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WESTERN WATER LAW & POLICY REPORTER™

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JUDICIAL DEVELOPMENTS

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WWL

WESTERN WATER NEWS

CALIFORNIA STATE WATER PROJECT'S LAKE OROVILLE PLUMMETS TO LOWEST LEVEL IN DECADES

As the drought continues to ravage the western United States and California descends into one of the worst droughts on record, California's second-largest reservoir, Lake Oroville, has reached its lowest water level since September 1977.

Background

Lake Oroville was created by Oroville Dam, which the California Department of Water Resources (DWR) completed in 1967. Lake Oroville conserves water for distribution by the California State Water Project to homes, farms, and industries in the San Francisco Bay area, the San Joaquin Valley and throughout southern California. The Oroville facilities also provide flood control and hydroelectric power and recreational benefits.

Water from Lake Oroville contributes to the irrigation of more than 755,000 acres in the San Joaquin Valley and comprises a critical source of supply to water agencies that collectively serve more than 27 million people. At full capacity, the lake can supply enough water to 7 million average California households for one year.

Lowest Water Surface Levels Since 1977

When the lake is full, the water surface level is 900 feet above sea level. Two years ago, the lake reached 98 percent capacity at 896 feet. Now, the water level has plummeted and recently measured just 643.5 feet above sea level, which is 28 percent of its total capacity and 36 percent of its historical average for this time of year. According to California Department of Water Resources (DWR), Lake Oroville received only 20 percent of expected runoff from snowmelt this year, which DWR characterized as a record low. The reservoir dropped by an average of more than one foot per day in July as DWR made releases to meet water quality and wildlife sustainability requirements.

Imagery from the lake's levels, in particular the exposed barren lake floor in places, provides an illustrative snapshot of how dire the drought is in California.

Low Lake Elevation Threatens Edward Hyatt Power Plant

The water from Lake Oroville is used to power the Edward Hyatt Powerplant (Hyatt Plant). The Hyatt Plant is designed to produce up to 750 megawatts of power but typically produces between 100 and 400 megawatts, depending on lake levels. According to the California Energy Commission, the typical average high daily demand across California is approximately 44,000 megawatts. The Hyatt Plant's production of 400 megawatts alone represents meeting nearly 1 percent of California's total peak daily energy demand.

The Hyatt Plant opened in the late 1960s and has never been forced offline by low lake levels. DWR reports that once the lake's surface level falls below 630 feet above sea level, the Hyatt Plant will be unable to generate power due to lack of sufficient water to turn the plant's hydropower turbines. With the lake level at its recent condition, California State Water Project officials anticipated at the time of this writing that the Hyatt Plant could go offline as soon as late August or early September.

The California Energy Commission has confirmed it is actively planning for the Hyatt Plant to go offline this Fall. If the plant stops generating power, it will likely remain offline until November or December before sufficient precipitation hopefully arrives in the region to turn the underground turbines back on.

Conclusion and Implications

Lake Oroville serves as a stark emblem of the severity of this drought and its dramatic impact in such a relatively short period of time. Two years ago, the lake reached 98 percent capacity but has quickly plummeted to historically low levels not seen in nearly half a century. Lake Oroville also highlights the significant role water plays in energy generation and the implications that a far-reaching drought can have on hydro-energy generating facilities and power production in California.

(Chris Carrillo, Derek R. Hoffman)

DROUGHT HAS IDAHO WATER USERS AND IRRIGATION DELIVERY ENTITIES ASKING RARE QUESTIONS REGARDING WATER USE AND ADMINISTRATIVE PREFERENCES

Like most of the western United States, nearly all of Idaho finds itself in some category of drought. Thousands of water users in the Magic Valley had their irrigation season end in mid-June when Magic Reservoir storage water ran dry (typically, the reservoir sustains a normal irrigation season through late September). Treasure Valley irrigators are scratching and clawing to extend the season to mid-September when mid-October is the norm, and they are going to essentially use every drop of storage water available in the Boise River reservoir system to do it leaving no carryover heading into next year. And increased groundwater pumping in some areas to make up for surface water deficits is suspected in causing dozens of domestic supply wells to run dry. The scramble to extend the irrigation season to the extent possible is raising some tough questions rarely asked, and largely foreign to thousands of new residents to the state who have relocated here during the latest population surge.

Constitutional Use Preferences

Many are generally aware that Idaho administers water rights under the rubric of the prior appropriation doctrine. Very early in Idaho's history, water was administered under a hybrid combination of the prior appropriation doctrine and the riparian doctrine. But, the Idaho Supreme Court quickly abolished the riparian doctrine. *See, e.g.*, *Drake v. Earhart*, 2 Idaho 750, 753, 23 P. 541, 542 (1890) (disposing of the "phantom of riparian rights.").

However, beyond the general concept of "first in time is first in right," Article XV, § 3 of the Idaho Constitution further prescribes use preferences in times of scarcity. For example, domestic uses enjoy preference over all other uses. After that, agricultural uses are preferred over commercial and industrial uses. And, in the case of mining districts, mining uses enjoy preference over agricultural and commercial/industrial uses.

In terms of "irrigation" uses, the question of "agricultural" preference is being asked. Idaho water rights law does not expressly gradate between arguably different types of "irrigation." Idaho water rights merely identify "irrigation" as the purpose of use, not "agricultural irrigation," "residential irrigation," or "municipal irrigation." Under the water rights regime, "irrigation" is seemingly "irrigation" no matter the end irrigation use of the water (to grow and finish an agricultural commodity, or to grow and maintain golf course grass). Irrigation water supplies have not quite dwindled to the point where this author is aware of attempts to further split "irrigation" hairs in terms of water delivery preference, but conversations are occurring.

Administrative Preferences

Turning to "domestic" uses, not all domestic uses are created equal in times of scarcity either. During the course of the for all intents and purposes completed Snake River Basin Adjudication (SRBA), a general stream adjudication that adjudicated surface water and groundwater rights across roughly two-thirds of Idaho stretching from Lewison in the Idaho panhandle to the Wyoming border east of Idaho Falls, statutory filing exemptions for certain, then-considered de minimis uses, including domestic, developed. While many domestic water right owners pursued their claims in the SRBA like any other water right, a vast majority did not. Failure to claim domestic water rights in the SRBA did not undermine the legality or continuing existence of such a right (defined under Idaho Code § 42-111), but the failure to claim does implicate the administration of such a right in times of scarcity.

This is because Idaho Code § 42-607, governing the distribution of water within established water districts, provides in pertinent part that those claiming the right to use water in the absence of an "adjudicated or decreed right" are treated in times of scarcity as having a right subsequent (*i.e.*, junior) in priority to any "adjudicated, decreed" or administrative "permit or licensed" water right. This effectively means that someone whose well was drilled and been in continuous use for domestic purposes since 1920, but who chose to rely on the domestic exemption to support their use, would be administered as junior to one who claimed and received a 1990 adjudicated domestic water right from the SRBA Court.

This is not to suggest that there has been a rash of domestic water supply administration shutting down otherwise senior domestic water rights in favor of junior rights that have been decreed, but these issues and questions have been bubbling to the surface at least for discussion purposes during this current drought cycle.

Conclusion and Implications

For now, these types of questions remain just that, academic curiosities for discussion and debate. But that will likely depend on the quality of this coming fall, winter, and spring. This year has not only been largely dry and hot, but windy too (which further strains the efficacy of short irrigation water supplies).

Idaho's mountains need more than a "normal" or "average" snowpack this winter; they need a much better snowpack than that. Reservoirs are heading into fall and winter with essentially zero carryover hedge/cushion for next year. And, ground and forests are parched. A significant portion of the snow that falls will likely seep into the soil profile before ever making it to streams, rivers, and reservoirs. Idaho water users are afraid that "normal" will not cut it this year. Here's to hoping for "one hell of" a 2021/22 winter and wet fall and spring bookends.
(Andrew J. Waldera)

LEGISLATIVE DEVELOPMENTS

NEW CALIFORNIA LAW INCREASES FINES FOR WATER THEFT

California Senate Bill 427 (SB 427), sponsored by State Senator Susan Eggman (D-District 5), was recently signed into law enabling water agencies to impose enhanced penalties for water theft, a problem that has increased dramatically throughout the state.

Background

Senate Bill 427 proponents report that at least 1.8 billion gallons of water have been stolen in California since 2013. The American Water Works Association suggests water suppliers assume for budgeting and management purposes that 0.25 percent of the volume supplied is withdrawn unlawfully. The California Legislature finds that a significant portion of water theft is related to unlawful cannabis grow operations. According to the author's argument in support of the bill:

> ...water theft poses a serious public health and safety risk and an economic risk to communities. During water theft, contamination can occur when non-potable sources are illegally connected to a drinking water system … Protecting the safety of water systems is a crucial issue, and this bill does that without allowing for excessively punitive fines relative to the ability to pay.

Additionally, water agencies often pass on the lost revenue from water theft to customers who effectively absorb those costs through the water supplier's rate structures.

Existing Law

Under California Government Code §§ 25132 and 36900, a violation of a local ordinance is a misdemeanor unless by ordinance it is made an infraction. In general, every ordinance violation that is determined to be an infraction is punishable by: 1) a fine not exceeding one $100 for a first violation; 2) a fine not exceeding $200 for a second violation of the same ordinance within one year; and, 3) a fine not exceeding $500 for each additional violation of the same ordinance within one year.

Senate Bill 427 Enhanced Penalties

SB 427 authorizes local agencies that provide water service to adopt ordinances prohibiting water theft and to modify and enhance fines and penalties.

If water theft is committed via meter tampering in violation of an ordinance adopted under this section, it is punishable by: 1) a fine not exceeding $130 for a first violation; 2) a fine not exceeding $700 for a second violation of the same ordinance within one year of the first violation; and 3) a fine not exceeding $1,300 for the third violation and each additional violation of the same ordinance within one year of the first violation.

All other forms of water theft in violation of an ordinance adopted under this section are punishable by: 1) a fine not exceeding $1,000 for a first violation; 2) a fine not exceeding $2,000 for a second violation of the same ordinance within one year; and 3) a fine not exceeding $3,000 for each additional violation of the same ordinance within one year.

The new law defines water theft to mean "an action to divert, tamper, or reconnect water utility services" and references § 498 of the Penal Code for definitions of the terms "divert," "tamper," "reconnect," and "utility service."

SB 427 requires the local agency to adopt an ordinance that sets forth the administrative procedure that governs the imposition, enforcement, collection, and administrative review of the fines or penalties for water theft.

Hardship Waiver

SB 427 provides that a hardship waiver may be obtained to reduce the amount of the fine upon a showing by the responsible party that payment of the full amount of the fine would impose an undue financial burden. The phrase "undue financial burden" is not defined and appears to be left to the discretion of the local agency.

Conclusion and Implications

With California in the midst of extensive drought conditions, greater deterrence to water theft is needed

to maintain sufficient and safe water supplies. Municipalities, water agencies and other government agencies throughout the state are grappling with the challenges of widespread, unlawful cannabis grow operations. Though SB 427 imposes stiffer penalties, the "profitability" of such operations raises a question of whether the penalties are sufficiently high. Meanwhile, millions of California residential water bills have gone unpaid for many months due to Covid-19 hardship claims. Water agencies and their managers face increasing challenges in providing a service that many California residents might take for granted—a clean, reliable and affordable water supply.
(Gabriel J. Pitassi, Derek R. Hoffman)

REGULATORY DEVELOPMENTS

CALIFORNIA DEPARTMENT OF WATER RESOURCES AND U.S. BUREAU OF RECLAMATION PETITION THE STATE WATER BOARD TO EXCHANGE STORED WATER TO MEET DEMAND IN THE CENTRAL VALLEY

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)

WASHINGTON DEPARTMENT OF ECOLOGY SEEKS COMMENTS ON WATER BANKING POLICY

Water banking continues to be a focus of attention for the Washington Department of Ecology (Ecology). The agency has issued a draft "Policy and Interpretive Statement, Administration of the Statewide Trust Water Rights Program." Comments are requested by September 19, 2021.

What are Policy and Interpretive Statements?

Ecology's Policy and Interpretive Statements are not regulations adopted through rule making, but rather internal statements designed as internal guidance to "ensure consistency" when the Agency is making decisions on applications and between regions. The practice started in the 1990s. This appears to be the first time Ecology has developed such a statement related to the

The Trust Water Rights Program

What is the Trust Water Rights Program? Washington's body of water law recognizes both statutory relinquishment and common law abandonment. The Trust Water Rights Program was established statewide in 1994 to allow developed water rights to be "placed in trust," to protect those water rights from relinquishment. The original design was to benefit instream flows for fish and other resources affected by out of stream diversions, and to counter the general tenets of the prior appropriation doctrine as it had developed in Washington which was perceived as a disincentivizing water conservation. Over time, the Trust Water Rights Program expanded to allow "Water Banking." Water Banking was first recognized by statute in 2003 to "provide an effective means to facilitate the voluntary transfer of water rights. . .and to achieve a variety of water resource management objectives" through application of the Trust Water Rights Program including drought response, voluntary streamflow enhancement, water mitigation and future water supplies.

Why now? Water banking in Washington is increasingly seen as the means to mitigate new water uses to lessen or eliminate the effect those uses will have on already low stream flows. As its use expands,

this policy is an effort by Ecology to place sideboards on and create consistent practices with respect to water banking.

The Draft Policy

Section 1: Definitions

The draft Policy includes a number of definitions not found elsewhere in Washington's Water Code. The statute from which the policy is derived includes only a limited selection of definitions; the Policy expands on those definitions to include high level definitions like: Mitigation, Trust Water Rights Program, and Water Bank. The draft Policy also includes a lengthy definition of "Public Interest" which is a broad and amorphous concept woven through out Washington's water code and case law, including the Trust Water Rights Program—["Exercise of a trust water right may be authorized only if the department first determines that neither water rights existing at the time the trust water right is established, nor the public interest will be impaired." RCW 90.42.040(4)(a)]—but not otherwise easily defined.

Section 2: Provides a brief overview of Ch. 90.42 RCW. *Section 3*: Provides a brief discussion on establishing a Trust Water Right, which becomes the basis of a water bank.

Section 4: Provides the real substance of the policy, details on Water Banking. Chief among the provisions, Section 4:

- Clarifies that water banks may include a singular trust water right for mitigation of another use or may be more complex and include a collection of water rights to be used to mitigate multiple other uses;

- Reiterates that whether to hold and manage a trust water right for water banking purposes is within Ecology's discretion;

- Establishes a process for an applicant to request that Ecology approve a water bank. Based on the Draft Policy, an applicant should request a water bank when the water right proposed to form the basis of the bank is requested to be changed. The policy includes development of a new application form and process, which includes requiring that the application describe the purposes, objectives, and timelines, for the proposed bank, and describe the anticipated demand to be served. Included in the proposed application is the requirement that the applicant provide information to support Ecology's evaluation of the public interest and that the water bank describes the anticipated public benefits that will result. Applications for a water bank will be subject to public comment;

- Provides criteria for Ecology's evaluation of a water bank request, including whether the Agency has adequate staff resources to process the request, whether the request aligns with Ecology's priorities—including solving critical water supply for uses who otherwise lack an available water supply, provide permanent instream flows in critical stream reaches, or is supported by tribes and local communities, and whether the proposed bank will cause detriment or injury to other water uses, or the public interest.

Ecology may decide based on these criteria whether to proceed, to defer or to deny the request. Ecology's decision to defer or deny a request does not preclude the applicant from modifying and resubmitting their request. Whether the deferment or denial is an appealable decision is not clear under the draft Policy.

Section 5: Clarifies Donations under the Trust Water Rights Program cannot be used for long-term or permanent migration, nor can permit exempt water uses under RCW 90.44.050.

Conclusion and Implications

If Ecology does agree to proceed, the parties may proceed to develop a Water Banking Agreement. The draft Policy lays out terms and conditions which will govern the ongoing operation of the banks to remain consistent with the Water Code, including timelines and consequences for failure to reach a Water Banking Agreement, and implementation, tracking and termination.

The full text of the Draft Policy can be found at https://apps.ecology.wa.gov/publications/SummaryPages/2111017.html.

(Jamie Morin)

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 SUPPLEMENTALCOMPLAINT 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

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 First Circuit's 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 n 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 Section 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 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)

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