of the Bay. In January 2017, the Corps adopted the second course of action (COA #2), which amounted to a final action that rejected the 20/40 Disposal Condition and committed the Corps to hydraulically dredging only one of the federal channels.

At the U.S. District Court

In September 2016, the Commission filed suit seeking a declaration that the Corps was required to conduct dredging pursuant to the LOA. The San Francisco Baykeeper intervened in June 2017 after the Corps adopted COA #2. The parties filed cross-motions for summary judgment. The plaintiffs argued that the Corps' actions violated the CZMA because lack of funding and cost could not excuse the Corps from its obligation to comply with the LOA's conditions. The plaintiffs contended that the LOA's conditions were enforceable because they were necessary to ensure the Corps' operations were consistent with the enforceable policies under the Bay Plan. The Corps opposed by claiming the conditions were not based on enforceable policies under the CZMA.

The U.S. District Court for the Northern District of California granted summary judgment in favor of the Corps, holding that the Bay Plan's dredging policies related to the 20/40 Disposal Condition were generalized policy statements and not legally enforceable under the CZMA. The court further found that COA #2 met the hydraulic dredge condition imposed by the WQC and LOA.

Plaintiffs timely appealed, arguing, among other claims, that the Corps' adoption of COA #2 violated the CZMA because the Commission's conditions are linked to federally enforceable policies.

The Ninth Circuit's Decision

A panel for the Ninth Circuit Court of Appeals affirmed the District Courts' grant of summary judgment in favor of the Corps. Writing for the panel, Judge Schroeder rejected the plaintiffs' claim that the Corps was required to comply with the 20/40 Condition because the condition was not supported by an enforceable policy under the CZMA.

The Ninth Circuit reasoned that the plaintiffs had correctly explained how the CZMA prohibits federal agencies, such as the Corps, from refusing to comply with a conditional concurrence solely on the basis of cost. However, the 20/40 Disposal Condition was not based on an "enforceable policy" of the Bay Plan. Instead, the 20/40 Disposal Condition required the Corps to meet specific numerical targets

that achieved the LTMS's goals—*i.e.*, no more than 20 percent of the Corps' dredged material could be disposed of in the Bay, and no less than 40 percent of the dredged material must be committed to beneficial reuse. However, the court explained that these metrics were not drawn from any actual or related provision of a NOAA-approved coastal management program.

The panel further explained that the 20/40 Disposal Condition was based on the LTMS, which never received NOAA approval, As such, its numerical targets were unenforceable as conditions under the Bay Plan or any other CZMA management program. The court rejected plaintiffs' counterargument that the Disposal Condition was based on the 2001 NOAA-approved amendments to the Bay Plan, observing that the policies spoke in general terms and did not contain any ratios or percentage-based targets. While it is true that the CZMA does not require policies to contain specific criteria to be enforceable, they must provide some meaningful guidance as to what is and is not permissible. For these reasons, the appellate court held that the Bay Plan's dredging policies did not contemplate specific ratios or allocations among different sites for the disposal of dredged materials, much less impose such requirements on an individual basis.

Because plaintiffs had not shown any textual or practical connection between the 20/40 Disposal Condition and the approved Bay Plan Policies in support thereof, the Ninth Circuit concluded that the condition was neither necessary to ensure consistency with, or based on enforceable policies, as permitted under the CZMA. Accordingly, the court held the 20/40 Disposal Condition was unenforceable and the Corps was not required to comply with it.

Conclusion and Implications

The Ninth Circuit's opinion provides a straightforward interpretation and analysis of the Coastal Zone Management Act. The opinion highlights the delicate balance of cooperative federalism between state and federal agencies, particularly with respect to activities in coastal zones. As the court's opinion explains, the CZMA defers to state agencies to ensure federal activities are consistent with the state coastal zone management programs. However, conditions of approval must be premised on specific and enforceable policies. Where, as here, policies merely contained overarching goals for the aggregate allocation of dredged material, state agencies should exercise caution in relying on them to impose specific obligations on individual federal actors such as the Corps. The Ninth Circuit's opinion is available at: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/08/06/20-15576.pdf.
(Bridget McDonald)

TRUMP ERA MODIFICATIONS TO THE DEFINITION OF THE 'WATERS OF THE UNITED STATES' REMANDED BY THE DISTRICT COURT IN ARIZONA TO THE EPA FOR FURTHER CLARIFICATION

Pascua Yaqui Tribe, et al. v. U.S. Environmental Protection Agency, et al., *Unpub.*,
Case No. CV-20-00266-TUC-RM (D. Az Aug. 30, 2021).

The U.S. District Court in Arizona recently remanded and vacated two final rules promulgated by the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps; Collectively, Agencies). Together, the rules repealed and redefined the term "waters of the United States" (WOTUS) in the federal Clean Water Act (the rules are referred to collectively as the NWPR). The court's decision was *not* certified for publication.

Factual Background

The Clean Water Act prohibits the discharge of pollutants into "navigable waters" and defines this term as "the waters of the United States, including the territorial seas." In *Rapanos v. United States*, 547 U.S. 715 (2006), a plurality opinion from Justice Kennedy determined that a water is navigable if the waters are navigable in fact or there is a significant nexus between the water or wetland and a navigable

water. The four-justice plurality opinion offered by Scalia determined that the phrase only applied to "relatively permanent, standing or continuously flowing bodies of water forming geographic features" and "wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right."

In 2015, the Agencies promulgated the "Clean Water Rule" to define the term "navigable waters." On February 28, 2017, President Donald Trump issued Executive Order 13,778 which suggested repealing the 2015 Clean Water Rule and redefining "navigable waters" using the Scalia plurality opinion in *Rapanos*. In 2019, the Clean Water Rule was repealed, and, in 2020, the NWPR was promulgated. On January 20, 2021, President Joe Biden issued Executive Order 13,990 which directed agencies to re-evaluate any changes within the last four years that conflict with important national objectives and resulted in a notice of intent to restore the Kennedy plurality definition of "navigable waters" in *Rapanos*. The Agencies provided notice of their intent to restore the pre-2015 regulatory definition of "waters of the United States" while working to develop a new regulatory definition.

Procedural Background

Plaintiffs Pascua Yaqui Tribe, Quinault Indian Nation, Fond du Lac Band of Lake Superior Chippewa, Menominee Indian Tribe of Wisconsin, Tohono O'Odham Nation, and Bad River Band of Lake Superior Chippewa challenged the NWPR and its exclusion of most wetlands from the definition of "navigable waters." On May 11, 2021, plaintiffs moved for summary judgement. On July 13, 2021, defendant-interveners Chantell and Michale Sackett (Sackett) and defendant-interveners Arizona Rock Productions Association; National Stone, Sand, and Gravel Association; Arizona Cattle Feeders Association; Home Builders Association of Central Arizona; Arizona Fam and Ranch Group; Arizona Farm Bureau; and Arizona Chapter Associated General Contractors (business interveners) filed a cross-motion for Summary Judgment.

The Agencies did not respond to the motions for summary judgment, and instead sought a voluntary remand of the challenge to the definition of "navigable waters" without vacating the case. Plaintiffs did not oppose the requested remand, but requested that the remand include a *vacatur*. The Sacketts opposed remand and the *vacatur*. The business-interveners did not oppose the remand, but opposed vacating the NWPR.

The District Court's Decision

The Motion to Remand

The court first considered the EPA's unopposed request to voluntarily remand the Clean Water Rule. Courts generally grant a voluntarily requested remand unless the request is frivolous or made in bad faith. Here, the court determined the voluntary remand request was not frivolous or made in bad faith. The Sacketts argued the EPA lacked discretion to revise the Clean Water Rule's definition of "adjacent wetlands," because the definition was required by under *Rapanos*. The court determined the Ninth Circuit already rejected the Sacketts' argument that the *Rapanos* plurality opinion is controlling. Thus, the court remanded the NWRP to the Agencies.

The Motion to Vacate

The court next considered two equitable factors in determining whether to vacate the NWPR: 1) the seriousness of the agency's errors, and 2) the disruptive consequences of an interim change that may itself be changed

On the question of the seriousness of the Agencies' errors, the court noted that the Agencies agreed the NWPR may not have adequately considered the CWA's statutory objectives or the effects of the repeal of the 2015 Clean Water Rule on the integrity of the nation's waters. These potential inadequacies were not mere procedural errors that could be remedied through further explanation. Instead, these errors could result in significant actual environmental harms. As a result, the court concluded the seriousness of the Agencies' errors in repealing and redefining "waters of the United States," the likelihood that the definition of "waters of the United States" will be further altered on remand, and the possibility of serious environmental harm weighed in favor of remand with *vacatur*.

The court next considered and rejected business intervenors' argument that a return to a pre-2015 regulatory regime would increase regulatory uncertainty. The court reasoned that uncertainty attends

vacatur of any rule and is insufficient to justify remand without *vacatur*. Further, the court noted that the pre-2015 regulatory regime is familiar to the Agencies and to industries and that the Agencies intend to return to the pre-2015 regulatory regime while working on the new definition of "waters of the United States." As a result, regulatory uncertainty did not weigh in favor of remand without *vacatur*.

Conclusion and Implications

This *unpublished* case remanding and vacating the repeal of the 2015 Clean Water Rule and the adoption of a new definition of "waters of the United States" does not provide precedential authority in challenges to the Trump era changes to the definition of "navigable waters"; however, EPA's lack of a response to the motion for summary judgement and the court's remand and *vacatur* signal a forthcoming change to the definition of "navigable waters" that will likely apply nationwide. The court's *unpublished* opinion is available online at: https://earthjustice.org/sites/default/files/files/order_remand_and_vacate.pdf. (Anya Kwan, Rebecca Andrews)

DISTRICT COURT DENIES CLEAN WATER ACT DEFENDANTS' MOTIONS TO DISMISS INDICTMENT COUNTS FOR INSUFFICIENT PLEADINGS

United States v. Bruce Evans, and Bruce Evans, Jr.,
___F.Supp.4th___, Case No. 3:19-CR-009 (M.D. Pa. Aug. 19, 2021).

The U.S. District Court for the Middle District of Pennsylvania recently denied the motions of two criminal defendants charged with multiple violations of the federal Clean Water Act (CWA), who had separately moved to dismiss several charges filed against them. At issue was whether the government sufficiently made its charging allegations against each defendant.

Factual and Procedural Background

Father, Bruce Evans, Sr. (Evans Sr.), and his son, Bruce Evans, Jr. (Evans Jr.), operated a waste treatment facility. The facility discharged treated effluent under a CWA permit issued under the National Pollutant Discharge Elimination System (NPDES) program. Father and son were charged under an initial indictment in 2019, and a superseding indictment the following year, with violations of the CWA for failing to comply with terms of the facility's NPDES permit. Evans Sr. was charged with 35 counts, and Evans Jr. was charged with five counts.

Under the CWA, a "knowing" violation of the CWA's discharge prohibition in § 301 may be prosecuted as a felony. In addition, the CWA criminalizes acts and omissions beyond the direct act of discharging pollutants into water: permit conditions require that holders, for example, "properly supervise, operate and maintain . . . treatment facilit[ies]," and failure to do so may give rise to criminal liability under CWA § 301.

Evans Sr. moved to dismiss six counts on the grounds that: 1) the government failed to establish the "knowing" element for each contested charge, 2) the government failed to allege his conduct of "intentionally pumping the contents" of a waste tank onto the ground and nearby grass during a tank cleaning implicated the "navigable waters" element, and 3) the counts related to his alleged failure to submit various reports prior to 2014 were barred by the CWA's five-year statute of limitations. Further, Evans Sr. argued these failures did not adequately inform him of the nature of the charges against him or allow him to adequately defend himself.

Evans Jr. moved to dismiss five of his counts on similar grounds that 1) the government failed to allege he was an "operator" of the facility and 2) the government failed to establish he committed the alleged violations "knowingly." Evans Jr. separately demanded a bill of particulars in the alternative, that the government must provide him additional "factual or legal information for him to prepare his defense . . . ."

The District Court's Decision

'Knowing' Element

The District Court first considered whether the indictments sufficiently alleged "knowing" violations of the CWA. The court relied on a Ninth Circuit case which reasoned that:

> . . .for a defendant to 'knowingly' add a pollutant in violation of the [CWA], he must know that he discharged an enumerated substance from a conveyance, and that the substance was 'discharged into water . . . .'

The government is not required "to prove [] that a defendant knew he discharged a substance [into "waters of the United States"] but "into water.'"

Applying the Ninth Circuit's reasoning, the District Court denied the motions to dismiss. The court noted the indictment alleged that defendants knowingly violated permit conditions by failing to properly supervise, operate and maintain the treatment facility, by knowingly allowing waste materials to not be properly treated and to accumulate below the outfall of the sewage treatment plant in an unnamed tributary. In addition, the court determined the indictment against Evans Sr. alleged his extensive involvement with the facility dating back to 1996 as a board member and facility manager. The court reasoned that even though Evans Sr. was not the operator, the indictment alleged his role as manager made him responsible for overseeing the operations of the facility, for dealing with the facility's engineering and environmental contractor on a day-to-day basis for approximately 26 years, and for regularly dealing with the state environmental department. In addition, the indictment alleged Evans Sr. signed the renewal of the facility's NPDES permit. Based on these allegations related to Evans Sr.'s long history with the facility, the court determined the indictment sufficiently alleged "knowing" violations to withstand a motion to dismiss.

'Navigable Waters' Element

The court next evaluated and rejected Evans Sr.'s contention that the government failed to allege he polluted "navigable waters," because the indictment alleged Evans Sr. merely allowed pollutants to spill onto soil and grass. The court reasoned that the "waters of the United States" language merely implicated the statute's jurisdictional element under the Commerce Clause. It further reasoned that CWA § 1319(c)(2)(A) makes it "a felony to knowingly violate 'any permit condition or limitation implementing' the CWA." As a result, the court concluded an allegation of intentionally dumping pollutants on the ground sufficiently stated a "knowing" violation of a permit condition, sufficient to withstand a motion to dismiss.

'Operator' Element

The court also considered and rejected Evans Jr.'s argument that the government failed to allege he was an "operator" under the CWA. The court observed that the indictment alleged Evans Jr. submitted a notarized application for certification as a wastewater treatment plant operator and that Evans Jr. was certified as an operator. Thus, the court concluded there was no merit to Evans Jr.'s claim the indictment failed to allege he was an operator of the facility.

Evans Sr.'s Statute of Limitations Defense

The court granted in part and denied in part Evans Sr.'s motion to dismiss several counts against him for nondisclosures more than five years before the indictment. The government argued Evans Sr.'s reporting violations were a continuing offense that tolled the statute of limitations. The court rejected the government's argument, reasoning that each failure to provide a report was its own complete violation of the CWA. As such, Evans Sr.'s conduct prior to January 8, 2014 was time-barred.

Evans Jr.'s Alternate Request for a Bill of Particulars

Finally, the District Court denied Evans Jr.'s request in the alternate for a more detailed bill of particulars from the government, noting that the government's:

> 52-page Superseding Indictment, viewed in its entirety, contains more than enough factual allegations to put both defendants on notice of the charges against them, [and] contains charging paragraphs that track the language of [the applicable statute] . . . .

Ultimately, the court denied Evans Jr.'s motion to dismiss in its entirety, and only granted Evans Sr.'s motion to dismiss with regard to his statute of limitations defense.

Conclusion and Implications

This case reaffirms the traditional principle that a criminal indictment is a mere accusation; the government need only allege sufficient facts that, if true, establish each element of each offense. An indictment need not prove every element outright. The court's opinion is available online at: https://www.casemine.com/judgement/us/612341e94653d00b2d598a95. (Carl Jones, Rebecca Andrews)

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