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WESTERN WATER LAW & POLICY REPORTER™

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WESTERN WATER NEWS

U.S. BUREAU OF RECLAMATION FORECASTS REDUCED INFLOWS TO LAKE MEAD, EXACERBATING SHORTAGE CONDITIONS ON THE COLORADO RIVER

In October, the U.S. Bureau of Reclamation (Bureau) released its 24-month study and two-year projections for major reservoir levels in the Colorado River System, forecasting a median inflow in 2022 that is 800,000 acre-feet less than forecasted in September. The forecast comes on the heels of the Bureau's first-ever shortage declaration in August, which led to Colorado River water cutbacks for Arizona and Nevada, but not California. While California's allocation of Colorado River water has not been reduced at this time, further decreases in reservoir capacity at Lake Mead could lead to additional shortage declarations in the future, potentially impacting full use of California's allocation of Colorado River water.

Background

Extending approximately 1,450-miles, the Colorado River is one of the principal water sources in the western United States and is overseen by the Bureau. The Colorado River watershed drains parts of seven U.S. states and two Mexican states and is legally divided into upper and lower basins, the latter comprised of California, Arizona, and Nevada. The river and its tributaries are controlled by an extensive system of dams, reservoirs, and aqueducts, which in most years divert its entire flow for agriculture, irrigation, and domestic water.

In the lower basin, Lake Mead provides drinking water to more than 25 million people and is the largest reservoir by volume in the United States. The Bureau makes annual determinations regarding the availability of water from Lake Mead by considering factors including the amount of water in system storage and forecasted inflow. To assist with these determinations, the Bureau releases operational studies called "24-Month Studies" that project future reservoir contents and releases. They include the latest inflow and water use forecasts. The October 24-Month Study included 30-year inflow data. The October 24-Month study also forecasts a 16 percent chance of a heightened shortage condition in 2023.

Regulation of the Colorado River

The Colorado River is managed and operated under a multitude of compacts, federal laws, court decisions and decrees, contracts, and regulatory guidelines collectively known as the "Law of the River." The Law of the River apportions the water and regulates the use and management of the Colorado River among the seven basin states and Mexico. The Law of the River allocates 7.5 million acre-feet (maf) of water annually to each basin. The lower basin states are each apportioned specific amounts of the lower basin's 7.5 maf allocation, as follows: California (4.4 maf), Arizona (2.8 maf), and Nevada (0.3 maf). A seven-party agreement in 1931 apportioned California's allocation between the Palo Verde Irrigation District, Yuma Project, Imperial Irrigation District, Coachella Valley Water District, Metropolitan Water District, and the City and County of San Diego. Nonetheless, California river water users historically used more than California's 4.4 maf allocation due to water surpluses or unused water by Arizona or Nevada. In 2003, certain of these entities executed a quantification settlement agreement that reduced water use to California's allocated amount through water transfers, canal lining projects, and agricultural conservation.

Interim Guidelines

In 2007, the Bureau adopted interim guidelines to address shortages in the Colorado River system (Guidelines). The purpose of the Guidelines consists of three components. First, the Guidelines are intended to improve the Bureau's management of the Colorado River by considering trade-offs between the frequency and magnitude of reductions of water deliveries, including related impacts on water storage in Lake Powell and Lake Mead, water supply, power production, recreation, and other environmental re-

sources. Second, the Guidelines provide mainstream federal water users a greater degree of predictability regarding the amount of annual water deliveries in future years, particularly under drought and low reservoir conditions. Finally, the Guidelines provide additional mechanisms for the storage and delivery of water supplies in Lake Mead to increase the flexibility of meeting water use needs from Lake Mead, including under drought and low reservoir conditions.

To accomplish the purpose of the Guidelines, the Guidelines have four operational elements: 1) shortage guidelines, 2) coordinated reservoir operations, 3) storage and delivery of conserved water, and 4) surplus guidelines. Relevant here, the shortage guidelines determine conditions under which the Bureau will reduce the annual amount of water available for consumptive use from Lake Mead. Cutbacks under the Guidelines only affect Arizona and Nevada. When Lake Mead is projected to be at or below 1,075 feet but at or above 1,050 feet, as the Bureau currently forecasts, the Bureau will apportion to the lower basin 7.167 maf, rather than 7.5 maf. To meet this amount, reductions will be made to Arizona and Nevada's allocations, but not California's allocation. Additional shortages will further reduce Arizona and Nevada's allocations.

2019 Drought Contingency Plan

Despite the Guidelines' reduction in Arizona and Nevada allocations when shortage conditions are forecasted for the lower basin, the lower basin states entered into a drought contingency plan in 2019, subsequently approved by Congress, to collaboratively redress lowering reservoir levels in Lake Mead. To this end, California agreed to make "contributions" when certain shortage conditions exist. Specifically, when Lake Mead levels are at or below 1,045 feet but above 1,040 feet, California will contribute 200,000 acre-feet to help remedy low reservoir levels. When Lake Mead levels are below 1,040 feet, California could contribute as much as 350,000 acre-feet. The Bureau would adjust its delivery schedules as necessary to reflect these contributions.

24-Month Study Forecasts

The Bureau's 24-Month Study forecasts Lake Mead levels at the end of calendar year 2022 to be 1,050.63 feet. This is less than one foot above the next shortage condition cutoff of 1,050 feet. While California's 4.4 maf allocation would not be affected—reductions would continue to be made to Arizona and Nevada's allocations—further decreases in Lake Mead levels could trigger California's drought contingency plan contributions which begin when lake levels reach 1,045 feet.

Conclusion and Implications

It remains to be seen whether Lake Mead levels will continue to decline. However, the Bureau's October forecast appears to reflect the continued impact of drought conditions on the Colorado River system. Thus, it is possible that California's drought contingency plan contributions could be triggered sometime after 2022, with corresponding adjustments made by the Bureau to lower basin delivery schedules. The U.S. Bureau of Reclamation's Updated Projections of Colorado River System Conditions, available online at: https://www.usbr.gov/newsroom/#/news-release/4013.
(Miles Krieger, Steve Anderson)

POPULATION GROWTH, CLIMATE CHANGE, AND WATER RIGHTS ADMINISTRATION ON THE BOISE RIVER

As was the case thorough most of the western United States, virtually all of Idaho suffered through some level of drought conditions during the 2021 irrigation season. Those served by Magic Reservoir in the lower Wood River Basin received roughly 27 days of stored water supply in 2021. Others, like the Boise River Basin, experienced a near normal irrigation season, only shortened by roughly one month, but used nearly every drop of stored water supply (including past carryover) to do it. In the Boise River Basin in particular, river priority reached as early as 1866/1867 towards the end of the irrigation season

causing considerable angst and leaving many to more deeply consider what the future may hold in Idaho's most populous river valley.

Background

Water rights exceeding reliable Boise River summertime flows were appropriated between 1864 and 1904 and later decreed in the *Stewart Decree* in 1906. Subsequent litigation over the delivery of *Stewart Decree*-based water rights as Boise River flows decline over the course of the irrigation season was resolved by a 1919 court order requiring the distribution of natural flow on the basis of 75 percent and 60 percent cuts in priority order. Remaining available natural flow existed only during the spring runoff, and water rights to these "flood waters" were largely appropriated between 1894 and 1914 and later decreed in the *Bryan Decree*. The only remaining option to satisfy the needs of increasing water demand was reservoir storage—first Arrowrock Reservoir, completed in 1915; next Anderson Ranch Reservoir, completed in 1950; and last Lucky Peak Reservoir, completed in 1955. For all intents and purposes, the Boise River is considered fully appropriated absent one's ability to construct more storage or otherwise divert and use springtime flood flows above and beyond those already appropriated. But there is an exception to this general rule.

Water Rights Administration

For water right administrative purposes, the Boise River is treated as two rivers—that located upstream of Star Road Bridge, and that below. The segment of river upstream of Star Bridge is actively administered, while the segment downstream of the bridge is not. Historically this is because groundwater baseflows, coupled with surface water irrigation return flows from a vast network of tributary drains and sloughs, essentially replenish and restore river flows sufficient to meet water right demand downstream of Star bridge and more. Consequently, several miles of the Boise River between Star, Idaho and its confluence with the Snake River remain open to year-round appropriation with more and more water right permit applications being filed as time goes on. But for how long?

Possible Solutions

If history teaches us anything, it is that things change. Early over-appropriation of the Boise River was largely overcome by the construction of reservoirs. But, the era of large dam-building is most likely behind us for a variety of reasons, chief amongst them financial cost and significant environmental considerations. Conversion to more efficient forms of irrigation (sprinkler and drip) and the piping and lining of irrigation canals and laterals can stretch existing water supplies, but at the expense of the shallow and deeper aquifer recharge flood irrigation practices and unlined canal seepage provide. Further groundwater development is an option, but aquifer drawdown will accelerate as more wells are drilled and more seepage is lost to other irrigation efficiency gains. Pile on explosive population growth and climate change concerns in the Boise River Basin and where does that leave the current administrative water right break at Star Road Bridge?

Increased groundwater development, canal lining, and conversion to sprinkler and drip irrigation is already impacting shallow aquifer depths and surface water irrigation drain flows.

Conclusion and Implications

These diminishing drain flows are, in turn, leading to less return flow to the Boise River and there are some large, senior water right priorities downstream of Star Bridge. For roughly a century those diverting water upstream of Star Bridge have not concerned themselves too deeply about those doing the same downstream of the bridge. And, junior appropriators downstream of Star Bridge have done the same by largely ignoring the implications of the seniors upstream. The "two-river" administrative system has worked for decades, until it does not. And it behooves everyone to start thinking in "one river" terms sooner than later it seems, because that day is likely coming.

Getting down to an 1866/67 priority on the Boise River and using essentially every drop of storage water available in the system during the 2021 irrigation season forces some, this author included, to be more thoughtful. Here's to hoping for one of the wettest and snowiest winters on record—not only here, but across the western United States.
(Andrew Waldera)

REGULATORY DEVELOPMENTS

BIDEN ADMINISTRATION BEGINS PROCESS OF REVERSING TRUMP-ERA AMENDMENTS TO NEPA REGULATIONS—CEQ RELEASES PROPOSED RULE

The Bident administration has begun the process of reversing various Trump administration amendments to regulations governing agencies' implementation the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq*., [NEPA]). Likely most consequential are the reversal of amendments that eliminated those well-litigated categories of "direct," "indirect" and "cumulative" effects of a project that should be analyzed, and replaced them with direction that agencies should concentrate on "reasonably foreseeable impacts." [86 Fed. Reg. 55757 (Oct. 7, 2021).]

Background

The Council for Environmental Quality (CEQ) on October 7, 2021, published a notice of proposed rulemaking that is the first of an intended two-phase process of implementing January 20, 2020 Executive Order (EO) 13990 establishing policies for the Biden administration to listen to the science; improve public health and protect our environment; ensure access to clean air and water; limit exposure to dangerous chemicals and pesticides; hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; reduce greenhouse gas emissions; bolster resilience to the impacts of climate change; restore and expand our national treasures and monuments; and prioritize both environmental justice and the creation of well-paying union jobs necessary to deliver these goals.

EO 13990 took specific aim at various actions by the Trump administration regarding CEQ regulations implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4321), revoking Trump-signed EO 13807, entitled *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects*, and directing agencies:

> . . .to review existing regulations issued between January 20, 2017, and January 20, 2021, for consistency with the policy articulated in the E.O. and to take appropriate action.

Trump's EO 13807 had culminated in a rulemaking process amending CEQA regulations first adopted in 1978, with the final rulemaking going into effect on July 16, 2020 (the 2020 amendments). Five separate lawsuits were subsequently filed, with stays of the 2020 amendments having been imposed in four of them, while the dismissal of the fifth is subject of a pending appeal.

On January 27, 2020, Biden signed EO 14008, which establishes a government-wide approach to the climate crisis by reducing greenhouse gas emissions and an administration policy to increase climate resilience, transition to a clean energy economy, address environmental justice and invest in disadvantaged communities, and spur well-paying union jobs and economic growth.

The Proposed Rules

CEQ's proposed rulemaking proposes to restore the definitions of "direct" and "indirect" effects, and "cumulative impacts" from the 1978 NEPA Regulations, 40 CFR 1508.7 and 1508.8 (2019), by incorporating them into the definition of "effects" or "impacts," such that each reference to these terms throughout 40 CFR parts 1500 through 1508 would include direct, indirect, and cumulative effects.

These revisions would eliminate 2020 amendments that, per CEQ:

> . . .create[d] confusion and could be read to improperly narrow the scope of environmental effects relevant to NEPA analysis, contrary to NEPA's purpose.

The 2020 amendments directed agencies to concentrate on "reasonably foreseeable impacts," rather than categorizing them as "direct," "indirect" or "cu-

mulative." CEQ's current thinking is that the 2020 amendments could improperly limit the timescale and scope of effects analyzed by agencies.

The proposed amendment to 40 C.F.R. 1502.13 addresses an agency's duty to "set[] forth the rational for the agency's proposed action" the purpose and effect section" of an Environmental Impact Statement (EIS). The 1978 version of the regulation required that an agency "briefly state the underlying purpose and need to which the agency is responding in proposing the alternatives, including the proposed action." The 2020 amendments:

> . . .add[ed] language that requires agencies to base the purpose and need on the goals of an applicant and the agency's authority when the agency's statutory duty is to review an application for authorization.

The proposed rule would revert to the 1978 language. CEQ reasoned that the 2020 amendments "could be construed to require agencies to prioritize the applicant's goals over other relevant factors, including the public interest." Rather than restrict the purpose and need for agency actions to applicants' goals, NEPA, per CEQ's reading, endorses agencies considering a range of factors including "regulatory requirements, desired conditions on the landscape or other environmental outcomes, and local economic needs, as well as an applicant's goals." CEQ also proposes a conforming change to 40 C.F.R. 1508.1(z), to define "reasonable alternatives" to the project that is the subject of an EIS as:

> . . .a reasonable range of alternatives that are technically and economically feasible, meet the purpose and need for the proposed action, *and, where applicable, meet the goals of the applicant*.

CEQ's next draft amendment seeks to re-establish the longstanding understanding, upended by the 2020 amendments, that agencies could develop NEPA procedures of their own to augment the CEQ regulations, so long as those procedures met or exceeded the degree of environmental review required by the CEQ regulations. The proposed rulemaking would remove language from 40 C.F.R 1507.3(a) and (b) that, collectively, "make the CEQ regulations a ceiling for agency NEPA procedures." Per CEQ "would allow agencies to fully pursue NEPA's aims by allowing them to establish procedures specific to their missions and authorities that may provide for additional environmental review and public participation," while CEQ would continue its review agencies' proposed NEPA regulations "to ensure that they are consistent with, but not necessarily identical to, CEQ's regulations."

Conclusion and Implications

That both administrations claim that their amendments (the 2020 amendments and those currently proposed by CEQ) are consistent with NEPA and the substantial body of caselaw seeking to interpret and apply the terms "direct," "indirect" or "cumulative" should give some idea of the potential for a spirited comment period and, if the proposed amendments to 40 C.F.R. 1508.7 and 1508.8 become final, renewed litigation over the meaning and proper application of these terms. For more information on the CEQ's proposed rule for implementation of NEPA, October 7, 2021, *see:* https://www.federalregister.gov/documents/2021/10/07/2021-21867/national-environmental-policy-act-implementing-regulations-revisions. (Deborah Quick)

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

•September 29, 2021 - EPA reached settlement agreements with Eagle 1968 LC and Kings Construction Co. Inc. to resolve alleged violations of the federal Clean Water Act (CWA) at the Jayhawk Club golf course in Lawrence, Kansas. In the settlement documents, EPA alleged that the companies discharged pollutants into approximately 7,000 feet of streams by placing fill material into the streams and grading over 256 acres of land as part of a renovation of the former Alvamar Country Club, now the Jayhawk Club, in Lawrence. EPA also says that the companies did the work without obtaining the required CWA permits. Eagle 1968 LC owns the property and hired Kings Construction Co. Inc. to do grading and excavation work at the site. Under the terms of settlement, the companies also agreed to restore streams at the site; conserve restored portions of the site; and purchase "mitigation bank" credits at a local stream and wetland preserve at a cost of approximately $300,000. The companies will also pay civil penalties totaling over $84,000.

•October 5, 2021—EPA announced that the cities of Winchester and Craigmont, Idaho have agreed to each pay a $15,000 penalty for hundreds of Clean Water Act violations at the cities' wastewater treatment plants. Winchester's plant discharges treated wastewater into Lapwai Creek and Craigmont's plant discharges into John Dobb Creek. During inspections in August 2019 and following a review of each treatment plants' records, EPA found the cities regularly discharged wastewater into the creeks in excess of permit limits. Winchester also failed to maintain a quality assurance plan for all monitoring required in its permit. In addition to each city paying the $15,000 penalty, both cities agreed to develop and implement a Facility Plan that will describe the specific actions, upgrades, and remedial measures to achieve and maintain compliance with the effluent limitations and requirements of their Clean Water Act permits. Craigmont also agreed to implement interim measures to achieve compliance with the chlorine limits in its permit until construction and implementation of the Facility Plan is complete. Winchester must complete implementation of its Facility Plan by April 30, 2025 and Craigmont must complete implementation of its Facility Plan by June 1, 2025.

•October 5, 2021—On September 30, 2021, three settlement agreements were approved by the U.S. District Court for the Central District of California. Under the agreements, Montrose Chemical Corporation of California, Bayer CropScience Inc., TFCF America Inc., and Stauffer Management Company LLC have agreed to pay $77.6 million for cleanup of contaminated groundwater at the Montrose Chemical Corp. Superfund and the Del Amo Superfund Sites in Los Angeles County, California. The companies will also investigate potential contamination of the historic stormwater pathway leading from the Montrose Superfund Site, south of Torrance Boulevard. The settlements not only provide for cleanup and investigation, but also collectively resolve active litigation in a case that has been pending for over 30 years under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly referred to as Superfund). From 1947 to 1982, Montrose operated the U.S.'s largest manufacturing plant for the pesticide DDT (dichloro-diphenyl-trichloroethane). The settlements require the companies to pay for and implement cleanup remedies and perform an investigation with federal and state oversight. The companies will also reimburse

EPA more than $8 million and California DTSC more than $450,000 for costs already incurred.

•October 13, 2021—The owner and operator of a pipeline have agreed to pay a $1.5 million civil penalty under the Clean Water Act and $7.2 million in damages and mitigation to resolve federal and state Oil Pollution Act and Clean Water Act claims arising from a 2010 spill of over 1,800 barrels of oil into a globally rare dolomite wetland from a pipeline near Lockport, Illinois. The complaint, filed along with the settlement, alleges that the crude oil spill injured a critical habitat for the federally-endangered Hine's emerald dragonfly. The December 2010 spill resulted from a breach in a 12" buried pipeline that discharged crude oil into a wetland adjacent to the Illinois-Michigan Canal near Lockport, Illinois. West Shore Pipe Line Co. of Lemont, Illinois, the owner of the crude oil pipeline, and Houston-based Buckeye Pipe Line Co., the operator, previously undertook responsibility for the cleanup of the spill site overseen by the EPA. In the settlement, Buckeye and West Shore have also agreed to pay $7.2 million for injury to the Hine's emerald dragonfly and other natural resources in the wetland which the federal and state trustees, and the U.S. Army Corps of Trustees (Corps), will jointly use to plan, design and perform restoration projects to compensate for the harms caused by the oil spill, as well as mitigation for impacts to wetlands.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•September 23, 2021—The DOJ Justice and state of Nebraska finalized a settlement with Big Ox Energy - Siouxland LLC and NLC Energy Venture 30 LLC for alleged violations of federal and state environmental laws at its waste-to-energy facility in Dakota City, Nebraska. Under the terms of the settlement, the defendants will pay a $1.1 million civil penalty to be split between the United States and Nebraska. EPA and Nebraska Department of Environment and Energy conducted multiple inspections of the facility in 2017 and 2018. The agencies found that the facility was releasing hazardous amounts of biomass and biogas. On at least 16 occasions between 2017 and 2019, biomass released from the digesters went over the sides of the facility's roof and onto the ground where it mixed with stormwater, resulting in discharges to adjacent properties and into nearby water bodies. In 2018, a facility malfunction resulted in 80,000 gallons of biomass overflowing from the digesters. These discharges resulted in emissions of biogas, an extremely hazardous substance. Air monitoring conducted by EPA determined that the facility was emitting methane at levels that were flammable and hydrogen sulfide in amounts that could result in injury or death from inhalation. As a result, the facility was required to take actions to reduce the risks posed by the emissions.

•October 4, 2021—Jeffersonville, Indiana-based American Commercial Barge Line LLC (American Commercial) has agreed to acquire and preserve 649 acres of woodland wildlife habitat near New Orleans, Louisiana, and pay over $2 million in damages, in addition to $1.32 million previously paid for damage assessment and restoration planning costs, under the Oil Pollution Act (OPA) and the Louisiana Oil Spill Prevention and Response Act (OSPRA), to resolve federal and State claims for injuries to natural resources resulting from an oil spill from one of its barges. The United States and Louisiana concurrently filed a civil complaint with a proposed consent decree. The complaint seeks damages and costs under OPA and OSPRA for injuries to natural resources resulting from American Commercial's July 2008 discharge of approximately 6,734 barrels (282,828 gallons) of No. 6 fuel oil into the Mississippi River upriver of New Orleans. The complaint alleges that the spill resulted from a collision that occurred when the American Commercial tug Mel Oliver, which was pushing a barge upriver, veered directly in front of the MV Tintomara, an ocean-going tanker ship sailing downriver. The oil spill spread more than 100 miles downriver and covered over 5,000 acres of shoreline habitat. The oil spill caused significant impact and injuries to aquatic habitats within the Mississippi River and along its shoreline, as well as to birds and other wildlife.

•October 14, 2021—The EPA, DOJ, the Eastern District of Texas, and the Texas Commission on Environmental Quality (TCEQ) have announced a settlement with E.I. Du Pont de Nemours and Company (DuPont) and Performance Materials NA, Inc. (PMNA) to resolve alleged violations of hazardous waste, air, and water environmental laws at the PMNA Sabine River chemical manufacturing facility

in Orange, Texas. Under this settlement agreement, DuPont and PMNA will conduct compliance audits, control benzene emissions, and perform other injunctive relief to address violations at the facility. Defendants will also pay a $3.1 million civil penalty and attorney's fees to the State of Texas. These measures will benefit nearby communities already overburdened by pollution by reducing uncontrolled emissions of hazardous air pollutants and unpermitted discharges from surface impoundments at the facility. In a joint complaint filed on October 13, 2021, DOJ, on behalf of EPA, and the State of Texas, asserted claims against DuPont and PMNA for alleged violations of the Resource Conservation and Recovery Act (RCRA), the Clean Water Act (CWA), the Clean Air Act (CAA), Section 7.002 of the Texas Water Code, Tex. Water Code § 7.002, and applicable regulations, at the former DuPont facility now owned and operated by PMNA. The alleged RCRA violations include failure to make hazardous waste determinations, the treatment, storage or disposal of hazardous waste without a RCRA permit, and failure to meet land disposal restrictions. The alleged CWA violations include unpermitted discharges of process wastewater in violation of the facility's Texas Pollutant Discharge Elimination System permits. The alleged CAA violations include failure to comply with the national emission standards for hazardous air pollutants for benzene waste operations and for miscellaneous organic chemical manufacturing for certain waste streams.

Indictments, Sanctions, and Sentencing

•October 1, 2021—Empire Bulkers Ltd., Joanna Maritime Limited and Chief Engineer Warlito Tan were indicted in New Orleans for violations of environmental and safety laws related to the Motor Vessel Joanna, a Marshall Islands registered Bulk Carrier. The four-count grand jury indictment alleges that the companies and Tan tampered with required oil pollution prevention equipment and falsified the ship's Oil Record Book, an official ship log regularly inspected by the Coast Guard. The Coast Guard found that the ship's Oily Water Separator had been bypassed by inserting a piece of metal into the Oil Content Meter so that it would only detect clean water instead of what was actually being discharged overboard. According to the indictment, Tan and the shipping companies falsified the log and sought to obstruct the Coast Guard's inspection. The defendants also were charged with violating the Ports and Waterways Safety Act by failing to immediately report a hazardous situation that affected the safety of the ship and threatened U.S. ports and waters. During the inspection on March 11, 2021, the Coast Guard discovered an active fuel oil leak in the ship's purifier room that resulted from disabling the fuel oil heater pressure relief valves, an essential safety feature designed to prevent catastrophic fires and explosions. (Andre Monette)

LAWSUITS FILED OR PENDING

U.S. SUPREME COURT HEARS ORAL ARGUMENTS IN *MISSISSIPPI V. TENNESSEE*—THE COURT COULD SET PRECEDENT FOR INTERSTATE GROUNDWATER DISPUTES ACROSS THE UNITED STATES

On October 4, 2021, the United States Supreme Court heard oral arguments in *Mississippi v. Tennessee*, Case No. 143 orig.—a case that could impact how states allocate interstate groundwater among themselves and how states determine their obligations to each other. At oral argument, the parties presented their objections to the Report of the Special Master, which determined the groundwater in dispute is an interstate resource subject to the doctrine of equitable apportionment and that equitable apportionment of the contested groundwater is the appropriate remedy for Mississippi's alleged harm. Resolution of the dispute in *Mississippi v. Tennessee* could decide whether the doctrine of equitable apportionment governs allocation disputes between states over groundwater stored in interstate aquifers.

Background

In 2014, the State of Mississippi filed a motion for leave to file a bill of complaint alleging the State of Tennessee, the City of Memphis, and Memphis Light, Gas & Water Division (Tennessee) stole groundwater from Mississippi by pumping large amounts of groundwater, without physical intrusion, from an interstate aquifer straddling the Mississippi-Tennessee border. Mississippi asserts Tennessee's groundwater pumping from wells located in Tennessee pulled groundwater that would have remained in groundwater storage within Mississippi's borders. Mississippi seeks over $600 million in damages and a declaratory judgment establishing its sovereign right and exclusive interest in groundwater stored in a formation of the interstate aquifer that lies entirely under the state of Mississippi.

The Special Master's Report

The Supreme Court granted Mississippi's motion for leave and appointed a Special Master to determine whether the groundwater stored in the Middle Claiborne Aquifer constitutes an interstate resource. In the Report of the Special Master in *Mississippi v. Tennessee*, Case No. 143 orig., Special Master's Docket No. 135 (Nov. 5, 2020), the Special Master rejected Mississippi's contention that Mississippi controls all of the water resources within its boundaries and thus owns a fixed portion of the aquifer. The Special Master's Report identified the aquifer as an interstate resource under four different theories–the definition, pumping effects, flow, and surface connection theories–with each theory viewing a different feature of the aquifer as individually making the entire aquifer an interstate character. The Special Master's Report recommended the Supreme Court apply the doctrine of equitable apportionment to the aquifer and uphold equitable apportionment as the appropriate remedy.

Mississippi filed exceptions to the Special Master's Report arguing that equitable apportionment does not apply to the groundwater at issue because the groundwater is not hydraulically connected to the surface water and Tennessee's pumping of groundwater violated Mississippi's sovereignty over its natural resources. According to Mississippi, the sovereignty-based framework should remedy its injury. Tennessee and numerous other amicus curiae filed briefs in opposing Mississippi's exceptions.

Breadth of the Equitable Apportionment Doctrine

Equitable apportionment is a federal common law doctrine that governs disputes between states over the allocation of interstate waters and ensures that contested water is divided between states in a just and equitable manner. *Colorado v. New Mexico*, 459 U.S. 176 (1982). However, the doctrine only applies in the absence of an interstate compact. *Id.* In situations such as this one, where the states have not already allocated and declared rights to contested water under an interstate compact, the Court is unable to enforce the terms of a compact and applies the doctrine of equitable apportionment.

Although the Court has applied the equitable apportionment doctrine to a variety of interstate resources, including groundwater, Mississippi argues that the equitable apportionment doctrine should not govern disputes over *all* groundwater. Instead, Mississippi asks the Court to limit the doctrine to groundwater that is hydraulically connected to a disputed surface water. According to Mississippi, groundwater does not freely flow within the aquifer's Sparta and Memphis Sand formations. Consequently, this non-hydraulically connected groundwater has a character different and district from surface water and is not subject to equitable apportionment.

In response, Tennessee argues that Mississippi is artificially limiting its claims to a portion of the aquifer's stored groundwater to avoid an equitable apportionment of the entire aquifer. Tennessee maintains that the doctrine should apply to the entire interstate aquifer and should be Mississippi's exclusive remedy.

Sovereignty and Interstate Resources

The Court has recognized that each state "has full jurisdiction over the lands within its borders, including the beds of streams and other waters." *Kansas v. Colorado*, 206 US 46 (1907). Under a state's sovereign authority, the state retains the power to preserve, protect, and control natural resources within its borders. Mississippi argues that Tennessee's pumping of groundwater violated Mississippi's sovereignty and consequently, the sovereignty-based framework should remedy the injury, not the equitable apportionment doctrine. In effect, Mississippi asks the Court to take a new approach to resolving interstate disputes over groundwater resources not hydraulically connected to interstate surface water.

Mississippi maintains it has a constitutional right and sole authority to control and allocate all waters located within its territorial borders under the sovereignty-based framework. Mississippi contends that Tennessee's cross-border groundwater pumping –without physical intrusion– knowingly, intentionally, and wrongfully invaded Mississippi's sovereign territory. Because equitable apportionment was not designed to remedy an injury resulting from an invasion of sovereign territory, Mississippi argues that a damages-based remedy is necessary for its alleged injury.

In response, Tennessee emphasizes that the Court has never allowed one state's sovereignty to subsume an entire interstate resource, and thus it is not possible for Mississippi to exercise exclusive ownership or control over *all* waters flowing within its boundaries. Tennessee also supports the Special Master's view that the Court has been unequivocal that equitable apportionment applies even when "the action of one State reaches through the agency of natural laws into the territory of another state." Report of the Special Master at 27, citing *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017 (1983). Tennessee argued that any adverse effects caused by Tennessee's cross-border pumping of groundwater from an interstate aquifer are natural consequences of the laws of hydraulics. Therefore, when pumping that occurs entirely within Tennessee affects Mississippi's ability to use the aquifer's groundwater through the operation of natural laws, it is no different than surface water and equitable apportionment is the appropriate remedy.

Western States' Perspective

The Attorneys General from the States of Colorado, Idaho, Nebraska, North Carolina, North Dakota, Oregon, South Dakota, and Wyoming jointly filed an *amicus* brief. The *amici curiae* encouraged Mississippi and Tennessee to follow established law concerning interstate groundwater resources by either entering into an interstate compact or by petitioning the Court to obtain a decreed equitable apportionment of the groundwater. The Attorneys General argued that the Court should not create a new claim to resolve interstate disputes over natural resource use under the sovereignty-based framework, which provides damages to compensate for past actions.

The *amici curiae* also emphasized that states involved in a dispute over interstate bodies of water should attempt to enter an interstate compact to establish duties and obligations for collectively managing the interstate resource. Absent an interstate compact, states have no duty to manage shared natural resources for the benefit of another state. In the event of a dispute over an interstate body of water, the Court should declare rights under the governing compact and enforce its terms or, in the absence of a compact, divide the water among the states by equitable apportionment.

According to the *amici curiae*, a claim for damages that addresses past violations of unknown duties will not solve the problem of how states should share a water resource going forward. When states are involved in a dispute over an interstate body of water,

the better remedy is for a state to sue to enforce the duty created by a compact or to petition the court for an equitable apportionment. When a court enforces the terms of a compact or decrees an equitable apportionment, any remedies for alleged injuries provided by the court are forward looking, eliminate present harm, and prevent future injuries. A court does not provide remedies that compensate for past actions absent an existing interstate compact or judicial equitable apportionment.

Conclusion and Implications

In *Mississippi v. Tennessee*, Mississippi asks the Supreme Court to remedy damages caused by Tennessee's interstate groundwater pumping of a shared aquifer. Mississippi invites the Court to weigh in on how states should share an interstate aquifer and to take a new approach to resolving disputes between states fighting over groundwater resources not hydrologically connected to interstate surface water. A decision by the Supreme Court could have profound impacts on how unallocated interstate groundwater resources are shared among states and could fundamentally reshape the role that equitable apportionment plays in determining states' obligations to each other.

The outcome in this case could increase the court's potential involvement in future interstate groundwater disputes. Additionally, the Supreme Court could further complicate water law by creating a new claim that provides damages for past conduct that occurred without a known duty to another state, which could undermine cooperation among states, decrease certainty over shared water resources, and potentially incentivize more states to pursue damages claims for groundwater pumping by a neighboring state.
(Lisa Claxton, Jason Groves)

WATER AGENCIES FILE LAWSUITS CHALLENGING CALIFORNIA STATE WATER BOARD'S SACRAMENTO-SAN JOAQUIN CURTAILMENT ORDER

The State Water Resources Control Board (State Water Board or SWRCB) issued curtailment orders to approximately 4,500 water rights holders in the Sacramento-San Joaquin Delta on August 20, 2021. The curtailment orders were issued pursuant to emergency regulations the State Water Board adopted on August 3, 2021—and approved by the Office of Administrative Law on August 19, 2021—granting the Deputy Director of the Division of Water Rights the authority to issue curtailment orders when the SWRCB determines water is unavailable. The curtailment orders directed water rights holders with the following priorities to cease diversions:

(1) All post-1914 appropriative water rights in the Delta watershed (including the Sacramento River and San Joaquin River watersheds and the Legal Delta);

(2) All pre-1914 appropriative water right claims in the San Joaquin River watershed;

(3) All pre-1914 appropriative water right claims in the Sacramento River watershed and in the Legal Delta with a priority date of 1883 or later; and

(4) Some pre-1914 appropriative water right claims on specific tributaries to the Sacramento River with a priority date earlier than 1883.

Lawsuits Filed

Several lawsuits were filed within a month of the State Water Board's August 3, 2021 adoption. Specifically, the following lawsuits were filed:

- *Banta-Carbona Irrigation District, Patterson Irrigation District, and West Stanislaus Irrigation District v. California State Water Resources Control Board, et al.* (Super. Ct., Sacramento County, 2021, No. 2021-80003718.) (hereafter *BCID, et al. v. SWRCB, et al.*)

- *Central Delta Water Agency and South Delta Water Agency v. California State Water Resources Control Board, et al.*, (Super. Ct., Sacramento County, 2021, No. 2021-80003720.) (hereafter *CDWA, et al. v. SWRCB, et al.*)

•*Merced Irrigation District v. California State Water Resources Control Board, et al.*, (Super. Ct., Fresno County, 2021, No. 21CECG02643.) (hereafter *MID v. SWRCB, et al.*)

•*San Joaquin Tributaries Association v. California State Water Resources Control Board, et al.*, (Super. Ct., Fresno County, 2021, No. 21GECG02632.)

The Delta Watershed and Curtailment Orders

The Sacramento-San Joaquin Delta watershed (Delta Watershed), spanning some 44,000 square miles, provides drinking water for 25 million Californians and irrigation for millions of acres of farm land. On May 10, 2021, Governor Gavin Newsom issued a proclamation of State of Emergency, directing the State Water Board to consider adopting emergency regulations to curtail diversion in the Delta Watershed. In response, the SWRCB released its first draft of the Water Unavailability Methodology (Methodology) for a 14 day comment and review period on May 12, 2021. The SWRCB released the Methodology for public comment nine days later. The SWRCB released a revised Methodology in June, and then a second revised Methodology on July 23, 2021.

The State Water Board issued a Notice of Proposed Emergency Rulemaking for Emergency Regulations on July 30, 2021, and adopted the Emergency Regulations on August 3, 2021. The Office of Administrative Law approved the regulations and the emergency regulations went into effect on August 19, 2021. By August 20, 2021, the Methodology had been revised a third time and the State Water Board incorporated it by reference into the curtailment orders.

The curtailment orders require water rights holders to cease diversions and certify compliance—under penalty of perjury—via an online compliance form. Failure to cease diversion could result in enforcement actions, including a fine of $1,000 per day and $2,500 per acre foot of water diverted in contravention of the curtailment order.

By early September 2021, four separate lawsuits been filed against the State Water Board, alleging several claims challenging the State Water Board's regulatory process and subsequent curtailment order.

Lawsuits Challenging the Emergency Regulations

One case, *San Joaquin Tributaries Association, et al. v. California State Water Resources Control Board*, was the subject of a recent article in this publication. (*San Joaquin Tributaries Authority Files Lawsuit Challenging State Water Board Diversion Curtailment order for Sacramento-San Joaquin Delta* (Oct. 2021) 32 Cal. Wat. Law and Policy Rptr., 1, p. 318.) The remaining suits make similar claims, as noted below.

BCID, et al. v. SWRCB, et al.

In this lawsuit, petitioners Banta-Carbona Irrigation District, Patterson Irrigation District, and West Stanislaus Irrigation District assert appropriative water rights that were subject to the curtailment order. The petitioners allege that the State Water Board acted arbitrarily, capriciously, and failed to proceed in a manner required by law by depriving them of property rights without due process. In addition, the petitioners claim neither the State Water Board nor the Deputy Director presented the petitioners with legal or factual determinations supporting the curtailment orders specific to their water rights. Similarly, the petitioners assert the State Water Board and the Deputy Director abused their discretion by not including legally sufficient findings in the curtailment order, which in turn relies on a flawed methodology.

In addition, the petitioners assert that the Methodology is an underground regulation because it is a standard, adopted by the State Water Board, to implement water rights administration. Finally, the petitioners claim the curtailment order violates the rule of priority because the Methodology underpinning the curtailment order considers only broad categories of priorities, presumed inflow and demand on a monthly basis, and did not consider the relative uses of the water users in the watersheds. The Methodology assumed, the petitioners claim, that any diversion by junior water right holders would injure senior water rights.

CDWA and SDWA v. SWRCB, et al.

The Central Delta Water Agency and South Delta Water Agency (collectively: Delta petitioners) represent landowners on 120,000 and 148,000 acres, respectively, of the Sacramento-San Joaquin Delta.

The majority of their landowners assert riparian, pre-1914, and post 1914 permits or licenses to divert within San Joaquin County. The Delta petitioners make similar due process, exceeding statutory authority, underground regulation, violating rule of priority, and lack of evidentiary support claims as those made by the petitioners in the *Banta Carbona* lawsuit.

In addition to these claims, the Delta petitioners also argue that the doctrine of collateral estoppel preludes curtailment based on the Methodology. The Methodology, according to the Delta petitioners, is "fundamentally flawed . . . [because] it outright denies" Delta diverters their asserted entitlements to the incidental water quality benefit. For example, Delta petitioners claim the State Water Board acted arbitrarily and capriciously by failing to take into consideration the water quality needs of Delta diverters.

MID v. SWRCB, et al.

Merced Irrigation District (MID) is a California irrigation district serving 164,000 acres, 133,000 of which is irrigated farmland. MID asserts six riparian and pre-1914 rights, in addition to ten post-1914 appropriative rights. It also owns and operates two hydroelectric projects: the Merced River Hydroelectric Project and the Merced Falls Hydroelectric Project.

Like the previous petitioners, MID brings similar claims against the State Water Board and the Deputy Director. MID additionally argues that the State Water Board did not adequately demonstrate the existence of an emergency pursuant to Government Code, § 11346.1, as a requirement of enacting emergency regulations. Rather, MID states drought is a common feature of California, and not an emergency. As a result, MID alleges the State Water Board acted arbitrarily and capriciously by failing to support their finding of an emergency for the emergency regulations with substantial evidence.

MID also claims the Methodology violates the rule of priority by assuming that diverters in the legal delta who claim both a riparian and pre-1914 water rights should be treated as solely riparian.

Conclusion and Implications

In sum, the central component of the three new lawsuits is the Methodology that underpins the curtailment orders. All petitioners claim the Methodology was not subject to procedures required for due process and the Administrative Procedure Act, is in effect an underground regulation, and it violates the rule of priority.

On October 15, 2021, the Irrigation petitioners in *BCID, et al. vs. SWRCB., et al.,* submitted a petition to coordinate the Delta curtailment suits in a single court. The Irrigation petitioners state that their "case as well as all the other designated related cases pending in this court and in the Fresno and Contra Costa Superior Courts, are complex and should be coordinated in the same court." The Judicial Council has not yet ruled on the petition to coordinate and is expected to do so in the coming weeks.
(Nico Chapman, Meredith Nikkel)

JUDICIAL DEVELOPMENTS

NINTH CIRCUIT DECISION BROADENS SCOPE OF RCRA LIABILITY, UNDER ENDANGERMENT PROVISION, TO TRANSPORTERS

California River Watch v. City of Vacaville, ___F.4th___, Case No. 20-16605 (9th Cir. Sept. 29, 2021).

In September, the Ninth Circuit Court of Appeals issued a decision in *California River Watch v. City of Vacaville*, holding that the City of Vacaville could be found liable under the Resource Conservation and Recovery Act (RCRA) for the presence of the contaminant hexavalent chromium in its potable water system. The Ninth Circuit's decision broadens the scope of RCRA liability to reach entities transporting materials discarded as waste, despite lacking involvement in the creation or generation of waste.

Background

The federal Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq*., establishes a comprehensive regulatory framework governing the treatment, storage, and disposal of solid and hazardous waste. RCRA contains a citizen suit provision that allows for private causes of action. The "endangerment provision" allows any person to file a lawsuit against any person "who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B).

In 2017, California River Watch, an environmental non-profit organization, brought a citizen suit under RCRA's endangerment provision against the City of Vacaville (City), alleging the City's water supply was contaminated with hexavalent chromium (also known as chromium 6), which created an imminent and substantial endangerment to the health and safety of its residents. The City argued that the potable water served to customers, and the traces of chromium 6 contained in the water, did not constitute a solid waste under RCRA.

The case turned on whether the chromium 6 in the City's water supply qualifies as a "solid waste," which turns on the meaning of "discarded material." The U.S. District Court found for the City, holding the potable water supply containing chromium 6 did not qualify as solid waste. On appeal, the Ninth Circuit reversed the District Court's decision. The Ninth Circuit found that if the chromium 6 was previously discarded as waste and then reached the City's water system, it could qualify as discarded material and therefore as solid waste. The Ninth Circuit remanded the case to the District Court for further proceedings.

The Ninth Circuit's Decision

Under RCRA, solid waste is:

> . . .garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material . . . resulting from industrial, commercial, mining and agricultural operations, and from community activities . . . . 42 U.S.C. § 6903(27).

'Discarded Material'

The issue disputed here was whether the chromium 6 qualified as "other discarded material."

As decided by previous Ninth Circuit decisions, the meaning of "discard" is to "cast aside; reject; abandon; give up." *Vacaville*, Case No. 20-16605 at 9. The Ninth Circuit has held that a key consideration is whether the product has "served its intended purpose and is no longer wanted by the consumer." *Id*. The District Court found that the chromium 6 existed prior to, and was not a result of, the City's water treatment process. Moreover, the potable water itself was still being delivered to intended customers as a drinking water product. Thus, the District Court found that the City's activities did not demonstrate any "discarding" of the chromium 6 as part of its water treatment process.

On appeal, the Ninth Circuit considered the origins of the chromium 6 in the City's water to arrive at the conclusion that the chromium 6 constitutes discarded material. River Watch had provided expert testimony establishing that chromium 6 was widely used for commercial wood preservation at a location near Elmira, California called the "Wickes site." *Id.* at 10. From 1972 to 1982, companies operated wood treatment facilities and used chromium 6 to treat wood for preservation. It was common practice to drip dry wood treated with chromium 6, which trickled directly into the soil. The expert additionally claimed that a large amount of chromium 6 waste was dumped into the ground at the location.

The Ninth Circuit found that if River Watch's expert testimony was found credible, to be determined by the District Court on remand, then the chromium 6 would meet the RCRA definition of solid waste. Once the chromium 6 was discharged into the environment after the wood treatment process, it was no longer serving its intended use as a preservative, nor was it the result of natural wear and tear. *Id.* at 11. Thus, River Watch had created a triable issue on whether chromium 6 was discarded material.

'Transporter' Liability

In addition, the Ninth Circuit discussed whether the City could be a "transporter" of the waste under RCRA's endangerment provision. *Id.* at 12. The District Court's decision did not depend on whether the City was *transporting* the waste, rather the court had framed River Watch's claims as alleging the City was *generating* the waste. The Ninth Circuit observed that a transporter of solid waste does not need to play a role in discarding or creating the waste in the first place. Based on the definitions of "contribution" and "transportation," a triable issue existed as to whether the City was a past or present transporter of solid waste. On remand, the District Court would determine whether evidence showed that the chromium 6 originated from the Wickes site, reached the City's water wells, and was pumped through the City's water distribution system.

Conclusion and Implications

The Ninth Circuit issued an opinion that broadens the definition of "discarded material" and therefore "solid waste" under RCRA. The holding extends RCRA liability to entities that may be transporting materials previously discarded as waste, despite lack of involvement in the actual discarding or waste generation process. This decision may broadly affect water suppliers and distributors facing contamination issues. In addition to being regulated under federal and state drinking water laws and regulations, water systems face increased litigation risk under RCRA's endangerment provision. The court's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/09/29/20-16605.pdf.
(Steve Anderson)

NINTH CIRCUIT VACATES JUDGEMENT REQUIRING CLEAN WATER ACT CITIZEN SUIT TO PROVE ONGOING DISCHARGE IN CASE ALLEGING MONITORING VIOLATIONS

Inland Empire Waterkeeper and Orange County Coastkeeper v. Corona Clay Co., 13 F.4th 917 (9th Cir. 2021).

The Ninth Circuit Court of Appeals, on September 20, 2021, vacated a U.S. District court's grant of partial summary judgment and jury instructions. The court found that an ongoing discharge violation is not a prerequisite to a citizen suit asserting ongoing monitoring and reporting violations.

Factual and Procedural Background

The Corona Clay Company (Corona) processes clay products at an industrial facility overlooking Temescal Creek in Corona, California. Inland Empire Waterkeeper and Orange County Coastkeeper (Coastkeeper) are two affiliated nonprofit organizations with the mission of protecting water quality and aquatic resources in Orange and Riverside counties.
Storm water discharges from Corona's industrial processing activities are regulated under a statewide general National Pollutant Discharge Elimination System (NPDES) permit (General Permit). The General Permit includes requirements to sample

storm water discharges, and if the discharge exceeds specified pollutant levels, specific response actions are required.

In 2018, Coastkeeper filed a citizen suit under the federal Clean Water Act (CWA) alleging that Corona illegally discharged pollutants into the navigable waters of the United States, failed to monitor that discharge as required by the General Permit, and violated the conditions of the permit by failing to report violations. The District Court granted partial summary judgment for Coastkeeper after finding, with no dispute, that Corona had violated various requirements imposed by the General Permit and that the discharge was flowing into Temescal Creek.

On the remaining issues, the District Court instructed the jury that Coastkeeper must prove either a prohibited discharge after the complaint was filed, or a reasonable likelihood that discharge would recur. In issuing the jury instructions, the court determined Coastkeeper was required to show not only a monitoring violation, but also ongoing discharge violations to bring a CWA citizen suit.

The District Court's jury instructions asked the jury to determine two questions: First, whether Corona had discharged pollutants into "waters of the United States" and whether the discharge occurred after the complaint was filed. Second, whether the storm water discharge adversely affected the beneficial uses of Temescal Creek. The jury was also instructed to only answer the second question if it answered the first question in the affirmative. After the jury answered "No" to the first question, the court entered a final judgment in favor of Corona. Both parties appealed.

The Ninth Circuit's Decision

Standing

The Ninth Circuit first considered and rejected Corona's arguments that Coastkeeper lacked standing to bring the action. To have standing, an organizational plaintiff must have a concrete and particularized injury fairly traceable to the challenged conduct that likely can be redressed by a favorable judicial decision. The court determined Coastkeeper showed standing by sworn testimony from several members that they lived near the creek, used it for recreation, and that pollution from the discharged storm water impacted their present and anticipated enjoyment of the waterway. The court then determined that failure to provide information can give rise to an injury for purposes of standing. Coastkeeper's allegations that Corona failed to file reports required by the General Permit was an injury in fact that could support Coastkeeper's standing.

Jury Instructions

The Circuit Court next considered the District Court's conclusion and jury instructions that a CWA suit alleging monitoring and reporting violations can only lie if there are also current prohibited discharges. Under this analysis, the Ninth Circuit first considered a Supreme Court decision issued after the District Court's final judgment, which determined that a National Pollutant Discharge Elimination System permit is required when discharge flows directly into navigable waters or when there is a "functional equivalent of a direct discharge." Here, the Ninth Circuit noted that the District Court failed to ask the jury whether Corona's indirect discharge amounted to a "functional equivalent" of a discharge.

Demonstration of Ongoing Discharge Violations as Prerequisite to Citizen Suit

The Ninth Circuit then considered whether the District Court erred by requiring Coastkeeper to demonstrate ongoing discharge violations in order to bring a citizen suit alleging monitoring and reporting violations. Under current Supreme Court case law, entirely past violations which are not likely to recur cannot support a citizen suit seeking injunctive relief. In support of the District Court's decision, Corona asserted Congress left violations of monitoring and reporting requirements to regulatory agencies alone. The Ninth Circuit rejected the District Court's conclusion and Corona's assertion, reasoning that an ongoing discharge violation is not a prerequisite to a citizen suit asserting ongoing monitoring and reporting violations; the CWA allows a citizen suit based ongoing or imminent procedural violations. Because the District Court's partial summary judgement was predicated on Corona's admitted discharge and the jury instructions required Coastkeeper to prove elements not required by the CWA, the Ninth Circuit vacated the jury verdict and remanded for further proceedings in light of recent Supreme Court caselaw.

Conclusion and Implications

Because the District Court's partial summary judgement was predicated on Corona's admitted discharge and the jury instructions required Coastkeeper to prove elements not required by the CWA, the Ninth Circuit vacated the jury verdict and remanded for further proceedings in light of recent Supreme Court caselaw.

This case affirms that if a prohibited discharge into waters of the United States occurred, a Clean Water Act citizen suit can be premised on ongoing or reasonably expected monitoring or reporting violations. The court's decision is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/09/20/20-55420.pdf; or at: https://scholar.google.com/scholar_case?case=562323895751339978 6&hl=en&as_sdt=6&as_vis=1&oi=scholarr.
(Carl Jones, Rebecca Andrews)

DISTRICT COURT DENIES PRELIMINARY INJUNCTION SEEKING TO BAR THE BUREAU FROM CONTINUING VOLUNTARY GROUNDWATER PUMPING PROGRAM

Aqualliance, et al, v. U.S. Bureau of Reclamation, et al,
___F.Supp.4th___, Case No. 2:21-cv-01533 WBS DMC (E.D. Cal. Sept. 14, 2021).

Plaintiffs, Aqualiance, California Sportfishing Protection Alliance, and the California Water Impact Network, filed their complaint on August 26, 2021 and a Motion for Temporary Restraining Order and Preliminary Injunction shortly thereafter. Responding to The Bureau of Reclamation's assertion that no Environmental Impact Statement (EIS) was required, the environmental groups claim that:

> . . .[the Bureau] grossly failed its statutory mandates under the National Environmental Policy Act (NEPA) to disclose and consider the Project's effects prior to approval, and prior to irreversible effects occurring.

Attacking the Bureau's reactive efforts, the groups further asserted that with the knowledge of California's climate and history, "Reclamation failed to prepare for the dry year before us."

Ultimately, plaintiffs' Motion for Temporary Restraining Order was denied and the U.S. District Court on September 14, 2021.

Background

In an effort to incentivize the use of groundwater extractions in lieu of surface water from the Sacramento River, the U.S. Bureau of Reclamation (Bureau) approved a Voluntary Groundwater Pumping Program (Program) designed to provide funding to offset costs to those who obtain water from groundwater pumping rather than Sacramento River water.

On July 7, 2021, the Bureau released a draft Environmental Assessment (EA) for the Program evaluating its impacts. Following the public comment period, the Bureau issued a Finding of No Significant Impact (FONSI), determining that the Program did not require further evaluation via an Environmental Impact Statement. In considering whether the effects of the Proposed Action are significant, Reclamation's EA analyzed the affected environment and degree of the effects of the action:

> The Proposed Action will occur within existing facilities and there would be no effects to the following resources: aesthetics; geology, soils, & mineral Resources; land use; population & housing; transportation and traffic; recreation; hazards & hazardous materials; cultural resources; public services & utilities.

The District Court's Decision

In order to obtain a preliminary injunction, the moving party must establish that: 1) it is likely to succeed on the merits, 2) it is likely to suffer irreparable harm in the absence of preliminary relief, 3) the balance of equities tips in its favor, and 4) an injunction is in the public interest. Denying the environmental groups' request for a preliminary injunction, the Dis-

trict Court concluded that Plaintiffs had not satisfied their burden on any of these elements.

Beginning with the analysis on irreparable harm, the court found that it:

> . . .does not expect plaintiffs to be able to predict with scientific exactitude the harm which will result if defendants are not enjoined. But the court does expect more than the kind of vague generalizations and unquantified conclusions presented here.

For the next three pages, the court continued to discuss deficiencies in plaintiffs' request for preliminary injunction and explain why the Court ultimately concludes that Plaintiffs failed to meet their burden in proving irreparable harm.

The Speculative Nature of the Harm Alleged

Primarily, the court's analysis of plaintiffs' request for preliminary injunction takes issue with speculative nature of the harm alleged. With regard declarations filed by plaintiffs in support of their motion, the court charged that the first of these:

> . . .provides no specific evidence of a causal link between the pumping and damage, or of the similarity of the past pumping to the current program.

The court continued that "[p]laintiffs further allege in conclusory terms that groundwater-dependent ecosystems and endangered species are 'likely to be harmed,'" and that the other declaration submitted by plaintiffs "provides no basis to anticipate any specific harm that may occur to these ecosystems."

As for the harm alleged by plaintiffs, the court contended that:

> Plaintiffs are complaining of a harm that is already occurring in the program's absence. . .[and that]. . .because the funding will not cover the entirety of the cost groundwater users will incur, it is unclear to what extent Reclamation's incentivization efforts will be successful, making the program's impact speculative at this stage.

The District Court could have concluded its analysis here, noting that plaintiffs failed to show irreparable harm in the absence of injunction. Instead, the court took the occasion to also discuss plaintiffs' likelihood of success on the merits and the balance of equities and public interest. Going through each one-by-one, the court rebutted plaintiffs' positions and concluded the order by stating that "plaintiffs have not met their burden on any of the *Winter* injunctive relief factors."

Conclusion and Implications

As the U.S. District Court wrote in its order, "it is anticipated that the case will be finally submitted to the court for decision on the merits … sometime before the December holidays." Despite this, the Program's time frame was only slated to run from August through October, and even this short time frame was effectively shortened to only commence in September. With the plaintiffs unable to successfully halt the Program this year, it may nonetheless be worth following the case to see how it proceeds once the Program officially ends. The District Court's order is available online at: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2021/20210914_docket-221-cv-01533_order.pdf.

(Wesley A. Miliband, Kristopher T. Strouse)

DISTRICT COURT DENIES ALL BUT ONE MOTION IN REVIEW OF ACTIVITIES REQUIRING A GENERAL PERMIT UNDER THE CLEAN WATER ACT

Eden Environmental. Citizen's Group v. California Cascade Building Materials, Inc. et. al, ___F.Supp.4th___, Case No. 2:19-cv-01936 (E.D. Cal. Sept. 20, 2021).

The U.S. District Court for the Eastern District of California recently ruled on a number of motions and defenses associated with a federal Clean Water Act (CWA) citizen suit against a wood product plant for discharging pollutants without an industrial permit. The District Court interpreted use of the Standard Industrial Classification (SIC) Codes to identify facilities subject to permit requirements under the CWA.

Factual and Procedural Background

California Cascade Building Materials (Cascade) is a 20-acre wood products manufacturing and distribution plant. Using on-site equipment, Cascade saws, cuts, trims, planes, molds, and treats raw wood and timber into various end products it sells to retail lumber companies and businesses. Cascade also operates an interstate trucking operation for the transport of logs, poles, beams, lumber, and building materials. It is licensed under the U.S. Department of Transportation and provides on-site maintenance and repair for its trucks.

The California State Water Resources Control Board (State Water Board or SWRCB) issues statewide General Permits for industrial activities pursuant to the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) (General Permit). Facilities that either discharge or have the potential to discharge storm water associated with industrial activity and have not obtained a NPDES permit must apply for coverage under the General Permit. The General Permit identifies facilities required to enroll by reference to a list of Standard Industrial Classification (SIC) Codes.

On July 7, 2015, Cascade obtained coverage under the General Permit believing SIC Code 2499 (wood products, not elsewhere classified) applied. Subsequently, Cascade changed its position and determined that SIC Code 5031 (warehousing and wholesale distribution lumber) applied, which does not require coverage. On August 1, 2019, Cascade filed paperwork with the SWRCB to terminate its General Permit coverage.

On September 23, 2019, Eden Environmental Citizen's Group (Eden), an environmental organization, filed a citizen suit against Cascade and its officers alleging six violations of the General Permit and one violation of the CWA for failure to obtain coverage under the General Permit. As to the last claim, Eden asserted that Cascade engages in at least three distinct and separate economic activities, two of which require coverage under the General Permit: (a) warehousing and wholesale distribution of lumber and construction building materials under SIC Code 5031; (b) wood products manufacturing under SIC Codes 2421, 2431, 2491, and 2499; and (c) local trucking operations with on-site maintenance and fueling under SIC Codes 4213 and 7538. Cascade filed a motion to dismiss and in the alternative a motion for summary judgment, arguing that all of Eden's claims fail to the extent they are premised on violations of the General Permit Order. Eden's Officers also filed a motion to dismiss on the grounds that the fiduciary shield doctrine means the court did not have personal jurisdiction.

The District Court's Decision

Cascade's Motion to Dismiss

The court first considered and rejected Cascade's arguments that all claims premised on the violations of the General Permit should be dismissed because Eden failed to allege that: 1) the primary industrial activity at the facility had an SIC Code that requires General Permit coverage, or 2) the Facility had activities sufficiently economically separate and distinct to be considered separate "establishments" thereby requiring the application of multiple SIC Codes. The court noted that Eden alleged the facility caused the mechanical transformation of materials into new products, which met the definition of "manufactur-

ing" facility under the SIC manual and with respect to local trucking operations. The also court noted that Eden alleged Cascade operated an interstate trucking operation as evidenced by the number of truck drivers (16) and total traveled mileage in 2018 (754,156 miles). The court then examined the facilities covered by the General Permit and found that Eden adequately alleged sufficient facts to establish Cascade's wood products manufacturing and local trucking operations should be treated as separate establishments and distinct and separate economic activities from warehousing and wholesaling under SIC Code 5031. The court denied Cascade's motion to dismiss.

Cascade's Motion for Summary Judgment

The court next considered Cascade's motion for summary judgement, made on essentially the same grounds as its motion to dismiss, but emphasized that this motion was brought pursuant to the voluntary, self-imposed deadline in the parties' Joint Status Report. Cascade responded, in part, by requesting that the court defer its ruling on the motion, contending it needed additional discovery material to oppose the motion— specifically, evidence relevant to the SIC manual, such as Cascade's reports on employment, as well as sales and receipts. The court determined Eden was sufficiently diligent in pursuing discovery, which was still on going, and that the discovery sought was relevant to the matters at issue in the motion. The court denied Cascade's motion for summary judgment.

Cascade Officer's Motion to Dismiss

The court next considered Cascade's officers' argument that they were not subject to personal jurisdiction in California because their employment affiliations as the CEO and CFO were insufficient to create jurisdiction. They contended the ninth circuit, in applying in the fiduciary shield doctrine:

> . . .limit[s] personal jurisdiction to only those instances in which the individual defendant is the alter ego of the corporation or the individual's own activity in the state constitutes sufficient 'minimum contacts.'

Eden argued that the court had personal jurisdiction over Cascade's officers because the fiduciary shield doctrine does not apply to actions brought to enforce the CWA against responsible officers in their individual capacities, and that Eden's officers had the authority to exercise control over Eden's activities violating the CWA. In ruling on the officers' motion, the court noted that Eden failed to identify any affirmative action taken by the officers establishing alter ego liability or make specific arguments establishing the officers' control of and direct participation in the activities at issue. The court granted Cascade's officers' motion to dismiss for lack of personal jurisdiction.

Conclusion and Implications

This case provides additional insight as to the use of SIC codes to identify facilities subject to a General Permit for industrial activities. Specifically, this case is a useful tool for analyzing whether and when undertakings potentially under the umbrella of the CWA should be treated as separate establishments and distinct and separate economic activities. The case opinion is available online at: https://casetext.com/case/eden-envtl-citizens-grp-v-cal-cascade-bldg-materials-inc.
(McKenzie Schnell, Rebecca Andrews)

NEW MEXICO COURT OF APPEALS CLARIFIES THE LEGAL TEST FOR ABANDONMENT OF WATER RIGHTS

State ex rel. Office of the State Engineer v. Harris Gray, William Frost and New Mexico Copper Corporation, Case No. 37,258, *slip op.* (N.M. Ct. App. Sept. 17, 2021).

On September 17, 2021, the New Mexico Court of Appeals entered an opinion revisiting the issue of abandonment of water rights. *See State ex rel. Office of the State Engineer v. Harris Gray, William Frost and New Mexico Copper Corporation* (hereinafter *Gray*). The appeal presented an issue of first impression regarding how the law of abandonment and the doctrine of relation back and its diligence requirement should be applied to a large, complex project. The principal question posed was how the standard of "reasonable diligence" should be applied in the circumstances of copper mining—an enterprise that involves the investment of vast amounts of capital, extends in development over a long period of time, and is exquisitely sensitive, during development and operation, to highly variable market prices over which the mine operator has no control. In this case, the copper mine development at issue has a history dating back more than 50 years. The Court of Appeals affirmed in part and reversed in part.

Background

As in all western states, water in New Mexico is a limited and precious resource. New Mexico faces a variety of problems associated with its limited water supply and increased water demands, including drought, rapid population growth, interstate and international obligations and environmental modifications of existing laws. Continued and expanded water conservation, along with strategic planning, is necessary to meet the state's present and future water needs.

In the majority of western states, under the system of prior appropriation, the need to correlate surface and groundwater supplies was driven by the unique geology of the West. In the West, unlike the East, aquifers or geologic formations containing sufficient permeable material saturated with water that yield usable quantities of waters to wells or springs, occur with great frequency in different underground strata. In addition, many of the West's rivers and stream systems are hydraulically connected to these underground aquifers. The policies on which conjunctive management of western waters are founded protected vested prior appropriations of water and promoted regional, basin - based water management land use planning. The confluence of these themes reflects water policy in the Western United States and New Mexico. Appellate courts have sought to strike a balance between maximum beneficial use of scarce water resources and protection of other water users.

The Court of Appeals' Decision

The Court of Appeals affirmed the lower adjudication court's determination that appellants Harris Gray, William Frost and New Mexico Copper Corporation have no *Mendenhall* water rights. *See: State ex rel. Reynolds v. Mendenhall*, 1961-NMSC-083, 86 N.M. 467. However, the Court of Appeals reversed the adjudication court's ruling on the amount of appellant New Mexico Copper Corporation's water rights as related to wells the lower adjudication court had declared to have been abandoned and remanded the case for reconsideration in light of its opinion.

Application of the *Mendenall* Doctrine

In New Mexico water law, the relation-back, or *Mendenhall* Doctrine, holds that water rights that are initiated prior to the declaration of a basin but not fully developed until later relate back, in priority date, to the beginning of the work, "provided they are developed pursuant to the original plan and with reasonable diligence under the circumstances." *Hydro Res. Corp. v. Gray*, 2007-NMSC-061, ¶ 30, 143 N.M. 142; *see also, State ex rel. Reynolds v. Mendenhall*, 1961-NMSC-083, 68 N.M. 467.

The water rights at issue here were developed for use in a copper mine but were not fully vested through beneficial use before a steep decline in copper prices forced mining operations to cease until it again became economically feasible to operate the mine. During the down time, ineffectual efforts were made to market the rights for other uses lest the rights be lost. When the mine could be operated

profitably, appellants Harris Gray, William Frost and New Mexico Copper Corporation sought to use their claimed water rights fully to support the renewed mining operation, consistent with the original plan. The District Court determined that the prior actions to preserve the water rights for ultimate mining use evidenced a lack of diligence that extinguished those rights to the extent that they had not been applied to beneficial use.

In deciding the *Gray* case, the New Mexico Court of Appeals recognized that its decision is one of "first impression" clarifying the legal test for trial courts to utilize in determining whether a water right has been abandoned. *Gray* at 1, 60. The Court of Appeals first analyzed the *Mendenhall* "doctrine of relation back and its 'diligence' requirement" and found that the adjudication court was correct in finding that the evidence did not support the doctrine. *Id.* at 2, 53. However, the Court of Appeals made clear that it would evaluate:

> . . .whether the adjudication court appropriately considered economic, financial, logistical, and legal challenges as factors when it analyzed whether vested water rights had been abandoned. *Id.* at 1.

The court clarified the legal test in New Mexico for evaluating the issue of abandonment and held that the adjudication court was correct holding that the vested water rights in *Gray* had not been abandoned. *Id.* at 61-62.

The *Gray* decision makes clear that forfeiture for non-user and abandonment are two distinct doctrines. *Gray* at 63. Forfeiture requires only non-use for a set period of time. *Id.* at 58. In contrast:

> . . .[a]bandonment requires the confluence of both intention and act. Mere non-user is not in itself an abandonment. The intention of the party is always a controlling consideration. *Gray* at 56 (internal citation omitted).

Prior to *Gray*, New Mexico had not determined what actions are sufficient to provide a reasonable justification for nonuse, and thus, overcome a presumption of abandonment. *Id.* at 60. The Court of Appeals rejected the standard set forth in *State ex rel. Reynolds v. South Springs Co.*, 1969-NMSC-023, 80 N.M. 144 (*South Springs*), noting that it fails to lay out a general rule for abandonment because *South Springs* was decided under New Mexico's forfeiture statute. *Id.* That statute:

> . . .provided that failure to use water for a period of four years would result in reversion of the water to the public unless the non-use was caused by 'circumstances beyond the control of the owner'. *Gray* at 58 (internal citation omitted); *see also* NMSA 1978, § 72-5-28 (2002) (surface water) and NMSA 1978, §72-12-8 (2002) (underground waters).

Conclusion and Implications

The Court of Appeals' latest water law opinion comes down at a time when demand for copper worldwide is skyrocketing. The demand is driven by its use in advanced clean energy technologies, in turn, causing the price of copper to double in the past year. That is why the *Gray* opinion is significant. Development of a copper mine and the related water rights involve substantial capital investments. In addition, the demand for the mined resources can fluctuate dramatically, so that the use of the related water rights is not constant but varies with the demand for the mined mineral resource.

South Springs is a New Mexico Supreme Court case that historically has been cited as controlling on the issue of abandonment. But it did not involve massive amounts of capital investment, rather, it involved a water right on a northern New Mexico acequia. This may be an explanation why in *Gray*, the Court of Appeals did not follow *South Springs*.

Whether *South Springs* controls or whether the *Gray* case controls will not be known because neither the mining company nor those that opposed the mine filed a petition for review by the New Mexico Supreme Court. Thus, the Court of Appeals' *Mendenhall* ruling will stand and the Court of Appeals' holding that the water rights were not abandoned will also stand. Whether the New Mexico Court of Appeals' decision in *Gray* or whether the Supreme Court's historical reliance on *South Springs* provides the better explication of the law of abandonment will be decided only when the next abandonment case reaches the New Mexico Supreme Court.
(Christina J. Bruff)

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